OTHER INTERNATIONAL DEVELOPMENTS

Climate Protection without Borders

by Carl Christian von Weizsäcker*

If the global climate is to be stabilised to ensure that the average temperature on Earth does not increase by more than 2 degrees Celsius, emissions of CO_2 and other greenhouse gases (GHGs) must be reduced by at least half of current levels by the middle of this century. In order to achieve this, all major emitters of CO_2 must be bound by an international treaty. The partners of such a world climate agreement would have to include the Kyoto States as an entity along with the USA, Brazil, Russia, India, and China. Individual member States would then be allocated CO_2 emissions rights that would also be tradable. This trade would be served by a fund that could sell and buy the CO_2 rights and, in this way, stabilise the world market price for CO_2, initially at around 40 Euros per metric ton of CO_2.

This idea of globally tradable emissions rights is based on the economic theory according to which a market of this kind for a homogenous good ensures that the scarce resource is used with optimum efficiency. The practical problem of agreeing on the emission volumes for individual countries will constitute a key issue in the negotiations leading to the future world climate agreement. In any case, the target path must lead to a situation whereby the *per capita* CO_2 emissions of the populations in all countries are the same by around the middle of this century.

We know from the structure of the global climate problem that the precise time at which CO_2 is emitted is not of crucial importance. All that needs to be ensured is that CO_2 emissions decline cumulatively and enduringly. Therefore, it could make sense to accept higher CO_2 emissions initially if this makes their reduction easier to achieve in the long run. This idea can be illustrated based on the example of China (and similar considerations also apply to India and Brazil).

Until recently, China was a very poor country. As a result of its shift to a market economy, however, China now finds itself in the throes of a turbulent catching-up process in relation to economic growth. The standard of living of the Chinese population has doubled in less than ten years. If this trend continues up to the middle of this century, China will reach the same *per capita* wealth level as the one currently enjoyed by the population of Europe.

Historical experience shows that environmental awareness increases with rising living standards. People who are hungry do not think about the distant future. Their priority is getting enough food to survive now. When a population is able to feed itself, it begins to focus on housing and clothing. After this, it becomes interested in a good education for its children and its own health. Environmental awareness starts here, as it cannot be denied that environmental pollution is usually accompanied by negative impacts on health. Initially, people think of their local environment; filters are fitted in power stations to retain the coal dust, sulphur dioxide, and other harmful substances. If living standards continue to increase, the question of climate change gains in significance for the population.

Consequently, the paradoxical situation arises where, despite the fact that economic growth is harmful to global climate stabilisation, it is also the subjective, psychological precondition for focusing the population's interest on stabilising the climate. Therefore, as it is absolutely essential that China participates in a world climate agreement, the Chinese population should initially be granted significant CO_2 rights so that economic growth there is not halted. However, this should be attached to the condition that China commits itself now to reducing its CO_2 emissions in subsequent decades in accordance with the agreement.

Such an approach would have the advantage, first, of inducing China to enter into such an agreement and, second, of immediately increasing the price of CO_2 emissions in China to the world market level. The opportunity costs of CO_2 emission would then also increase for a country like China: although it will have been allocated more emissions rights than the country currently needs, it would be able to sell the emissions rights it does not require to the fund.

This would create an incentive for the Chinese government to set the CO_2 price on the domestic market at this world market level and establish an efficient allocation mechanism for CO_2. This could take place in the immediate aftermath of the establishment of the world climate agreement. Such an approach would not stunt the growth process in China in any way, as the increase in the price of electricity arising from the establishment of this CO_2 regime would be countered by the additional yields from the sale to the fund of CO_2 rights, which would constitute, in turn, financial resources available for use in the investment process for economic growth.

Wind and Solar Energy not a Priority

When the need for a world climate agreement as outlined above is considered in the light of the energy forecasts of the International Energy Agency (IEA), also presented above, it is very clear that the global climate problem can only be resolved if we succeed in technically mastering the capture and sequestration (storage) of carbon during the combustion of coal, oil and gas in large power plants, and in implementing this approach at an

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economically palatable cost. No number of wind turbines, solar systems or nuclear power plants can substitute for clean coal. Therefore, from a technical perspective, the most important contribution a country like Germany can make to the resolution of the climate problem is to show the world how clean coal functions. This would exceed the role played by the advancement of wind or solar energy many times over.

This assertion is further corroborated by the ideas presented by economist Hans-Werner Sinn in relation to the climate problem. Sinn points out that those countries which export fossil energy feedstock – coal, oil and natural gas – are interested in selling of their goods, and will remain reliant on this for some time to come. The world market price for these goods is determined by supply and demand.

If the demand for coal and gas declines as a result of the construction of additional systems and plants based on renewable energies and nuclear power, or as a result of the implementation of energy-saving measures, and if the demand for oil declines because drivers are also forced to use biofuels, this will lead, above all, to a reduction in the cost of these fuels in the short to medium term – that is, a lower price for oil, gas and probably coal as well.

Dancing on the rim of a volcano Courtesy: Int. Herald Tribune

It would also result in even more coal, gas and oil being used in other parts of the world until a balance has been re-established between supply and demand. In other words, based on an extreme variant of the "Sinn effect", the promotion of renewable energies and construction of additional nuclear power plants do not reduce CO_2 emissions at all; they are merely relocated. Having counted on fossil fuels for centuries – all the more in recent decades – and thus fostered supply through technical progress and high investment, we will not be able to get rid of this supply so quickly.

The desire of the suppliers, that is the Persian Gulf States and other oil-exporting countries, to line their coffers through the sale of these exports, can only be made compatible with successful climate policy if we ensure – with the help of carbon capture and sequestration – that this supply does not cause CO_2 emissions or, at least, produces fewer CO_2 emissions.

The question of how strong this "Sinn effect" is can only be answered empirically. What proportion of a cubic metre of natural gas or ton of coal that is saved through the construction of wind power plants in a particular part of the world disappears from the world market because the reduced price of this fuel renders its extraction uneconomical? How much of this saved fossil fuel is used additionally elsewhere in the world because the reduced price now makes its use there cost-effective?

If it is assumed in the context of a sample calculation that the long-term demand curve for fossil fuels has the same (negative) slope as the long-term (positive) supply curve, any technical saving of fossil fuels through the use of renewable energies, additional nuclear power, energy-saving measures, and the avoidance of economic growth will cause half of the fossil energy saved in this way to be burned additionally elsewhere due to the reduction in its price. As a result, based on the "Sinn effect", the net saving is only half of what it would be in the absence of this effect.

As opposed to this, in accordance with the "Sinn effect", the net effect of the CO_2 savings achieved through the use of clean coal is even greater than the initial technical savings as the sequestration of CO_2 at coal-fired power plants costs additional energy. Thus, in the case of the use of clean coal, more coal is required per kilowatt hour than is the case without sequestration. Although CO_2 emissions decline with clean coal, the conversion triggers an increase in the demand for coal. Consequently, in contrast to the other types of emissions saving, this approach has the effect of increasing the price of fossil fuels with the result that demand in the areas of application in which there is no sequestration, declines.

Therefore, for every metric ton of sequestered CO_2 there is an overall saving of CO_2 in excess of one ton. The climate effect of a ton of CO_2 saved technically through sequestration is therefore considerably greater than the climate effect of a ton of CO_2 saved technically through the use of renewable energies or nuclear power.

Finally, a few comments on climate policy as implemented at European and national level. The Kyoto Protocol, which was concluded in 1997, concerns 30 percent of global CO_2 emissions – based on the States that actually undertook to implement reduction obligations. These reduction obligations are in the range of 10 percent as compared with the initial value of emissions levels in 1990. The States involved in this agreement are, for the most part, States with slow economic growth. This means that, without the Kyoto Protocol, their CO_2 emissions would have increased by around 10 percent between 1990 and 2012.

Kyoto Protocol without Significant Effect

As a result of the Kyoto Protocol, therefore, CO_2 emissions within the States that have undertaken to reduce their emissions are 20 percent lower on average than they

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would have been in the absence of the agreement. This 20 percent relates to 30 percent of the global emissions, thereby representing 6 percent of the global emissions in the initial year 1990. In view of the fact that global CO_2 emissions are currently still increasing by 1.8 percent per year (despite the Kyoto Protocol), this one-time saving of 6 percent of the global emissions only signifies a delay in the growth of the CO_2 emissions by around three years. This is all that has been achieved by the Kyoto Protocol: its direct effect on the climate is, therefore, negligible.

