



IUCN Academy of
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eJournal

A Word from the Editors

Welcome to Issue 10 of the IUCN Academy of Environmental Law Journal. We have, as always, a thought-provoking issue and one which highlights the unique contribution of this journal in giving a truly global and comparative view of environmental law.

Policies as a mandatory consideration in environmental impact assessments – A Swiss law perspective on the Western Australian regime' provides an engaging comparative analysis of *Jacob v Save Beeliar Wetlands (Inc)* (2016). This case was a landmark decision in Australian EIA law as it considered the extent to which a decision-maker must take into account their own published government policy for development applications. Whilst the WA Court of Appeal determined that decision-makers are not required to take into account non-statutory instruments, Schnyder and Gardner considers the approach under the Swiss EIA regime where decision-makers must consider non-formal instruments and policies.

This piece provides a timely review of the WA EIA regime and calls for the need for reform in order to generate stronger public certainty surrounding administrative decision-making. The application of the Swiss EIA regime to the fact pattern presented in *Beeliar* calls out the contradictory behaviour of those in power and calls for decision-makers to act in the same way that they preach. Although both the Australian and Swiss EIA regimes share similar principles of procedural fairness and equitable interpretation under the law, the Australian regime would be improved by amending EIA law to allow decision-makers to issue binding guidelines which substantiate and interpret its requirements for EIAs.

Nigeria's Biotechnology Act and Non-Precaution: Raising the Threshold?

Continual advances in biotechnology and genetically modified organisations (GMOs) raises new opportunities, as well as ecological threats, for developing country ecosystems. 'Nigeria's Biotechnology Act and Non-Precaution: Raising the Threshold?' presents a timely critique of Nigeria's National Biosafety Agency Management Act 2015 and argues for the inclusion of the precautionary principle as a guiding ethos to prevent the widespread adoption of untested biotechnology into vulnerable environments.

Critically, the paper raises the importance of increased capacity building to provide developing countries such as Nigeria the means to safely test new biotechnology and GMOs before its introduction into the market. The piece thoughtfully presents a nuanced understanding of the importance of effective governance and participation into the process, and advocates for increased transparency in the GMO decision-making process. *Nigeria's Biotechnology Act and Non-Precaution: Raising the Threshold?* is instructive for any audience wishing to gauge the future threats to biosafety across the developing world, and how domestic GMO and biotechnology legislation can better align with obligations presented under the Cartagena Protocol.

The more things change...

Country reports in Issue 10 chime with some of the wider global debates about both the economy and the environment. As the so-called 'crisis of multilateralism' deepens so demands for key international institutions to make real change to address social and environmental failings grow. At the WTO public forum in Geneva this year, panels included what felt like an unprecedented focus on calls for a 'WTO 2.0'. Balancing (and rebalancing) the pillars of sustainable development has long been a concern of environmental law. Country reports in Issue 10 highlight this as a still crucial thread in the development of law and policy: it arises in the context of land use policy in Kenya, in which demands for sustainability may be eclipsed by a focus on productivity; in Austria, where work on additional runways engaged the need to balance economic development and environmental protection in the context of infrastructure development and in Japan where law and policy is being developed with close reference to the SDGs.

This year also saw an escalation in public attention to and scientific warnings on major environmental issues including the climate emergency, deforestation and plastic pollution. Across the world the Extinction Rebellion protests have sought to engage citizens and call upon governments to bring about structural change to respond to the emergency. Country reports this year have also highlighted the extent to which responding to climate change has become a routine aspect of environmental law. From climate litigation in Austria, to the use and production of energy in Spain and movement towards a low carbon society in Japan. The Bahamas report meanwhile highlights a frustrating lack of progress despite international commitments.

Country responses to plastic pollution have become a consistent feature in this journal in the past two years, most frequently focusing on reducing the use of plastic bags through the introduction of measures such as direct charges to the consumer or requirements on the composition of bags. That focus continues in this Issue with an overview of the plastic bag measures introduced in Spain, steps towards a ban on single use plastic in the Bahamas and the broader framework for sustainable materials and a specific plastics strategy in Japan.

Set against these sometimes dramatic and urgent topics and discourses, certain environmental law mechanisms and processes whatever their weaknesses, are consistently a feature of the Country Reports section and, as seen in the Reports, ensuring that they are applied and implemented appropriately is an important task across jurisdictions. Planning and Environmental Impact Assessment (EIA) is addressed in Country Reports for Hong Kong, Austria, Spain, New Zealand, Ukraine and the Bahamas. Public law maintains its long-standing role in delivering environmental protection and environmental justice as evidenced by the range of judicial review claims in this Issue's Country Reports section.

As ever, the Country Reports section serves an important function in not only highlighting the comparative differences and particular circumstances of environmental law across different countries, but in drawing our attention to consistent themes, obstacles and challenges shared by those engaged in environmental protection.

This issue includes two book reviews. Iyan Offer provides a bold and welcome review of Werner Scholtz's *Animal Welfare and International Environmental Law: From Conservation to Compassion*. This (as the reviewed text itself) is important in linking the fields of environmental law and animal welfare which, as Offer and others suggest, might not need to be as separate as is sometimes claimed. Anastasia Telesetsky meanwhile provides a review of *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH*, addressing some of the themes that have become so vital in the global debates noted above.

We hope that readers will find this issue insightful and we thank both our contributors and the Editorial Team for their efforts in publishing another issue of the Journal. We conclude with two updates:

1. We are pleased and proud to inform readers that going forward, the Journal will be known as the IUCN AEL Journal of Environmental Law. We hope that this updated title will appeal not only to AEL members but also to our wider environmental law community.
2. This is planned to be the last issue for us as Editors-in-Chief. Having been involved with the journal for a number of years we are both taking on other roles. It has been wonderful to contribute to the life of the journal but this an exciting time for the journal as new editors step in and the journal continues to evolve and grow.

Opi Outhwaite and Shawkat Alam

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Editorial team for Issue 10

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POLICIES AS MANDATORY RELEVANT CONSIDERATIONS IN ENVIRONMENTAL IMPACT ASSESSMENTS – A SWISS LAW PERSPECTIVE ON THE WESTERN AUSTRALIAN REGIME

Florian Schnyder* and Alex Gardner**

This article makes a comparative legal analysis of the legal effect of non-statutory policies in environmental impact assessment processes. It explores how a Swiss Court would have analysed this issue as determined by the Western Australian Court of Appeal decision in Jacob v Save Beeliar Wetlands (Inc) (2016). It asks whether that analysis would have led to a different outcome. Further, the article compares the function of mandatory relevant considerations in the Western Australian and the Swiss environmental impact assessment regimes, analyzing whether and how the Swiss approach could help to improve the Western Australian regime.

Introduction

Background

In July 2016, the Court of Appeal of the Supreme Court of Western Australia (“Court”) delivered its decision in *Jacob v Save Beeliar Wetlands (Inc)*¹ (“Beeliar Case”), which allowed an appeal from the Minister for Environment from the decision of Martin CJ² at the first instance. In summary, the Court held that only statutory policies issued with ministerial approval under Part III of the *Environmental Protection Act 1986* (WA) (“EP Act”) are mandatory relevant considerations in the Environmental Protection Authority’s (“EPA”) environmental impact assessment (“EIA”) processes. Consequently, the Court decided that the EPA, an independent statutory advisory

*Florian is the first author on this article, especially contributing the knowledge of Swiss law.

**Alex, as second author, contributed to the overall design and, especially to the knowledge of Australian law. The authors are grateful for the reviewer's comments, but the final version remains our responsibility.

¹ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126; (2016) 50 WAR 313; 216 LGERA 201; delivered on 15 July 2016.

² *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482.

2 Policies as Mandatory Relevant Considerations

body, had no duty to consider its own “EIA guidelines” (as the EPA describes them), being policies it published without ministerial approval (“Non-Statutory Policies” or “NSPs”).

The Beeliar Case concerned the environmental impact assessment of a proposal by the Commissioner of Main Roads (“CMR”) to extend the Roe Highway, a major freeway in the southern suburbs of Perth that traverses through conservation category wetlands (“Proposal”). A key issue was whether the EPA would recommend the use of offsets to mitigate environmental effects. The EPA had published three NSPs³ applicable to assessing the Proposal, outlining its approach to the use of offsets. It specifically addressed cases in which the implementation of a proposal would result in *significant* residual impacts on *critical* environmental assets. In these cases, the EPA stated that it did not consider environmental offsets to be an appropriate means of rendering such proposals environmentally acceptable and that there is a “presumption against recommending approval for proposals that are likely to have *significant* adverse impacts to *critical* assets.”⁴

The EPA concluded that the implementation of the Proposal would result in *significant* residual impacts on *critical* environmental assets. Nevertheless, the EPA’s report recommended that the Proposal should be implemented under certain conditions, including that the CMR must “offset the *significant* impacts to fauna, vegetation and wetlands.”⁵ Accordingly, the EPA’s decision was inconsistent with the EPA’s own published NSPs and, crucially, made without reference to the three NSPs. Because the Court of Appeal held that NSPs are not mandatory relevant considerations (“MRC”), this inconsistency and the failure to consider the three NSPs in the assessment report had no legal consequences.

³ Environmental Protection Authority of Western Australia, *Environmental Offsets – Position Statement No. 9*, (2006); Environmental Protection Authority of Western Australia, *Guidance for the Assessment of Environmental Factors – Environmental Offsets – Biodiversity – Guidance Statement No 19*, (2008); Environmental Protection Authority of Western Australia, *Environmental Offsets – Biodiversity – Environmental Protection Bulletin No 1*, (2008).

⁴ Environmental Protection Authority of Western Australia, n 3 (Position Statement 19), 14 and 19; Environmental Protection Authority of Western Australia, Australia, n 3 (Guidance Statement 19), 3; Environmental Protection Authority of Western Australia, n 3 (Bulletin 1), 2.

⁵ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126, at [15] (emphasis added).

Arguments, Aim, Structure, and Methods

The Beeliar Case has already been reviewed in the course of earlier studies (e.g. by Adam Sharpe,⁶ Andre Maynard,⁷ Jasmine Morris,⁸ Lauren Butterly,⁹ Philip Paul,¹⁰ and Toby Nisbet and Geoffrey J Syme¹¹). This article adds to earlier commentary by examining the Beeliar Case from a comparative Swiss law perspective and aims to demonstrate how Western Australia could improve its environmental impact assessment regime.

It is argued that the Court of Appeal decision in the Beeliar Case jeopardizes confidence in the EPA. The Court allows the EPA to publish guidelines outlining its assessments approach without having a duty to consider these guidelines in the course of the assessment of a specific proposal. Martin CJ, at first instance of the Beeliar Case, mentioned some of the negative consequences attached to the finding that NSPs are not mandatory relevant considerations.¹² Amongst other things, Martin CJ stated that persons relying upon NSPs are likely to be misled at various points in the assessment process and that it would be unlikely that the requirements of procedural fairness are met “because many of those engaged in the process will be proceeding on the basis of a false premise”.¹³

⁶ Adam Sharpe, *Policy as a mandatory relevant consideration: a reflection on Jacob v Save Beeliar Wetlands (Inc)* (2016) 50 WAR 313, (2018) 45 Brief, 27 – 35.

⁷ Andre Maynard, *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482, (2016) 3 Australian Environmental Law Digest, 5 – 6.

⁸ Jasmine Morris, *Jacob v Save Beeliar Wetlands: The demise of EPA policy as a mandatory relevant consideration*, (2017) 34 EPLJ, 338 – 352.

⁹ Lauren Butterly, *Save Beeliar Wetlands (Inc.) v Jacob* [2015] WASC 482, (2016) 35 Environmental Law Reporter, 7 – 8.

¹⁰ Philipp Paul, *Case note on Jacob v Save Beeliar Wetlands (Inc): mandatory relevant considerations, administrative procedures and legal unreasonableness*, (2016) 18 University of Notre Dame Australia Law Review, 1 – 18; Philipp Paul, *Jacob v. Save Beeliar Wetlands (Inc): Mandatory relevant considerations, administrative procedures and legal unreasonableness*, (2016) 18 University of Notre Dame Australia Law Review, 160 – 176.

¹¹ Toby Nisbet and Geoffrey J Syme, *No way to build a highway: Law, social justice research and the Beeliar Wetlands*, (2017) 34 EPLJ, 162 – 175.

¹² See Jasmine Morris, n 8, 341 et seq. for an overview of the various negative consequences imposed by the finding that EIA are not MRC.

¹³ *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482 at [186].

Under Swiss law (discussed below), the Swiss counterpart to the EPA is required to examine whether a proposal is in line with “all provisions on the protection of the environment”. The Swiss Federal Supreme Court says that the term “provision” is not limited to laws and ordinances but also includes non-statutory policies and guidelines, provided they permit an equitable interpretation of the applicable statutory provisions, which can be adjusted to the individual case. We argue that the NSPs relevant to the Beeliar Case meet these requirements because they permit an equitable interpretation of the legal requirements under section 44(2)(b) of the EP Act and would, therefore, be qualified as MRCs under Swiss law.

We argue further, on the basis of the Swiss EIA regime and decisions of the Swiss Federal Supreme Court, that the EPA would have violated the principle of good faith in public law. The EPA decision would have contravened this principle because it recommended implementation of the Proposal contrary to the presumption expressed in the NSPs against recommending implementation of proposals with *significant* residual impacts on *critical* environment assets without any (obvious) objective reason to do so. In our view, a Swiss court would have deemed the EPA assessment report on the Proposal to be invalid because the EPA acted *venire contra factum proprium*; that is, in a contradictory manner. Furthermore, we argue that the Western Australian Supreme Court is unlikely in the future to assert that NSPs have any legally binding effects so the threats to the confidence in the EPA could be mitigated by amendment to the EP Act.

Finally, we argue that the Swiss principle of good faith in public law and the concepts derived therefrom, such as the protection of legitimate interests and the concept of equitable interpretation of statutory provisions, share many of the ideas apparent in the (Western) Australian concept of procedural fairness and the (rejected) notion of legitimate expectations. Therefore, we attribute the different outcomes of the assessment of the facts underlying the Beeliar Case to the different administrative law environments of Western Australia and Switzerland. Accordingly, any lesson from the Swiss approach requires attention to these differences, including with regard to concerns about the legitimacy of NSPs raised by the Court in the Beeliar Case.¹⁴

¹⁴ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [55] for example.

The particular comparative aim of this article is to examine how the Beeliar Case would have been analysed under Swiss law. The general comparison of the Western Australian and the Swiss EIA regimes, with a focus on MRCs, permits further analysis of whether the Swiss approach could help to improve the Western Australian regime.

Florian conducted the comparative research as a doctrinal study of the relevant regulatory instruments. On the basis of that research, the article first examines and compares the Western Australian and the Swiss environmental protection legislation in order to identify, describe, and compare the rules that govern the respective EIA processes and to provide a general overview of these processes.

Secondly, it examines, in the course of a theoretical doctrinal analysis, how the Beeliar Case would have been analysed under Swiss law. The purpose is to outline the differences between the Western Australian and the Swiss regimes with regard to how MRCs inform the respective EIAs. The analysis includes an examination of the relevant general principles, statutory provisions, and case law.

The article concludes by determining whether and how the Swiss approach could help to improve the Western Australian regime. We suggest specific reforms, whilst being cognizant that there are some fundamental differences between the two legal systems.

Environmental Impact Assessments under Western Australian and Swiss law: A Comparison

Environmental Impact Assessments in Western Australia

Outline

In Australia, an EIA may be required by either the Commonwealth, under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (“EPBC Act”) or the relevant State legislation.¹⁵ In Western Australia (“WA”), the relevant legislation is the EP Act.¹⁶

At the Commonwealth level, an EIA is required if an *action* has, will have, or is *likely* to have a *significant* impact on a matter of national environmental significance, for which the EPBC Act provides specific protection (e.g. declared World Heritage property).¹⁷ The requirement to obtain an approval rests on provisions that impose civil penalties on individuals and body corporates if they take such actions without having obtained approval in advance.¹⁸

In WA, an EIA is required for *significant proposals*.¹⁹ A significant proposal is a one that, if implemented, is *likely* to have a *significant effect* on the *environment*.²⁰ The requirement to obtain an approval rests on section 41A of the EP Act, which states that a person who does anything to

¹⁵ Sections 101 et seq. EPBC Act.

¹⁶ Sections 37B et seq. EP Act.

¹⁷ See e.g. Sections 12(1), 15B(3), 16(1), and 18 EPBC Act.

¹⁸ See e.g. Sections 12(1), 15B(3), 16(1), and 18 EPBC Act. There are parallel criminal offence provisions.

¹⁹ Section 37B et seq. EP Act; An EIA might also be required for “strategic proposals” in the sense of Section 37B(2) EP Act and for “proposals of a prescribed class” in the sense of Sections 38(5) and 38(5c) EP Act in connection with Section 2C Environmental Protection Regulations 1987 (WA).

²⁰ Section 37B(1) EP Act.

implement a proposal before the decision, whether or not to approve the implementation of the proposal, has been published by the Minister, commits an offence.²¹

Aim

While the EPBC Act aims to protect specific matters of national environmental significance,²² the EP Act aims to protect the WA environment²³ in general.²⁴ Hence, the question of whether approval is required at the Commonwealth and/or State level (and whether the EIA must be conducted under the EPBC Act and/or under the EP Act), depends on the environmental matters that are affected by a specific action in WA. Accordingly, it must be determined whether an action is likely to have a significant effect on one of the specific environmental matters mentioned in Part 3 of the EPBC Act and whether that *action* is a *proposal* (in the sense of the EP Act) that is likely to have a significant effect on the environment. If both State and Commonwealth approval are required, there are procedures for cooperation in the assessment process by accrediting one level of government to conduct the assessment and provide the information to both levels of government for their respective approval decision-making.²⁵ As the Commonwealth normally accredits State process, this article focuses on the WA EIA regime but the question of the effect of guidelines may also apply to the Commonwealth regime.

Referral

A proposal means a project, plan, programme, policy, operation, undertaking or development, or change in land use, or amendment of any of the foregoing, but does not include land use planning

²¹ Section 41A(1) EP Act in connection with Sections 45(5)(b) and 45(8) EP Act. It is further required that the decision that the proposal is to be assessed has already been published.

²² Section 3(1)(a) EPBC Act.

²³ See *The Crown in Right of the State of Queensland v. D.R. Murphy and Anor* (1990) 64 ALJR 593, at [15] and [16], where the High Court of Australia explained that the term “environment”, as used in the EP Act, must be understood in its ordinary meaning.

²⁴ Section 4A EP Act.

²⁵ EPBC Act Chapter 3, Part 5, provides for making bilateral agreements on accreditation of environmental impact assessment procedures or outcomes, and ss.83 and 87 provide for conducting a Commonwealth assessment by accredited State procedures.

schemes.²⁶ A significant proposal under the EP Act must first be referred to the *Authority*,²⁷ meaning the EPA.²⁸ In contrast, under the EPBC Act, proponents must refer proposed actions directly to the Minister, as the Commonwealth Department of Environment conducts the EIA process rather than an independent statutory authority.

The EPA is established under the EP Act and consists of five members appointed by the Governor on the recommendation of the Minister on account of their interest in, and experience of, matters affecting the environment.²⁹ The members and the chairman of the EPA are independent from the Minister, meaning that they are not subject to the directions of the Minister.³⁰ The objective of the EPA is to use its best endeavors to protect the environment and to prevent, control and abate pollution and environmental harm.³¹ One of the various functions of the EPA is to conduct EIAs.³² The EPA has all such powers as are necessary to enable it to perform its functions.³³

Any person *may* refer a significant proposal to the EPA.³⁴ This means that the EP Act does not impose a duty on private individuals and body corporates to refer significant proposals. A duty to refer is, however, imposed on decision-making authorities if they gain notice of a significant proposal.³⁵ In addition, the EPA is obliged to require a proponent or a decision-making authority to refer a proposal if the EPA considers that it is a significant proposal.³⁶

²⁶ Section 3(1) EP Act. Land use planning schemes are subject to a different EIA process.

²⁷ Section 38 EP Act.

²⁸ Section 3(1) EP Act.

²⁹ Sections 7(1) and 7(2) EP Act.

³⁰ Sections 7(4a) and 8 EP Act.

³¹ Section 15 EP Act.

³² Section 16(1) EP Act.

³³ Section 17(1) EP Act.

³⁴ Section 38(1) EP Act.

³⁵ Section 38(5)(a) EP Act; Such duty is also imposed if a decision-making authority gains notice of a proposal of a prescribed class (Section 38(5)(b) EP Act).

³⁶ Section 38(5c)(a) EP Act; The same applies, again, with regard to proposals of a prescribed class (Section 38(5c)(b) EP Act).

The EP Act does not define the term “significant”, so the ordinary or everyday meaning of this term applies.³⁷ Consequently, consideration must be given to various matters when assessing whether a proposal is likely to have a significant effect.³⁸ These matters are, for example, the values, sensitivity and quality of the concerned environment, the extent of likely impacts (i.e. intensity, magnitude, duration and geographic footprint), and the level of confidence in the prediction of the impacts and the success of proposed mitigation measures.³⁹

EPA Assessment and Mandatory Relevant Considerations

The EPA must decide whether or not to assess a proposal referred to it.⁴⁰ The EP Act does not provide any criteria that the EPA must apply when making this decision. Accordingly, the EPA makes a discretionary decision in accordance with the objectives under Sections 4A and 16 of the EP Act.⁴¹ If the EPA decides to assess a proposal, it may, inter alia, request further information from the proponent, any other person, and the public (in the course of a public inquiry) for the purposes of assessing the proposal.⁴²

Subsequently, the EPA must prepare a report on the outcome of its assessment and provide that report (the *assessment report*) to the Minister.⁴³ In the assessment report, the EPA must set out the *key environmental factors* that it has identified in the course of the assessment and

³⁷ Environmental Protection Authority of Western Australia, *Statement of Environmental Principles, Factors and Objectives* (June 2018), 5; Environmental Protection Authority of Western Australia, *Environmental Impact Assessment (Part IV Divisions 1 and 2) Procedures Manual* (April 2018), 11.

³⁸ Environmental Protection Authority of Western Australia, n 37 (Statement), 5; Environmental Protection Authority of Western Australia, n 37 (Procedures Manual), 11.

³⁹ Environmental Protection Authority of Western Australia, n 37 (Statement), 5; Environmental Protection Authority of Western Australia, n 37 (Procedures Manual), 11.

⁴⁰ Section 39A(1) EP Act.

⁴¹ Some guidance on the matters, to which the EPA may have regard when considering significance of potential, and on the information, which the EPA considers when making its decision, is provided in Environmental Protection Authority of Western Australia, n 37 (Procedures Manual), 11.

⁴² Section 40 EP Act.

⁴³ Section 44(1) EP Act.

recommend whether or not the proposal may be implemented.⁴⁴ If the EPA recommends approval of the proposal, it must further make a recommendation as to the conditions and procedures to which the implementation should be subject.⁴⁵

Judicial interpretation of the term “environmental factors” has clarified that it refers to the environmental impacts of the proposal under assessment,⁴⁶ and that “economic loss and extraneous commercial considerations are not relevant environmental factors”.⁴⁷ Further, the EPA may only consider factors that are relevant to the “general surrounds of the area in question and how the proposed activity will impact on all things and creatures in that area.”⁴⁸

As explained above, in the Beeliar Case, the Court held that only statutory policies (i.e. policies issued with ministerial approval under Part III of the EP Act) are MRCs for the EPA in the course of its EIA process.⁴⁹ The Court explained that statutory policies, unlike NSPs, are formed in the course of a “lengthy, tortuous process involving all stakeholders, public and private” under Part III of the EP Act. The Court concluded that it would be “inconceivable that the legislator intended the EPA to have the power to make policies on the same matters [...] which it is then impliedly required to take into account in the performance of its duties”.⁵⁰ In addition, the Court explained that the express terms of section 44(2) of the EP Act specify the matters that the EPA must set out in the assessment report and that this provision would therefore identify the MRCs for the

⁴⁴ Section 44(2) EP Act.

⁴⁵ Section 44(2) EP Act.

⁴⁶ Alex Gardner, “*Environmental Factor*”: *The Western Australian EPA’s Response to the Coastal Waters Case*, (1997) *Environmental and Planning Law Journal*, 141 – 148, 142; *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority and Another; Ex Parte Coastal Waters Alliance of Western Australia Incorporated* (1996) 90 LGERA 136.

⁴⁷ *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority and Another; Ex Parte Coastal Waters Alliance of Western Australia Incorporated* (1996) 90 LGERA 136, p 2.

⁴⁸ Alex Gardner, n 46, 143; *Coastal Waters Alliance of Western Australia Incorporated v Environmental Protection Authority and Another; Ex Parte Coastal Waters Alliance of Western Australia Incorporated* (1996) 90 LGERA 136, p 9 and 10.

⁴⁹ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [55].

⁵⁰ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [55].

EPA in the course of its assessments.⁵¹ In summary, the Court held that the EP Act does not leave any room for an implication that NSPs in the form of EPA guidelines could be MRCs.⁵²

The respondent conservationists also argued that the EPA had a duty to consider the NSPs as MRCs because of the *Environmental Impact Assessment (Part IV Division 1) Administrative Procedures 2002* (WA) ("**Administrative Procedures 2002**") made by the EPA under the EP Act.⁵³ The Court held that the wording of the relevant provision, "The Authority *may* consider [...] relevant environmental policies [...]",⁵⁴ made the three NSPs mere permissive relevant considerations and not MRCs.⁵⁵ Nevertheless, the Court left open the argument that MRCs may result from the Administrative Procedures made by the EPA.⁵⁶

Decision by the Minister

The EPA sends the completed assessment report to the Minister, who must publish it and send copies of it to various stakeholders, being concerned Ministers, the decision-making authority that referred a proposal to the EPA, and the proponents.⁵⁷

Next, the Minister must consult with the other relevant decision-making authorities (other Ministers or State public agencies) and seek to agree with them on the implementation of the proposal and the regulatory conditions.⁵⁸ If they reach an implementation agreement or a decision (if no implementation agreement is necessary) that the proposal may be implemented, the Minister must send copies of the agreement or the decision to various stakeholders and cause its publication.⁵⁹ Section 45 of the EP Act does not outline the criteria that the Minister must apply

⁵¹ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [56].