Hence, the Kyoto Protocol can only be seen as worthwhile if it is assumed that the good example, the exemplary behaviour of a model pupil as presented here, will prompt other states in the global community to participate in a real world climate agreement. There is some evidence to support the fact that this behavioural assumption is valid. For example, the willingness to pursue an active climate policy has increased significantly in the United States in recent years. The Chinese leadership may also have been influenced by Kyoto.

Nonetheless, it is far from inconceivable that a world climate agreement involving all of the OECD countries, China, India, Brazil and Russia will fail. Europe needs a Plan B for this eventuality. Should this approach fail, there is some evidence in support of the view that climate policy should be abandoned, including in the Kyoto states. As long as industrial operations in these states must compete with companies in the USA and China, which are not subject to the disadvantages of such an agreement, competition distortions will arise and impact negatively on employment and prosperity in the Kyoto states – and, moreover, assuming that Kyoto is a failure, without any positive effect on the world's climate.

In addition, the migration of the energy-intensive sectors of industry to the non-Kyoto states means that emissions are not actually reduced but merely transferred. This makes no sense whatsoever. It would also be dishonest, in part, to pride ourselves on the prevention of CO_2 emissions in the area under the jurisdiction of the Kyoto Protocol, if this measure remains largely ineffective because it has prompted an increase in CO_2 emissions in other parts of the world.

Another relevant point here is that the measures currently being taken to reduce CO_2 emissions are extremely dirigiste. For this reason, they are actually counter-productive to a certain extent. This is clearly demonstrated by the example of biofuel. If agricultural prices increase as a result of the obligation to mix biofuel with diesel, this poses a serious disadvantage for the poorer sector of the world's population, for whom food becomes more expensive. Secondly, it means that more artificial fertiliser will be used as the rise in agricultural prices triggers an increase in the profit-maximising volume of artificial fertiliser employed. As Crutzen *et al.* show,[1] the use of artificial fertiliser is extremely harmful to the climate due to the resulting production of the trace gas nitrous oxide. Thus, in terms of GHG emissions, all in all, the mixing of biofuel with diesel increases rather than decreases emissions.

The State is not the best manager of scarce resources in other respects either. This is evidenced by the miserable results of the various attempts to establish centrally planned economies in human history as compared with market-economy systems. Hence, a shift to price mechanisms also makes sense in the area of climate policy. The world climate agreement outlined above could, therefore, provide a model for more efficient climate policy at national level. If, for example, solar energy is being promoted today in the form of the feed-in of solar electricity into the national grid at a price of almost 0.5 Euros per kilowatt hour, this approach to climate policy is clearly too expensive as compared with the above-estimated price of 40 Euros per ton of saved CO_2 emissions. Accordingly, systems are currently being promoted whose contribution to the reduction of emissions costs 300–400 Euros per ton of CO_2.

A wealthy country can, of course, afford such extravagance in the area of climate policy – customers simply pay a bit more for their electricity to compensate. However, the resources used in this way could be used far more efficiently in the interest of climate protection, and an eight to ten times greater effect could, perhaps, be achieved at the same cost.

Forty Euros per Ton as Limit

The price assessment of 40 Euros per ton of CO_2 equivalent as fair in terms of climate policy can already serve as a guideline for pioneering policy in the national and European context. Promotional measures and dirigiste dictates should be verified according to whether they save CO_2 at costs that lie below 40 Euros per ton. Many of today's climate-policy instruments would struggle to pass this test.

An efficient policy design also serves the interest of sustainable climate policy. In view of the pressing policy problems arising in other areas, inefficient, over-expensive climate instruments will ultimately discredit climate policy itself. For example, if the construction of new coal-fired power stations in Germany meets with resistance, which is partly climate-policy based, the shortfall in the electricity supply to the population that may be expected as a result of both this and the withdrawal from nuclear power will prompt a change in mood that will also impact negatively on climate policy.

Therefore, the only solution that makes sense is a world climate agreement that obliges, at least, the OECD countries and China, India and Russia to realise massive reductions in CO_2 emissions. These cannot be achieved through energy saving, the promotion of renewable energies and nuclear power alone; clean coal is indispensable. The most important technological-economic contribution that Germany can make here is to demonstrate workable systems for clean coal. Certain forms of promotion of renewable energies, for example the mandatory mixing of biofuels, are counter-productive in climate-policy terms.

Note

1 Crutzen, P.J., Mosier, A.R., Smith, K.A. and Winiwarter, W. (2008). "N_2O release from agro-biofuel production negates global warming reduction by replacing fossil fuels". *Atmos. Chem. Phys.* 8: 389–395.

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Common Interests and the (Re)constitution of Public Space

by Ellen Hey*

Introduction

International environmental law, as Alexandre Kiss so aptly illustrated in his writings, concerns issues that are of common interest.[1] That is, it deals with issues that are of concern to all of humanity and that any one State cannot address on its own. Addressing such issues challenges the inter-state paradigm, central to classical international law, hence the term "global environmental law".

This essay examines the nature of global environmental law and asserts that the transition from international to global environmental law has resulted in a reconstitution of public space, understood as the space in which society interactively (re)constitutes itself through, amongst other things, law.[2] Normatively, this essay interprets "public space" as the space in which public power should be exercised in the common interest and subject to standards of accountability, associated with the rule of law. Global environmental law, in addressing issues that are of common interest, has moved away from the inter-state paradigm in terms of both substantive law and decision-making patterns and in the process, public space has been reconstituted in a manner that raises questions regarding the legitimacy of global environmental law and the accountability of the entities exercising public power in particular. This essay, moreover, makes the point that national public law offers a discourse in which these changes can be conceptualised and a normative basis for a further interactive reconstitution of public space and global environmental law and thus for establishing a more just system of law.

To understand the nature of global environmental law, both in terms of substance and decision-making patterns, I assert that the transformation from international to global environmental law can be characterised by two developments: substantive law marks a shift from the discretionary to the functional role of States; decision-making patterns mark a shift from the discretionary role of States to the discretionary role of global institutions, particularly in the South-North context. This article concludes with an examination of the nature of public space as shaped by global environmental law and suggests that national public law discourse offers concepts which may serve to further reconstitute public space so that it may more legitimately serve the common interest.

Substantive Elements of Global Environmental Law: From a Discretionary to a Functional Role of States

Substantive elements in global environmental law reflect concerns associated with the wellbeing of individuals and groups and seek to further distributive justice. Principle 1 of the 1992 Rio Declaration on Environment and Development (Rio Declaration), for example, provides that:

> *Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.*

Moreover, Judge Weeramantry in his separate opinion in *Gabčikovo-Nagymaros*, contemplated "[w]e have entered an era of international law in which international law subserves not only the interests of individual States, but looks beyond them and their parochial concerns to the greater interests of humanity and planetary welfare".[3]

These quotes illustrate two concerns that increasingly are reflected in global environmental law: the interests of human beings and the interests of humanity as a whole. Global environmental law conceptualises States as the protectors of these concerns by focusing on their functional role. It defines this functional role by formulating the responsibilities of States in terms of common interests, considerations of equity and the substantive interests and rights of individuals and groups in society. Each of these elements highlighting the functional role of States will be discussed below.

Common Interests

Common interests are reflected in global environmental law by the concept of "common concern". This concept does not address the thorny issue of State sovereignty, or lack thereof, over a certain space or resource. Instead, it qualifies a certain issue or problem as being of concern to humankind.[4] The 1992 Convention on Biological Diversity (Biodiversity Convention) in its preamble provides "that the conservation of biological diversity is a common concern of humankind" and the 1992 United Nations Framework Convention on Climate Change (Climate Change Convention), also in its preamble, provides "that change in the Earth's climate and its adverse effects are a common concern of humankind". While other multilateral environmental agreements (MEAs) do not explicitly declare an issue or problem to be of common concern, they reflect an approach similar to that employed in the Biodiversity and Climate Change conventions. This approach is characterised by States parties to an MEA sharing responsibility for addressing the detrimental consequences of environmental deterioration for developing States, for the wellbeing of individuals in general and certain groups in particular and for areas beyond national jurisdiction, and by identifying the need for common but differentiated action by States and action by the private sector.[5]

The concept of common concern is distinct from concepts such as "common area" and "common heritage of mankind", which treat certain areas and their resources as common property resources subject, respectively, to formal equal access (Antarctica, the high seas and outer

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space) and material equal access (the Area). The concept of common concern instead leaves existing jurisdictional regimes intact, be it sovereignty over territory and the territorial sea, sovereign rights in the exclusive economic zone, or flag State or State of registry jurisdiction in the global commons. It requires that States, within their territory and over activities subject to their jurisdiction, adopt measures to curtail environmental degradation and that States assist each other in addressing these problems.