⁵² *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [54].

⁵³ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [4]. EP Act s 122 authorises the EPA to make administrative procedures.

⁵⁴ Clause 9.4.1(j) Administrative Procedures 2002. Emphasis added.

⁵⁵ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126, at [62].

⁵⁶ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [60] and [62].

⁵⁷ Section 44(3) EP Act.

⁵⁸ Section 45(1) EP Act.

⁵⁹ Section 45(5) EP Act.

when making this decision, though it is arguable that the Minister must have regard to the Act's objectives as outlined in s 4A. Accordingly, the Minister has a broad power to approve or refuse the implementation of a proposal and, in the case of an approval, to decide on the regulatory conditions.

Environmental Impact Assessments in Switzerland

Outline

In Switzerland, EIAs are governed on the level of the Confederation (the Swiss counterpart to the Australian Commonwealth) under Articles ("**Arts.**") 10a – 10d of the Federal Act on the Protection of the Environment ("**PE Act**").⁶⁰ The provisions on EIAs in the PE Act are further substantiated in the Federal Ordinance on Environmental Impact Assessments ("**EIA Ordinance**").⁶¹

Art. 10a (1) of the PE Act states that authorities must, before taking any decision on the planning, construction or modification of *installations*, assess the impacts of the installation on the environment at the earliest possible stage. Art. 10a (2) further states that the requirement to conduct an EIA applies to installations that could have a significant impact on the environment and that, to comply with provisions on the protection of the environment, the assessment must propose measures specific to the project or site.

At this stage, it is important to mention that EIAs under Swiss law are not conducted as a stand-alone assessment process and do not, therefore, result in a separate environmental approval.⁶²

⁶⁰ Bundesgesetz über den Umweltschutz [Federal Act on the Protection of the Environment] (Switzerland) 7 October 1983, SR 814.01 <<https://www.admin.ch/opc/en/classified-compilation/19830267/index.html>>

⁶¹ Verordnung über die Umweltverträglichkeitsprüfung [Federal Ordinance on Environmental Impact Assessments] (Switzerland) 19 October 1988, SR 814.011 <<https://www.admin.ch/opc/de/classified-compilation/19880226/index.html>>

⁶² Daniela Ivanov, *Die Harmonisierung des Baupolizeirechts unter Einbezug der übrigen Bundesgesetzgebung* [The Harmonization of Construction Regulations, Taking into Account Other Federal Legislation] (Schulthess Juritische Medien AG 2006), 272.

Rather, EIAs conducted by the relevant environmental protection agency (a specialist unit for issues of environmental protection) are integrated into another process, the so-called underlying procedure (*Leitverfahren*).⁶³ This procedure may be a permit procedure (e.g. the procedure to obtain a construction permit), an approval procedure, or a concession process.⁶⁴ Consequently, the authority responsible for the underlying procedure determines the outcome of the EIA on the basis of the assessment provided by the environmental protection agency.⁶⁵ Depending on the individual installation, EIA outcomes in Switzerland are, therefore, decided by authorities on the Federal, Cantonal (the Swiss counterpart to the Australian States⁶⁶), or Municipal (the Swiss counterpart to the Australian Local Government Areas) level.⁶⁷

Since the duty to decide an EIA outcome is imposed on authorities only, there is no need for specific provisions that impose civil or criminal liabilities on persons if they plan, construct, or modify installations without an EIA being conducted in advance.⁶⁸ The EIA, if required, will form an integrated part of the general authorization process that the proposal must undergo, regardless of its environmental impacts.⁶⁹ Due to the lack of an environmental-specific approval, the criminal liabilities provided in the Federal, Cantonal, and Municipal laws, which enforce the requirement to obtain the general (i.e. not environmental-specific) approval, are sufficient.⁷⁰ The failure of an

⁶³ Daniela Ivanov, n 62, 274.

⁶⁴ Art. 5(1) EIA Ordinance.

⁶⁵ Art. 5(1) and 5(3) EIA Ordinance; Daniela Ivanov, n 62, 274.

⁶⁶ A Swiss counterpart to the Australian Territories does not exist. Switzerland therefore has so-called Half-Cantons, which are only allowed to one representative (instead of two) in the Swiss Council of States (the small chamber of the Swiss Federal Parliament) but are nevertheless protected under Constitution of the Swiss Confederation.

⁶⁷ Daniela Ivanov, n 62, 276.

⁶⁸ Alain Griffel and Heribert Rausch, *Kommentar zum Umweltschutzgesetz [Commentary on the Federal Act on the Protection of the Environment]* (Schulthess Juristische Medien AG, 2nd ed, 2011), Art. 10a, at [8] et seq.

⁶⁹ Alain Griffel and Heribert Rausch, n 68, at [8] et seq.

⁷⁰ The requirement to obtain a (general) approval to set up and operate a landfill, for example, is introduced by Art. 30e(2) PE Act. Art. 60(1) PE Act imposes a criminal liability on any person that constructs or operates a landfill without an approval. Since an approval for a landfill, inter alia, requires an EIA to be conducted (Art. 1 in connection with Schedule 1 40.4 and 40.5 EIA Ordinance), such approval will not be granted without an EIA. Accordingly, it is sufficient to impose a criminal liability on persons that operate a landfill without an approval (Art.60(1)m PE Act) and there is no need impose a specific criminal liability if an EIA has not been conducted. Other examples, where the same mechanism applies, are the Cantonal building regulations, which state that a building may not be construed without a construction permit. If such building is an “installation”, the general construction-approval process must include an EIA, meaning that the (general) construction permit cannot be granted without it. Accordingly, it is, again,

authority to conduct an EIA in the course of an underlying procedure, however, may have the consequence that subsequent permits, approvals, or concessions will be revoked until the EIA is conducted.⁷¹ An exception thereto applies if the aim of the EIA (see next section) has been achieved in the overall assessment of the installation in the course of the underlying procedure.⁷²

Aim

In Switzerland, the aim of EIAs is to assess and determine whether an installation is in line with all environmental protection provisions.⁷³ This includes, inter alia, the PE Act and all provisions concerning nature conservation, cultural heritage, landscape protection, water protection, forest conservation, hunting, fishing, and genetic engineering.⁷⁴ Accordingly, EIAs must be understood as legal impact assessments.⁷⁵ The result of this assessment process forms the basis for the respective authority's decision in the underlying authorization procedure.⁷⁶

Further, all predictable impacts of an installation on the environment must be determined and assessed in advance in order to ensure that the responsible authorities are able to make their decisions in an informed manner.⁷⁷ This allows the authorities to take due account of the precautionary principle (Art. 1(2) and 11(2) PE Act).⁷⁸

sufficient to impose criminal liabilities on persons if they construct a building without a general construction permit.

⁷¹ *Decision of the Administrative Court of the Canton of Zurich of 10 March 2004*, VB.2003.00036, at E 3.2.1.

⁷² *Decision of the Swiss Federal Supreme Court of 2 Mai 2007*, BGE 133 II 169, at 2.2.

⁷³ Art. 3(1) EIA Ordinance.

⁷⁴ Art. 3(1) EIA Ordinance; According to the *Decision of the Swiss Federal Supreme Court of 26 October 2016*, 1C_346/2014, at E 1.3, the list in Art. 3(1) EIA Ordinance is not exhaustive.

⁷⁵ Swiss Federal Office for the Environment, *Was wird im Rahmen einer UVP geprüft [What is being Assessed in the Course of an EIA?]* (18 September 2012) <<https://www.bafu.admin.ch/bafu/de/home/themen/uvp/inkuerze/was-wird-geprueft-.html>>; Art. 3 EIA Ordinance.

⁷⁶ Section 2(3) EIA Ordinance.

⁷⁷ Daniela Ivanov, n 62, 271.

⁷⁸ Daniela Ivanov, n 62, 271.

Duty to Assess

As mentioned above, the duty to conduct an EIA is imposed on installations that could have a significant impact on the environment in the manner described under Art. 10a (2) of the PE Act. However, Art. 10a (3) empowers the Swiss Federal Council (“SFC”) to designate the types of installations for which an EIA is required, thereby allowing the SFC to use threshold values, above which an EIA must be conducted.⁷⁹ The SFC has issued an exhaustive⁸⁰ list of all installations that require an EIA, whereby threshold values are used in many cases.⁸¹ The list further designates the applicable EIA procedure for some of the installations.⁸² If the procedure is not designated, the Cantons are authorized to determine the applicable EIA procedure themselves.⁸³

Accordingly, to decide whether an EIA must be conducted, the authorities need not determine whether an individual installation could have a significant impact on the environment. Rather, they must simply consult the list of installations in Schedule 1 to the EIA Ordinance. The exhaustive character of this list has the consequence that authorities are prohibited from conducting EIAs if an installation is not mentioned therein, even if they believe that an installation could nevertheless have a significant impact on the environment.⁸⁴ Schedule 1 to the EIA Ordinance lists more than 80 installations, for which an EIA must be conducted. This includes, inter alia, national highways,

⁷⁹ Art. 10a(3) PE Act.

⁸⁰ *Decision of the Swiss Federal Supreme Court of 24 April 1991*, BGE 117 Ib 135, at E 3b. The Swiss Federal Supreme Court (“**SFSC**”) had to assess whether the Cantonal Authority had erred in law when it decided to conduct an EIA with regard to a car park with 299 parking spots. The SFSC held that the list in Schedule 1 EIA Ordinance is exhaustive and that the Cantons are prohibited from amending the content of this list via their Cantonal laws or jurisprudence. In sum, the SFSC confirmed that the Cantonal Authority had, in deed, erred in law because the requirement for an EIA is imposed only if a car park has at least 300 parking spots (under the current version of the EIA Ordinance, the threshold is set at 500 car parks).

⁸¹ Schedule 1 EIA Ordinance; Daniela Ivanov, n 62, 272.

⁸² Schedule 1 EIA Ordinance.

⁸³ Art. 5(3) EIA Ordinance.

⁸⁴ *Decision of the Swiss Federal Supreme Court*, n 80, at E 3b.

car parks with more than 500 parking spots, new railway lines, harbours, airports, nuclear power plants, high-voltage lines, cement factories, etc.⁸⁵

Assessment by the Responsible Environmental Protection Agency and Mandatory Relevant Considerations

Art. 10b(1) of the PE Act states that a proponent who wishes to plan, construct or modify an installation must submit an *environmental impact report* (“EIR”) to the competent decision-making authority (“Authority”) and that this report forms the basis of the EIA.⁸⁶ Art. 10b(2) further states that the EIR: i) must contain all the information that is required to assess the compatibility of the installation with the provisions on the protection of the environment, ii) must be drawn up in accordance with the guidelines issued by the responsible environmental protection agency (“Agency”), and iii) must describe certain specific matters.⁸⁷ Based on Art. 10b(4), the Authority may request further information from the proponent and call for expert reports.

As a first step, however, the Agency carries out a preliminary investigation⁸⁸ in order to identify the environmental factors and the individual matters that must be assessed.⁸⁹ If it is possible to determine conclusively the effects of an installation on the environment and to define the necessary environmental measures in the course of the preliminary investigation, then the results of the preliminary investigation are deemed to be the EIR.⁹⁰ Accordingly, proponents need only issue and submit an EIR if the results of the preliminary investigation cannot be deemed to be the

⁸⁵ Schedule 1 EIA Ordinance.

⁸⁶ See also Art. 7 and 11 EIA Ordinance.

⁸⁷ These matters are: i) the initial state, ii) the project including proposed measures for the protection of the environment and in the event of disaster and an outline of the main alternatives that have been assessed by the proponent, and iii) the foreseeable residual environmental impacts; Art. 9 and 10 EIA Ordinance.

⁸⁸ Art. 10b(3) in connection with Art. 10c(1) PE Act; Art. 8 EIA Ordinance.

⁸⁹ Swiss Federal Office for the Environment, *Richtlinie des Bundes für die Umweltverträglichkeitsprüfung* [Federal Guideline for Environmental Impact Assessments], (2009), at 2.2.

⁹⁰ Art. 10b(3) PE Act; Art. 8a EIA Ordinance.

EIR.⁹¹ Subsequently, the Agency is required to assess the (deemed or actual) EIR.⁹² Based on a preliminary assessment, the Agency may propose procedural measures to the Authority.⁹³ With regard to certain specific installations (e.g. refineries, aluminium smelters, thermal power stations, and large cooling towers), the Authority is further obliged to consult the Swiss Federal Office for the Environment (“SFOE”).⁹⁴

When assessing the EIR, the Agency must first examine, on the basis of the relevant guidelines, whether the information required for the assessment is complete and correct.⁹⁵ If the proponent’s information is deficient, the Agency must ask the Authority to obtain further information from the proponent or to call for an expert.⁹⁶ The guidelines relevant to this Agency’s determination depend on whether the assessment must be conducted by a Federal, Cantonal, or Municipal Agency.⁹⁷ If the assessment is being conducted by a Federal agency, the relevant guidelines are those issued by the SFOE.⁹⁸ The same applies if Schedule 1 EIA Ordinance prescribes that the SFOE must be heard with regard to a specific installation or if the Cantonal Agency did not issue its own guidelines.⁹⁹ Apart from that, the relevant guidelines are those issued by the competent Cantonal or Municipal Agencies.¹⁰⁰

Next, the Agency must assess whether the proposed installation is in line with the provision on the protection of the environment.¹⁰¹ Accordingly, the MRCs for the Agency’s assessment are the entire applicable Swiss legislation, insofar as it refers to the protection of the environment.¹⁰²

⁹¹ Art. 10c(1) PE Act.

⁹² Art. 10c(1) PE Act.

⁹³ Art. 10c(1) PE Act.

⁹⁴ Art. 10c(2) PE Act; Art. 12 EIA Ordinance.

⁹⁵ Art. 13(1) EIA Ordinance.

⁹⁶ Art. 13(2) EIA Ordinance.

⁹⁷ Art. 10(1) EIA Ordinance.

⁹⁸ Art. 10(1) EIA Ordinance; The relevant guidelines are the SFOE guidelines; see Swiss Federal Office for the Environment, n 89, at 2.2.

⁹⁹ Art. 10(1) EIA Ordinance.

¹⁰⁰ Art 10(2) EIA Ordinance.

¹⁰¹ Art. 13(3) EIA Ordinance.

¹⁰² Daniela Thurnherr, *Fachhandbuch Öffentliches Baurecht – Expertenwissen für die Praxis [Technical Manual Public Construction Law – Expert Knowledge for Practice]* (Schulthess Juristische Medien AG 2016), at 7.168.

Subsequently, the Agency must inform the Authority of the outcome of its assessment, advise whether or not the installation may be implemented and, if answered in the affirmative, propose the conditions to which the implementation should be subject (if necessary).¹⁰³ The EIR and the results of the Agency's EIA may be inspected by any person unless overriding public or private interests require secrecy.¹⁰⁴

Assessment and Decision by the Competent Decision-Making Authority

After the Agency has submitted the results of its EIA to the Authority, the Authority must conduct its own assessment and determine whether the installation is in line with all environmental protection provisions.¹⁰⁵ Art. 17 of the EIA Ordinance states that (next to all environmental protection provisions) the following matters must inform this assessment: i) the EIR, ii) comments received from other authorities, iii) the results of the Agency's assessment of the EIR, iv) the Agency's proposal regarding implementation and conditions thereto, v) expert opinions, and vi) comments received from other persons, commissions, organizations, and authorities. If Authority concludes that the installation is not in line with these provisions, the Authority must assess whether the installation may be implemented subject to conditions.¹⁰⁶

Accordingly, the results of the Agency's assessment of the installation are equivalent to an official expert opinion but are only one of several matters that the Authority must consider.¹⁰⁷ This assessment is only binding on the Authority with regard to the facts, not with regard to the

¹⁰³ Art. 13(4) EIA Ordinance.

¹⁰⁴ Art. 10d(1) PE Act.

¹⁰⁵ Section 18(1) EIA Ordinance.

¹⁰⁶ Section 18(2) EIA Ordinance.

¹⁰⁷ Stephanie Walti, *Die Strategische Umweltprüfung [The Strategic Environmental Assessment]* (Schulthess Juristische Medien AG 2014), 42

Agency's legal assessment.¹⁰⁸ Consequently, the Authority may only deviate from the Agency's findings of fact for compelling reasons.¹⁰⁹

After the Authority has conducted its own assessment, it must decide whether or not the installation may be implemented and, if so, the conditions to which the implementation of the installation shall be subject (if any).¹¹⁰ Art. 19 of the EIA Ordinance states that the Authority, when making this decision, must consider the results of its own assessment of the installation. Accordingly, the results of the Authority's own assessment are MRCs that must inform the Authority's decision.¹¹¹

Assessment of the Beeliar Case under Swiss Law

Outline

This part examines how the Beeliar Case would have been decided under Swiss law in order to determine the major differences between the WA and the Swiss EIA regimes with regard to MRCs. Therefore, the core question is whether "provisions on the protection of the environment" also include Non-Statutory Policies and guidelines or whether this term addresses only laws and ordinances.

For this purpose, it is assumed that the events that formed the basis of the Beeliar Case have occurred *mutatis mutandis* in the Canton of Zurich (Switzerland's most densely populated Canton).

¹⁰⁸ Stephanie Walti, n 107, 42.

¹⁰⁹ Stephanie Walti, n 107, 42.

¹¹⁰ Art. 19 EIA Ordinance.

¹¹¹ Stephanie Walti, n 107, 42.

Jurisdiction

In Switzerland, the jurisdiction for the construction of roads is divided between the Federation and the Cantons.¹¹² The Federation only has jurisdiction for the construction of national highways.¹¹³ Since the Cantons may exercise all rights that are not delegated to the Federation, the Cantons have jurisdiction for the construction of all other roads.¹¹⁴ Accordingly, the proposal to extend a local highway and the decision whether or not such proposal should be implemented are made by the Cantonal authorities.

Duty to Assess

In order to determine whether the extension of a local highway also requires an EIA under Swiss law, the list of relevant installations contained in Schedule 1 of the EIA Ordinance must be consulted.

Clause 11.3 of this schedule states that high performance roads and main roads (such as a highways) are an installation in the sense of Art. 10(1) of the PE Act and, therefore, require an EIA to be conducted. Further, the Cantons are authorized to determine the applicable EIA procedures.¹¹⁵

¹¹² Art. 83 Bundesverfassung der Schweizerischen Eidgenossenschaft [Constitution of the Swiss Confederation] (Switzerland) 18 April 1999, SR 101.

¹¹³ Art. 83 Constitution of the Swiss Confederation.

¹¹⁴ Art. 3 Constitution of the Swiss Confederation.

¹¹⁵ Schedule 1, Clause 11.3 EIA Ordinance.

Competent Authorities

The Canton of Zurich has determined that EIAs of high-performance roads and main roads must be conducted in the course of the approval procedure under the Road Act of the Canton of Zurich.¹¹⁶ Accordingly, this approval procedure is the “underlying procedure”.

The competence to decide on the implementation of proposals to construct local highways is allocated to the State Council of the Canton of Zurich (“Council”).¹¹⁷ As the authority responsible for the underlying procedure, the Council must also decide whether or not the proposal may be implemented under the PE Act.¹¹⁸ Accordingly, the Council functions as the *Authority*¹¹⁹ in the course of the EIA (i.e. as the Swiss counterpart to the WA Minister).

The Canton of Zurich designated the Environmental Protection Coordination Office of the Building Department of the Canton of Zurich (“Office”) as the agency responsible for conducting all EIAs that are required on the level of the Canton of Zurich.¹²⁰ Accordingly, the Office functions as the *Agency*¹²¹ in the course of the EIA (i.e. as the Swiss counterpart to the WA EPA).

Finally, the competence to make proposals to construct high-performance roads and main roads in the Canton of Zurich is allocated to the Building Department of the Canton of Zurich (“Building

¹¹⁶ Schedule 1, Clause 11.3 Einführungsverordnung des Kantons Zürich über die Umweltverträglichkeitsprüfung [Implementation Ordinance on Environmental Impact Assessments of the Canton of Zurich] (Switzerland), 5 October 2011, ON 710.5.

¹¹⁷ §15(1) Strassengesetz des Kantons Zürich [Road Act of the Canton of Zurich] (Switzerland) 27 September 1981, ON 722.1.

¹¹⁸ Art. 5(1) EIA Ordinance.

¹¹⁹ See Section II.2.iv) above.

¹²⁰ § 2 Einführungsverordnung des Kantons Zürich über die Umweltverträglichkeitsprüfung [Implementation Ordinance on Environmental Impact Assessments of the Canton of Zurich] (Switzerland), 5 October 2011, ON 710.5.

¹²¹ See Section II.2.iv) above.

Department”).¹²² Accordingly, the Building Department functions as the proponent in the course of the EIA (i.e. as the Swiss counterpart to the WA Commissioner for Main Roads).

Assessment by the Agency - Mandatory Relevant Considerations

Outline

As the proponent of the installation, the Building Department must draw up an EIR and submit it to the Council (i.e. the Authority).¹²³ Subsequently, the Office (i.e. the Agency) must assess the EIR and determine whether the proposed installation is in line with “all provisions on the protection of the environment”.¹²⁴

In comparing the Beeliar Case circumstances, the question is, therefore, whether “provisions on the protection of the environment” include only laws and ordinances or whether this term also extends to non-statutory policies and guidelines. In the Beeliar Case, the relevant policies were issued by the EPA (as the WA counterpart to the Swiss Office) and it was also the EPA, itself, that did not consider these policies. From a Swiss law perspective, the question is whether the Office is required to consider these policies due to the principle of good faith in public law, which prohibits contradictory behaviour on the part of the authorities.¹²⁵

¹²² § 12(1) Road Act of the Canton of Zurich.

¹²³ Art. 10b(1) PE Act

¹²⁴ Art. 13(3) EIA Ordinance.

¹²⁵ Art. 5(3) Constitution of the Swiss Confederation.

Non-Statutory Policies and Guidelines under Swiss Law

Authorities in Switzerland have issued a large number of non-statutory policies and guidelines.¹²⁶ The main purpose of these policies and guidelines is to facilitate the application of the law and to promote uniform enforcement.¹²⁷ However, such guidelines and policies do not have the force of law.¹²⁸ Nevertheless, they are often applied in the same manner as legal provisions.¹²⁹

In a 2015 case,¹³⁰ the Swiss Federal Supreme Court (“SFSC”) explained that policies and guidelines must be taken into consideration if they permit an equitable interpretation of the applicable statutory provisions, which can be adjusted to the individual case.¹³¹ As a consequence, the SFSC decided that deviations from policies and guidelines are not permitted without due cause, provided that the individual policy or guideline permits an equitable interpretation of the applicable statutory provisions, which can be adjusted to the individual case.¹³²

In this case, an authority (the SFOE) issued guidelines outlining what it considered to be “good agricultural practice” in relation to agricultural installations.¹³³ These guidelines, for example, contained detailed provisions on how floors must be constructed and sealed.¹³⁴ The SFSC held that the statements in these guidelines represent a convincing interpretation of the legal requirement according to which an agricultural installation must be constructed so that it “does not impose the risk of water pollution”.¹³⁵ The fact that it was a Municipal authority (the municipal

¹²⁶ Alain Griffel, *Allgemeines Verwaltungsrecht im Spiegel der Rechtsprechung [General Administrative Law Mirrored in Jurisprudence]* (Schulthess Juristische Medien AG 2017), at 130.

¹²⁷ Alain Griffel, n 126, at 130.

¹²⁸ Alain Griffel, n 126, at 130.

¹²⁹ Alain Griffel, n 126, at 130.

¹³⁰ *Decision of the Swiss Federal Supreme Court of 15. June 2015*, 1C_62/2014.

¹³¹ *Decision of the Swiss Federal Supreme Court*, n 130, at E 3.

¹³² *Decision of the Swiss Federal Supreme Court*, n 130, at E 3.

¹³³ *Decision of the Swiss Federal Supreme Court*, n 130, at E 3.

¹³⁴ *Decision of the Swiss Federal Supreme Court*, n 130, at E 3.

¹³⁵ *Decision of the Swiss Federal Supreme Court*, n 130, at E 3.

council of Muolen, a small village in the Canton of St. Gallen with 1,100 people) that conducted the EIA and thereby considered a non-statutory policy issued by a Federal authority, did not change the SFSC's conclusion that the Municipal authority did not err when it treated the guideline as a MRC.¹³⁶

In a 2008 case,¹³⁷ the SFSC had to assess whether a circular letter by the SFOE defining the implementation of a quality assurance system ("QAS"), to monitor compliance of radiation emitted by mobile communication antennas with the applicable transmission limits, had a binding effect on the operators of mobile communication antennas.¹³⁸ The appellants argued that the relevant ordinance¹³⁹ does not provide a sufficient legal basis for the SFOE to introduce the QAS (whether by way of a circular letter or in any other manner).¹⁴⁰ The SFSC decided, however, that the circular letter did not require a legal basis in the relevant ordinance because it qualified as an enforcement guideline (*Vollzugshilfe*).¹⁴¹ The SFSC explained that the authorities responsible for the application and/or enforcement of an act or an ordinance are authorized to issue enforcement guidelines as part of their general supervision and coordination duties.¹⁴² The SFSC emphasized that such guidelines are deemed to facilitate the understanding of environmental law provisions and to promote uniform application of these provisions by the responsible authorities.¹⁴³ The SFSC concluded that such guidelines help to promote legal equality and certainty and, therefore, have a binding effect in that deviations are only allowed for due cause.¹⁴⁴

In summary, this means that the MRCs, which are "all environmental protection provisions", may also include non-formal documents, such as NSPs, provided they permit an equitable interpretation of the applicable statutory provisions, which can be adjusted to the individual case.

¹³⁶ *Decision of the Swiss Federal Supreme Court*, n 130, at E 3.

¹³⁷ *Decision of the Swiss Federal Supreme Court of 15. January 2008*, 1C_148/2007.

¹³⁸ *Decision of the Swiss Federal Supreme Court*, n 137, at E 3.

¹³⁹ Verordnung über den Schutz vor nichtionisierender Strahlung [Federal Ordinance on Protection against Non-Ionising Radiation] (Switzerland) 23 December 1998, SR 814.710.

¹⁴⁰ *Decision of the Swiss Federal Supreme Court*, n 137, at E 3.

¹⁴¹ *Decision of the Swiss Federal Supreme Court*, n 137, at E 3.2.

¹⁴² *Decision of the Swiss Federal Supreme Court*, n 137, at E 3.2.

¹⁴³ *Decision of the Swiss Federal Supreme Court*, n 137, at E 3.2.

¹⁴⁴ *Decision of the Swiss Federal Supreme Court*, n 137, at E 3.2.

The Principle of Good Faith in Public Law

Arts. 5(3) and 9 of the Constitution of the Swiss Confederation state that authorities must act in good faith and that every person has the right to be treated by state authorities in good faith and in a non-arbitrary manner. These two provisions are substantiated by the prohibition of the abuse of rights, which applies to all areas of Swiss law.¹⁴⁵

One of the rules that results from the general prohibition of the abuse of rights is the prohibition on contradictory behaviour (*venire contra factum proprium*).¹⁴⁶ In particular, authorities are prohibited from changing their position on a specific matter without objective reason.¹⁴⁷ This means that the law does not protect contradictory behaviour.¹⁴⁸ Any other conclusion would jeopardize the confidence in the authorities, which, in turn, could lead to a loss of confidence in the (environmental) legislation in general.¹⁴⁹

Another rule, which results from the general prohibition of the abuse of rights, is the principle that legitimate expectations must be protected.¹⁵⁰ The protection of legitimate expectation only applies if several conditions are fulfilled.¹⁵¹ First, there must be a basis of trust that is suitable to raise expectations in the behaviour of the authority (e.g. official decrees, decisions, contracts, information, etc.).¹⁵² Secondly, it is required that the expectations raised by the basis of trust were legitimate, meaning that the person claiming protection of its expectations (the “**Claimant**”) acted

¹⁴⁵ *Decision of the Swiss Federal Supreme Court of 9 July 2015*, 2C_334/2014, at E 2.5.

¹⁴⁶ *Decision of the Swiss Federal Supreme Court*, n 145, at E 2.5, with reference to various other decisions of the SFSC where the general applicability of this principle was upheld.

¹⁴⁷ *Decision of the Swiss Federal Supreme Court*, n 145, at E 2.5.

¹⁴⁸ *Decision of the Swiss Federal Supreme Court*, n 145, at E 2.5.

¹⁴⁹ *Decision of the Swiss Federal Supreme Court*, n 145, at E 2.5.

¹⁵⁰ Ulrich Haefelin, Walter Haller, Helen Keller, Daniela Turnherr, *Schweizerisches Bundesstaatsrecht [Swiss Federal State Law]* (Schulthess Juristische Medien AG, 9th ed, 2016), para 820.

¹⁵¹ *Decision of the Swiss Federal Supreme Court of 19 March 2003*, BGE 129 I 161, at 4.1.

¹⁵² *Decision of the Swiss Federal Supreme Court*, n 151, at 4.1.

in knowledge (i.e. because) of the basis of trust and did not know and could not have known about the error (if any) of the basis of trust.¹⁵³ Thirdly, the Claimant must have made an adverse disposition, which cannot be reversed, because he acted in reliance on the basis of trust.¹⁵⁴ Finally, the protection of legitimate expectation cannot be invoked if this could cause harm to overriding public interests.¹⁵⁵

If all of these requirements are met, the Claimant's legitimate expectations must be protected.¹⁵⁶ The manner of this protection depends on the circumstances of the individual case and, therefore, various approaches have been developed in Swiss legal practice.¹⁵⁷ For example, one approach is to order the authority to comply with the basis of trust, meaning that information provided or representations made by the authority become binding for the authority, despite their incorrectness.¹⁵⁸ Another, more common, approach is to grant the Claimant financial compensation for useless expenses.¹⁵⁹ The main goal of this principle is to ensure that individuals are able to rely on information and/or the behaviour of the authorities and not to suffer any disadvantages if they do so.¹⁶⁰ Consequently, in individual cases, even a treatment deviating from substantive law may be justified.¹⁶¹

Result

From a Swiss law perspective, the three NSPs that the EPA had issued in the Beeliar Case may be "provisions on the protection of the environment" (i.e. MRCs) if they permit an equitable

¹⁵³ *Decision of the Swiss Federal Supreme Court*, n 151, at 4.1.

¹⁵⁴ *Decision of the Swiss Federal Supreme Court*, n 151, at 4.1.

¹⁵⁵ *Decision of the Swiss Federal Supreme Court*, n 151, at 4.1.

¹⁵⁶ *Decision of the Swiss Federal Supreme Court*, n 151, at 4.1.

¹⁵⁷ Ulrich Haefelin, Walter Haller, Helen Keller, Daniela Turnherr, n 150, para 824 and 825.

¹⁵⁸ Ulrich Haefelin, Walter Haller, Helen Keller, Daniela Turnherr, n 150, para 825.

¹⁵⁹ Ulrich Haefelin, Walter Haller, Helen Keller, Daniela Turnherr, n 150, para 825.

¹⁶⁰ Ulrich Haefelin, Walter Haller, Helen Keller, Daniela Turnherr, n 150, para 823.

¹⁶¹ *Decision of the Swiss Federal Supreme Court of 14 April 1983*, BGE 109 V 52, at 3b).

interpretation of the applicable statutory provisions, which can be adjusted to the individual case. Accordingly, it is necessary to examine whether the individual NSPs meet these requirements.

In *Bulletin No. 1*¹⁶² and in *Statement No.9*¹⁶³ the EPA, inter alia, outlined its understanding of “environmental offsets” and explained in which cases it deemed such offsets to be necessary.¹⁶⁴ It further referred to “critical assets” and explained that it will adopt a presumption against recommending approval for proposals that have significant adverse environmental impacts on such assets.¹⁶⁵ Section 44(2) of the EP Act states that the EPA must set out (a) the “key environmental factors” and (b) its “recommendations as to whether or not the proposal may be implemented”. Apart from the general duty in section 4A to give effect to the objects of the Act, the EP Act does not further concretize the factors that influence this decision. In *Bulletin No. 1* and *Statement No. 9*, the EPA explained, for example, the importance in its decision-making of critical assets and its approach to environmental offsets. This represents an equitable interpretation of the provisions in sections 44(2)(a) and (b) of the EP Act. Further, the EPA makes most of its statements in these policies in a general manner. Accordingly, this equitable interpretation of the statutory provision can be adjusted in an individual case.

In *Guidance Statement No. 19*,¹⁶⁶ the EPA explained that the purpose of the statement was to assist proponents by providing information about “the EPA’s thinking in relation to aspects of the EIA process”.¹⁶⁷ In other words, the EPA intended to provide information on its understanding (i.e. interpretation) of the relevant provisions of the EP Act and how it would apply them. Thus, the EPA, again, interprets the legal requirements under section 44(2)(a) and (b).

¹⁶² Environmental Protection Authority of Western Australia, n 3 (Bulletin 1).

¹⁶³ Environmental Protection Authority of Western Australia, n 3 (Position Statement 19).

¹⁶⁴ Environmental Protection Authority of Western Australia, n 3 (Bulletin 1), 1 and 2; Environmental Protection Authority of Western Australia, n 3 (Position Statement 19), 2.

¹⁶⁵ Environmental Protection Authority of Western Australia, n 3 (Bulletin 1) 2; Environmental Protection Authority of Western Australia, n 3 (Position Statement 19), 19.

¹⁶⁶ Environmental Protection Authority of Western Australia, n 3 (Guidance Statement 19).

¹⁶⁷ Environmental Protection Authority of Western Australia, n 3 (Guidance Statement 19), Section “Foreword”.

Overall, these are reasons to believe that a Swiss court would have taken the view that the three NSPs permit an equitable interpretation of the statutory provisions contained in the EP Act, which can be adjusted to the individual case. Consequently, the Office (i.e. the EPA) would not be permitted to deviate from the three NSPs, unless there is due cause to do so. A Swiss court would decide that the three NSPs were MRCs (there are no indications in the Beeliar Case that the EPA had good cause for the deviation because the EPA did not mention the three NSPs in its report). This would be so, regardless of the fact that the EP Act does not provide for a legal basis to issue the NSPs.

In practice, this result would render unnecessary any arguments in connection with the principle of good faith in public law and any concept derived therefrom. As shown above, the SFSC could have ordered the Office (i.e. the EPA) to issue a new report considering the NSPs in question. Accordingly, Save Beeliar Wetlands (Inc), the applicant at first instance of the Beeliar Case (the “Applicant”), would have prevailed and there would be nothing left that could be compensated via the principle of good faith in public law. Nevertheless, we subsequently examine the outcome that could be achieved under Swiss law if the three NSPs would not have permitted an equitable interpretation of the provisions in the EP Act (e.g. because they deviated from substantive law).

With regard to such a case, there are reasons to believe that a Swiss court would have taken the view that the Office (i.e. the EPA) violated the principle of good faith in public law because it changed its position without any (obvious) objective reason. That is, the EPA’s decision to recommend implementation of the Proposal violated the principle because the decision was contrary to its policy presumption (against recommending implementation of proposals with *significant* residual impacts on *critical* environment assets) without any (obvious) objective reason. Accordingly, a Swiss court would have decided that the Office’s assessment report on the Proposal was invalid, regardless of whether or not the NSPs were MRCs. Swiss law does not protect contradictory administrative behaviour, unless justified by compelling reasons.

Furthermore, there are strong indications that a Swiss court would have also taken the view that the legitimate expectations of the Applicant must be protected. The NSPs were published by the

Office (i.e. the EPA) and are, therefore, a basis of trust that is suitable to create expectations in the behaviour of the authority.¹⁶⁸ Further, it is apparent from the Beeliar Case that the Applicant acted on the basis of trust (i.e. the NSPs) and did not know, and could not have known, that the EPA would disregard them. A more complicated question is whether and what kind of “irreversible adverse dispositions” the Claimant made because it relied on the NSPs in participating in the EIA process. In other words, the question is which disadvantages the Claimant suffered from due to its reliance on the NSPs.¹⁶⁹ If the Claimant had known that the EPA acted lawfully when it disregarded the NSP, it is likely that the Claimant would not have initiated legal proceedings against the Proposal in the first place. This means that the only “irreversible adverse disposition” made by the Claimant in reliance on the basis of trust (i.e. the NSPs) were the costs for the legal proceedings against the Proposal. In summary, this means that it is most likely that only financial compensation could be achieved under the Swiss concept of the protection of legitimate expectations.

Lessons to be learnt from the Swiss Approach?

Outline

In order to determine whether and how the Swiss approach could help to improve the Western Australian EIA regime, it is necessary first to consider the different stances on administrative law in Switzerland and Western Australia. There are differences that may have a strong influence on the different outcomes of the legal assessment of the facts underlying the Beeliar Case under Western Australian and under Swiss law. The key differences to consider are the approaches to the legal effect of NSPs and the continued application under Swiss law of the concept of legitimate expectations, which the Australian High Court has discarded.

Good Faith in Public Law and Legitimate Expectations

¹⁶⁸ See *Decision of the Swiss Federal Supreme Court of 21 May 2019*, 8C_79/2019, at 5.1. where the SFSC states that a leaflet issued by an authority is a sufficient basis of trust.

¹⁶⁹ Ulrich Haefelin, Walter Haller, Helen Keller, Daniela Turnherr, n 150, para. 825.

Switzerland

The concept of good faith in public law, and the protection of legitimate expectations deduced therefrom, has a long tradition in Switzerland.¹⁷⁰ Further, Swiss Courts attribute particular attention to concerns of legal certainty and, for that reason, generally apply policies published by governmental bodies if, although not legally binding, they permit an equitable interpretation of statutory provisions, which can be adjusted to the individual case.¹⁷¹

Western Australia

Some of the ideas apparent in the Swiss principle of good faith in public law, the concept of protection of legitimate interests and the equitable interpretation concept, are shared in (Western) Australian concepts such as procedural fairness and the (rejected) notion of legitimate expectations.

With regard to the doctrine of procedural fairness, the Australian High Court's 1985 decision in *Kioa v West*¹⁷² forms a landmark case.¹⁷³ It forms part of the source of the duty to afford procedural fairness in (Western) Australia and, by the competing positions delivered by Mason and Brennan JJ, initiated a debate of almost 30 years surrounding the questions of the source of the duty, the criteria which trigger the duty, and the content of duty to afford procedural fairness.¹⁷⁴

¹⁷⁰ Ulrich Haefelin, Walter Haller, Helen Keller, Daniela Turnherr, n 150, paras. 33 et seq and 820 et seq.

¹⁷¹ *Decision of the Swiss Federal Supreme Court of 2007 (exact date not available)*, BGE 133 V 346, at 5.4.2, with reference to various older decisions of the SFSC.

¹⁷² *Kioa v West* (1985) 159 CLR 550.

¹⁷³ Naomi Sharp, *Procedural fairness: The age of legitimate expectations is over* (2016) 90 Australian Law Journal, 798. See, also, Shauna Roeger, "Minister for Immigration and Border Protection v WZARH (2015) 326 ALR 1", [2016] AdelLawRw 12; (2016) 37(1) Adelaide Law Review 295 at 299.

¹⁷⁴ Naomi Sharp, n 173, 798 and 799, with reference to *Kioa v West* (1985) 159 CLR 550, 609, 612, and 616 – 617.

Today, procedural fairness is characterized as a fundamental common law principle.¹⁷⁵ This has the effect that procedural fairness must be given (if the duty is triggered), unless there is a legislative intention to exclude it.¹⁷⁶

The concept of legitimate expectations has experienced a rise and a fall in the duty to afford procedural fairness.¹⁷⁷ The firmest endorsement of the concept came from the statement of Mason J in *Kioa v West* that the duty to accord procedural fairness arises where the exercise of power affects rights, interests or legitimate expectations, unless there is a legislative intention to the contrary.¹⁷⁸ As Naomi Sharp explains in her study on procedural fairness in Australia, the central criterion of the concept may be derived from a 1983 decision by the Privy Council from Hong Kong in *Attorney-General (Hong Kong) v Ng Yuen Shiu*.¹⁷⁹ There, Lord Fraser of Tullybelton stated: “where a public authority charged with the duty of making a decision promised to follow a certain procedure before reaching that decision, good administration required that it should act by implementing the promise provided the implementation did not conflict with the authority's statutory duty”.¹⁸⁰

The Australian courts applied the concept of legitimate expectation in numerous cases regarding both the implication and the content of the duty, though it was soon and frequently criticized as being too vague.¹⁸¹ A majority of the High Court discarded the doctrine entirely in the 2015

¹⁷⁵ Naomi Sharp, n 173, 800, with reference to *Saeed v Minister for Immigration & Citizenship* (2010) 241 CLR 252, at [58]-[59] and *Momcilovic v The Queen* (2011), 245 CLR 1, at [43]; Toby Nisbet and Geoffrey J Syme, n 11, 171, with reference to *Kioa v West* (1985) 159 CLR 550, 609.

¹⁷⁶ Naomi Sharp, n 173, 805, with reference to *S10/2011 v Minister for Immigration & Citizenship* (2012) 246 CLR 636, at [96] and [100].

¹⁷⁷ Naomi Sharp, n 173, 800 et seq.

¹⁷⁸ Naomi Sharp, n 173, 800; *Kioa v West* (1985) 159 CLR 550, 582, 584.

¹⁷⁹ Naomi Sharp, n 173, 801, with reference to *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, 638E-638F.

¹⁸⁰ *Attorney-General (Hong Kong) v Ng Yuen Shiu* [1983] 2 AC 629, 638E-638F; Naomi Sharp, n 173, 801.

¹⁸¹ Naomi Sharp, n 173, 800 et seq., with reference to *FAI Insurances Ltd v Winneke* (1982) 151 CLR 342, *Re Minister for Immigration & Multicultural & Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1, at [81]-[83] (McHugh and Gummow JJ), at [116]-[122] (Hayne J), at [140]-[148] (Callinan J).

decision of *Minister for Immigration & Border Protection v WZARH*, saying that the concept of legitimate expectations does “not provide a basis for determining whether procedural fairness should be accorded [...] or for determining the content of such procedural fairness.”¹⁸² Today, it is commonly accepted that the obligation to afford procedural fairness is triggered if the exercising of power affects the interests of a person.¹⁸³ In order to determine whether the interests affected in a specific case are sufficient to trigger the obligation, the High Court of Australia has further endorsed the rules of standing for a public law remedy.¹⁸⁴ According to these rules, a “special interest” is required which need not to be legal, financial, proprietary or otherwise tangible.¹⁸⁵ It is required, however, that the interest affected in the individual case goes beyond a mere intellectual or emotional interest.¹⁸⁶ In view of these developments, Naomi Sharp concludes that the wide range of possible “sufficient interests” does not leave any useful role for the concept of reasonable expectations to play.¹⁸⁷ The key questions are, therefore, whether a legislative intent to exclude the duty of procedural fairness can be ascertained and, if not, what the content of that duty is in the individual case.¹⁸⁸ Today, the guiding principle is whether practical unfairness has occurred because of the conduct in question.¹⁸⁹ Consequently, the concept of procedural fairness is expressed in various ways and “does not require the inflexible application of a fixed body of rules”.¹⁹⁰

¹⁸² *Minister for Immigration & Border Protection v WZARH* (2015) 256 CLR 326 at [30].

¹⁸³ Naomi Sharp, n 173, 803, with reference to *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, at [75].

¹⁸⁴ Naomi Sharp, n 173, 805, with reference to *S10/2011 v Minister for Immigration & Citizenship* (2012) 246 CLR 636.

¹⁸⁵ Naomi Sharp, n 173, 805, with reference to *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 527 and *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70, 7.

¹⁸⁶ Naomi Sharp, n 173, 805, with reference to *Australian Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493, 530 (Gibbs J) and *Animals Angels eV v Secretary, Department of Agriculture* (2014) 228 FCR 35, at [119]-[120].

¹⁸⁷ Naomi Sharp, n 173, 805.

¹⁸⁸ Naomi Sharp, n 173, 805.

¹⁸⁹ Naomi Sharp, n 173, 812; Toby Nisbet and Geoffrey J Syme, n 11, 171.

¹⁹⁰ Toby Nisbet and Geoffrey J Syme, n 11, 171, with reference to *National Companies and Securities Commission v News Corp Ltd* (1984) 156 CLR 296, 312 (Gibbs CJ).

Result

First, the examination of the Australian concept of procedural fairness raises the question of whether, and to what degree, this concept has been considered by the Court in the Beeliar Case.

In her study on the Beeliar Case, Jasmine Morris criticizes that this did not happen at all.¹⁹¹ She points out that the duty to afford procedural fairness existed, regardless of the fact that the legitimate expectations concept was dismissed.¹⁹² With reference to *SZSSJ v Minister for Immigration and Border Protection*, she further highlights that the Federal Court suggested that the requirements of procedural fairness are not met where an authority departs from a representation about a future procedure if the outcome would have been different without the deviation from that representation.¹⁹³

Morris argues that the EPA represented that it would consider the NSPs in the course of the EIA because it developed and published them.¹⁹⁴ She further analyses the wording of various NSPs and finds that these contain further significant representations on the part of the EPA.¹⁹⁵ She argues that the failure of the EPA to consider its own policies may result in a recommendation that is different from a recommendation that would be made when considering the NSPs.¹⁹⁶ Finally, Morris concludes that the EPA, by not treating the NSPs as MRC, failed to afford procedural fairness to persons (such as the Applicant) that are affected in their interest by taking

¹⁹¹ Jasmine Morris, n 8, 341, with reference to *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482, at [168] and [181], where Martin CJ stated the requirements of procedural fairness are applicable.

¹⁹² Jasmine Morris, n 8, 341, with reference to *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, at [65].

¹⁹³ Jasmine Morris, n 8, 341, with reference to *SZSSJ v Minister for Immigration and Border Protection* (2015) 234 FCR 1, at [94].

¹⁹⁴ Jasmine Morris, n 8, 342.

¹⁹⁵ Jasmine Morris, n 8, 342.

¹⁹⁶ Jasmine Morris, n 8, 342.

action in reliance upon the NSPs only to be met by the EPA's decision to make a recommendation that is inconsistent with the EPA's own statements in the NSPs.¹⁹⁷

Indeed, the Court of Appeal does not make any statements with regard to the conclusion of the primary judge, Martin CJ, who held that not treating the NSPs as MRCs would make it unlikely that the requirements of procedural fairness could be met.¹⁹⁸ We further agree that the duty to accord procedural fairness existed in the case because the EP Act does not exclude the duty to accord procedural fairness¹⁹⁹ and because there is a wide range of sufficient "special interests" available on the facts of the case. Finally, we also agree that the content of the duty is that the EPA must treat the NSPs as MRCs in order afford actual and practical procedural fairness.²⁰⁰ The application of procedural fairness in the Western Australian EIA process could mean that NSPs must be treated as MRCs even though the concept of legitimate expectations has been rejected in Australia.

In Switzerland, based on the facts underlying the Beeliar Case (as far as they are known), this result could have not been achieved via the protection of the legitimate expectation concept. As shown above under section III.5.iv, the main goal of this concept is to ensure that individuals are able to rely on information and/or on the behaviour of the authorities and not to suffer any disadvantages if they do so. This is reflected in the requirement that the Claimant must have made an irreversible adverse disposition because he acted in reliance on the basis of trust. This, in return, leads to the result that only financial compensation could be achieved because the only irreversible adverse disposition made by the Claimant due to his reliance on the basis of trust (i.e. the NSPs) are the costs for the (unsuccessful) legal proceedings against the Proposal. With regard to the Beeliar Case, this means that the Australian concept of procedural fairness would have been more suitable to substantiate that the NSPs must be treated as MRCs than the Swiss concept of the protection of legitimate expectations. This raises the question of why the Court did

¹⁹⁷ Jasmine Morris, n 8, 342.

¹⁹⁸ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126, at [48].

¹⁹⁹ *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482 at [186].

²⁰⁰ See Toby Nisbet and Geoffrey J Syme, n 11, 173, who also share this view.

not consider aspects of procedural fairness at all. An answer might be that the Applicant did not seek judicial review because of the denial of procedural fairness.²⁰¹

The comparison of the Swiss concept of protection of legitimate expectation and the Australian concept of procedural fairness shows that these concepts have many similarities. Both concepts help to impose boundaries on government action by ensuring that individuals are able to rely on information provided, and the representation made by the authorities, and do not suffer any disadvantages if they do so. How this is achieved, however, is quite different. In Australia, it is the obligation to accord procedural fairness, a fundamental common law principle, which requires actual fairness to be achieved by the conduct in question. In Switzerland, however, where only financial compensation and not an actual application of the NSPs could be achieved, it is the constitutional principle of good faith in public law according to Article 9 of Constitution of the Swiss Confederation that requires the protection of legitimate interests. The examination of the Beeliar Case under Swiss law has, however, shown that in practice a qualification of the three NSPs in question as being MRCs via the concept of legitimate expectations does not become necessary in the first place. This is because the concept of equitable interpretation of statutory provisions already has the effect that the NSPs are MRCs in the EIA process.

Concerns regarding the Legitimacy of NSP

Outline

To summarize, in Switzerland, non-statutory policies, such as the three NSPs addressed in the Beeliar Case, must be applied (i.e. must be treated as MRC) if they permit an equitable interpretation of statutory provisions, which can be adjusted to the individual case. This has the effect that NSPs, although not legally binding, become important tools in practice and, therefore, form the actual basis upon which individuals mainly rely when dealing with authorities. On the other side, the ability to issue factually binding NSPs provides the authorities with the ability to

²⁰¹ *Save Beeliar Wetlands (Inc) v Jacob* [2015] WASC 482, at [145]

unilaterally declare their understanding of an equitable interpretation, which, in turn, raises concerns about the legitimacy of NSPs in correctly interpreting the legislation.

In Western Australia, the Court of Appeal in the Beeliar Case denied the mandatory consideration of the NSPs (i.e. their treatment as MRCs) by reference to their lack of statutory legitimacy.²⁰² The question is, therefore, how Switzerland deals with those kinds of concerns and how those concerns are, or could have been, dealt with under Western Australian law.

Switzerland

In Switzerland, the concerns regarding the legitimacy of NSPs and their treatment as MRCs are minimized due to the fact that they are not legally binding. This means that the legality of NSPs as such, or parts thereof, unlike laws and ordinances, can be challenged in each individual case where they have been applied (or not applied).²⁰³ This challenge will be successful if the court finds that the relevant NSP does not permit an equitable interpretation of the applicable statutory provision and/or that such interpretation cannot be adjusted to the individual case.²⁰⁴ This means that in Switzerland, the application of NSPs in the same manner as laws and ordinances, despite their lack of statutory legitimacy, is justified because of the possibility to challenge them legally in each individual case.