Considerations of Equity

Considerations of equity are reflected in global environmental law most pertinently in the concepts of inter- and intra-generational equity.[6] Inter-generational equity concerns equity between generations while intra-generational equity concerns equity within a generation. Both concepts are intimately related to the concept of sustainable development as conceptualised by the Brundtland Commission. I reproduce the oft quoted words:

> *Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.*[7]

The Commission emphasises that "the concept of needs" refers to "in particular the essential needs of the world's poor, to which overriding priority should be given".[8]

It is noteworthy that the International Court of Justice (ICJ) in its advisory opinion in the *Legality of the Threat or Use of Nuclear Weapons*[9] and again in *Gabčikovo-Nagymaros*[10] determined that "the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn". The court clarified the concept of beneficiary with regard to the activities of States, individuals and groups, including those belonging to future generations.

Protection of the interests of future generations is among the explicit goals of most MEAs. Inter-generational equity is reflected in global environmental law through the obligations to prevent and redress environmental damage, to use natural resources sustainably and to adopt a precautionary approach in the development and implementation of environmental policy and law.

Intra-generational equity is intimately related to the South-North, or developing-developed State, controversy. This controversy concerns issues of distributive justice and echoes the legacies of colonialism and the continued unequal relations of power between developing and developed States.[11] Intra-generational equity finds its clearest expression, at the level of principles, in the principle of "common but differentiated responsibilities".[12] This principle entails that developed States, given their past contribution to the deterioration of the environment, their concomitant accumulation of wealth and their present financial and technological capabilities have an obligation to take on larger burdens when it comes to protecting the environment and to transfer financial resources and technology to developing States, which are obliged to take steps to protect the environment that are within their means. The principle of common but differentiated responsibilities manifests itself through grace periods for developing States,[13] instruments that impose obligations only on developed States[14] and provisions that make the implementation of the obligations resting upon developing States conditional on the transfer of funds, know-how and technology from developed States.[15]

While sustainable development as conceptualised by the Brundtland Commission addresses the interests of generations,[16] *i.e.*, individuals and groups belonging to those generations, and the ICJ refers to "human beings, including generations unborn",[17] the principle of common but differentiated responsibilities as incorporated in MEAs addresses the duties of States *vis-à-vis* each other. These treaties, then, should be understood as emphasising the functional role of States in attaining sustainable development for individuals and groups belonging to present and future generations, including those located in other States. While individuals and groups thus are identified as the beneficiaries of State action, they are not, as such, the addressees of the treaty provisions concerned.

Substantive Rights and Interests

Individual and group substantive interests and (sometimes) rights are often addressed in global environmental instruments, either indirectly, as the object of the policies to be pursued by States, or directly, as rights *per se*. Legally binding instruments generally do not refer to environmental rights, while legally non-binding instruments do. Human rights bodies have interpreted the more general concept of civil and political rights so as to include environmental considerations within their scope of application.

The right to an adequate environment has been incorporated into binding legal instruments at the regional level only.[18] It forms part of both the 1981 African Charter on Human and Peoples' Rights, which provides that "[a]ll peoples shall have the right to a generally satisfactory environment favourable to their development"[19] and the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Protocol of San Salvador) which provides that "everyone shall have the right to live in a healthy environment and to have access to public services".[20] The African Charter thus conceptualises the right to a healthy environment as a people's right, while the Protocol of San Salvador conceptualises it in terms of a social and economic right. Albeit indirectly, the Committee on Economic, Social and Cultural Rights (Committee on ESCR) in 2000 also addressed the right to adequate environmental conditions as part of the right to health as expressed in Article 12(1) of the Covenant on Economic, Social and Cultural Rights.[21] In addition, human rights courts and human rights bodies have interpreted various civil and political rights, such as the right to life, the right to physical integrity, the right to private life as well as procedural rights such as the right to fair trial, to be relevant in an environmental context.[22]

Many legally non-binding instruments, such as Agenda 21,[23] the Rio Declaration,[24] the 2002 Millennium Development Goals,[25] the 2002 Johannesburg Declaration[26] and the 2005 World Summit Outcome,[27] address the interest of individuals and of particular groups in a healthy environ-

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ment and emphasise the functional role of States, as well as the private sector, in protecting these interests. These documents and especially the more recent ones, however, remain far from formulating such concerns in terms of human rights.

Some MEAs in their preambles incorporate public health concerns, including those of special groups such as women, among the *raison d'etre* of the regime.[28] Such provisions in some cases are developed further in the body of the instrument by way of provisions on public information, awareness and education.[29]

The Biodiversity Convention is one example of a treaty that addresses the interests of individuals and groups and the functional role of States somewhat more elaborately, but in a very specific context and in an instrumental manner. In one set of linked provisions, for example, it requires that States promote the wide application of the knowledge of indigenous and local communities "with the approval and involvement of the holders of such knowledge …and encourage the equitable sharing of the benefits arising from the utilization of such knowledge…",[30] "[p]rotect and encourage customary use of biological resources in accordance with traditional cultural practices compatible with conservation or sustainable use requirements",[31] and "[s]upport local populations to develop and implement remedial action in degraded areas where biological diversity has been reduced".[32] In evaluating these provisions one must take into account the fact that they are imbedded in an instrument that generally addresses the rights and duties of States, seeks to secure access to the benefits that derive from the use of certain types of biological resources and conditions the interests of individuals and groups upon the States' governmental and economic abilities.[33]

A pertinent example of an environmental right derived from both legally binding and legally non-binding instruments is the right to water, which concerns a fundamental aspect of both the human right to life and the human right to a healthy environment.[34] The right to water is part of the right to enjoy adequate living conditions for women living in rural areas under Article 14(2) of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women and of the right to health under Article 24(2) of the 1989 Convention on the Rights of the Child. To date, however, it has not been included in a binding legal instrument as a free-standing right.

The right to water is addressed comprehensively in General Comment 15, a legally non-binding document adopted by the Committee on ESCR in 2002.[35] Other instruments address the need to secure access to water in adequate amounts and of adequate quality to cover basic human needs, albeit as environmental interests rather than as rights. Among the basic human needs dependent on access to water are the needs for drinking water and water for sanitation. The 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes (Helsinki Convention), adopted within the framework of the United Nations Economic Commission for Europe (UNECE), is an example of this approach. While it does not in a geographical sense have global coverage, this protocol does, like the Helsinki Convention,[36] harbour traits of global environmental law. Most prominently, States are to undertake specified actions, both individually and in cooperation, in order to secure proper access to water for drinking and sanitation purposes with the aim of protecting human health, and, for sanitation, also the environment. Thus, while remaining short of formulating a right to water, the Protocol on Water and Health clearly indicates that the objectives of State action are to be the interests of individual human beings living within States parties to the protocol, including individuals living in other States Parties.

Thus, in various degrees water-related instruments move away from the discretionary role that classical international law attributes to States, and move toward an emphasis on the functional role of States. That is, States are to undertake action to protect the environment, water in particular, in the interest of individuals and groups. General Comment 15, moreover, also addresses the role of non-state actors and global institutions in securing the right to water. Non-state actors are addressed indirectly by requiring that States take steps, both legal and political, "to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries".[37] Global institutions are addressed indirectly through a requirement that States, when acting within such institutions, cooperate to realise the right to water,[38] and directly in a call on such institutions to incorporate the right to water in their policies.[39]

From a Discretionary to a Functional Role of States

The notion that States are to act in the interest of individuals and groups in society and in the common interest thus has been explicitly incorporated into global environmental law. Also included in these instruments is the notion that States, in particular developed States, are to assist developing States in protecting the interests of the individuals and groups living in the latter. States, however, remain wary of formulating environmental rights in legally binding instruments and such rights have been included in legally non-binding instruments only sparingly and in the case of the right to water in a document, General Comment 15, developed by a committee of experts, rather than State representatives. Moreover, the strong manifestation of the functional role of States, even if not expressed in terms of individual rights, contained in the Protocol on Water and Health to the Helsinki Convention, lacks world-wide coverage.[40]

Universal principles such as the principle of common concern, the principle of sustainable development and the principles of inter- and intra-generational equity provide the basis for conceptualising the functional role of States in terms of law, both *vis-à-vis* each other and individuals and groups. The functional role of States *vis-à-vis* each other becomes concrete in particular in the South-North context where it has been translated into more demanding obligations for developed, as opposed to developing, States and obligations that require developed States to assist developing States. The functional role of States *vis-à-vis* individuals and groups in society manifests itself in the

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obligations that limit the discretion of States to treat the environment within their territory or jurisdiction as they see fit. These developments mark a departure from the classical international legal system in which law is conceptualised as inter-state law that is reciprocal and contractual in nature. Instead, global environmental law harbours traits of national public law, in which entities are constructed that, through the exercise of public powers, are meant to act in the common interest while protecting the rights and interests of individuals and groups. As will be illustrated in the next section of this essay, global environmental law allocates public powers to global institutions, the World Bank in particular, but it does so in a manner that is from a normative point of view deficient. It, as it were, transfers public powers (that in classical international law are attributed to States) to global institutions, but does not transfer or incompletely transfers to the global level of decision making the checks and balances associated with the exercise of public powers at the national level. This development, moreover, is particularly noteworthy in the South-North context, because it is in this context that the World Bank exercises powers that can be conceptualised as being of a public nature.

Institutional and Decision-Making Patterns in Global Environmental Law: From the Discretion of States to the Discretion of Global Institutions

Besides States, a variety of global institutions participate in decision making in global environmental law. These institutions engage in both normative development and decision making in individual situations. The former takes place especially through the development of rules and standards that seek to implement the provisions of MEAs. Some participating institutions might include the formal governing bodies of MEAs, UN specialised agencies and programmes (*e.g.*, the World Bank,[41] the United Nations Environment Programme (UNEP) and the United Nations Development Programme (UNDP)), and cooperative endeavours among these institutions, such as the Global Environment Facility (GEF). Decision making in individual situations takes place especially, but not only, by way of institutions, such as the World Bank and the GEF, deciding on the allocation of funds to projects that seek to implement MEAs in developing and economy in transition (EIT) States. It is noteworthy that most of the decisions taken in the case of normative development are of a legally non-binding character, in terms of classical international law, while most of the decisions taken in individual situations relate to developing States.[42]

The Structure of Decision Making

MEAs form the basis of most contemporary global environmental law. Several of these agreements, such as the Biodiversity Convention and Climate Change Convention, are concluded in the form of a framework agreement, which provides the basic principles and institutions on which further development of the regime can be predicated. Protocols, such as the 1997 Kyoto Protocol and the 2000 Cartagena Protocol on Biosafety,[43] and decisions adopted by the conference of the parties to the framework agreement further develop the regime.[44] All MEAs contain provisions committing developed States to transfering funds and technology to developing States.[45] Within most MEAs each State has one vote and most decisions within MEAs are taken by consensus, with some others taken by qualified majority vote.[46] From a classical legal point of view, however, it is particularly noteworthy that most of the decisions taken within the framework of MEAs are legally non-binding even if they may affect the rights of States and of individuals and groups within the contours of the regime in question. The body of rules adopted within the framework of the Kyoto Protocol to determine whether a State Party and its nationals are entitled to participate in the flexible mechanisms of the Kyoto Protocol represents a significant departure from classical international law, in which a State is assumed to be bound by a rule or set of rules in the form of a treaty only if that State formally has consented to that rule or treaty or if a constituent treaty expressly attributes the competence to adopt legally binding rules to a global institution, such as the United Nations Charter to the Security Council.[47] The Kyoto rules[48] have given rise to numerous questions regarding the legitimacy of global environmental law.[49]

The manner in which global environmental law constructs the relationship that links developed States and global institutions with developing States gives rise to questions regarding the legitimacy of decision making in this area of law, particularly where the transfer of funds and technology from developed to developing States in an MEA-based regime, is implemented via institutions located outside that regime. Such institutional relocation brings about a shift in relevant decision-making patterns to the detriment of developing States: the one-State, one-vote system of MEAs may often be replaced by the system of weighted voting used in the World Bank and related institutions and by the considerable power of the Bank itself.

The World Bank and the GEF[50] and other funds administered by the Bank, are particularly relevant in this context. The World Bank, for example, is the largest financier of biodiversity projects that serve, among other things, to implement the Biodiversity Convention in developing States.[51] The GEF functions as the financial mechanism of several MEAs and receives guidance from their conferences of parties, but operates under guidelines adopted by the GEF itself. In its pilot phase, however, the GEF was subject solely to the decision-making processes and procedures of the World Bank, in which developed States have a major say. It was during this phase that some of the basic rules of the game governing the operation of the GEF were fleshed out. Due to political pressure from developing States in the early 1990s, the GEF has been restructured, with developing and developed States now sharing decision-making power more equally.[52]

Similar to the GEF, the Prototype Carbon Fund (PCF), established by the World Bank in 1999, fleshed out these rules for implementation of the Kyoto Protocol, to a large extent. In particular, the Fund's use in the clean development mechanism (CDM) and joint implementation (JI),

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two of the flexible mechanisms of the Kyoto Protocol, is specifically clarified. The CDM seeks to implement the Kyoto Protocol through projects financed by developed States in developing States; JI seeks to implement the protocol through projects amongst developed States and by developed States in EIT States. However, in the context of the World Bank, JI is relevant in particular for the latter type of projects. In the PCF, both developed States and private companies from developed States participate in decision making relative to their financial input into the fund.[53] The PCF, and similar funds,[54] have played a decisive role in developing the global carbon market. However, developing States, the providers of the raw product (greenhouse gas (GHG) emissions), only have a marginal say in the decision-making processes of the PCF, while developed States and private companies from developed States, the providers of the financial means to realise the reductions, hold decision-making power and obtain valuable emission reduction units that they can use to meet their commitments under the Kyoto Protocol or trade on the global carbon market, established on the basis of the protocol. Moreover, the reductions in GHGs achieved through these funds, besides benefiting the States in which the projects are executed, also benefit the wider global community, including developed States.

The World Bank, as such and through the various funds that it administers, has become a central player in global environmental law and exercises considerable power *vis-à-vis* developing States and the manner in which they implement their MEA-based commitments.[55] Such powers, if conceived in terms of the substantive principles discussed in the previous section, serve to protect common interests, *e.g.*, in the conservation of biodiversity and the protection of the climate system. They, moreover, implement considerations of equity, *i.e.*, the principle of common but differentiated responsibilities, and merit the qualification "public powers" that serve to construct public space and that should be subject to standards of accountability. Such standards, when conceptualised in terms of public law, involve a set of checks and balances in order to avoid their abuse and entail participatory rights for those that may be affected by the powers exercised.[56] While the World Bank has not been oblivious to demands for the introduction of accountability mechanisms, its safeguard policies and other internal rules and regulations, and the World Bank Inspection Panel (Inspection Panel), discussed below, only partly serve to address the concerns expressed.

The position of the World Bank as an entity that exercises public powers in global environmental law challenges the inter-state paradigm, as do the mechanisms employed by the Bank, *e.g.*, the GEF and the PCF, due to the manner in which they involve the private sector. The private sector not only executes World Bank projects, but participates directly in institutions such as the PCF in which it exercises decision-making powers on a par with States, as investors in the fund.

Participatory Rights

Participatory rights involve transparency of decision making, participation in decision making and access to accountability mechanisms.[57] While many environmental instruments attest to the importance of such participatory rights, few actually include the duty to establish such rights at the national level and the examples of instruments that refer to the realisation of such rights in a transboundary context or within global institutions are few and far between.