²⁰² Toby Nisbet and Geoffrey J Syme, n 11, 168, with reference to *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126, at [56]

²⁰³ Alain Griffel, n 126, at 131.

²⁰⁴ *Decision of the Swiss Federal Supreme Court*, n 130, at E 3.

Western Australia

In the Beeliar Case, the Court of Appeal explained that Part III of the EP Act would provide the EPA and Minister with the authority to issue statutory policies with the express legal effect as MRCs.²⁰⁵ According to the Court, it was, therefore, inconceivable that the legislature intended to provide the EPA (alone) with the authority to issue policies with the same MRC effect without any express statutory provision in the EP Act.²⁰⁶ For the Court, the NSPs were permissible, not mandatory, relevant considerations.

In their study on social justice, Toby Nisbet and Geoffrey J Syme criticize some of the premises of the Court's judgement in the Beeliar Case.²⁰⁷ They begin by arguing that the Court of Appeal mischaracterized the interpretive effect of the "subsidiary legislation-making power" of Part III of the EP Act, distinguishing it from the non-legislative policy making contemplated by other parts of the Act.²⁰⁸ Nisbet and Syme conclude that Part III of the EP Act would not be particularly relevant when determining the intention of the parliament with regard to (non-statutory) policies.²⁰⁹ They also argue that the wording of section 44(2) of the EP Act gives little guidance on the parliament's intention as to whether or not NSPs could be MRCs in an EIA.²¹⁰

Nisbet and Syme, however, admit that it is difficult to determine an intention of parliament according to which policies created outside Part III of the EP Act should be treated as MRCs, which suggests that the concerns regarding the legitimacy of NSPs as MRCs are justified. Therefore, their analysis also turns to the question of whether the duty to afford procedural fairness could provide a basis for the conclusion that NSPs are MRCs. In the course of this analysis, they examine various decisions on the content of NSPs and whether they must be

²⁰⁵ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [55].

²⁰⁶ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126 at [55].

²⁰⁷ Toby Nisbet and Geoffrey J Syme, n 11, 168

²⁰⁸ Toby Nisbet and Geoffrey J Syme, n 11, 169.

²⁰⁹ Toby Nisbet and Geoffrey J Syme, n 11, 169.

²¹⁰ Toby Nisbet and Geoffrey J Syme, n 11, 169

treated as MRCs.²¹¹ Nisbet and Syme conclude that the question of whether policy-makers must consider their own published policies when making decisions remains unsettled.²¹²

Result

In Switzerland, the concept of the equitable interpretation of statutory provisions is the cause for legitimacy concerns regarding NSPs and their treatment as MRCs, but at the same time it also helps to deal with these concerns. Since NSPs are only applicable if they are compliant with statutory law, and merely provide for an (equitable) interpretation thereof, they become a helpful tool. The reason for this is that individuals can rely upon them while, at the same time, having the possibility to legally challenge them in the individual case.

In Western Australia, the legitimacy concerns with regard to NSPs can only be overcome by a clear expression of parliament's intention that NSPs should be mandatory relevant considerations. Therefore, it seems that the Swiss concept of equitable interpretation will not be of any help to address these concerns in Western Australia and, consequently, prevents the conclusion that NSPs are MRCs if they permit an equitable interpretation of statutory provisions. In Western Australia, in the absence of clear legislative intention, it will be necessary to argue that procedural fairness establishes that NSPs are MRCs. At this point, the (Western) Australian concept of procedural fairness shares many of the ideas present in the Swiss concept of equitable interpretation. Both concepts require, for example, that NSPs are consistent with the (object of the) legislation.

²¹¹ See Toby Nisbet and Geoffrey J Syme, n 11, 172 et seq., where the following decisions are examined: *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409; *Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, *Minister for Immigration, Local Government & Ethnic Affairs v Gray* (1994) 50 FCR 189 (French and Drummond JJ); *Nikac v Minister for Immigration, Local Government and Ethnic Affairs* (1988) 20 FCR 65.

²¹² Toby Nisbet and Geoffrey J Syme, n 11, 173.

Lessons from the Swiss approach

This examination of the different stances on administrative law in Western Australia and Switzerland has shown that the Swiss concept of the protection of legitimate expectations is probably only of little help for the development of ideas that could help to improve the Western Australian regime. The examination has shown that the Australian concept of procedural fairness already incorporates the ideas of the Swiss' legitimate expectations concept and is, besides the Swiss concept, even able to provide a solution according to which NSPs are MRCs. In addition, Australia has explicitly rejected the notion of legitimate expectations.

The question of whether a policy-maker is also required to consider its own published policies under the obligation to accord procedural fairness has not been answered by a (Western) Australian court so far.²¹³ Accordingly, the establishment of the complex argument that NSPs are MRCs (via the concept of procedural fairness) is also burdened with a certain degree of uncertainty. Therefore, it would be best if the EP Act were amended to legitimate the EPA's capacity to issue policies and require the EPA to treat them as MRCs.

Nevertheless, the Swiss concept of equitable interpretation of statutory provisions, which shares many ideas with the Australian concept of procedural fairness, might be a helpful source for ideas that could lead to an improvement of the Western Australian EIA regime. In particular, the Swiss concept of equitable interpretation could inspire adequate wording for an amendment to the EP Act. The Swiss concept is a simple and proven instrument to ensure that NSPs remain within the boundaries of simply explaining and further detailing the provisions of substantive law.

Based on the Swiss concept of equitable interpretation, a possible new provision in the EP Act could read as follows: *The Authority may, from time to time, publish guidelines on its decision-*

²¹³ Toby Nisbet and Geoffrey J Syme, n 11, 173.

making. Such guidelines must be consistent with the objectives and the provisions of the Act and represent an equitable interpretation of the provisions of the Act, which can be adjusted to the individual case.

Conclusion

The major difference between the Swiss and the Western Australian EIA regime is that the Swiss regime does not provide for a stand-alone and centralized EIA process, which results in a separate environmental approval. EIAs in Switzerland and its Cantons are conducted by various different authorities and agencies. However, because they must all apply the same laws and ordinances (the PE Act and the EIA Ordinance), it must be ensured that this happens in a consistent manner. The same applies in various other areas of Swiss law, which is the reason why guidelines and policies are often de facto legally-binding in Switzerland, even if not authorized by the laws or ordinances to which they refer.²¹⁴

Further, major differences between the two regimes exist with regard to the aim of EIAs. In Switzerland, only a number of specific installations are subject to an EIA and the actual process is limited to assessing compliance with all environmental provisions. In WA, EIAs are a systematic and holistic evaluation of the impacts of a proposal on the environment, which aim to ensure that a project, if implemented, has as little impacts as possible.

With regard to the MRCs that must inform the respective EIAs, the major differences between the two regimes result from the formal requirements for the legal bases of the MRCs. After the Beeliar Case, MRCs for EIAs in WA may only result from provisions contained in (e.g. section 44(2) of the EP Act) or explicitly authorized by the EP Act (e.g. statutory policies under Part III of the EP Act, or the administrative procedures under section 122 of the EP Act).²¹⁵ The EP Act leaves “no room” for a conclusion to the contrary.²¹⁶ In Switzerland, MRCs are “all environmental protection

²¹⁴ Alain Griffel, n 126, at 130.

²¹⁵ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126, at [54] - [61].

²¹⁶ *Jacob v Save Beeliar Wetlands (Inc)* [2016] WASCA 126, at [54].

provisions” and may include non-formal documents, such as NSPs, provided they permit an equitable interpretation of statutory provisions, which can be adjusted to individual case.

As already demonstrated by Martin CJ in the Beeliar case, this conclusion could also be made under the EP Act. This study has further demonstrated that many of the ideas apparent in the Swiss principle of good faith in public law and the concept of protection of legitimate expectations are shared in the (Western) Australian principle of procedural fairness. In this context, our study reveals that the application of the (Western) Australian concept of procedural fairness could, indeed, have led to the conclusion that NSPs must be treated as MRCs. Such a conclusion would not have been possible under the Swiss concept of protection of legitimate expectations. Further, our study reveals also that many of the ideas of the Swiss concept of equitable interpretation, the concept that makes NSPs into MRCs in Swiss EIAs, are shared in the (Western) Australian principle of procedural fairness and could, therefore, help to substantiate why the obligation to accord procedural fairness would require that NSPs are treated as MRCs also in Western Australia.

However, due to the unambiguous decision of the Court of Appeal in the Beeliar Case and the lack of authority on the question of whether decision-makers must consider their own published policies in the course of their decision-making, it is unlikely that WA courts will (again) conclude that NSPs may identify MRCs for EIAs in the future if the EP Act remains in its current form. Presently, the EPA could, at any time and at its own discretion, deviate from its own published NSPs without risking an invalidation of its assessment reports. Consequently, proponents may be reluctant to rely on the statements and explanations in the various NSPs published by the EPA. This reluctance jeopardizes proponent and community confidence in the EPA, even though the EPA has revised and updated most of its NSPs following the decision of Martin CJ.²¹⁷

²¹⁷ PD Quinlan, EM Heenan and SU Govinnage, *Independent Legal and Governance Review into Policies and Guidelines for Environmental Impact Assessments under the Environmental Protection Act 1986 (WA)*, (2016), iii. And see the website of the EPA at <http://epa.wa.gov.au/>.

The examination of the Beeliar Case under Swiss law shows the practical need for guidelines, policies, fact sheets, and other NSPs, in order to make EIA procedures efficient and expedient. The examination has further shown the great importance of these instruments for ensuring predictability and legal certainty in the context of EIAs, as well the threats that a loss of confidence in these instruments may entail. In addition, the examination has shown that the decision of the Court in the Beeliar Case may impact on the public confidence in the EPA because it grants legal protection to contradictory behaviour of that authority.

Finally, the examination of the Beeliar Case under Swiss law implies that this situation could be remedied if the extent to which NSPs may be MRCs is limited to cases where NSPs permit an equitable interpretation of the applicable statutory provisions, which can be adjusted to the individual case. Therefore, a solution for Western Australia could be an amendment to the EP Act, according to which the EPA may from time to time, and separately from the Administrative Procedures under section 122, issue guidelines for the purpose of substantiating the EPA's requirements for environmental impact assessments.

NIGERIA'S BIOTECHNOLOGY ACT AND NON-PRECAUTION: RAISING THE THRESHOLD?

Nsiska Abasi Umana Odong*

Abstract

The Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 2000 is an international instrument established to protect humans and the environment from the harmful effects of biotechnology. Besides enacting legislation to regulate Biotechnology within their territories, Article 2 (4) of the Protocol encourages member states to enact stricter regulations within the object and provisions of the Protocol.

Consequently, Nigeria enacted the National Biosafety Agency Management Act, 2015 ('the Act'). Although a commendable move in many respects, the Act fails to provide for the Precautionary Principle, among others, in its provisions. The paper, applying traditional doctrinal analysis methodology, argues that this failure has not only limited the Act's effectiveness in protecting Nigerians and the environment from the adverse effect of Biotechnology products, such as genetically modified organisms ('GMOs') and living modified organisms ('LMOs'), but it has also detached the Act from the essence of the Protocol.

Considering the ease with which biological resources can slip through national boundaries the paper advocates for suitable amendments of the Act to protect not only Nigerians and the environment, but also citizens and biological diversity elsewhere, from the adverse effect of Biotechnology products. This will also bring the Act in consonance with the Protocol.

Key words:

The Environment, The Biosafety Protocol, the Precautionary Principle, Scientific uncertainty and irreversible harm

Introduction

One of the central themes of the Biosafety Protocol is the regulation of the movement of LMOs in the international space. A key mechanism for achieving this is the Precautionary Principle. Nigeria is a signatory to both the Biosafety Protocol and its parent Treaty – the Convention on Biological Diversity ('the CBD'). To further harness the benefits of the Biosafety Protocol, Nigeria has domesticated the Biosafety Protocol through the enactment of the National Biosafety Agency Management Act, 2015. To further consolidate, the Nigerian National Biosafety Management Agency put in place the National Biosafety (Implementations Etc.) Regulations in 2017²¹⁸, ostensibly to provide additional legal framework for the regulation of issues not addressed by the Act. However, both instruments have not incorporated the Precautionary Principle into their frameworks and this failure has weakened Nigeria's effort to effectively regulate Biotechnology by lowering the threshold of protection that the Precautionary Principle provides, thereby exposing both humans and the environment to the adverse effects of by Biotechnology. To provide impetus for this argument, the paper will consider the following areas: the meaning of the Precautionary Principle, including its origin and international law status. The essence is to provide a background on the Precautionary Principle, especially of its emergence as a free-standing principle of customary international law that exists independently of Treaty obligations. Through an exploration of the misgivings about Biotechnology, focus will be placed on the criticisms levelled against Biotechnology in furtherance of the argument that there is the need for the additional layer of protection offered by the Precautionary Principle. The Precautionary Principle is one of the key instruments for achieving the fulfilment of the objectives of the Biosafety Protocol. Further, through an assessment of the Nigerian Biotechnology Space and the effect of its non-Precautionary outlook it will be argued that Nigeria's failure to inculcate the Precautionary Principle into its Biotechnology regulatory framework, has lowered the protection afforded Nigeria by the Biosafety Protocol, from the adverse effect of Biotechnology. An overview of the 2015 Act will also be undertaken, to highlight other areas of weakness and also the causative international pressure by the pro-Biotechnology proponents which enabled it. A Comparative Analysis of the Precautionary Principle in Operation outside Nigeria will also be undertaken of countries/institutions that have incorporated the Precautionary Principle into their legal regulatory

²¹⁸ Regulations 2017.pdf online: available at <http://bch.cbd.int/database/record.shtml?documentid=111783> (last accessed June 21, 2018).

frameworks, to show that Nigeria ought to tow the same line. Finally, the paper recommends that the 2015 Act be amended to provide for the Precautionary Principle, among others, in line with the provisions of the Biosafety Protocol. In carrying out the research, the paper will employ the doctrinal research methodology, which has been described by Terry Hutchinson as on that “best typifies a distinctly legal approach to research.”²¹⁹ The methodology is highly recommended when reviewing legal texts²²⁰ as it allows for the identification, analysis and synthesis of legal texts.²²¹

Meaning of the Precautionary Principle

There is divided opinion as to the meaning of Precautionary Principle. Some experts opine that it is vague²²², dangerous,²²³ incoherent,²²⁴ not cohesive,²²⁵ internally inconsistent²²⁶ and mythical like the unicorn.²²⁷ Another expert doubts if “the principle can be deemed a legal principle.”²²⁸

²¹⁹ Dawn Watkins & Mandy Burtons, *Research Methods in Law*, 2nd Ed. (London: Routledge, 2017) at P. 8 online: available at <https://www.taylorfrancis-com.proxy.bib.uottawa.ca/books/e/9781315386669> (last accessed August 27, 2019) [Watkins & Burtons].

²²⁰ Van Mark Hoecke, *Methodologies of Legal Research What Kind of Method for What Kind of Discipline?*, (Hart Publishing, 2011) at pp. 2 and 11 online: available at <https://www.bloomsburycollections.com/book/methodologies-of-legal-research-what-kind-of-method-for-what-kind-of-discipline/ch1-legal-doctrine-which-method-s-for-what-kind-of-discipline> (last accessed August 27, 2019).

²²¹ Watkins & Burtons, *supra* note 2 at p.13.

²²² Andre Wibisana, “The development of the precautionary principle in international and Indonesian environmental law” (2011) 14(1-2) Asia Pacific Journal of Environmental Law, p.169-202 at p. 170 online: available at <http://heinonline.org.proxy.bib.uottawa.ca/HOL/Page?public=false&handle=hein.journals/apjel14&page=169&collection=journals> (last accessed October 08, 2017) [Wibisana].

²²³ Percival, Robert V., “Who's afraid of the precautionary principle?(The North American Symposium on the Judiciary and Environmental Law)” (2005) 23(1), Pace Environmental Law Review, p.21-81 at 28 online: available at <http://heinonline.org.proxy.bib.uottawa.ca/HOL/Page?public=false&handle=hein.journals/penv23&page=21&collection=journals> (last accessed October 08, 2017) [Percival].

²²⁴ *Ibid.*

²²⁵ John Bernetich, “Sovereignty and regulation of environmental risk under the precautionary principle in WTO law” (2011) 35(3) Vermont Law Review, p.717-739 at p. 719 online: available at <http://web.b.ebscohost.com.proxy.bib.uottawa.ca/ehost/pdfviewer/pdfviewer?vid=1&sid=b6375c26-3955-4765-99c2-309232237783%40sessionmgr101> (last accessed October 8, 2017) [Bernetich].

²²⁶ *Ibid.*

²²⁷ Percival, *supra* note 6.

²²⁸ Wibisana, *supra* note 5.

Percival, however, defines it as a principle that “commands that the damages done to the natural world (which surrounds us all) should be avoided in advance and in accordance with opportunity and possibility.”²²⁹ Phillip Kannan sees it as:

“[a] risk management theory that elaborates on the simple command “show me.” It decides whether the regulator or the regulated must be “shown.” It decides whether “show” means proof to a scientific certainty or scientific consensus, a scintilla of evidence, a wild hunch, or some other standard. It decides when the showing is to start, when it must be completed, what the consequences of not showing are, what roles the regulators and the regulated have in the process of showing, whether minimizing false positives or false negatives is to be the goal of the showing, and whether showing should protect the public interest primarily under a liability model or a preventive model.”²³⁰

Greg Severinsen defines the principle as “an approach to risk management that favours environmental protection in cases of factual uncertainty”,²³¹ proceeding on the notion that it is “better to be safe than sorry’ or ‘take care’ before proceeding.”²³² Justice Stern, argues that the precautionary principle is a statement of common sense,²³³ which means “the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty.”²³⁴ All of these definitions reflect Article 15 of Rio Declaration which is widely reputed to have introduced

²²⁹ Percival, *supra* note 6 at pp.23-4.

²³⁰ Phillip Kannan, “The precautionary principle: more than a cameo appearance in United States environmental law?” (2007) 31(2) William and Mary Environmental Law and Policy Review, p.409-458 at pp.409-410 online: available at <http://heinonline.org.proxy.bib.uottawa.ca/HOL/Page?public=false&handle=hein.journals/wmelpr31&page=409&collection=journals> (last accessed October 08, 2017) [Kannan].

²³¹ Greg Severinsen, “Letting our standards slip?: Precaution and the standard of proof under the Resource Management Act 1991” (2014) Vol. 18 New Zealand Journal of Environmental Law at p.173-206 at 176 online: available at <http://heinonline.org.proxy.bib.uottawa.ca/HOL/Page?public=false&handle=hein.journals/nzjel18&page=173&collection=journals> (last accessed October 8, 2017) [Severinsen].

²³² *Ibid.*

²³³ The dictum of Stein J. of the Land and Environment Court of New South Wales in the case of *Leatch v National Parks and Wildlife Service and Shoalhaven City Council*, 81 LGERA at 270, particularly at 324, reported in the Compendium of Judicial Decisions in Matters Related to Environment (1998) Vol.1.

²³⁴ *Ibid.*

the Precautionary Principle into international consciousness.²³⁵ It provides that 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”. It is argued that despite the apparent lack of unanimity among experts as to the precise meaning of the Precautionary Principle, there is consensus about the fact that it has two core elements being “a degree of precaution” and “a shift of burden of proof”. Notably, the Precautionary Principle is context-dependent, as such, the slightly different approaches to the definition of the principle may have been influenced by the different milieus of the various experts. This explains why Kannan argues that there are several precautionary principles in operation²³⁶ and why J. B. Wiener has identified three different versions of it.²³⁷ The first version, that *uncertainty does not justify inaction* version,²³⁸ allows precautionary measures to set in while evidence against the risk feared is still inchoate.²³⁹ The second version, which is stronger than the first in the sense that it compels rather than permits action, is the *uncertain risk justifies action*, which provides that “when an activity raises threats of harm to human health or the environment, precautionary measures should be taken even if some cause and effect relationship is not fully established.”²⁴⁰ The third version, which is the *shift in the burden of proof*, is the most stringent as it “insists that uncertainty about risk requires forbidding the potentially risky activities until the proponent of activities demonstrates that [they pose] no risk.”²⁴¹

²³⁵ P. Sandin, 'Dimensions of the Precautionary Principle' (1999) *Human and Ecological Risk Assessment* in Wibisana, *supra* note 1 at p.33 [Sandin].

²³⁶ Kannan, *supra* note 15 at p.416.

²³⁷ Wibisana, *supra* note 5 at pp.180-1.

²³⁸ *Ibid.*

²³⁹ *Ibid.*

²⁴⁰ *Ibid.*

²⁴¹ *Ibid.*

Origin and Customary Law Status of the Precautionary Principle

It seems apt to discuss both the origin and customary law status of the Precautionary Principle together for the reason that its recent origin may have a bearing on its acceptance as a norm of international customary law.

At the national level, the Precautionary Principle is traceable to the German concept of 'Vorsorgeprinzip'²⁴² which has a dual role: halting pollution through prevention and forethought; and prudent utilization of natural resources as a preservation technique for future generations.²⁴³ The administrative measures built around the 'Vorsorgeprinzip' are activated by the foreseeability of damage, whether actual or imaginary.²⁴⁴ The Principle gained currency at the international level when it made its way into the London Declaration of 1987.²⁴⁵ It was also invoked in the various treaties that emerged to protect the North Sea.²⁴⁶ A significant milestone was when it was recognized in Principle 15 of the UN Declaration on the Environment and Development (the Rio Declaration) which was signed by 178 countries,²⁴⁷ signifying its wide acceptance. In 1982, the Principle featured prominently in the UN's World Charter of Nature.²⁴⁸ The EU has since made the Principle a cornerstone of its regulatory policies.²⁴⁹ Sweden had adopted similar measures in the 1960s before the Precautionary Principle as we know it today gained traction.²⁵⁰

Opinion is divided on the customary international law status of the Precautionary Principle. Despite wide acceptance and evidence of state practice, Ambrus Monika argues that the Precautionary Principle has not attained international customary law status,²⁵¹ because it is

²⁴² Percival, *supra* note 6 at pp.23-4.

²⁴³ Wibisana, *supra* note 5 at p.172.

²⁴⁴ *Ibid.*

²⁴⁵ Bernetich, *supra* note 8 at p.719.

²⁴⁶ Percival, *supra* note 6 at pp.23-4.

²⁴⁷ *Ibid* at p. 21.

²⁴⁸ Wibisana, *supra* note 5 at p.172.

²⁴⁹ Percival, *supra* note 6 at p. 23-4.

²⁵⁰ *Ibid.*

²⁵¹ Monika Ambrus, "The Precautionary Principle and a Fair Allocation of the Burden of Proof in International Environmental Law" (2012) 21(3) Review of European Community & International

vague, uncertain and lacks practical utility.²⁵² Kannan corroborates this by arguing that although the Principle is widely applied, it is too imprecise and ambiguous to be regarded as forming part of the customary international law corpus.²⁵³ These views, however, contradict article 38 of the ICJ Statute, which is regarded as one of the most authoritative source of international law. Article 38 emphasizes acceptability and state practice as the hallmark of customary international law. It can be argued that going by the general acceptability of the Precautionary Principle which “has been codified in more than fifty treaties in international environmental law”²⁵⁴ and adopted by the EU, among others, the Precautionary Principle has emerged as customary international law. Warwick Gullett supports this position on the grounds that it is an aberration to “find in either the international environmental arena or countries with advanced environmental protection frameworks an environmental policy document, a new environmental law, or even a political statement about environmental management that does not include a reference to the principle or reflect some of the core ideas of the precautionary concept”.²⁵⁵ He concludes that the precautionary principle has been extensively used by the European Environment Agency, the WTO and the UN and has, therefore, become international customary law.²⁵⁶

Misgivings About Biotechnology

Among scientists, there is divided opinion on Biotechnology. Some vouch for its safety and expediency, while others are wary of the threat it poses to humans and the

Environmental Law, pp.259-270 at p. 161 online: available at https://journals-scholarsportal-info.proxy.bib.uottawa.ca/details/09628797/v21i0003/259_tppaafopiiel.xml (last accessed October 8, 2017) [Ambrus].

²⁵² *Ibid* at p. 259.

²⁵³ Kannan, *supra* note 15 at p.427.

²⁵⁴ Ambrus, *supra* note 54 at p.261.

²⁵⁵ Warwick Gullett, “The precautionary principle in Australia: policy, law and potential precautionary EIAs” (2000) 11(2) Risk: Health, Safety & Environment, p.93-124 p. 93-4 online: available at <http://heinonline.org.proxy.bib.uottawa.ca/HOL/Page?public=false&handle=hein.journals/risk11&page=93&collection=journals> (last accessed October 8, 2017) [Gullett].

The UN relied on the principle especially in the regulation of straddling fish stocks and also in tackling pollution in the North Sea.