Principle 10 of the Rio Declaration provides an example of a provision stressing the importance of participatory rights at the national level. The declaration, however, does not address such rights in a transboundary context or with respect to global institutions. The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses (Watercourses Convention) provides an example of the manner in which classical international law addresses participatory rights in a transnational context. It provides for inter-state consultation,[58] leaving it up to the States concerned whether they involve individuals and groups, and requires non-discriminatory access (instead of minimum standards of access) for individuals and groups to judicial and other procedures in case of transboundary harm or serious threat thereof.[59] The Watercourse Convention, then, does not establish minimum standards regarding participatory rights of individuals and groups, neither in a national nor in a transnational context. Other instruments refer to the importance of involving the public in general or particular groups, such as indigenous peoples or women, in the development of policies regarding the environment, but they remain short of establishing participatory rights for individuals and groups.[60]

The World Bank's safeguard policies are quite relevant to this discussion. These policies consist of Bank Operational Policies and Bank Procedures (OP/BP) and are internally binding on Bank personnel in the execution of projects, entailing that Bank personnel have to ensure that States implement these policies. The Bank has adopted specific safeguard policies on environmental assessment, indigenous peoples and international waterways. The policy on environmental assessment requires the State concerned to consult with groups and local NGOs affected by a given project and requires that relevant information be made available in a timely manner and in a form and language relevant to those consulted.[61] On indigenous peoples, the policy formulates the duty of the borrower State to engage in "a process of free, prior and informed consultation with the affected Indigenous Peoples' communities"[62] and determines that the Bank shall only engage in projects where such consultations "result in broad community support to the project by the affected Indigenous Peoples".[63] The Bank's safeguard policy on international waterways provides for inter-state consultation by way of a process similar to that contained in the Watercourses Convention.[64]

The World Bank Inspection Panel uses these safeguard policies and other OP/BPs in assessing complaints submitted by two or more individuals alleging that they have or are likely to suffer harm due to failure of the Bank to meet its own internal rules in the execution of projects supported by the Bank. Established in 1993, this Panel focuses on complaints involving projects executed by the

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IBRD and IDA. It does not cover all projects financed through the GEF, which are not necessarily executed by these institutions,[65] nor does it consider complaints regarding projects financed by the International Financial Corporation (IFC) or the PCF and similar funds. The Inspection Panel can be characterised as providing access to an administrative or quasi-judicial procedure.[66]

The most comprehensive approach to participatory rights is contained in instruments adopted within the ambit of the UNECE.[67] These instruments incorporate participatory rights, also in a transboundary context, both in treaties dealing with specific topics, such as water management[68] and environmental impact assessment,[69] and provide a comprehensive regime in the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention). The Aarhus Convention provides minimum standards on access to information,[70] participation in decision making[71] and access to justice,[72] and requires that these be applied without discrimination in a transboundary context.[73] The Aarhus Convention also requires its parties to promote the application of the principles contained in the Convention "in international environmental decision-making processes and within the framework of international organizations in matters related to the environment".[74] This provision was further elaborated in the 2005 Almaty Guidelines, which set out standards on how access to information and public participation can be improved in international forums.[75] A further salient element of the Aarhus Convention is its Compliance Committee, which is entitled to hear claims of non-compliance submitted by individuals or groups against a party.[76] The Aarhus Convention, moreover, is open to States outside the UNECE region, subject to the approval of the Meeting of the Parties.[77]

The Discretion of Global Institutions

The analysis in this section illustrates that while global institutions exercise considerable decision-making powers and public powers in global environmental law, the availability of instruments to check and balance those powers is extremely limited. Procedural fairness, in particular participatory rights, needs to be introduced into the decision-making processes of those institutions.

First, a much more balanced approach to the participation in decision making by developing States is needed. The author does not accept as valid current reasoning that those who "pay taxes" should be fully represented in an institution, such as the World Bank and the PCF, that deals with common-interest problems, while those who provide the other part of the solution, "the raw product", are underrepresented. Where the returns obtained by those who pay taxes are valuable assets (GHG emission reductions) on the global carbon market, the need for fair representation is even clearer. As a result, the substantive principle of common but differentiated obligations incorporated in the Climate Change Convention is being used to facilitate lucrative trade, with developed States and their companies reaping the financial benefits. Such a system is unlikely to be regarded as legitimate.

Increased participation by developing States, however, is unlikely to be sufficient to commit institutions, such as the World Bank, to a functional role. In order to enhance that role, the participatory rights of individuals and groups *vis-à-vis* the Bank also need to be enhanced. Ideally, such solutions should be provided in the context of the localities where projects are being implemented and where their effects are most likely to be experienced. While this is relatively easier where transparency and participation in decision making are concerned, as evidenced by World Bank safeguard policies,[78] international law poses a formidable obstacle to the realisation of accountability mechanisms *vis-à-vis* global institutions at that level due to the immunity that global institutions enjoy under national law for activities related to their policies.[79] This doctrine, I suggest, should be revisited. If global institutions exercise public powers as outlined in this essay, powers that are not commensurate with the manner in which international institutions are regarded in classical international law, which assumes they act at the inter-state level only, it would seem appropriate to limit those powers in accordance with legal concepts associated with national public law.

Given that global institutions are unlikely to relinquish the immunities that they enjoy under national law, it is at present most likely that any accountability mechanisms that may be established will be launched by these institutions themselves. In the case of the World Bank this could be done, for example, through the further development of the operational and Bank policies and the expansion of the mandate of the Inspection Panel to include the competence to review the Bank's practices against human rights standards. Other institutions might take similar steps[80] or introduce an ombudsperson, as has been done for the IFC and the Multilateral Investment Guarantee Agency (MIGA),[81] and was proposed for the GEF in 2006.[82]

This manner of proceeding, however, requires critical consideration as it does not take into account the multifaceted nature (geographical diversity of processes and of actors) of decision making in global environmental law. Instead, it reproduces at the global level, albeit incompletely, structures familiar from national public law in States governed by the rule of law.[83] Perhaps most i mportantly, such procedures, even in tandem with others that may be available within a State where the project is executed, do not allow for a comprehensive consideration of the decision making involved. Instead, they compartmentalise decision making into separate processes – the national and the international – and force complainants to present their claims in a piecemeal approach, hampering them from presenting the harm suffered or likely to be suffered as a result of the intimately inter-related decision-making processes linked to the project. The World Bank Inspection Panel exemplifies this manner of proceeding, given that the State concerned does not play a role in the complaint procedure, at least not in a formal sense.

There is a need to consider how participatory rights might be realised closer to the individuals and groups that may be affected by relevant projects so that problems can be considered in their local context, perhaps in the form of ombudspersons located in developing States appointed

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especially to consider complaints involving projects in which global institutions exercise public powers *vis-à-vis* individuals and groups in those States.[84] More generally, it is important to depart from the notion that participatory rights and in particular accountability mechanisms cannot have a hybrid character, involving global, national and local elements: hence the suggestion to revisit the doctrine regarding the immunities of global institutions under national law. This suggestion is related to the multi-faceted, as opposed to multi-layered, manner in which decision making takes place in global law. These processes are not confronted with neatly distinguished layers, but rather with a host of inter-linked decision-making processes and actors whose decisions ultimately culminate at the "localest" of levels, that of individuals and groups.

Conclusion: (Re)Constituting Public Space

The substantive elements of global environmental law hold the promise of a more evenhanded global order by emphasising the functional role of States. The decision-making patterns employed in global environmental law, however, take away from that promise by emphasising the discretionary power of international institutions, especially in the relationship between developing States and the World Bank and related institutions. In the transition from international to global environmental law, public space has been reconstituted by attributing global public powers to international institutions without establishing an adequate system of checks and balances to hold those powers accountable.

A further reconstitution of public space is required in order to attain a more just global legal order. While undoubtedly substantive principles of (environmental) law require our attention, the procedural deficit in global environmental law requires our attention just as urgently. In so doing, consideration should be given to developing and expanding the accountability mechanisms discussed above. In addition certain paradigms of international law, which provide essential building blocks of present global public space, should be reconsidered. These include the doctrine regarding the immunity of global institutions such as the World Bank and the doctrine that international institutions, as private actors, are not governed by international, *i.e.*, inter-State, law. These doctrines enable global institutions to function in a legal vacuum and to create their own systems of rules, as illustrated by developments in the World Bank and related institutions.

If global institutions take on powers hitherto attributed only to States, such as financing, planning and implementation of projects that affect the livelihood of individuals and groups in society, then why should these institutions not be subject to the same human rights standards and accountability procedures that international law seeks to apply to States? National public law offers a language in which we can conceptualise the problems at stake.[85] However, the solutions adopted at the national level probably cannot and should not be replicated at the international level. Instead, we need to be more creative and develop solutions that enable integrated approaches to the decision-making patterns involved in global environmental law. Such approaches should engage all levels of decision making (national, regional and global) involved in a project and should depart from the impact that such a project may have on individuals and groups in society.

The approach advocated in this essay involves a further reconstitution of public space through law and concomitantly a reconstitution of society, with society reconstituting law in an interactive process. Are these propositions idealistic, revolutionary or at least not realistic? A question often posed by Alexandre Kiss in his writings. I do not think so. Some elements are already in place, even if not perfect – think of the World Bank Inspection Panel. Other elements undoubtedly will require time to develop in a heuristic and piecemeal fashion.

Moreover, as Alexandre Kiss, with reference to Richard Strauss' choir of blind men in the *Frau ohne Schatten*, noted at the end of his inaugural lecture on the occasion of his visiting professorship at the Erasmus School of Law: "there is something and we do not know what it is, but still we must try to improve it". "This is the common destiny and the common vocation of all social sciences, which are based on the presumption that human beings can be known and that their behaviour can be foreseen and permanently oriented towards a better future".[86]

Notes

1 *See for example* Kiss, A. (1985). "The Common Heritage of Mankind: Utopia or Reality?" XL *International Journal* 423; Kiss, A. (1997). "The Common Concern of Mankind", 27 *Environmental Policy and Law* 244; Kiss, A. (2003). "Economic Globalization and the Common Concern of Humanity", in: Kiss, A., Shelton, D. and Ishibashi, K. (Eds), *Economic Globalization and Compliance with International Environmental Agreements* (The Hague: Kluwer Law International) 3; Kiss, A. (2005). "Réflexions sur l'intérêt général de l'humanité", in Zerbini Ribeiro Leão, R. (Ed.), *Studies in Honour of Antônio Augusto Cançado Trinidade*, vol. 1 (Porto Alegre: Fabris) 79; and Kiss, A. and Shelton, D. (2007). *Guide to International Environmental Law* (The Hague: Martinus Nijhoff Publishers).

2 The ideas about public space reflected in this essay are informed by Phillip Allot's ideas regarding constitutionalism, social power and international law as expressed in Allot, P. (1990). *Eunomia, A New Order for a New World* (Oxford: Oxford University Press); and Allot, P. (1999). "The Concept of International Law", 10 *European Journal of International Law* 31. The ideas about society and law interactively reconstituting each other are informed by Allot's writings and by Brunnée and Toope's work on an interactional theory of international law as expressed in Brunnée, J. and Toope, S. (2000) "International Law and Constructivism: An Interactional Theory of International Law", 39 *Columbia Journal of Transnational Law* 19.

3 *Case Concerning the Gabčikovo-Nagymaros Project (Hungary/Slovakia)*, 1977 ICJ Rep. 7, separate opinion of Vice-President Weeramantry, at Paragraph C(c).

4 *Also see* Brunnée, J. (2007). "Common Areas, Common Heritage, and Common Concern", in: Bodansky, D., Brunnée, J. and Hey, E. (Eds), *Oxford Handbook of International Environmental Law* (Oxford: Oxford University Press), 550.

5 *See*, *e.g.*, the 2001 Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention), which in its preamble reflects these concerns.

6 *Also see* Shelton, D. (2007). "Equity", in: Bodansky *et al*., *supra* note 4, 639.

7 The World Commission on Environment and Development. (1987). *Our Common Future* (Oxford: Oxford University Press), 43.

8 *Ibid*.

9 *ICJ Reports* 1999, Paragraph 29.

10 *Supra* note 3, judgement, Paragraph 112.

11 *See* Anghie, A. (2002), "Colonialism and the Birth of International Institutions", 34 *NYU Journal of International Law and Politics* 513; Pogge, T. (2001). "The Influence of the Global Order on the Prospects for Genuine Democracy in Developing Countries", 14 *Ratio Juris* 326.

12 *See* Caney, S. (2005). "Cosmopolitan Justice, Responsibility and Global Climate Change", 18 *Leiden Journal of International Law* 747. For a critical analysis, *see* Stone, C.D. (2004). "Common but Differentiated Responsibilities in International Law", 98 *American Journal of International Law* 276.

13 Article 5, 1990 Montreal Protocol on the Depletion of the Ozone Layer (Montreal Protocol).

14 Article 3, 1997 Kyoto Protocol only imposes emission reduction obligations on developed and economy in transition (EIT) States.