²⁵⁶ *Ibid*

environment. This division reinforces the need for safeguards like the Precautionary Principle. Proponents point at its potential to feed the world population as it enables “farmers to grow more food less expensively than ever before.”²⁵⁷ However, research has shown that on the contrary, traditional farmers may be worse off as LM seeds are very expensive. This is complicated by the fact that farmers can no longer preserve such seeds for future use and must buy to plant each new season, on account of the *terminator technology*, that is, Genetic Use Restriction Technologies developed by companies which imbue LM seeds with the ability to kill its seeds before sprouting so that farmers cannot save them for future use.²⁵⁸

Proponents also argue that “crops are now being developed to resist abiotic stresses, such as drought and soil salinity”, allowing for “increased crop production on marginal land.”²⁵⁹ Others point to the slower ripening of food²⁶⁰ through the process of gene mutation which enhances food preservation, a key consideration in export trade. Proponents also point to the fact that GM crops are pest and herbicide resistant²⁶¹ and this is a cost-cutting measure as it dispenses with the need to use pesticides, which are highly toxic. For instance, Bt seeds for corn, canola, cotton, and soybeans are genetically developed by Monsanto to produce the *Bacillus thuringiensis* (Bt) toxin, which is lethal to Bollworms, an insect pest, thereby dispensing with the need to use pesticides.²⁶² On the contrary, there is evidence that Bollworms in Arkansas and Mississippi in the US have built a resistance through the process of genetic mutation which enables them to successfully repel the genetically engineered toxin. Peacock notes that the “development occurred in less than a decade and was fastest in areas where monoculture practices eliminated nearby groves, weeds, and trees where the bollworms could have survived

²⁵⁷ Kathy Wilson Peacock, *Biotechnology and Genetic Engineering* (New York: Infobase Publishing, 2010) at p. 4 [Peacock].

²⁵⁸ UNCTAD, *Key Issues in Biotechnology* (New York and Geneva: The United Nations, 2002) at p.7.

²⁵⁹ *Ibid* at p.4.

²⁶⁰ *Ibid*.

²⁶¹ Peacock, *supra* note 120 at p.5.

²⁶² *Ibid* at p.7.

without destroying the Bt cotton".²⁶³ This generates greater concerns than the threat posed by the naturally-occurring Bollworms as a lot more will now be required to combat the gene-mutating Bollworms. On this account, there is evidence that LM seeds pose threats to their naturally occurring counterparts.

There are additional concerns that genes from LMOs could be transferred through pollination and gene wandering, to other food crops, weeds and even wild relatives of the original species, thereby leading "to the development of resistant 'superweeds', loss of genetic diversity within crop species, and possibly even the destabilization of some ecosystems".²⁶⁴ Specifically, Peacock argues that as soon as LM "seed is released into the environment, it is nearly impossible to contain. Its modified genome will mingle with non-modified genomes, thereby altering numerous species within a given ecosystem. Farmers will no longer be able to control exactly what they are growing."²⁶⁵ Research conducted by Ignacio Chapela and David Quist supports Peacock's position as it revealed that although Mexico had banned the planting of LM corn since 1998, LM corns from the US had contaminated the organic species grown in Mexico.²⁶⁶ From the human health perspective, there are fears that harmful genes could unwittingly be transferred into the food chain and pose a danger to human health.²⁶⁷ A case in point was the discovery of traces of the highly allergic Brazil nut, which had unwittingly found its way into soya meant for animal feed.²⁶⁸

Critics point to the fact that Biotechnology thrives on monoculture, which "tends to damage the land and leave crops vulnerable to pests, which leads to heavy applications

²⁶³ *Ibid* at p.28.

²⁶⁴ UNCTAD, *supra* note 121 at p.5.

²⁶⁵ Peacock, *supra* note 120 at p.29.

²⁶⁶ *Ibid*.

²⁶⁷ UNCTAD, *supra* note 121 at p.6.

²⁶⁸ *Ibid*.

of pesticides.”²⁶⁹ Peacock opines that monoculture could endanger food security with a repeat of Ireland’s famine experience of the 1840’s where potato, the country’s staple food was wiped out by blithe, leading to famine.²⁷⁰

Concentrated animal feeding operations (CAFOs) pose another challenge and underscore the threat posed by Biotechnology to the environment. CAFOs allow different livestock to breed together and this has also become a breeding ground for diseases. To keep these animals healthy and safe, they are treated with antibiotics. About 70% of the antibiotics produced in the US are consumed by animals in CAFOs.²⁷¹ Many of the “antibiotics used for this purpose are still used to treat human illnesses, and there is concern that resistance to the antibiotics could be transferred to [biological entities that cause disease to] humans and [other] animals through food and feed products.”²⁷² To prevent this, the WHO and the US Center for Disease Control have objected to the use of antibiotics in the food chain.²⁷³ Research has also shown that waste from CAFOs is highly injurious to human health and the environment. In China “the lakes, rivers, and streams that receive runoff from pig farms are becoming polluted as tons of phosphorus-laden waste deplete oxygen, kill fish, and emit greenhouse gases”.²⁷⁴

With a world on the edge security-wise, Biotechnology poses even greater terrorism dangers. In 2001, anthrax (*Bacillus anthracis*) was manipulated into a weapon when it was posted to government officials in the US and certain select media houses, which resulted in the death of 5 people with a further 22 sustaining various injuries. The US

²⁶⁹ Peacock, *supra* note 120 at p.6.

²⁷⁰ *Ibid.*

²⁷¹ *Ibid* at p.9.

²⁷² UNCTAD, *supra* note 121 at p.6.

²⁷³ *Ibid* at p.9.

²⁷⁴ Peacock, *supra* note 112 at pp.9&20.

government spent \$200 million to clean up its postal service in the aftermath and a further \$41.7 million to clean up Capitol Hill.²⁷⁵

Concerns also exist from an animal rights perspective. Cows are now injected with rBGH or rBST, an engineered *E. coli* bacteria manufactured by Monsanto, ostensibly to produce more milk.²⁷⁶ However, apart from farmers rejecting the claim that cows injected with rBGH or rBST produce more milk than those who have not been so injected,²⁷⁷ research has shown that these injected cows suffer from mastitis, an infection of the udder which “reduce[s] fertility, and increase[s] lameness”²⁷⁸

The Biosafety Protocol and the Precautionary Principle

Having considered the recent origin of the Precautionary Principle at the international level, which is traceable to the London Declaration of 1987²⁷⁹ and popularized by the Rio Declaration²⁸⁰ on the one hand, and the criticisms levelled against Biotechnology on the other hand, in this section, the Precautionary Principle will be situated within the context of the Biosafety regulatory framework. The link to the Rio Declaration will be particularly instructive as the Rio Declaration may well be regarded as one of the precursors to the Biosafety Protocol. Principle 7 of Rio Declaration enjoins “all states to cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem”. Being a Declaration, this important mandate cannot not be enforced²⁸¹ but “it [has] also [become] increasingly clear that we need to

²⁷⁵ *Ibid* at p.30.

²⁷⁶ *Ibid* at p.29.

²⁷⁷ *Ibid*.

²⁷⁸ *Ibid*. In response, rBGH has been banned in the EU, Canada, Australia and New Zealand.

²⁷⁹ Bernetich, *supra* note 8 at p.719.

²⁸⁰ Percival, *supra* note 49.

²⁸¹ Margaret T. Okorodudu-Fubara, “Dynamics of a New World Environmental Legal Order” (1999) 133, Obafemi Awolowo University, Ile-Ife, Nigeria Inaugural Lecture Series at p.13.

find better ways of translating agreements into effective action at local, national and sectoral levels.”²⁸² The translation took place as the Rio Declaration birthed, at least, four MEAs with binding obligations, they include the Convention on Biological Diversity (CBD), the Framework Convention on Climate Change 1992, the Montreal Protocol on Substances that Deplete the Ozone Layer 1997 and Agenda 21.²⁸³ The CBD has three goals which are to promote “the conservation of biodiversity, the sustainable use of its components, and the equitable sharing of benefits arising out of the utilization of genetic resources.”²⁸⁴ To drive home these objectives, the instrument provides for “measures for the conservation of biological diversity; incentives for the conservation and sustainable use of biological diversity; research and training; public awareness and education; assessing the impacts of projects upon biological diversity; regulating access to genetic resources; access to and transfer of technology; and the provision of financial resources.”²⁸⁵ This perhaps explains why Chidi Oguamanam is of the view that the CBD is the pioneer multi-dimensional instrument regarding the conservation of biodiversity as previous instruments were market-based.²⁸⁶ Nevertheless, the CBD is a framework Convention, without coercive force. In addition, it does not address the issue of Biotechnology which poses serious threats to the conservation of biodiversity.²⁸⁷ In reaction to this, Article 19 (3) of the CBD allows for the negotiation of a Protocol²⁸⁸ and as such, the Biosafety Protocol entered into force on September 11, 2003.²⁸⁹

²⁸² Maurice Strong is the former Secretary-General of the 1992 UN Conference on Environment and Development (the Rio Earth Summit); Secretary-General of the 1972 Stockholm Conference); first Executive Director of the UN Environment Programme; Under-Secretary-General of the UN; and first President, Canadian International Development Agency, CIDA. *Ibid* at 1-1.

²⁸³ Okorodudu-Fubara, *supra* note 144 at p.12.

²⁸⁴ “Summary”, *A brief introduction to the Convention on Biological Diversity (CBD)* online: available at www.iisd.ca/biodiv/cbdintro.html (last accessed March 18, 2016).

²⁸⁵ *Handbook on the Convention on Biological Diversity including its Cartagena Protocol on Biosafety*, 3d ed (Montreal: Secretariat of the Convention on Biological Diversity, 2005) at p.xxiii online: available at <https://www.cbd.int/doc/handbook/cbd-hb-fore-en.pdf> (last accessed March 18, 2016).

²⁸⁶ Chidi Oguamanam, “Biological Diversity” in Shawkat Alam et al, ed., *Routledge Handbook of International Environmental Law* (USA and Canada: Routledge Taylor and Francis Group, 2013) at 207 at p.217.

²⁸⁷ David Hunter, J. Salzman & D. Zaelke, *Environmental Law and Policy* (New York: Foundation Press, 2002) at p.953.

²⁸⁸ “Convention on Biological Diversity”, online: available at www.cbd.int/doc/legal/cbd-en.pdf (accessed January 29, 2016).

²⁸⁹ “About the Protocol”, online: available at www.cdb.int/ (accessed on March 18, 2016).

The Biosafety Protocol, in its preamble, reaffirms the precautionary principle. The Biosafety Protocol went further to make the precautionary principle its cornerstone by declaring in its very first article that:

“In accordance with the precautionary approach contained in Principle 15 of the Rio Declaration on Environment and Development, the objective of this Protocol is to contribute to ensuring an adequate level of protection in the field of the safe transfer, handling and use of living modified organisms resulting from modern biotechnology that may have adverse effects on the conservation and sustainable use of biological diversity, taking also into account risks to human health, and specifically focusing on transboundary movements.”

Articles 10(6) and 11(8) of the Biosafety Protocol further provide that lack of scientific certainty on the adverse effects of LMOs should not prevent state parties from taking decisions regarding the importation of LMOs, to safeguard biological diversity within national boundaries. Commenting on this, Aaron Cosbey and Stas Burgiel opine that this is the strongest version of the Precautionary Principle as “the precautionary principle can be used in deciding whether to prohibit or restrict import of LMOs.”²⁹⁰ Given the above, it is arguable that while the Precautionary Principle pre-dates the Protocol, the Protocol bolstered it. Peter Andree²⁹¹ and UNCTAD share this sentiment.²⁹²

The Nigerian Biotechnology Space and non-Precaution

²⁹⁰ Cosbey, Aaron & Stas Burgiel, *The Cartagena Protocol on Biosafety: An Analysis of Result* (Winnipeg: IISD, 2000) at p.13.

²⁹¹ Peter Andree, “The Cartagena Protocol on Biosafety and Shifts in the Discourse of Precaution” (2005) 5(4) *Global Environmental Politics*, 2005, pp.25-46 at p.25 online: available at <http://content.ebscohost.com.proxy.bib.uottawa.ca/ContentServer.asp?T=P&P=AN&K=18826212&S=R&D=bth&EbscoContent=dGJyMNHr7ESeprY4zdnyOLCmr0%2BeqLBSsKi4SbKWxWXS&ContentCustomer=dGJyMPGotUqzqq5OuePfgeyx44Dt6fIA> (last accessed October 8, 2017).

²⁹² UNCTAD, *supra* note 121 at p.11.

Nigeria's Biological Diversity Endowment

From the climatic and ecological perspectives, Nigeria enjoys extremely diverse ecosystems “from semi-arid savanna to mountain forests, rich seasonal floodplain environments, rainforests, vast freshwater swamp forests and diverse coastal vegetation”²⁹³ These “climatic conditions and physical features have endowed Nigeria with some of the richest flora and fauna on the continent.”²⁹⁴ For instance, Africa’s largest stretch of mangrove forest is in Nigeria’s Niger Delta region.²⁹⁵ Amphibians have made Nigeria their home,²⁹⁶ and it has become a fortress for primates. The “most endangered gorilla subspecies on earth, the Cross River gorilla (*Gorilla gorilla diehli*), with an estimated population of less than 250, is found only in a couple of protected areas in [Nigeria’s] Cross River State.”²⁹⁷ Nigeria has an abundance of plant varieties including “many species with traditional value as food items, medicines and for various domestic uses; Nigeria is also a hub for varieties of important crop plants”²⁹⁸ FAO opines that Nigeria is one of Africa’s leading producers of rice.²⁹⁹ Nigeria is also the world’s biggest producer of Cassava with an annual output of about 50 million metric tons - about 20% of the world’s production. The fisheries sub-sector, according to FAO contributes between 3-4% to Nigeria’s GDP³⁰⁰ “the sub-sector [also] generates employment and income for a significant number of artisanal fishermen and small traders”³⁰¹ Its value is also underscored by the fact that 50% of the country’s animal protein requirement is met by this sub sector.³⁰² The Forest resources sub-sector is another biodiversity component that “accounts for approximately 2.5% of the country’s GDP”,³⁰³ providing jobs for over 2 million Nigerians (a [fraction/ percentage of the country’s population]).³⁰⁴ It also provides about

²⁹³ The Convention on Biological Diversity, “Nigeria – Biodiversity Fact” online: available at <https://www.cbd.int/countries/profile/default.shtml?country=ng#facts> (last accessed May 26, 2018) [The CBD – Nigeria’s Biodiversity fact].

²⁹⁴ *Ibid.*

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ *Ibid.*

²⁹⁸ *Ibid.*

²⁹⁹ The Food and Agricultural Organization, “FAO Country Programming Framework Federal Republic of Nigeria 2013 - 2017 at p. 4 online: available at [www. http://www.fao.org/3/a-au053e.pdf](http://www.fao.org/3/a-au053e.pdf) (last accessed June 26, 2018).

³⁰⁰ *Ibid.*

³⁰¹ *Ibid.*

³⁰² *Ibid.*

³⁰³ *Ibid* at p. 5.

³⁰⁴ *Ibid* at p. 5.

80 % of the energy needs of Nigerians living in the rural areas.³⁰⁵ FAO estimates Nigeria's water resources in the region of 20 million hectares with lakes accounting for 677,000 ha, rivers for 10,812,000 ha, flood plains for 515,000ha, ponds for 7,764.5 ha, miscellaneous stagnant pools of seasonal rivers for 200,000 ha and lastly miscellaneous reservoirs for 275,534 ha.³⁰⁶

This explains why about 70% of Nigerians depend on agriculture for survival³⁰⁷ with the sector contributing about 38% to the country's GDP.³⁰⁸ In fact, agriculture employs about 2/3 of Nigeria's population,³⁰⁹ estimated by the World Bank at 184 million.³¹⁰

The CBD recognizes the difficulty in placing monetary value on the country's biodiversity since "biodiversity conservation has not been recognized as feasible investment in Nigeria's economic development and, consequently natural resources valuation has not been fully incorporated into national economic planning"³¹¹ but the World Bank estimates the commercial value of the country's biodiversity at over \$8 billion per annum,³¹² contributing to 46% of the GDP.³¹³

Sadly, this biodiversity is threatened. The CBD notes that despite the adaptation of these resources to climate change and environmental vicissitudes, "a number of these wild crops and their relatives are being replaced with new varieties/cultivars and therefore threatened with extinction. Available evidence shows that biodiversity is being lost at a disturbing rate in Nigeria."³¹⁴

³⁰⁵ *Ibid* at p. 5.

³⁰⁶ *Ibid* at p. 6.

³⁰⁷ The CBD – Nigeria's Biodiversity fact, *supra* note 178.

³⁰⁸ *Ibid.*

³⁰⁹ *Ibid.*

³¹⁰ The World Bank, "Nigeria Overview" online: available at <http://www.worldbank.org/en/country/nigeria/overview> (last accessed June 26, 2018).

³¹¹ *Ibid.*

³¹² *Ibid.*

³¹³ *Ibid.*

³¹⁴ *Ibid.*

Nigeria's Biotechnology Regulatory Framework

Nigeria's efforts in participating in the global biodiversity conversation are likely to be informed by the alarming loss of biodiversity in the country. In this regard, Nigeria is a party to the CBD and the Biosafety Protocol. To localize the benefits of the Biosafety Protocol, Nigeria signed the Protocol on May 24, 2000 and it entered into force on October 3, 2003.³¹⁵ Subsequently, the National Biosafety Management Agency Bill (the Biosafety Act) came into force on April 15, 2015.³¹⁶

The Act, according to its preamble, is the fulcrum of Biotechnology regulation in Nigeria. It creates the Biosafety Management Agency (the Agency) with the mandate to regulate biotechnology "with a view to preventing any adverse effect on human health, animals, plants and environment."³¹⁷ Section 1(a) of the Act mandates the Agency to "ensure the effective management of all components of the Nation's biosafety". The Act has 44 sections but sadly, the Precautionary Principle is not mentioned, and this failure has made Nigeria vulnerable against the interests of powerful Biotechnology companies. As argued above, the Precautionary Principle is a safety net, which allows regulators time for appraisal before signing off on decisions with potential detrimental effects on humans and the environment. Although section 3(f) of the Act mandates the Agency to "develop risk management plan and strategy for protecting human health, biological diversity and the environment from potential risks associated with genetically modified organisms", without the Precautionary Principle providing a practical base, this may amount to mere theorizing.

In 2015, Nigeria took another stride in its regulation of Biotechnology. Pursuant to section 41 of the Act, the Agency promulgated the National Biosafety (Implementations Etc.) Regulations, 2017³¹⁸ with the objective of providing "details of regulatory and supervisory requirements necessary to promote and aid the efficient and profitable implementation of the provisions of the

³¹⁵ The Convention on Biological Diversity, "Status of Ratification and Entry into force" online: available at <http://bch.cbd.int/protocol/parties/> (last accessed May 25, 2018).

³¹⁶ See the Schedule of the Act.

³¹⁷ The Preamble.

³¹⁸ Regulations, *supra* note 1.

Act".³¹⁹ However, like its predecessor, the 77-item regulation failed to provide for the Precautionary Principle.

These instruments have also failed to embrace key elements of the Precautionary Principle. A critical understanding of the Precautionary Principle involves a "shift in the allocation of the burden of proof (BoP): the proponents of certain actions should bear the onus of proving the innocuousness of the activity."³²⁰ This is not the case in Nigeria as none of these laws, including the Evidence Act, reverse the BoP. Conversely in Ecuador, proponents of environmental enterprises bear the burden of proof to establish the innocuousness of their proposed enterprise and in addition, uncertainties are construed in favour of the environment.³²¹ Similarly, the EU has placed the burden of proof on proponents of LMOs. Even the USA, which is yet to ratify the Biosafety Protocol, has joined the trend as chemical manufacturing companies now bear the burden of proving the safety of their products, as against the former practice where the onus of proving the dangers of a product was on the regulator.³²² In practice, a burden of proof shift typically triggers three measures: regulators put forward evidence of a scientific nature that there is imminent threat to the environment or humans from an activity, the regulator places a ban on the threat posing substance, and the proponent is availed of both administrative and adjudicatory machinery to disprove the notion that the substance has indeed generated sufficient threat to warrant a clamp-down.³²³ Nigeria has jettisoned this important safe-guard.

On Environmental Impact Assessment (EIA), the Act provides in section 31(1) that an "applicant seeking approval for any genetically modified organism under this Act shall, prior to the submission of the application, carry out a mandatory risk assessment of the potential risk the

³¹⁹ Item 1(b).

³²⁰ Ambrus, *supra* note 54 at p.259.

³²¹ David Boyd, "Constitutions, Human Rights and the Environment: National Approaches" in Anna Grear & Louis Kotze, ed., *Research Handbook on Human Rights and the Environment* (UK: Edward Elgar Publishing, 2015) 170 at p.182 [Boyd].

³²² Silvia Camporesi & James Knuckles, "Shifting the Burden of Proof in doping: Lessons from Environmental Sustainability applied to High-Performance Sport" (2014) 15(1) *Reflective Practice* at p.106-118 at p. 111 online: available at https://journals-scholarsportal-info.proxy.bib.uottawa.ca/details/14623943/v15i0001/106_stbopiesaths.xml (last accessed February 17, 2018).

³²³ Kannan, *supra* note 15 at p.425.

genetically modified organism poses to human health, animal, plant or the environment in Nigeria". While this is commendable, one should not lose sight of the fact that EIAs generally have two components – the pre-project initiation and the periodic assessment phases. The Act has only provided for the pre-project component and not the periodic assessment aspect. Again, and crucial to the present analysis, it is important to note that the Act is silent on what measures should follow the finding of a potential threat. In this way, the Act has abdicated its duty to provide all-round, continuous surveillance on Biotechnology activities in Nigeria. Speaking on this, Ambrus opines that the practical demonstration of the precautionary principle is the EIA and "not only does the protection of the environment require that an initial risk assessment is carried out when a measure is introduced, but it also implies that the potential risk of a measure to the environment is periodically reassessed."³²⁴

Another reason why Nigeria ought to be slow in embracing Biotechnology is the fact that Nigeria lacks both expertise and facilities to regulate LMOs. Regarding manpower, the CBD reports that Nigeria currently has just 9 experts³²⁵ and lacks expertise in core areas specified by the Convention.³²⁶ The dearth of facilities in Nigeria was highlighted by the UNEP Environmental Assessment of Ogoniland in respect of the negative impact of oil and gas activities on the environment. The UNEP was faced with a lack of facilities to carry out its mandate and UNEP pronounced that this was its most difficult job to date.³²⁷ Samples that UNEP gathered were sent to accredited (ISO 17025) laboratories in Europe for scientific analysis³²⁸ as Nigeria did not have

³²⁴ Ambrus, *supra* note 54 at p.261.

³²⁵ The CBD – Nigeria's Biodiversity fact, *supra* note 178.

³²⁶ The Convention on Biological Diversity, "Areas of Capacity Building" online: available at <http://bch.cbd.int/database/record.shtml?documentid=101156> (last accessed May 26, 2018). The areas include Institutional capacity, Human resources capacity development and training, Risk assessment and other scientific and technical expertise, Risk management, Public awareness, participation and education in biosafety, Information exchange and data management including participation in the Biosafety Clearing-House, Scientific, technical and institutional collaboration at subregional, regional and international levels, Technology transfer, Identification of LMOs, including their detection, Socio-economic considerations, Implementation of the documentation requirements under Article 18.2 of the Protocol, Handling of confidential information, Measures to address unintentional and/or illegal transboundary movements of LMOs and Scientific biosafety research relating to LMOs.

³²⁷ UNEP, "*Environmental Assessment of Ogoniland: a Report by the United Nations Environment Programme*", (Nairobi: UNEP Secretariat, 2011) at p. 8, online:

<http://postconflict.unep.ch/publications/OEA/UNEP_OEA.pdf> (last accessed February 11, 2016).

³²⁸ *Ibid* at p. 9.

the facilities. It could be argued that UNEP's assessment is dated as it was completed in 2011, however there is neither evidence, report nor record of any change in circumstances in the intervening period.

The African Union (AU), aware of these short-comings that make Africa susceptible to powerful international interests, had acknowledged the lack of regulatory capacity "as a hindrance to the safe acquisition and application of modern biotechnology".³²⁹ It also admitted that "the absence of well-equipped laboratories for testing" of LMOs was a significant concern.³³⁰ As a way out, the AU adopted the *African Model Law on Biosafety* in 2003.³³¹ The document was revised in 2011³³² to, inter alia, create a single Biosafety Clearing House for the continent.³³³ Interestingly, both the earlier model law and its revised version are premised on the Precautionary Principle.³³⁴ Despite these moves, western interests have successfully de-marketed the single regulatory flagship model so that many countries, including Nigeria, in exchange for grants, have jettisoned the AU model and adopted weaker national laws to please these powerful interest.³³⁵

In Nigeria, these corporate entities infiltrated and lobbied the Nigerian parliament into passing the Act without the Precautionary Principle and sponsored the Act in its extant version including the various public hearings which were deliberately shrouded in secrecy as part of the opaque operations designed to keep the Nigerian citizenry unsuspecting.³³⁶ Nigerians were, therefore, not surprised when they saw that the "back page of the printed biosafety bill distributed to stakeholders at the meeting had the logo of USAID and AATF, key institutions promoting LMOs

³²⁹ Haidee Swanby, "The Revised African Model Law on Biosafety and the African Biosafety Strategy" ACB Briefing Paper No. 9, 2009 at p. 4 online: available at https://acbio.org.za/wp-content/uploads/2015/02/AU_Biosafety-brief.pdf (last accessed June 16, 2018) [Swanby].

³³⁰ *Ibid.*

³³¹ Mariann Bassey Orovwuje, "Nigerian Biosafety Act: The Journey and the need to Act" at p.19 online: available at http://aefjn.org/wp-content/uploads/2016/05/Nigerian-Biosafety-Act_The-Journey-and-they-need-to-Act.pdf (last accessed June 9, 2018) [Orovwuje].

³³² *Ibid.*

³³³ Swanby, *supra* note 214 at p.3.

³³⁴ *Ibid* at p. 4 & 6.