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15 *E.g*., Article 4(7), Climate Change Convention; Article 20(4), Biodiversity Convention.
16 *See* text *supra* note 7.
17 *See* text *supra* note 10.
18 *See* Merrills, J.G. (2007). "Environmental Rights", in: Bodansky *et al*., *supra* note 4, 661.
19 Article 24, African Charter on Human and Peoples' Rights.
20 Article 11(1), Protocol of San Salvador.
21 Paragraphs 4, 11, 15, 16, 22 and 36, General Comment 14(2000), Doc. E/C.12/2000/4, 11 August 2000; for the text of general comments by the Committee on ECSR see: http://www2.ohchr.org/english/bodies/cescr/comments.htm (accessed 11 October, 2008).
22 *See* the contributions by Dinah Shelton on "Human Rights and the Environment" in the successive editions of the *Yearbook of International Environmental Law* (Oxford: Oxford University Press); and García San José, D. (2005). *Environmental Protection and the European Convention on Human Rights*, Human Rights Files, No.21 (Strasbourg: Council of Europe Publishing).
23 In particular Section 3.
24 Principle 1, quoted above, as well as Principles 20, 21 and 22.
25 *See* http://www.un.org/millenniumgoals/ (accessed 11 October, 2008).
26 Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August–4 September 2002, Doc. A/CONF.199/20, at 1, http://www.un.org/jsummit/html/documents/documents.html (accessed 11 October, 2008).
27 General Assembly Resolution, 2005 World Summit Outcome, A/Res/60/1, 24 October 2005; see Paragraph 48 for commitments related to the environment.
28 Second paragraph & preambles of the Stockholm Convention and the Montreal Protocol; 2nd, 3rd and 15th paragraphs & preamble, 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.
29 Article 10, Stockholm Convention.
30 Article 8(j), Biodiversity Convention.
31 *Ibid*., Article 10(c).
32 *Ibid*., Article 10(d).
33 *E.g*., Article 8(j) of the Biodiversity Convention stipulates that the obligation expressed is "[S]ubject to its national legislation", while Article 10 contains the proviso "as far as possible and as appropriate".
34 *Also see* Hey, E. (2009). "Distributive Justice and Procedural Fairness in Global Water Law", in: Ebbesson, J. and Okowa, P. (Eds), Environmental Law and Justice (Cambridge, Cambridge University Press).
35 General Comment 15, UN Doc. E/C.12/2002/11, 20 January 2003.
36 Both the Helsinki Convention and the Protocol on Water and Health in principle apply within the UNECE region. The parties to the Helsinki Convention in 2003, however, adopted a decision that, when it enters into force, they will open the convention (not the protocol) to participation by States outside the UNECE region, upon approval of the Meeting of the Parties (Decision III/1, Amendment to the Water Convention, 28 November 2003, Doc.ECE/MP.WAT/14, 12 January 2004).
37 Paragraph 33, General Comment 15.
38 *Ibid*., Paragraph 36.
39 *Ibid*., Paragraph 60.
40 *See supra* note 36.
41 The term World Bank refers to the International Bank for Reconstruction and Development (IBRD) and the International Development Agency (IDA). When reference is to one of these specific institutions their acronym will be used. Other institutions such as the International Financial Corporation (IFC) are affiliated to the World Bank.
42 *Also see* Hey, E. (2007). "International Institutions", in: Bodansky *et al*., *supra* note 4, 749.
43 Protocols, respectively, to the Climate Change Convention and the Biodiversity Convention.
44 *E.g*., The CBD Handbook, http://www.cbd.int/convention/refrhandbook.shtml (accessed 11 October, 2008), which contains all decisions taken by the parties to implement the Biodiversity Convention and Cartagena Protocol. Similar handbooks are available for other MEAs.
45 *See supra* note 15.
46 *E.g*., Article 9(2) of the Montreal Protocol allows parties to amend certain aspects of the annexes to the protocol by a two-thirds majority vote.
47 *Also see* Hey, E. (2003). *Teaching International Law. State Consent as Consent to a Process of Normative Development and Ensuing Problems*, inaugural lecture (The Hague *etc*.: Kluwer Law International).
48 *E.g*., Decision 2/CMP.1 on the Principles, Nature and Scope of the Mechanisms Pursuant to Articles 16, 12 and 17, adopted by the parties to the Kyoto Protocol in 2005.
49 A*lso see* Bodansky, D. (2007). "Legitimacy", in: Bodansky *et al*., *supra* note 4, 704 at 712.
50 Although administered by the World Bank, the GEF was established jointly by the World Bank, UNEP and UNDP.
51 *See* http://web.worldbank.org (Topics > Environment > Topics) (accessed 11 October, 2008).
52 *See* Matz, N. (2005). "Financial Institutions between Effectiveness and Legitimacy – A Legal Analysis of the World Bank, Global Environment Facility and the Prototype Carbon Fund", 5 *International Environmental Agreements* 265.
53 *Ibid*.
54 *See* http://carbonfinance.org/ (accessed 11 October 2008).
55 *Also see* Anghie, A. (2004). "International Financial Institutions", in: Reus-Smit, C. (Ed.), *The Politics of International Law* (Cambridge: Cambridge University Press), 217.
56 *Also see* Allot, *supra* note 2.
57 *Also see* Ebbeson, J. (2007). "Public Participation", in: Bodansky *et al*., *supra* note 4, 681.
58 Articles 11–19, Watercourses Convention.
59 *Ibid*., Article 32.
60 *E.g*., Article 6(a)(ii) and (iii), Climate Change Convention; Paragraphs 12 and 13, preamble, and Article 8(j), Biodiversity Convention; Article 10, Stockholm Convention.
61 Paragraph 14–18, Operational Policy 4.01: Environmental Assessment, 1999. All World Bank safeguard policies, http://www.worldbank.org (projects and operations, safeguard policies) (accessed 11 October, 2008).
62 Paragraph 6, Operational Policy 4.10 (OP/BP 4.10), July 2005, contains the safeguard policy on Indigenous Peoples. OB/BP 4.10 replaced OP/BP 4.20 on the same topic, adopted in September 1991.
63 Paragraph 1, Operational Policy 4.10: Indigenous Peoples, 2005. Also see Bank Procedure 4.10: Indigenous Peoples – Paragraph 2 further specifies the notion of "free, prior and informed consultation".
64 Operational Policy 7.50: Projects on International Waterways, 2001. Also see Bank Procedure 7.50: Projects on International Waterways, 2001.
65 The GEF has adopted its own set of guidelines on participation, see http://www.gefweb.org/Operational_Policies/Public_Involvement/public_involvement.html (accessed 11 October, 2008).
66 *See* Boisson de Chazournes, L. (2005). "The World Bank Inspection Panel: about Public Participation and Dispute Settlement", in: Treves, T., Frigessi di Rattalma, M., Tanzi, A., Fodella, A., Pitea, C. and Ragni, C. (Eds), *Civil Society, International Courts and Compliance Bodies* (The Hague: T.M.C. Asser Press), 187.
67 For environmental instruments adopted within the UNECE, *see* http://www.unece.org/env (accessed 11 October, 2008).
68 Article 16, Helsinki Convention; Articles 5(1), 6(2), 8(1)(a)(iii), 9 and 10, Protocol on Water and Health.
69 Article 2(6), 1991 Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).
70 Articles 4 and 5, Aarhus Convention.
71 *Ibid*., Articles 6–8.
72 *Ibid*., Article 9.
73 *Ibid*., Article 3(9).
74 *Ibid*., Article 3(7).
75 Almaty Guidelines in Promoting the Application of the Principles of the Aarhus Convention in International Forums, Annex to Decision II/4, *Report of the Second Meeting of the Parties*, Doc. ECE/MP.PP/2005/2/Add.5 (20 June 2005).
76 Decision I/7, Doc ECE/MP.PP/2/Add.8, 1 April 2004.
77 Article 19(3), Aarhus Convention. The parties to the Espoo Convention, like those to the Helsinki Convention (see *supra* note 36), adopted a decision opening the convention to States outside the UNECE region, subject to the approval of the meeting of the parties (Decision II/4, 27 February 2001. Doc. not yet in force).
78 *See* text following *supra* note 59.
79 *See* generally Schermers, H.G. and Blokker, N. (2003). *International Institutional Law (*Boston/Leiden, Martinus Nijhoff), Paragraphs 1591–1616. Note, moreover, that the project documents governing projects executed by the World Bank and agreed to by the State where the project is executed generally provide for the immunity of the Bank under the national legal system of the developing State in question.
80 *See* Bradlow, D. (2005). "Private Complaints and International Organizations: a Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions", 36 *Georgetown Journal of International Law* 403.
81 *See* http://www.cao-ombudsman.org/ (accessed 11 October, 2008).
82 Speech delivered by Monique Barbut, CEO and Chairperson of the GEF, delivered at the GEF Council Meeting, Washington DC, 5 December, 2006, http://www.gefweb.org (accessed 11 October, 2008).
83 *But see* Caney, S. (2005). *Justice Beyond Borders, A Global Political Theory* (Oxford: Oxford University Press), 148–188, arguing for the establishment of strong supra-state authorities within "a multi-level system of governance, in which power is removed from States to both supra-state and sub-state authorities" (at 188).
84 *See* Chester, S. (2002). *Justice under International Administration: Kosovo, East Timor and Afghanistan* (New York: International Peace Academy), http://www.ipacademy.org/pdfs/JUSTICE_UNDER_INTL.pdf (accessed 11 October, 2008).
85 *Also see* the NYU project on global administrative law at http://iilj.org/GAL/default.asp (visited 11 October, 2008).
86 Kiss, A. (1997). *Compliance with International and European Environmental Obligations*, lecture delivered on the occasion of his inauguration as Visiting Professor at the Faculty of Law of the Erasmus University, Rotterdam on 15 November 1996 (The Hague: T.M.C. Asser Institute), 11.

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IWC

Talks "Fall Short"

by Joanna Depledge*

Efforts to develop a compromise package on the future of the International Whaling Commission (IWC) before the forthcoming 61st Annual Meeting (Madeira, 22–26 June 2009) have stalled. Despite "significant concrete results" and a "respectful dialogue", the Small Working Group (SWG) launched last year at IWC-60 reported on 18 May 2009 that the talks have "fallen short", and recommended that its work continue for a further year.[1]

This setback marks the latest drive, begun at IWC-59, to overcome the political impasse between pro- and anti-whaling nations that has dogged the IWC for many years. The initial focus was on process, with IWC-60 gavelling through a series of procedural reforms. The IWC then turned to substance, listing 33 issues requiring attention, including all the well-known and long-standing bones of contention. The SWG was established to consider these issues intersessionally, and charged with developing "a package or packages for review by the Commission".[2] The 26-member SWG was chaired by Ambassador Alvaro de Soto (former UN Special Coordinator for the Middle East Peace Process), one of the three veteran diplomats drafted in during the initial process-focused talks to bring an outside perspective to the IWC's problems. The SWG held two closed meetings in late 2008, first in Florida, US, then in Cambridge, UK. On the basis of discussions at these meetings, as well as informal bilaterals, SWG Chair de Soto and IWC Chair Bill Hogarth jointly developed a set of *Chairs' suggestions on the Future of the IWC*.[3] The *Chairs' suggestions* were then debated at an open IWC intersessional meeting (Rome, March 2009), attended by about half the IWC members (all were invited), along with a substantial number of NGO and IGO observers.

The *Chairs' suggestions* were structured on the SWG's decision, taken early on in its work, to divide the 33 issues in its workplan into two categories: 13 "Category A" issues were found to be fundamental to finding a political breakthrough, with the remainder listed as "Category B" issues that, while very important, were not considered so critical to a deal. Within Category A, the *Chairs' suggestions* then identified three core issues deemed to hold the key to any consensus package: small-type coastal whaling in Japanese waters; special permit (so-called "scientific") whaling; and whale sanctuaries. To address these three core issues, the Chairs suggested a two-phase approach, involving an initial five-year interim period during which a short-term political settlement would be implemented. More fundamental governance and management issues would be worked on during this interim period, hopefully leading to reforms and long-term consensus deals which could be put in place in a second phase after 2014.