³³⁵ *Ibid.*

³³⁶ [Orovwuje, *supra* note 216 at p.23.

and driving the passage of a weak biosafety bill”.³³⁷ What also aroused the interest of the Nigerian experts was the fact that the Bill was assented into law by former President Goodluck Jonathan in his last week in office, fueling the suspicion that this might have been in response to` pressure from certain quarters.³³⁸ Prior to this, the Donald Danforth Plant Science Centre (Danforth Centre) in the USA, which prides itself with the task of feeding “the hungry and improve[ing] human health”,³³⁹ had identified Nigeria, because of the country’s high population, as one of the countries of target, for the LMOs infiltration. The Centre had declared that there was the necessity “to start making plans for how these product developments are going to be carried out in four countries of interest and how these products are going to meet the regulatory requirements of those countries”.³⁴⁰ Funding for the project was to come from another American Institution in the way of Bill and Melinda Gates Foundation who made available to the Danforth Centre in January 2009, the grant of \$5.4 million USD to assist “the centre secure the approval of African governments to allow field testing of genetically modified banana, rice, sorghum and cassava plants.”³⁴¹ The pressure from the USA may have reached its peak when its Department of Agriculture (USDA) added its voice to the debate by enjoining Nigeria to up the tempo “to fast-track the creation of an enabling environment for biotechnology.”³⁴² It was therefore no surprise when the National Agricultural Biotechnology Development Agency (NABMA) organized a press conference on July 17, 2014 and openly declaring, while the bill was still in the Parliament, “that they were working to fast track the adoption of genetically modified organisms in Nigeria”.³⁴³ In addition to this, was the deliberate secrecy with which the Nigerian Parliament went about the passage of the Act with experts noting that a “critical concern of environmentalists towards the bill is the lack of provision

³³⁷ *Ibid.*

³³⁸ Nnimmo Bassey & Mariann Bassey Orovwuje, “Nigeria’s National Biosafety Management Agency Act, 2015 In Whose Interest? - A Review”, *HOMEF*, (December, 2015) at p.7 online: available at <https://homef.org/wp-content/uploads/2018/09/national-biosafety-act-homef-review.pdf> (last accessed August 28, 2019) [Bassey & Orovwuje].

³³⁹ Donald Danforth Plant Science Center’s Mission Statement, online: available at https://www.danforthcenter.org/about?_sw_csrfToken=MxMjEPGJMxG6h0hEQGEO05JhL086RVP8 (last accessed August 29, 2019).

³⁴⁰ Bassey & Orovwuje, *supra* note 223.

³⁴¹ *Ibid.*

³⁴² *Ibid* at p.9.

³⁴³ Nnimmo Bassey, “A Keg of Gunpowder”, *The Eco-Instigator*, Issue 12, (June, 2016) at p.23 online: available at <https://www.dropbox.com/s/jipig4hx77ywujr/eco%20instigator%2012s.pdf?dl=0> (last accessed August 29, 2019) [Bassey - A keg of Gunpowder].

for public consultation".³⁴⁴ These experts were not surprised at the speed with which the Nigerian legislation was passed, arguing that the Legislation,

"seems to have been drafted in a hurry. It seems as if the intention of the Nigerian government was to just get the Agency up and running in order to enable the Agency to put in place a biosafety regime... The Act has a number of grammatical errors and evidences sloppy drafting. In fact, some provisions do not make sense at all and in other places, references are made to the incorrect sections and to sections that do not in fact exist."³⁴⁵

Curiously, USAID is one of the promoters of a weak Nigerian Act and the USA is not a signatory to the Biosafety Protocol³⁴⁶ but has made the Precautionary Principle a cornerstone of its national environmental law architecture. Apart from USAID, Monsanto is another player in the Nigerian Biosafety space.³⁴⁷ It has been accused of influencing the Agency to issue Monsanto 2 permits to introduce GM maize and cotton to Nigeria.³⁴⁸ Strangely, these permits were signed and issued on a public holiday³⁴⁹ and for products³⁵⁰ that have been banned in France, Germany, Poland, Italy, Luxemburg, Austria, Hungary and Greece.³⁵¹ In announcing its ban, the German regulator argues that it has "legitimate reasons to believe that MON 810 posed a danger to the environment". Before placing its ban, France had "established that the effects of GM crops were similar to that of pesticides, including inflammation disorders and severe toxicity to liver and

³⁴⁴ Oluwafunmilayo Oyatogun, "Modern Foods: Taking a Second look at GMOs Food Policies In Nigeria" *The Eco-Instigator*, Issue 6, (December, 2014) at p. 17 online: available at <https://homef.org/wp-content/uploads/2019/01/eco-instigator-6.pdf> (last accessed August 29, 2019).

³⁴⁵ Bassey & Orovwuje, *supra* note 223 at p.10.

³⁴⁶ Orovwuje, *supra* note 216 at p.24.

³⁴⁷ *Ibid* at p.45.

³⁴⁸ "Group Calls for Sacking of National Biosafety Management Agency Board over GMO Permits", online: available at <http://saharareporters.com/2016/06/14/group-calls-sacking-national-biosafety-management-agency-board-over-gmo-permits> (last accessed June 16, 2018) [Group Calls for Sacking of Board over GMO Permits].

³⁴⁹ *Ibid*.

³⁵⁰ MON 810 is one of the items covered by the permit issued to Monsanto by the Agency.

³⁵¹ Group Calls for Sacking of Board over GMO Permits, *supra* note 233.

kidney.” Hungary also established that these products from Monsanto are “lethal to two Hungarian protected species and one insect classified as rare.”³⁵²

In October 2017, an NGO accused the Nigerian regulator of complicity in the importation of GM maize valued at \$9.7 Million into Nigeria. The NGO frowned at the grant of import permit to WACOT Limited, “the same company that tried to smuggle in the illegal GM maize in the first instance, barely two weeks after it announced the seizure of the product.”³⁵³ Indeed Nigerians have every reason to be wary, according to the Biosafety Clearing House, the Nigerian regulator has so far issued 6 permits regarding LMOs imports into the country, 3 of them to Mosanto.³⁵⁴ On one of the approvals given to Mosanto, experts frown at the lack of publicity surrounding the entire application process, noting that the application was displayed in only 2 Nigerian cities of Abuja and Zaria. In addition, there was neither a public hearing nor public consultation before the application was approved, with experts describing the speed of the application process as an “Olympian feat”.³⁵⁵ Experts readily point at 2 issues to demonstrate Mosanto’s grip on the Nigerian Biotechnology space: (1) the fact that most of the members of the Governing Board are LMO proponents on the one hand³⁵⁶ and the fact that Nigerian farmers, who are not only critical stakeholders, but are contenders with the LMO proponents for the same market, are excluded from being part of the Board;³⁵⁷ and (2) Monsanto is accused of being a major financier of Nigeria’s Biotechnology regulatory Agencies.³⁵⁸ Experts readily point to conduct such as the NABMA’s press conference declaration of seeking an early introduction of LMOs into the country as evidence.³⁵⁹ It is argued that these situations could create a conflict of interest concerning

³⁵² *Ibid.*

³⁵³ Adedayo Akinwale, “GMOs: Your Statement Unpatriotic, Biosafety Agency Slams HOMEf”, Nigeria’s ThisDay Newspaper of February 1, 2018 online: available at <https://www.thisdaylive.com/index.php/2018/02/01/gmos-your-statement-unpatriotic-biosafety-agency-slams-homef/> (last accessed June 6, 2018).

³⁵⁴ The Convention on Biological Diversity, Country Profile, Nigeria, online: available at <http://bch.cbd.int/database/results?searchid=709912> (last accessed June 16, 2018).

³⁵⁵ HOMEf, “When Nigerian Biotech Experts Met” *The Eco-Instigator*, Issue 13, (September, 2016) at p.6 online: available at <https://homef.org/wp-content/uploads/2019/01/eco-instigator-13.pdf> (last accessed August 29, 2019) [The Eco-Instigator, Issue 13].

³⁵⁶ HOMEf, “The Growing Menace of Mosanto-Induced Pro-GMO Lobby in Nigeria”, *Ibid* at p.21.

³⁵⁷ Nnimmo Bassey, “Don’t Sign that Biosafety Bill, Mr. President”, *The Eco-Instigator* Issue 14, (December, 2016) at p. 9 online: available at <https://homef.org/wp-content/uploads/2019/01/eco-instigator-14.pdf> (last accessed August 29, 2019) [Bassey - Don’t Sign that Biosafety Bill, Mr. President.

³⁵⁸ Patrick Gbadebo Rhodes-Vivour, “What do these Anti-GMO Activists Want”, *supra* note 240 at p.33.

³⁵⁹ Bassey - A Keg of Gunpowder, *supra* note 228.

regulatory Agencies' dealings with Monsanto and could be a potential landmine for the overall regulation of LMOs in Nigeria, because it could weaken their regulatory powers.

An example of this can be seen in the Agency's handling of one of Monsanto's applications to introduce LMOs into Nigeria. The request was published in the Leadership Newspaper of February 26, 2016 but curiously had 2 duration dates for the publication display: one running from February 29, 2016 to March 28, 2016 and the other from February 22, 2016 to March 15, 2016. Apart from the fact that the February 22, 2016 date precedes the date of the publication, of particular concern is the fact the deadline for submission of objection was February 22, 2016, meaning that no objection would be valid since the publication itself was done after the deadline for filing of objection had passed.³⁶⁰

On the whole, Nigeria's Biotechnology Act seems a weak piece of legislation. Some of the reasons are:

The failure to incorporate the Precautionary Principle. Nnimmo Bassey describes this failure as a "fundamental flaw", and further asserts that "[s]uch a fundamental and common-sense principle cannot be ignored just because some powerful forces want to open the Nigerian environment to LMOs and related products."³⁶¹

The failure to provide for mandatory public participation when considering requests for the introduction of LMOs into Nigeria in section 26 (1) of the Act. On this, the Health of Mother Earth Foundation (HOMEF) has expressed concern for the use of the 'may' - a permissive verb, rather than the use of its mandatory counterpart 'shall'. HOMEF declared that it "is of great concern to us that the Agency 'may' decide to hold public hearings or consultations to obtain comments. We

³⁶⁰ *Ibid* at p.23.

³⁶¹ Bassey - Don't Sign that Biosafety Bill, Mr. President, *supra* note 242.

propose that the right word to use here is "shall" because holding public hearings should not be optional".³⁶²

The Agency has discretionary powers to publish a request for application to introduce LMOs into Nigeria by virtue of section 25(2) of the Act and a maximum window of 21 days is allowed for comments, if the Agency decides to publish, as stipulated in section 25 (1) of the Act. It is argued that these provisions are inimical to public participation. It is further argued that obtaining public participation has become an acceptable practice in environmental regulation and that public participation not only legitimizes environmental regulatory processes but is also an important feed-back mechanism. In recognition of this, Article 23 of the Biosafety Protocol notes that 'Public Awareness and Participation' provides for public participation, with Article 23 (2) providing for the adoption of such measures in national legislations. It provides that States Parties "shall, in accordance with their respective laws and regulations, consult the public in the decision-making process regarding living modified organisms and shall make the results of such decisions available to the public".

Publication here should not be discretionary but mandatory, since it is the major outlet for which the public becomes aware of applications to introduce LMOs into the Country. On the 21 days window for comments, I argue that 21 days may not be enough for an informed and in-depth comments either for or against any potential introduction of LMOs into the environment. Experts have also voiced their concerns on the provisions of section 25 of the Act by opining that "publications must be the basic minimum provisions in the context of public participation"³⁶³ and that it should include "a reasonable time-period, in order to give the public or groups the opportunity to express an opinion. '21 days'...do not give enough time to the public and interested bodies to comment. More so, section 25 needs to state when the information needs to be made public."³⁶⁴

³⁶² The Eco-Instigator, Issue 13, *supra* note 240 at p.11.

³⁶³ *Ibid.*

³⁶⁴ *Ibid.*

Section 18 of the Act allows the Agency to accept gifts, including money, land and properties, within and outside Nigeria. Earlier on, it was argued that the direct funding of the Agency by Mosanto and potentially, other LMO capitalists could lead to conflicts of interest.³⁶⁵ This is another interesting scenario as regards conflict of interest. How would the Agency reprimand a prior donor if such a donor has acted contrary to the provisions of the Act? On this, HOMEF argues thus, "Section 18 sounds weird. Is there any example in another law in Nigeria where a Government Agency could receive gifts such as land without at least a direct linkage to avoid conflicts of interests etc?"³⁶⁶

Section 10 of the Act provides for the membership of the Biotechnology Groups in the regulatory Governing Board but in the same vein, excludes Nigeria's farmers from being members of the same Governing Board. The composition of the Board with members from the Industrial, Trade and Investment sectors, the organized private sector, National Biotechnology Development Agency and the Biotechnology Society of Nigeria leaves much to be desired, since these groups are known Biotechnology promoters. On this, HOMEF fumes thus, "Why should they be part of the Governing Board, when it is really their conduct, their technology and products the law is aiming to regulate? This is setting the stage for conflict of interest. Industry, Trade and Investments, Biotech Agency and Biotech Society people are not the best regulators here". On farmers' exclusion, HOMEF opines thus, "We also object to the exclusion of representatives of farmers and consumers in the Governing Board. It is critical to ensure participation of farmers, because they will be the prime target, they should be "saved" according to the biotech industry".³⁶⁷ Nevertheless, it is argued that for the same reasons stated earlier, farmers should not be members of the Board.

The Act does not provide for separate procedures for the handling of LMOs destined for food, feed, planting, pharmaceuticals, and for industrial use. The Act provides for one unified

³⁶⁵ Bassey - A Keg of Gunpowder, *supra* note 228.

³⁶⁶ The Eco-Instigator, Issue 13, *supra* note 240 at p.11.

³⁶⁷ *Ibid.*

process,³⁶⁸ whereas the Biosafety Protocol provides for different procedures for the handling of LMOs for “direct use as food, feed or for processing” in Article 11 and “Pharmaceuticals” in Article 5.

Lack of clarity on the applicable standard regarding liability and redress. Section 41 (2) of the Act provides that “Liability and redress for a damage that occurs as a result of an activity under this Act is subject to applicable laws.” There are three types of liability regimes in operation: Absolute Liability, Strict Liability and Vicarious Liability and so the couching of the section in this way, is not only confusing but may also play into the hands of LMO producers who might exploit this to their own advantage, by arguing for the application of a liability regime with a higher fault quotient, which will make proof more difficult and onerous. It is conceded that the Biosafety Protocol did not provide for a liability regime, but that was addressed by the 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Bio-safety³⁶⁹ which provided for a strict liability regime and this supplement had been in place before the enactment of the Nigerian Act. The lack of clarity may have already been exploited in Nigeria if HOMEF’s opinion is anything to go by. HOMEF argues that section 41(1(a) anticipates a fault-based regime which “requires a higher burden of proof and could make it difficult for liability to be established. Note that this provision envisions that liability for LMOs will be dealt with by regulations, and through existing laws, not a specific liability and redress law”.³⁷⁰

Sections 30(1)-(2) of the Act provide for appeals of Board decisions. While 30(1) provides the internal right of appeal to the Governing Board, it gives only the applicant the right to appeal. Section 30(1) quite commendably provides for judicial review, with jurisdiction vested in the Federal High Court, but perhaps, taking a cue from 30(1), only the applicant can approach the court for such a matter. These restrictions are not in tandem with public participation principles. The very restrictive provision on standing on Appeal will not only stifle public interest litigation, but it will also endanger public participation in the area of liability and redress.

³⁶⁸ *Ibid* at p.10.

³⁶⁹ Bassey - Don't Sign that Biosafety Bill, Mr. President, *supra* note 242 at p.9.

³⁷⁰ The Eco-Instigator, Issue 13, *supra* note 240 at p.12.

From the foregoing, it is argued that the Act is weak in the above-mentioned key areas and therefore may not provide the enabling environment for robust Biotechnology regulation in Nigeria.

A Comparative Analysis of the Precautionary Principle in Operation outside Nigeria

In the preceding section, it was established that the following countries have either placed a partial or full ban on LMOs or some of its products: The USA, France, Germany, Poland, Italy, Luxemburg, Austria, Hungary and Greece.³⁷¹ Here, brief analysis will be undertaken of other Countries/Institutions that have made the Precautionary Principle a cornerstone of their Biotechnology regulations. The idea is to show that if these countries (most of them with improved scientific and technological capacities and infrastructure than Nigeria, to handle the adverse effect of Biotechnology) have adopted the Precautionary Principle in their regulatory frameworks, then Nigeria has no reason not to.

Firstly, Canada is a Biotechnology giant, who even participated in the negotiation of the Biosafety Protocol but is yet to ratify the instrument.³⁷² Canada, has, however, in a move that underlines the relevance of the Precautionary Principle in environmental management, through its Supreme Court, ruled that the Principle is in force in Canada.³⁷³ Spraytech and Chemlawn, lawn care companies, were arraigned by the local government for operating their businesses in breach of the 'Hudson's pesticide law' but both objected to the arraignment and instead asked the high court to strike out the suit on grounds of lack of jurisdiction, since the regulation of pesticide is within the purview of the provincial and federal government. On appeal, the Supreme Court, in what Janet calls 'a landmark decision', reached a unanimous verdict with all 7 justices concurring, that local governments' power to regulate the use of pesticide, to safeguard the health of its citizens

³⁷¹ *Ibid.*

³⁷² Severinsen, *supra* note 16 at p.355.

³⁷³ *Ibid.*

cannot be fettered except where it conflicts with both Federal and Provincial laws. In reaching this decision, the Court relied on the precautionary principle, “a ‘better safe than sorry’ approach that says protective measures can be implemented without full scientific certainty when there are threats of irreversible damage to the environment.”³⁷⁴ Commenting on some of the implications of this verdict, legal experts reason that since this “was the first high-court decision to cite the precautionary principle, Canada’s Supreme Court ruling ...on pesticide use is likely to have broad ramifications. The decision opens the door not only to more pesticide bans, but also to controls on a number of pollutants”.³⁷⁵

In addition, Health Canada, relying on the Precautionary Principle, pronounced bisphenol A. a toxic substance,³⁷⁶ declaring that “the potential harmful effects of bisphenol A during development cannot be dismissed and that the application of precaution is warranted”.³⁷⁷ The posture of Health Canada transcends a bisphenol A debacle as it “fully supports the use of precautionary approaches when considering the effects of chemicals and products on human health and environmental safety.” A study conducted on 5476 Canadians where their urine samples were collected and analysed, revealed that 90.7% had bisphenol A in their systems.³⁷⁸ It is not uncommon for one to get in contact with Bisphenol A as about 3 million tonnes are manufactured annually and is a key ingredient in the manufacture of household items and other necessities.³⁷⁹

On implication for health and the environment, Laura states that

“Animals exposed to low doses of bisphenol A during the perinatal period showed malformations or altered development of the male and female reproductive tracts, the mammary glands and the brain. These animals also displayed abnormal behaviours, had reduced fertility and often became obese or showed symptoms of

³⁷⁴ *Ibid.*

³⁷⁵ *Ibid.*

³⁷⁶ Laura N. Vandenberg, “Exposure to bisphenol A in Canada: invoking the precautionary principle” (2011) 183(11) Canadian Medical Association Journal, p.1265 at p. 1269 online: available at <http://www.cmaj.ca.proxy.bib.uottawa.ca/content/183/11/1265.full.pdf> (last accessed October 8, 2017).

³⁷⁷ *Ibid* at p.1265.

³⁷⁸ *Ibid.*

³⁷⁹ *Ibid.*

metabolic syndrome. Bisphenol A predisposed rodents to cancer of the prostate and breasts and increased the sensitivity of some of the animals to carcinogens. These effects were seen when animals were exposed to concentrations of bisphenol A similar to the levels to which humans are exposed.”³⁸⁰

The EU which had already inculcated the Precautionary Principle into its laws before the actuation of the Biosafety Protocol,³⁸¹ has placed a ban on GMO importation,³⁸² a much wider coverage than just LMOs. The string of cases decided on the basis of this principle validates this assertion. They include *Artegodan Vs Commission*, *Pfizer Animal Health S.A. Vs Council* and *Malagatti – Vezinhet SA Vs Commission*.³⁸³ In fact the EU's “concept of pre-market approvals is built on the assumption that a product is unsafe until proven otherwise”.³⁸⁴ Furthermore, the Precautionary Principle is the fulcrum of the EU's Food Law. Regulation 178/2002 – the General Food Law, 2002, was the first instrument which defined the Precautionary Principle in Europe.³⁸⁵

In Australia, the Precautionary Principle was adopted into the Australian environmental management architecture in 1992 and “is listed as one of four principles ... covering all Australian public environmental policy and management decisions.”³⁸⁶ As a follow up, the Precautionary Principle has been enacted in section 391 of the Environment Protection and Biodiversity Conservation Act, 1999 in Australia.³⁸⁷ Iceland,³⁸⁸ Mexico³⁸⁹ and Ecuador³⁹⁰ have banned all

³⁸⁰ *Ibid.*

³⁸¹ Boyd, *supra* note 206 at p.195.

³⁸² Peacock, *supra* note 120 at p.VIII.

³⁸³ *Ibid.*

³⁸⁴ *Ibid* at p. 194.

³⁸⁵ *Ibid* at p. 173.

³⁸⁶ Warwick Gullett, “The precautionary principle in Australia: policy, law and potential precautionary EIAs” (2000) 11(2) Risk: Health, Safety & Environment, p.93-124 at pp. 99-100 online: available at <http://heinonline.org.proxy.bib.uottawa.ca/HOL/Page?public=false&handle=hein.journals/risk11&page=93&collection=journals> (last accessed October 8, 2017).

³⁸⁷ *Ibid* at p.103.

³⁸⁸ Peacock, *supra* note 120 at p.86.

³⁸⁹ *Ibid* at p.30.

³⁹⁰ Boyd, *supra* note 206.

forms of Biotechnology in their countries. In Japan, the population is skeptical of embracing LMOs, and as at 2008, there were none in the country.³⁹¹ India is equally slow in embracing it.³⁹² Germany is pro-traditional farming and this is reflected in its Genetic Engineering Act.³⁹³ Britain is no exception as it also promotes a pro-traditional farming nation.³⁹⁴ With many of these highly industrial and technology-driven countries wary of the threats posed by LMOs, Nigeria, with its enormous natural and biological resources endowments³⁹⁵ and its marginal technological and human capacity ought to be cautious.

Conclusion

Nigeria is not matching words with action. Section 2(e) of the Act promises to “ensure safety in the use of modern biotechnology and provide a holistic approach to the regulation of genetically modified organism”. By failing to provide for the Precautionary Principle, Nigeria’s approach cannot be termed ‘holistic’. It can also be argued that by this, Nigeria has failed to follow the Protocol, as such, the wording of section 3(b) of the Act which provides that Nigeria shall implement the provisions of the Conventions and Protocols on LMOs is a half-truth. requires consideration

On the basis of the foregoing, it is recommended that Nigeria should place an outright ban on Biotechnology as the country lacks the capacity to manage its adverse effects.

However, in the event, that Nigeria is minded to continue with its experimentation with Biotechnology, then the following amendments to the Act are recommended, to strengthen the regulatory framework for a robust regulation of the industry.

³⁹¹ Peacock, *supra* note 120 at p.95.

³⁹² *Ibid* at p.101.

³⁹³ *Ibid*.

³⁹⁴ *Ibid* at p 88.

³⁹⁵ The World Bank, “Nigeria Overview” online: available at <http://www.worldbank.org/en/country/nigeria/overview> (last accessed June 26, 2018).

1. Nigeria should include the Precautionary Principle in its regulatory framework.³⁹⁶
2. The provision of mandatory public participation when considering requests for the introduction of LMOs into Nigeria.
3. The Agency's discretionary powers to publish a request for application to introduce LMOs into Nigeria should be made mandatory and maximum window of 21 days for comments. If the Agency decides to publish, this window should be extended to at least 90 days to allow for a robust engagement between the public and the regulatory processes.
4. The ability of the Agency to accept gifts, including money, land and properties, within and outside Nigeria should be expunged because it will lead to conflicts of interest.
5. Representatives of Biotechnology groups and their allies should not be made members of the regulatory Governing Board. It is a fundamental rule of natural justice that "one should not be a judge in its own case". This seems to be the case now, more so, when the Board hears appeals arising from the Agency's regulatory decision-making bodies.
6. The Act, as stipulated by the Biosafety Protocol, should provide separate procedures for the handling of LMOs destined for food, feed, planting, pharmaceuticals, and for industrial use.
7. Section 41(2) of the Act should be amended to provide for strict liability as the applicable standard for liability and redress in Biotechnology regulation in Nigeria. This will place the Act on the same pedestal as the 2010 Nagoya-Kuala Lumpur Supplementary Protocol on Liability and Redress to the Cartagena Protocol on Bio-safety.
8. Section 30 of the Act should be amended to give interested persons, groups, NGOs and environmentalists the right of standing to challenge the Agency's decision, where such a decision is not in the interests of Nigeria's environmental well-being.

Perhaps, it is fitting to end with an opinion of one of the promoters of LMOs - Arpad Pusztai, a highly respected scientist and researcher at the Rowett Research Institute in Aberdeen, Scotland,

³⁹⁶ Andre Nollkaemper, *The Precautionary Principle in International Environmental Law: What's new under the Sun?* (1991) *Marine Pollution Bulletin* 22(3) at p. 107-8 online: available at https://journals-scholarsportal-info.proxy.bib.uottawa.ca/pdf/0025326x/v22i0003/107_tppiwlwnuts.xml (last accessed October 08, 2017).

who on August 12, 1998 while on British television, in answer to a viewer's question on whether he would eat the LM potatoes that he was eulogizing, responded rather unexpectedly and to the surprise of a bewildered public. Pusztai said that "he would not be willing to eat potatoes containing genetically altered lectin. He also said that the lack of other studies like his was a concern to him and that marketing GM foods without such studies essentially turned the public into guinea pigs".³⁹⁷

³⁹⁷ Peacock, *supra* note 120 at p.89.

COUNTRY REPORT: NEW ZEALAND

Giving effect to policy statements and plans in resource consent decisions

Trevor Daya-Winterbottom*

Introduction

The Resource Management Act 1991 (RMA) is a framework statute that provides for a hierarchy of policy statements and plans to be prepared by relevant Ministers and local authorities to achieve the statutory purpose of promoting the sustainable management of natural and physical resources (s 5). Section 5 of the RMA is accompanied by a suite of other provisions in pt 2 of the statute that provide examples of how sustainable management may be provided for in relevant circumstances, e.g. the preservation of the natural character of the coastal environment and protecting it from inappropriate subdivision, use, and development (s 6(a)). Part 2 of the RMA is the driving engine of the statute that influences all decision-making either directly regarding the preparation of policy statements and plans, or indirectly regarding the determination of resource consent applications pertaining to the development or use of air, land, or water. The question that plagued the administration and implementation of the RMA until the *King Salmon* and *Davidson* decisions discussed below was the extent to which reference back to pt. 2 of the RMA was necessary where relevant policy statements and plans were in place to guide resource consent decision-making.

The New Zealand courts historically had applied an “overall judgment” approach to interpreting pt. 2 of the RMA that left decision-makers with considerable discretion as to the relative weight

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that should be placed on relevant considerations when deciding resource consent applications, including the weight that should be given to the provisions in policy statements and plans.³⁹⁸ Put simply, the central question was whether policy statements and plans should (in the context of a framework statute) provide direction in terms of a constraint on discretion as to how resource consent applications should be considered, or should merely be regarded as relevant considerations that could be ascribed whatever weight the decision-maker considers appropriate.

Effectively, the overall judgement approach allowed applicants for resource consent to subvert the provisions in these documents by referring back to pt. 2 and arguing that proposed activities would nevertheless achieve sustainable management, notwithstanding any non-compliance. This approach was contested in *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* (Elias CJ, McGrath, William Young, Glazebrook and Arnold JJ).³⁹⁹ This was in the context of an appeal against a change to amend the operative regional coastal plan to enable additional marine farms to be located in an area of significant landscape value in the Marlborough Sounds where the provisions of the relevant national policy statement and the operative regional coastal plan sought to avoid any adverse effects from activities (including marine farms) on this sensitive environment. The New Zealand Supreme Court rejected the “overall judgment” approach and held that the policy statement and plan provisions were intended to implement sustainable management and should be applied without reference back to pt. 2 of the RMA unless there was some defect in the planning hierarchy (arising from invalidity, incomplete coverage, or uncertainty) that rendered this necessary.

The question then arose as to whether the Supreme Court decision in *King Salmon* should be applied in other decision-making contexts under the RMA. This was considered in 2017 by the New Zealand High Court in *RJ Davidson Family Trust v Marlborough District Council* (Cull J),⁴⁰⁰ the first decision from the superior courts to apply the *King Salmon* approach in a resource

³⁹⁸ *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 (NZEnvC); *Watercare Services Ltd v Minihinnick* [1998] NZRMA 113 (NZCA).

³⁹⁹ *Environmental Defence Society Inc v The New Zealand King Salmon Company Ltd* [2014] NZSC 38.

⁴⁰⁰ *RJ Davidson Family Trust v Marlborough District Council* [2017] NZHC 52.

consent application context. The decision in *Davidson* was the subject of further appeal to the New Zealand Court of Appeal in 2018. This report will set out the background context of the High Court decision, explore the recent Court of Appeal judgment in *RJ Davidson Family Trust v Marlborough District Council* (Cooper, Asher and Brown JJ),⁴⁰¹ and provide some conclusions regarding the implications of the Court of Appeal judgment.

Davidson concerned a resource consent application for a proposed marine farm in the Marlborough Sounds and the potential adverse effect of that activity on the habitat of the nationally endangered New Zealand King Shag (*Leucocarbo carunculatus*) that is endemic to the Marlborough Sounds. Coincidentally, the relevant policy statements and plans (the New Zealand Coastal Policy Statement (NZCPS) and the Sounds Plan) were the same planning documents that also applied in *King Salmon*.

Does *King Salmon* apply to a resource consent application?

To answer this question the High Court in *Davidson* noted that the Supreme Court decision in *King Salmon* emphasized that:⁴⁰²

The RMA envisages the formulation and promulgation of a cascade of planning documents, each intended, ultimately, to give effect to s5, and to pt2 more generally. These documents form an integral part of the legislative framework of the RMA and give substance to its purpose by identifying objectives, policies, methods and rules with increasing particularity both as to substantive content and locality.

⁴⁰¹ *RJ Davidson Family Trust v Marlborough District Council* [2018] NZCA 316.

⁴⁰² [2017] NZHC 52 at [71] citing [2014] NZSC 38 at [30].

It also noted that the Supreme Court decision in *King Salmon* “addressed the way in which a decision-maker” must take into account the planning documents” and stated:⁴⁰³

Section 5 is not intended to be an operative provision, in the sense that it is not a section under which particular planning decisions are made, rather, it sets out the RMA’s overall objective. Reflecting the open textured nature of pt2, Parliament has provided for a hierarchy of documents the purpose of which is to flesh out the principles in s5 and the remainder of pt2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt2 remains relevant. It does not follow from the statutory scheme that because pt2 is open textured, all or some of the planning documents that sit under it must be interpreted as being open textured.

By arriving at this conclusion, the Supreme Court rejected an “overall judgment” approach in the context of a plan change appeal. Based on this reasoning, the High Court in *Davidson* applied the *King Salmon* doctrine in the context of the resource consent application before it and found that ... *King Salmon* does apply to s104(1) because the relevant provisions of the planning documents ... have already given substance to the principles in pt2. Where, however, as the Supreme Court held, there has been invalidity, incomplete coverage or uncertainty of meaning within the planning documents, resort to pt2 should then occur.

The High Court decision in *Davidson* was controversial because its constrained discretion in relation to resource consent application decisions. As result, some practitioners considered that “over 20 years of case law” should not be displaced lightly and suggested that legal method (in terms of the classic approach to statutory interpretation and legal reasoning) should be applied by examining the legislative background to pt. 2 of the RMA.⁴⁰⁴ While this view had much force it is relevant to note, that despite its importance as the first critical decision regarding the meaning of s 5 of the RMA, the Environment Court decision in *North Shore City Council v Auckland*

⁴⁰³ [2014] NZSC 38 at [151].

⁴⁰⁴ Martin Williams, “Part 2 of the RMA – “engine room” or backseat driver?” April RMJ 2017 25 at 26.

Regional Council did not contain any analysis of the relevant Parliamentary materials.⁴⁰⁵ The same position applies in relation to the subsequent Court of Appeal decision in *Watercare Services Ltd v Minhinick* that adopted a substantially similar approach to *North Shore*, but again without any reference to the relevant Parliamentary materials.⁴⁰⁶

It was therefore unclear as to whether the previous case law was rightly decided. Namely, whether part 2 of the RMA *ought* to be given effect to in a directive way that implements sustainable management via policy statement and plan provisions “with increasing particularity both as to substantive content and locality” in a resource consent application context.⁴⁰⁷ The Court of Appeal decision in *Davidson* answered this question.

***Davidson* in the Court of Appeal**

The Court of Appeal judgment in *Davidson*⁴⁰⁸ is the first decision to grapple with the Parliamentary history of s.104 of the RMA in terms of the relative importance of the cross-reference to pt. 2. The Court agreed with the submissions of counsel (for the RJ Davidson Family Trust) which “demonstrated” that amendments made to s.104 in 1993 were “plainly designed to preserve the preeminent role of pt. 2” in resource consent decision-making. As originally enacted on 1 July 1991, s 104(4) of the RMA included a list planning instruments, statutory provisions, and regulations that decision-makers were required to have regard to when deciding resource consent applications. The cross-reference to pt. 2 of the RMA appeared in this list as the penultimate matter that decision-makers should have regard to at paragraph (g). This version of s 104 of the RMA remained in force during the period from 1 October 1991 to 6 July 1993 when it was replaced by s 54 of the Resource Management Amendment Act 1993 to include the current formula now found in s 104(1) that provides:

⁴⁰⁵ *North Shore City Council v Auckland Regional Council* [1997] NZRMA 59 at 94.

⁴⁰⁶ *Watercare Services Ltd v Minhinick* [1998] NZRMA 113 at 124-125.

⁴⁰⁷ [2014] NZSC 38 at [30].

⁴⁰⁸ [2018] NZCA 316 at [27] to [38] and [47].

When considering an application for resource consent and any submissions received, the consent authority must, subject to Part 2, have regard to ...

This finding about the role of pt. 2 settled the point “about the consent authority’s ability to refer to pt. 2 in an appropriate case”.⁴⁰⁹ The Court of Appeal in *Davidson* then went on to consider the more fundamental question regarding the circumstances when it may be appropriate to refer to pt. 2 when deciding resource consent applications. The Court noted the direct relationship between pt. 2 of the RMA and statutory planning documents prepared under pt. 4 of the RMA. For example, the Supreme Court in *King Salmon* had observed that the statutory hierarchy in the RMA was intended to:⁴¹⁰

... flesh out the principles in s 5 and the remainder of pt. 2 in a manner that is increasingly detailed both as to content and location. It is these documents that provide the basis for decision-making, even though pt. 2 remains relevant.

This led the Court of Appeal in *Davidson* to state that:⁴¹¹

In the case of applications for resource consent however, it cannot be assumed that particular proposals will reflect the outcomes envisaged by pt. 2. Such applications are not the consequence of planning processes envisaged by pt. 4 of the Act for the making of planning documents. Further, the planning documents may not furnish a clear answer as to whether consent should be granted or declined. And while s 104, the key machinery provision for dealing with applications for resource consent, requires they be considered having regard to the relevant planning documents, it plainly contemplates reference to pt. 2.

⁴⁰⁹ [2018] NZCA 316 at [47].

⁴¹⁰ [2014] NZSC 38 at [151].

⁴¹¹ [2018] NZCA 316 at [51].

The Court of Appeal then turned to analyze what had actually been decided in *King Salmon* before considering whether the ability to refer to pt. 2 of the RMA when deciding resource consent applications should be “subject to any limitations of the kind contemplated by *King Salmon* in the case of changes to a regional plan”.⁴¹² The Court found that:

- both cases concerned the same regional plan (the Sounds Plan),
- *King Salmon* assumed that the NZCPS “conformed” with relevant RMA requirements because this point had not been challenged by collateral attack,
- *King Salmon* pertained to a plan change to enable a new marine farm to be consented,
- the plan change at issue in *King Salmon* was required by s 67(3) of the RMA to “give effect” to or “implement” the NZCPS,
- the plan change would not have given effect to the NZCPS because it proposed to enable marine farming in an area of outstanding landscape value where any significant adverse effects arising from activities were required to be avoided, and that
- an “overall judgment” approach was not appropriate in the *King Salmon* context because the relevant NZCPS policies were clear, prescriptive, and specific as to the outcome.⁴¹³

These factors led the Court to conclude:⁴¹⁴

We see these various passages in the [*King Salmon*] judgment as part of the Court’s rejection of the “overall judgment” approach in the context of plan provisions implementing the NZCPS. Given the particular factual and statutory context addressed by the Supreme Court, we do not consider it can properly be said the Court intended to prohibit consideration of pt. 2 by a consent authority in the context of resource consent applications ...

⁴¹² [2018] NZCA 316 at [53].

⁴¹³ [2018] NZCA 316 at [54] to [65].

⁴¹⁴ [2018] NZCA 316 at [66].

The Court of Appeal gave the following reasons for this conclusion:

The Supreme Court in *King Salmon* did not refer to s 104, or expressly the “frequency” of references to pt. 2 of the RMA in resource consent decisions, or expressly consider the general application of the “overall judgment” approach in resource consent decision-making. In particular, the Court of Appeal noted that:⁴¹⁵

If the Supreme Court’s intention had been to reject that approach it would be very surprising that it did not say so. We think the point is obvious from the preceding discussion but note in any event that in its discussion of whether the Board had been correct to utilize the “overall judgment” approach the Court’s reasoning was expressly tied to the “plan change context under consideration”. It was in that context that the Court said the “overall judgment” approach would not recognize environmental bottom lines.

More specifically, the Court of Appeal was not convinced that the concern expressed by the Supreme Court in *King Salmon* regarding the “uncertainty” inherent in the “overall judgment” approach was intended to apply generally to all kinds of decision-making under the RMA.⁴¹⁶

The Court of Appeal found that the “language” used in s 104(1) of the RMA “contemplates direct consideration of pt. 2 matters”, and that the “overall judgment” approach will remain relevant in some cases because there will not be:⁴¹⁷

... the same level of assurance outside the NZCPS setting that plans made by local authorities will inevitably reflect the provisions of pt. 2 of the Act. That is of course the outcome desired and anticipated, but it will not necessarily be achieved.

⁴¹⁵ [2018] NZCA 316 at [67] citing [2014] NZSC 38 at [108].

⁴¹⁶ [2018] NZCA 316 at [68].

⁴¹⁷ [2018] NZCA 316 at [70].

The Court of Appeal then went on to illustrate these conclusions by two examples relating to activities in the coastal marine area. First, where “the NZCPS is engaged” it found that *King Salmon* should be applied given the strong policy direction found in the NZCPS. In particular, the Court found that reference to pt. 2 would be unlikely to provide different guidance, because the relevant pt. 2 provisions should already be reflected in the NZCPS and the regional coastal plan. But the Court went on to note that:⁴¹⁸

... resort to pt. 2 for the purpose of subverting a clearly relevant restriction in the NZCPS adverse to the applicant would be contrary to *King Salmon* and expose the consent authority to being overturned on appeal.

In contrast, the Court gave another hypothetical example of a case where a proposed activity did not breach any of the prescriptive policies in the NZCPS and is “affected by different policies so that it was unclear from the NZCPS itself as to whether consent should be granted or refused” and where “the consent authority would be in the position where it had to exercise judgment”.⁴¹⁹ In this type of case, the policy statements and plans referenced in s 104(1)(b) of the RMA will be relevant considerations and provide a starting point for deliberation but reference back to pt. 2 of the RMA should be allowed, “for such assistance as it might provide”.⁴²⁰ The Court stated:⁴²¹

As we see it, *King Salmon* would not prevent that because first, in this example, there is notionally no clear breach of a prescriptive policy in the NZCPS, and second the application under consideration is for a resource consent, not a plan change.

The Court of Appeal considered that a similar approach should be adopted when deciding resource consent applications generally. The starting point should be the relevant policy statement and plan provisions under s 104(1)(b) of the RMA.⁴²² The Court cited with approval the approach of Tipping J in *Dye v Auckland Regional Council* regarding the interpretation and

⁴¹⁸ [2018] NZCA 316 at [71].

⁴¹⁹ [2018] NZCA 316 at [72].

⁴²⁰ [2018] NZCA 316 at [72].

⁴²¹ [2018] NZCA 316 at [72].

⁴²² [2018] NZCA 316 at [73].

application of such provisions, namely, that “a fair appraisal of the objectives and policies read as a whole” is required.⁴²³ This led the Court of Appeal in *Davidson* to define the situations where it may be appropriate to refer back to pt. 2 of the RMA, namely:

Reference to pt. 2 should be unnecessary where:⁴²⁴

... it is clear that a plan has been prepared having regard to pt. 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt. 2 in such a case would likely not add anything. It could not justify an outcome contrary to the thrust of the policies.

Reference to pt. 2 should be necessary where:⁴²⁵

... it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt. 2, that will be a case where the consent authority will be required to give emphasis to pt. 2.

The Court of Appeal preferred to express the position in this way “rather than adopting the expression “invalidity, incomplete coverage or uncertainty” (that was employed by the Supreme Court in *King Salmon*) when defining circumstances in which resort to pt. 2 could either be “necessary” or “helpful” when interpreting policy statement and plan provisions.⁴²⁶ This led the Court to hold that:⁴²⁷

If a plan ... has been competently prepared under the Act it may be that in many cases the consent authority will feel assured in taking the view that there is no need to refer to pt. 2 because doing so would not add anything to the evaluative exercise. Absent such assurance, or if in doubt, it will be appropriate and necessary to do so. That is the

⁴²³ *Dye v Auckland Regional Council* [2002] 1 NZLR 337 at [25].

⁴²⁴ [2018] NZCA 316 at [74].

⁴²⁵ [2018] NZCA 316 at [74].

⁴²⁶ [2018] NZCA 316 at [76] citing [2014] NZSC 38 at [90].

⁴²⁷ [2018] NZCA 316 at [75].

implication of the words “subject to Part 2” in s 104(1), the statement of the Act’s purpose in s 5, and the mandatory, albeit general, language of ss 6, 7 and 8.

The Court of Appeal therefore found that the High Court decision on appeal in *Davidson* was based on the incorrect assumption that consent authorities will be precluded from referring back to pt. 2 of the RMA when deciding resource consent applications “unless the plan is deficient in some respect” (i.e. because one of the three *King Salmon* exceptions applies). This was an error of law.⁴²⁸ Additionally, the Court considered that the High Court decision in *Davidson* was:⁴²⁹

... contrary to what was said by the Privy Council in *McGuire* describing ss 6, 7 and 8 [in pt. 2 of the RMA] as “strong directions, to be borne in mind at every stage of the planning process”.

Beyond that, the Court of Appeal found that the original Environment Court decision in *Davidson* was “clearly justified” based on the Sounds Plan and that the resource consent application could have been rejected solely on its merits due to “the risk of extinction of King Shags”.⁴³⁰ There was therefore no error in terms of the merits assessment, the error of law was “not significant”, and there was therefore no need to remit the case back to the Environment Court for reconsideration.⁴³¹

Conclusions

It is now reasonably settled from the *King Salmon* and *Davidson* decisions that reference back to pt. 2 of the RMA is not required in the context of preparing policy statements and plans under pt.

⁴²⁸ [2018] NZCA 316 at [77] and [83](a).

⁴²⁹ [2018] NZCA 316 at [77] citing *McGuire v Hastings District Council* [2000] UKPC 43, [2002] 2 NZLR 577 at [21].

⁴³⁰ *RJ Davidson Family Trust v Marlborough District Council* [2016] NZEnvC 81 at [287].

⁴³¹ [2018] NZCA 316 at [80], [78], and [83](b).

4 of RMA, unless the planning hierarchy is “deficient in some respect” as a result of “invalidity, incomplete coverage or uncertainty”.⁴³² This conclusion flows from the requirement in pt. 4 that policy statements and plans should in turn both implement sustainable management and give effect to higher order documents in the statutory planning hierarchy. Put simply, policy statements and plans are intended to “flesh out the principles in s 5 and the remainder of pt. 2 in a manner that is increasingly detailed both as to content and location” and “provide the basis for decision-making”.⁴³³

The law regarding resource consent application decisions is bifurcated. Following *Davidson*, it will be unnecessary to refer back to pt. 2 of the RMA where:⁴³⁴

... it is clear that a plan has been prepared having regard to pt. 2 and with a coherent set of policies designed to achieve clear environmental outcomes, the result of a genuine process that has regard to those policies in accordance with s 104(1) should be to implement those policies in evaluating a resource consent application. Reference to pt. 2 in such a case would likely not add anything.

It may however be necessary to refer back to pt. 2 of the RMA where:⁴³⁵

... it appears the plan has not been prepared in a manner that appropriately reflects the provisions of pt. 2, that will be a case where the consent authority will be required to give emphasis to pt. 2.

The test will therefore be whether “the planning documents ... furnish a clear answer as to whether consent should be granted or declined”.⁴³⁶ Following *Davidson* it will now only be appropriate to refer back to pt. 2 and apply an “overall judgment” approach where that would be “helpful” and some “exercise of judgment” is required because the hierarchy of planning documents does not

⁴³² [2018] NZCA 316 at [76] and [77].

⁴³³ [2018] NZCA 316 at [49] citing [2014] NZSC 38 at [151].

⁴³⁴ [2018] NZCA 316 at [74].

⁴³⁵ [2018] NZCA 316 at [74].

⁴³⁶ [2018] NZCA 316 at [51].

provide a “clear answer”.⁴³⁷ Increasingly, reference back to pt. 2 should be unnecessary where new and up to date policy statements and plans have been “competently prepared under the Act”.⁴³⁸

Generally, the “overall judgment” approach will now play a more limited role in deciding resource consent applications and the untrammelled freedom expressed in *North Shore* (and that prevailed as law during the period 1997-2014) is unlikely to be relevant. The Court of Appeal decision in *Davidson* applied legal method when analysing the meaning and intent of the cross-reference to pt. 2 in s 104 of the RMA, but as noted above it is now unlikely that there will be a return to the “overall judgment” approach articulated in *North Shore* and *Minhinnick*. Following *Davidson* there is now a more constrained and stepped approach to resource consent decisions, and the circumstances when reference back to pt. 2 of the RMA may be helpful and appropriate.

⁴³⁷ [2018] NZCA 316 at [72].

⁴³⁸ [2018] NZCA 316 at [75].

COUNTRY REPORT: AUSTRIA

Busy Times for Courts and the Legislator

Birgit Hollaus*

Austria is bound by the *Aarhus Convention*,⁴³⁹ as a party since 2005 and as a member state of the European Union (EU).⁴⁴⁰ However, the rights for public and environmental organizations enshrined in the Convention have only been implemented to a limited extent in Austria. Induced by a judgment of the Court of Justice of the European Union (CJEU) picking up on this situation, the year 2018 has been marked by several developments in statute law and case law attempting to (better) implement the *Aarhus Convention* in Austria. At the same time though, attempts of the legislator to promote economic interests at the expense of environmental protection have continued.

Developments in Statute Law

Including the public in one area, while limiting it in another

The year 2018 has seen two main legislative initiatives which have changed the situation for the public, including environmental organizations, in the context of permitting procedures in several areas relating to the environment. The effects of those two changes are, however, quite different.

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⁴³⁹ UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25 June 1998, Aarhus; available at <http://www.unece.org/env/pp/treatytext.html>.

⁴⁴⁰ The European Union (EU) ratified the Aarhus Convention in 1998. According to EU law, an international agreement such as the Aarhus Convention, binds the EU institutions and the Member States (Art 216(2) *Treaty on the Functioning of the European Union*).

The 2018 Amendment to the Austrian EIA Act

The Austrian *EIA Act*,⁴⁴¹ a federal law largely pre-determined by EU law,⁴⁴² applies to the permitting of specific large-scale projects listed in its Annexes. The Act requires the EIA authority to apply all national laws that are relevant to the implementation of the project at stake in the permitting procedure;⁴⁴³ this includes both material and procedural provisions. In addition, the *EIA Act* includes specific procedural rules, including additional provisions on standing and party rights.⁴⁴⁴ The recent *2018 Amendment to the Austrian EIA Act*⁴⁴⁵ saw two main changes to these rules.

The first of these changes relates to environmental organizations and introduces a further requirement to the relevant rules on standing. An environmental organization now must not only (i) have environmental protection as its primary objective according to its statutes, (ii) be non-profit according to Austrian tax law and (iii) exist for at least three years but must also (iv) have at least one hundred members.⁴⁴⁶ The introduction of this additional fourth criterion for environmental organizations has sparked heated debate amongst stakeholders. For example, stakeholders doubt that this “minimum member criterion”, which in fact only a few Austrian environmental organizations can meet, is in line with EU law requirements and the *Aarhus Convention*.⁴⁴⁷ Furthermore, stakeholders have claimed that this controversial criterion was – arguably deliberately – not included in the original draft law published on the parliament’s website

⁴⁴¹ *Environmental Impact Assessment Act 2000 – EIA Act (UVP-G)*, Austrian Federal Law Gazette 697/1993, as amended by Austrian Federal Law Gazette I 80/2018.

⁴⁴² As a MS of the EU, Austria is required to implement the EU *EIA Directive*, Directive 2011/92/EU of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L26/1. Austria implemented this directive in its *EIA Act*.

⁴⁴³ § 3(3) *EIA Act* ‘consolidated development consent procedure’.

⁴⁴⁴ § 19 *EIA Act*.

⁴⁴⁵ Austrian Federal Law Gazette I 80/2018.

⁴⁴⁶ § 19(6) *EIA Act*.

⁴⁴⁷ Gregor Schamschula, ‘Neue Änderungen im UVP-G: Umweltorganisationen müssen draußen bleiben’ (*umweltrechtsblog.at*, 6 October 2018)

<<https://www.umweltrechtsblog.at/blog/blogdetail.html?newsID=%7B28FE58F4-C972-11E8-8746-309C23AC5997%7D>> accessed 14 January 2019. See also Ökobüro, ‘ÖKOBÜRO: Gutachten belegen: Beschränkung der UVP-Teilnahme von Umweltschutzorganisationen ist europa- und völkerrechtswidrig’, <<http://www.oekobuero.at/oekobuero-gutachten-belegen-beschraenkung-der-uvp-teilnahme-von-umweltschutzorganisationen-ist-europa-und-voelkerrechtswidrig>> 2 January 2019.

but was only introduced by a motion in the Parliamentary Environmental Committee, so that it was not subject to public scrutiny.⁴⁴⁸

In line with the majority government's working programme,⁴⁴⁹ the second change to EIA standing rules introduces the so-called "Business Hub Ombudsman" (*Standortanwalt*) as a new party to EIA proceedings.⁴⁵⁰ While the exact details of its mandate and the question of who is going to act as "Business Hub Ombudsman" are left open,⁴⁵¹ the EIA amendment clarifies the purpose and rights of this new party: The "Business Hub Ombudsman" can invoke those legal provisions prescribing public interests in favour of the project at stake in permitting procedures and before the administrative courts.⁴⁵² Observers have quite correctly pointed out that the "Business Hub Ombudsman" does not actually fit the concept of parties in Austrian administrative law. In principle, parties can only participate and challenge an EIA permit insofar as their subjective rights are violated in order to defend their rights in view of a project. The "Business Hub Ombudsman", however, shall advocate *for* a project and its permitting.