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Although the Chairs were at pains to emphasise that their paper did not represent a finished package, the suggested trade-offs were very explicit. In terms of small-type coastal whaling, the four concerned Japanese communities would be allowed to catch common minke whales during the interim period under specific constraints (only day trips, only five vessels). The Scientific Committee would advise on the quotas allowed (Japan went on to propose 150 whales), including whether these quotas should come to an end after the interim period. In return, and pending agreement on a longer-term solution, Japan would scale down its scientific whaling during the interim period, either by gradually phasing this out (Option one), or by agreeing to reduced quotas (Option two). The third element of the suggested package would be the establishment of a whale sanctuary in the Southern Atlantic during the interim period; its renewal would then require a vote of three-quarters of IWC members. Alongside these suggested core trade-offs, the moratorium on commercial whaling would stand, and whale-watching would be recognised as a legitimate management approach (Japan has long resisted this, claiming that whale-watching is beyond the IWC's purview). The other Category A and Category B issues would also be considered and elaborated during the interim period.

Reactions to the *Chairs' suggestions* were lukewarm among delegations to the IWC intersessional.[4] For their part, conservation NGOs were stinging in their criticism and urged governments to reject the proposals.[5] For many, the Chairs went too far in their concessions to Japan, notably in allowing scientific whaling to continue. Even if the stronger Option 1 were agreed (and Japan declared this to be against the spirit of the IWC), the absence of any binding, long-term interdiction would mean that Japan might simply resume its scientific whaling after the interim period. Option 2, involving reduced but continuing quotas, was dismissed by NGOs as not meriting discussion. Regarding the proposed sanctuary, critics pointed to the absence of any guarantee of its renewal after five years, especially given the majority vote required (although Brazil said it was prepared to accept this compromise). The approval of coastal whaling off Japan also proved provocative, with several IWC members and the NGOs warning of a "slippery slope". South Korea's intervention at the IWC intersessional on the plight of its coastal whaling community, and the domestic pressure it was under to address this problem, served only to accentuate these warnings.

The target of the *Chairs' suggestions* was clearly Japan. Certainly, the Japanese delegation was among the more cautiously enthusiastic at the IWC intersessional, declaring the paper, despite its "difficulties", to provide

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"a reasonable basis for discussions" and judging the interim approach as "wise".[6] Japan took offence, however, at some of the negative reactions to the suggestions, notably from NGOs. The delegation also complained of violent harassment of its scientific whaling fleet in the Southern Ocean by the conservation NGO Sea Shepherd. Japan warned that its view of the IWC and its willingness to participate in negotiations may be compromised, if IWC members were unable to halt the violent attacks suffered by its fleet. It later emerged that Japan's scientific whaling programme had failed to catch its targeted quota of whales last season, due largely to Sea Shepherd's operations in the Southern Ocean.[7]

Despite their inevitably robust responses to it, delegations were prepared to work with the *Chairs' suggestions*. At the close of the intersessional, delegates thus asked the SWG to "resume its work building on progress achieved so far", and to "strive to complete a package/packages of proposals" by 18 May 2009.[8] Armed with this mandate, Chair Hogarth embarked on a flurry of bilateral consultations among the key players to try to flesh out a deal, but ultimately to no avail. Chair Hogarth later revealed, to a US Congressional hearing, that the sticking point was Japan's reluctance to compromise sufficiently on its scientific whaling programme.[9]

For now, although negotiations have stalled, they have not yet collapsed. The SWG did agree on a work plan for dealing with issues that, under the *Chairs' suggestions*, would be considered during the interim period, including Category B issues. More contentiously, the SWG requested the Scientific Committee to develop a draft, non-binding work plan and timeline to assess fully Japan's proposed quota for small-type coastal whaling during the suggested interim period. To quote the SWG report, "given the complexity and the sensitivity of the issues involved, it should not come as a surprise that it has thus far not been possible to secure agreement on key specifics".[10] It is already quite an achievement that the process has got this far, especially in terms of framing the negotiations. The focus on the three core issues – although criticised as sidestepping the fundamental controversies – at least boils down the IWC's troubles into manageable, and negotiable, chunks. The two-stage approach – although deferring contentious questions – would allow for confidence-building advances.

The question now is whether delegates to IWC-61 will agree to renew the SWG's mandate for a further year. The anti-whaling nations will almost certainly do so. The US, for example, has declared support for continuing the SWG's work, with a 2010 deadline.[11] Japan's endorsement, however, cannot be taken for granted. Its intransigence that led to the current setback, despite the favourable package on the table, suggests that Japan's commitment to the IWC process is waning. An important insight from negotiation theory is that the relative negotiating power between two parties (anti-whalers and pro-whalers, say) depends upon how attractive to each party is the *alternative* to a negotiated agreement.[12] It seems that, for Japan, the alternative to an agreement negotiated in the IWC is becoming increasingly attractive. At a meeting organised by the Pew Environment Group in February 2009[13] (the third in a series), the Japanese Institute of Cetacean Research unveiled an alternative draft set of rules on whaling that Japan might invoke "in case of failure of 'the future of IWC' initiative".[14] This draft convention would treat whales like any other living species, to be hunted and fished according to sustainability principles. It is perfectly plausible that Japan might use the stalling of the SWG talks as an excuse to walk away from the IWC. For their part, anti-whaling countries are also losing patience. Most notably, the new US Administration under President Obama has vowed to step up, rather than compromise on, the protection of the world's whales.[15]

On the eve of its Madeira meeting, the IWC's future thus lies on a knife-edge. Of course, this is not the first time that the IWC has tried to craft a political settlement between pro- and anti-whaling positions. There is a sense, however, that things are different this time round, and that a collapse (not just a delay) in the SWG talks would plunge the IWC from long-standing stalemate into acute crisis. Averting such an outcome may require higher-level political involvement than is usual in the IWC, including from foreign affairs and environment ministries, not just fisheries. This was one of the recommendations of the above-mentioned Pew Environment Group meeting,[16] where Minister Humberto Rosa, Portuguese Secretary of State for the Environment, pledged to use his good offices as IWC host to entice fellow ministers to Madeira. Strong leadership from the IWC host is certainly to be welcomed (especially as IWC Chair Hogarth is due to step down in Madeira) and could help tip the balance towards a more positive outcome. So long as IWC members decide to keep talking, there is hope that an agreement – however partial and interim – can eventually be reached.

Notes

1 IWC/61/6. Report of the Small Working Group (SWG) on the Future of the International Whaling Commission.

2 IWC. (2008). Revised Chair's Report of the 60th Annual Meeting.

3 IWC/M09/4. Report of the Small Working Group (SWG) on the Future of the International Whaling Commission. Presented by Alvaro de Soto, SWG Chairman, 2 February 2009.

4 IWC/61/7. Chair's Report of the Intersessional Meeting of the Commission on the Future of IWC, FAO Headquarters, Rome, 9–11 March 2009.

5 Whalewatch. (2009). "Response to Chairs' Suggestions on the Future of the IWC". http://www.whalewatch.org/reports/Whalewatch_response_to_Chairs_suggestions.pdf.

6 See note 4.

7 BBC. (2009). "Activists thwart Japan whale hunt". 13 April 2009. http://news.bbc.co.uk/1/hi/world/asia-pacific/7996950.stm.

8 See note 4.

9 Tandon, S. (2009). "Whaling Commission head says Japan must compromise". 20 May 2009, http://news.yahoo.com/s/afp/20090521/wl_asia_afp/usjapanwhaling.

10 IWC/61/6.

11 *Ibid.*

12 Fisher, R., Ury, W. and Patton, B. (1992). "Getting to Yes: Negotiating an Agreement without Giving In". London: Random House Business Books.

13 IWC/M09/INFO 1, The Pew Whales Commission, Lisbon, 9–10 February 2009. Chair's Report.

14 Goodman, D. (2009). "Building a 'safety net'". Paper prepared for the Pew Whales Commission, Lisbon, February 9–10, 2009. Tokyo: The Institute of Cetacean Research. http://www.pewwhales.org/pewwhalescommission/submissions/ICT%20submission%20to%20Pew%20Whales%20Commission%20-%20Jan,%202009.pdf.

15 Darby, A. (2009). "US toughens stance on Japanese whaling". 20 May 2009, http://www.watoday.com.au/world/us-toughens-stance-on-japanese-whaling-20090520-bfng.html?page=-1.

16 IWC/M09/INFO 1.

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