The Federal Aarhus Participation Act

In late 2017, the CJEU confirmed that the provisions of the *Austrian Water Act*⁴⁵³ on public participation and access to justice were not in line with the requirements of the *Aarhus*

⁴⁴⁸ Ökobüro, 'Amendment of the Environmental Impact Assessment Act (UVP-G) curtails participation rights of Environmental Organisations', <<http://www.oekobuero.at/4-english-summary-okt18>> accessed 14 January 2019.

⁴⁴⁹ ÖVP/FPÖ, 'Zusammen. Für unser Österreich. Regierungsprogramm 2017–2022' (2017) at 134, available at <https://www.bundestkanzleramt.gv.at/documents/131008/569203/Regierungsprogramm_2017%E2%80%932022.pdf/b2fe3f65-5a04-47b6-913d-2fe512ff4ce6> accessed 14 January 2019.

⁴⁵⁰ See also Country Report for Austria 2017, IUCN AEL E-Journal, Issue 9.

⁴⁵¹ It is understood that the federal state branches of the Austrian Economic Chambers, an association which represents Austrian businesses through mandatory membership, shall act as "Business Hub Ombudsman". A proposal for an amendment to the respective organisational law has recently been introduced, yet doubts have been raised as to its lawfulness, see Julia Fitz, 'StandortanwältInnen: Des Rätsels Lösung' (*umweltrechtsblog.at*, 13 December 2018) <<https://www.umweltrechtsblog.at/blog/blogdetail.html?newsID=%7B5634C255-FEDE-11E8-84E0-309C23AC5997%7D>> accessed 14 January 2019.

⁴⁵² § 19(12) *EIA Act*.

⁴⁵³ *Wasserrechtsgesetz (WRG)*, Austrian Federal Law Gazette 215/1959, as amended by Austrian Federal Law Gazette I 79/2018.

Convention.⁴⁵⁴ This judgment prompted the Austrian federal legislator to change the legal situation in the *Austrian Water Act* and several sectoral laws at the federal level by adopting the *Aarhus Participation Act*.⁴⁵⁵

Despite being termed ‘Act’, the amendment does not introduce a new law but introduces new, individual provisions on public participation and access to justice to the existing sectoral laws, the *Water Act*, the *Federal Waste Management Act*,⁴⁵⁶ and the *Air Pollution Control Act*.⁴⁵⁷ These new provisions are not identical and therefore the amendment creates a slightly different situation for the public under each sectoral law; an observation made and criticized by both legal practitioners and scholars.⁴⁵⁸

While the federal legislator has used the *Aarhus Participation Act* to showcase its commitment to public participation and environmental protection in general,⁴⁵⁹ environmental organizations have criticized the amendment for two reasons.⁴⁶⁰ First, the amendment would address only three sectoral environmental laws, namely those, in relation to which the European Commission has already launched an infringement procedure under EU law.⁴⁶¹ Many others, mostly those falling within the legislative competence of the federal states, would remain untouched. As a party to the *Aarhus Convention*, Austria is required to implement the Convention also in areas which are not influenced by EU law. The *Aarhus Participation Act* would thus not bring Austrian law in line with

⁴⁵⁴ Judgment of 20 December 2017, *Protect*, C-664/15, ECLI:EU:C:2017:987. For details on this case see Country Report for Austria 2017, IUCN AEL E-Journal, Issue 9.

⁴⁵⁵ *Aarhus-Beteiligungsgesetz 2018*, Austrian Federal Law Gazette I 73/2018.

⁴⁵⁶ *Abfallwirtschaftsgesetz (AWG)*, Austrian Federal Law Gazette I 102/2002, as amended by Austrian Federal Law Gazette I 73/2018.

⁴⁵⁷ *Immissionsschutzgesetz – Luft (IG-L)*, Austrian Federal Law Gazette I 115/1997, as amended by Austrian Federal Law Gazette I 73/2018.

⁴⁵⁸ See the statements submitted during the pre-parliamentary procedure available at <https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00061/index.shtml#tab-Stellungnahmen> accessed 14 January 2019.

⁴⁵⁹ Nora Laufer, ‘Rätsel um Verfasser der Umweltnovelle’ *DiePresse* (Vienna, 16 October 2018) 15.

⁴⁶⁰ Katharina Scharfetter, Priska Lueger and Gregor Schamschula, ‘Access to Justice in Austria: One step forward, two steps back’ (Access to Justice for a Greener Europe, 3 December 2018) <<https://www.clientearth.org/access-to-justice-in-austria-one-step-forward-two-steps-back/>> accessed 14 January 2019.

⁴⁶¹ Infringement case n° 20144111 relating to the *Water Act*, the *Federal Waste Management Act*, and the *Air Pollution Control Act*.

all the *Aarhus Convention*'s requirements.⁴⁶² Second, the sectoral laws would now grant environmental organizations certain rights, yet these laws refer to the definition of 'environmental organization' in the *EIA Act*. Since in the latter Act, the definition has become more stringent,⁴⁶³ few civil society organizations will be able to benefit from those newly granted rights in the *Water Act*, the *Federal Waste Management Act*, and the *Air Pollution Control Act*. As both EU law and the *Aarhus Convention* require broad public participation and access to justice, especially for environmental organizations, it is doubtful whether the *Aarhus Participation Act* is in line with those basic requirements.

Committing to Economic Development in Law

In the aftermath of Austria's first climate change lawsuit, which denied a permit for an airport runway extension,⁴⁶⁴ the federal legislator discussed two legislative proposals in 2018 which both aimed at strengthening economic development in Austria. Neither of the two legislative proposals has been passed (yet) due to different problems sketched below.

Special Treatment for Infrastructure Projects in the Public Interest

In July 2018, the coalition government presented a first legislative proposal which was designed to speed-up EIA permitting procedures for certain infrastructure projects.⁴⁶⁵ The proposal for a so-called *Business Hub Development Act*⁴⁶⁶ foresaw essentially that an expert committee selects, upon application by developers, projects which are deemed to be in the public interest. Based on this selection, the Minister for Digital and Economic Affairs together with the Minister for Transport, Innovation and Technology would then make the final decision and publish the selected projects

⁴⁶² Ökobüro, 'First steps towards an implementation of the Aarhus Convention's Guarantees on „Access to Justice“ in Austria', <<http://www.oekobuero.at/4-english-summary-okt18>> accessed 14 January 2019.

⁴⁶³ See above.

⁴⁶⁴ For details see Country Report for Austria 2017, IUCN AEL E-Journal, Issue 9. For an update on the case see below in this report.

⁴⁶⁵ The EIA permitting procedure applies to specific large-scale projects listed in the Annexes of the *EIA Act*.

⁴⁶⁶ *Standortentwicklungsgesetz (StEntG)*.

in an ordinance. The main benefit for these projects would be a subsequent speeding-up of the permitting procedure: the competent authority would be required to decide within one year of the ordinance being published whether the project can be permitted. If the authority failed to do so, the project would be deemed permitted ("automatic permitting").

The legislative proposal was heavily criticized throughout the pre-parliamentary procedures by legal scholars and practitioners as well as ministry, federal state and administrative court representatives.⁴⁶⁷ Unsurprisingly, the main point of criticism was related to the automatic permitting. Observers bluntly stated that this aspect was contrary to EU law which requires assessment of each individual project.⁴⁶⁸ Even the very few exceptions to this rule, for example for permits granted by a legislative Act, would require that the environmental impacts of the respective project are assessed at some stage. A group of environmental organizations even submitted a complaint to the European Commission informing it of the legislative plans in Austria.⁴⁶⁹

Consequently, the legislative proposal was redrafted.⁴⁷⁰ Instead of the automatic permitting described above, the project applicant can now ask the administrative court of first instance to decide on its application if the permitting authority has failed to do so within 12 months of the permitting application having been submitted.⁴⁷¹ Stakeholders have questioned whether this right

⁴⁶⁷ See the statements submitted during the pre-parliamentary procedure available at https://www.parlament.gv.at/PAKT/VHG/XXVI/ME/ME_00067/index.shtml#tab-Stellungnahmen accessed 14 January 2019.

⁴⁶⁸ Eva Schulev-Steindl and Ferdinand Kerschner, 'Standpauke für die "Standortentwicklung"' [2018] RdU 177.

⁴⁶⁹ Letter of 17 August 2018, available at http://www.oekobuero.at/images/doku/open_letter_and_complaint_austria_stentg.pdf accessed 14 January 2019.

⁴⁷⁰ Parliamentary procedure 372 d.B., documentation available at https://www.parlament.gv.at/PAKT/VHG/XXVI/II/II_00372/index.shtml#tab-Uebersicht accessed 14 January 2019. For a short summary see Dieter Altenburger, ' (*umweltrechtsblog.at*, 22 November 2018) < <https://www.umweltrechtsblog.at/blog/blogdetail.html?newsID=%7BB7C01D6C-EE9A-11E8-B191-309C23AC5997%7D> > accessed 14 January 2019.

⁴⁷¹ § 11(4)-6) and § 12 of the proposal for a *Business Hub Development Act*.

granted to the project applicant will actually expedite the permitting procedure. Such a right already exists if the permitting authority is at fault, yet it is hardly ever invoked.⁴⁷²

The Austrian State Objective of Economic Growth

Austrian constitutional law recognizes several state objectives, for example the state objective acknowledging that the Republic of Austria is committed to comprehensive environmental protection.⁴⁷³ Such state objectives primarily guide the legislator when passing legislation. Yet, they also serve as a reference for public authorities and the courts when they interpret the law. This is particularly important where the law uses broad terms and requires the deciding body to perform a balancing exercise.⁴⁷⁴

Already in 2017, a legislative initiative proposed the introduction of a state objective 'acknowledging the importance of economic growth, employment and representing a competitive business hub'.⁴⁷⁵ The initiative was discussed again in parliament in 2019. After having been reworded⁴⁷⁶ and having passed the constitutional affairs committee with the votes of the governing parties, the proposed state objective failed to secure the necessary two-thirds majority in the parliamentary vote.

⁴⁷² Ferdinand Kerschner, "'Auf unzweifelhafte Weise" sehr zweifelhaft' (*umweltrechtsblog.at*, 3 December 2018) <<https://www.umweltrechtsblog.at/blog/blogdetail.html?newsID=%7BCB7959BD-F6FC-11E8-84E0-309C23AC5997%7D>> accessed 14 January 2019.

⁴⁷³ § 3 of the *Austrian Federal Constitutional Act on Sustainability (BVG Nachhaltigkeit)*, Austrian Federal Law Gazette I 11/2013.

⁴⁷⁴ For details see Country Report for Austria 2017, IUCN AEL E-Journal, Issue 9. For an update of this case law, see below.

⁴⁷⁵ Legislative initiative 2172/A of 17 May 2017, available at <https://www.parlament.gv.at/PAKT/VHG/XXV/A/A_02172/index.shtml> accessed 14 January 2019.

⁴⁷⁶ In the committee, the text of the envisaged state objective was amended. The new proposal which secured the votes of the committee read 'The Republic of Austria (federation, Länder and municipalities) avows itself to a sustainable and competitive business location as a precondition for prosperity and employment.'

Developments in Case Law

Catching-Up with Austria's First Climate Change Lawsuit: Part III

In 2017, an Austrian administrative court of first instance denied the EIA permit for an airport runway extension due to an overriding public interest in climate protection.⁴⁷⁷ This court decision, was condemned by some stakeholders and was subsequently annulled by the Austrian Constitutional Court.⁴⁷⁸ According to the Constitutional Court, the court of first instance had been in the wrong to consider 'climate protection' as being a public interest relevant to its balancing exercise.⁴⁷⁹

Bound by this judgment of the Austrian Constitutional Court, the court of first instance had to decide anew on the EIA permit for the airport runway extension. In March 2018, the court granted the EIA permit;⁴⁸⁰ in its balancing exercise it no longer referred to climate change or climate protection. Several individuals and citizens' initiatives, all parties to the proceedings, filed a subsequent complaint against this permit decision with both the Austrian Constitutional Court and the Administrative Court putting forward different arguments.

The Austrian Constitutional Court rejected the complaint filed with it.⁴⁸¹ According to the Constitutional Court, the claim that due to the intense political debate there had been no 'fair trial' in the sense of Art 6 of the *European Convention on Human Rights*⁴⁸² was not sufficiently substantiated. In addition, the claim questioning the constitutionality of the regulation on air traffic noise levels would not raise an issue of constitutional law. The Austrian Administrative Court has yet to assess the complaint. It remains to be seen whether, and if so, how, the Administrative Court deals with the complaint.

⁴⁷⁷ BVwG, Judgment of 2 February 2017, W109 2000179-1/291E.

⁴⁷⁸ VfGH, Judgment of 29 June 2017, E 875/2017, E 886/2017.

⁴⁷⁹ For details see Country Report for Austria 2017, IUCN AEL E-Journal, Issue 9.

⁴⁸⁰ BVwG, Judgment of 23 March 2018, W109 2000179-1.

⁴⁸¹ VfGH, Decision of 4 October 2018, E 1818/2018.

⁴⁸² Council of Europe, *Convention for the Protection of Human Rights and Fundamental Freedoms* (*European Convention on Human Rights*, as amended by Protocols Nos. 11 and 14).

Finally: A Right to Clean Air in Austria

According to the CJEU, the *EU Air Quality Directive*⁴⁸³ grants individuals and environmental organizations affected by the exceedance of limit values for air pollutants “a so-called right to clean air.” In particular, individuals and environmental organizations can ask the competent national authority to revise its air quality plan and implement effective measures to keep the exceedance period as short as possible. In Austria, both individuals and environmental organizations had previously attempted to invoke this right before administrative courts. These attempts had failed though.⁴⁸⁴

The Austrian administrative courts held that the Austrian legal system would not provide a legal remedy which allowed invoking a right to clean air.⁴⁸⁵ The courts accepted that in order to fill this potential gap, inspiration could be taken from existing legal remedies, for example those available in situations where the public authority decides by means of a decision. However, even if such a remedy was applied to the present situation, for environmental organization a problem would remain: Austrian air quality law does not accord them a right to clean air, consequently they cannot invoke its violation through a legal remedy. In a recent case, brought again by an environmental organization, the Administrative Court now relied on a different line of argument.⁴⁸⁶

In this recent case, an environmental organization asked the competent authority in the federal state of Salzburg to review the existing air quality plan for that federal state, and to implement effective measures in certain affected areas where certain air pollutant limit values were

⁴⁸³ Directive 2008/50/EC of 21 May 2008 on ambient air quality and cleaner air for Europe, OJ L152/1.

⁴⁸⁴ Sketching these cases see Tina Rametsteiner and Thomas Alge, ‘VwGH stärkt Rechtsschutz durch Aarhus-Konvention und EuGH-Rechtsprechung. Das Recht von Umweltorganisationen auf Geltendmachung behördlicher Unterlassungen am Beispiel Luftreinhaltung’ [2018] RdU 137.

⁴⁸⁵ The legal quality of the air quality plan (Luftreinhalteprogramm) is disputed, yet at least partly assimilated with an ordinance, while the air quality measures are put into effect by an ordinance. The legal remedies available to challenge an ordinance are limited though, see Art 139(1) of the *Austrian Federal Constitution*, Austrian Federal Law Gazette 1/1930, as amended by Austrian Federal Law Gazette I 22/2018.

⁴⁸⁶ VwGH, Judgment of 19 February 2018, Ra 2015/07/0074.

exceeded. As Austrian law did not grant the environmental organization the possibility to invoke the right to clean air, the environmental organization referred instead to the access to justice provisions of the *Aarhus Convention* and the EU *Air Quality Directive*, including its right to clean air. The Administrative Court followed this argument: The CJEU had already confirmed that also environmental organizations benefit from a right to clean air inasmuch as they can question national air quality action. As Austrian law did not allow environmental organizations to ask for a review of air quality action under EU law requirements, national law made it effectively impossible for environmental organizations to rely on their right to access to justice in environmental matters. Such a situation, as stated by the CJEU in a 2018 judgment,⁴⁸⁷ was not in line with the requirements of the *Aarhus Convention*.

The judgment of the Administrative Court was positively received in the legal community.⁴⁸⁸ On a more technical note though, it is surprising that the court chose to rely on the *Aarhus Convention* at all. Since the CJEU had clearly confirmed the right to clean air also for environmental organizations, it is unnecessary to refer to an additional instrument allowing for access to justice.

Conclusion

Although Austria ratified the *Aarhus Convention* in 2005, the Austrian legislator has so far not fully implemented the Convention's guarantees on access to environmental information, public participation in environmental decision-making and access to justice for civil society. The attempts in 2018 of both the legislator and the judiciary to give a voice to the *Aarhus Convention* are a first step to rectify the situation, yet more needs to be done. The continued emphasis on economic development and economic interests of the majority government seems to impede any meaningful development though.

⁴⁸⁷ Judgment of 20 December 2017, *Protect*, C-664/15, ECLI:EU:C:2017:987, para 48. For details see Country Report for Austria 2017, IUCN AEL E-Journal, Issue 9.

⁴⁸⁸ For a case comment see Teresa Fritz, 'Antragsrecht anerkannter Umweltorganisationen bei Untätigkeit von Behörden im Luftreinhalterecht' [2018] RdU 211.

COUNTRY REPORT: KENYA

Regulating Land Use in Kenya: An Overview of the National Land Use Policy

Dr Collins Odote^{*}

Introduction

Land is an important aspect of the development agenda for Kenya since the majority of people rely on land for their livelihoods. Consequently, the rules that govern how land is accessed, used, managed and disposed are critical. It is for this reason that this report analyses changes made in 2018 that relate to land governance.

This report assesses the contribution of the 2018 National Land Use Policy in continuing the reforms made under the Constitution of Kenya, 2010 and the National Land Policy, 2009. In order to do so this report first examines the development of those constitutional and policy reforms and then assesses the 2018 Policy.

The Land Question in Kenya

Kenya's reliance on land for its development and the sustenance of its people makes land governance a priority agenda for the country. Dealing with issues of land use is important in the quest for ensuring that land delivers development dividends. As the former Secretary General of the UN, Kofi Annan wrote, "land use is at the heart of our hopes of achieving truly sustainable development."⁴⁸⁹ The way that land is used is an important aspect in determining whether that

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⁴⁸⁹ Kofi Annan, "Message to the Second Colloquium of the IUCN Academy of Environmental Law" in Nathalie Chalifour, *et al (Eds), Land Use Law for Sustainable Development*, (Cambridge University Press, New York, 2007) xiii.

land delivers the dividends of development. In the Kenyan context there is increasing focus on how the land is used, including questions that range from how much land one individual can use to whether we should tax idle land.

From the colonial period, when land formed a main ground for agitation for independence, to post-colonial control over land as a tool for political power, land remains a key governance issue. Kenya's efforts to deal with land reforms demonstrate the close nexus between land and politics. Kenya's Supreme Court would affirm this, when, in 2015, it stated that "land, as a factor in social and economic activity in Kenya, has been a subject of constant interest, and of controversy, especially from a political standpoint."⁴⁹⁰ The political nexus to land was evident in the ethnic clashes that rocked Kenya during the 1992 and 1997 elections.

The importance of land reform to deal with the land question and enhance societal development is not just a Kenyan concern. The African Union in 2009 adopted the Framework and Guidelines on Land Policy in Africa.⁴⁹¹ The Framework and Guidelines discuss the land question, holding that it "has its origins in geo-political, economic, social and demographic factors more recently compounded by emerging global and strategic imperatives."⁴⁹² It urged for concerted efforts to adopt national land policies and enhance land reforms across the continent.

The first attempt at dealing with the land question in Kenya was through the appointment of a Commission of Inquiry, under the Commission of Inquiries Act⁴⁹³, on 17th November 1999 by President Daniel arap Moi to inquire into the land law system. The Commission recommended the development of a National Land Policy, a new institutional framework for land administration

⁴⁹⁰In the Matter of the National Land Commission and Attorney General & others, ((2015)eKLR. Available at <http://kenyalaw.org/caselaw/cases/view/116512>. (Accessed on 5/8/2019).

⁴⁹¹ African Union, *Framework and Guidelines on Land Policy on Africa (2010)*. Available at https://www.uneca.org/sites/default/files/PublicationFiles/fg_on_land_policy_eng.pdf.

⁴⁹² IBID.

⁴⁹³ Chapter 102, Laws of Kenya.

and constitutional reform.⁴⁹⁴ On the latter, the Commission concluded that “any meaningful land reform to be undertaken in the country have to be accompanied by relevant Constitutional changes in order to have a firm foundation.”⁴⁹⁵ The recommendations saw land issues included in the Draft Constitution prepared by the Constitution of Kenya Review Commission. However, the draft was not processed as President Moi dissolved Parliament leading to the 2002 elections before the Constitutional conference.

The 2002 elections led to defeat of Uhuru Kenyatta, the candidate of the then ruling Party, the Kenya African National Union (KANU) and the victory of Mwai Kibaki of the National Rainbow Coalition (NARC). The NARC Government under Mwai Kibaki was, however, also unable to usher in a new Constitution with land provisions in their first term of office. Despite this, Kibaki’s Government progressed land reforms by undertaking a comprehensive assessment of the use of land as a political tool, through the work of a Commission of Inquiry into illegal and irregular allocations of public land.⁴⁹⁶

Despite the far-reaching nature of the recommendations of the above Commission chaired by Paul Ndungu, the lack of a supportive constitutional architecture meant that the land question continued to persist. The 2007 general elections would demonstrate the dangers of unresolved land problems in Kenya. During those elections over 1000 people died as a result of the violence following the disputed elections. That violence had the land issue at its core.⁴⁹⁷

⁴⁹⁴ Republic of Kenya, *Report of the Commission of Inquiry into the Land Law System of Kenya on Principles of a National Land Policy Framework, Constitutional Position of Land and New Institutional Framework for Land Administration* (Government Printer, 2002).

⁴⁹⁵ IBID, page 92.

⁴⁹⁶ Republic of Kenya, *Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land* (Government Printer, 2005)

⁴⁹⁷ P.K. Mbote, “The Land Question and Voting Patterns in Kenya” In Kimani Njogu and P. W. Wekesa, *Kenya’s 2013 General Elections: Stakes, Practices and Outcomes*, (Twaweza Communications, 2015) 34-47 at 34.

Consequently, comprehensive resolution of the land question in its multiple facets became a priority for efforts to achieve Kenya's long-term development targets as captured in Vision 2030, the long-term agenda adopted following the 2007 elections.⁴⁹⁸ The Vision argued that "land is a critical resource for the socio-economic and political developments"⁴⁹⁹ it targeted that the "transformation expected under Vision 2030 is dependent on a national land use policy, which, therefore, must be completed as a matter of urgency."⁵⁰⁰ The success of this initiative would, however depend on the adoption of a comprehensive national land policy and fundamental reform of the country's Constitution, both issues also flagged by Vision 2030 document.

In 2009, Kenya adopted its first ever National Land Policy to provide policy guidance on resolving the land question in the country. In discussing the Land Question, the Policy identifies land use as an important component to be dealt with. Some of the salient use issues identified by the Policy include deterioration of land quality due to poor land use practices, under-utilization and abandonment of agricultural land, Uncontrolled development, urban squalor and environmental pollution; and wanton destruction of forests, catchment areas and areas of unique biodiversity. It then zeroes into the issues that require to be addressed to ensure better use of the land in Kenya as being, "rapid urbanization, inadequate land use planning, unsustainable production, poor environmental management, inappropriate ecosystem protection and management."⁵⁰¹ Based on this an entire section of the National Land Policy was dedicated to detailing policy interventions to respond the land use problems. The Policy sought to streamline and enhance urban and rural land use planning, improve the capacity and output of institutions responsibility for implementation and enforcement of approved plans, promote productive use of land by setting and adhering to productivity targets and restore and conserve land quality.

Constitutional Framework and Principles for Land Use

⁴⁹⁸ Republic of Kenya, *Kenya Vision 2030: A Globally Competitive and Prosperous Kenya* (October 2007). Available at https://www.researchictafrica.net/countries/kenya/Kenya_Vision_2030_-_2007.pdf.

⁴⁹⁹ IBID.

⁵⁰⁰ IBID.

⁵⁰¹ Sessional Paper Number 3 of 2009 *on National Land Policy* (Republic of Kenya, 2009), para 101.

In the process of reforming Kenya's Constitution, land was a priority given that it acted as one of the underlying and long-lasting sources of grievance amongst Kenyan communities and citizens. While the mediation efforts in 2008 led by a high level panel of eminent persons chaired by the late Kofi Annan under the aegis of the African Union identified several long-standing issues as the causes for the electoral violence,⁵⁰² some scholars argue that land tops that list.⁵⁰³ Kameri and Kindiki hold that despite the importance of all the factors that may have led to the 2007-2008 post-election violence, "it is land that is at the root of Kenya's turbulent present and uncertain future."⁵⁰⁴

In 2010, Kenya significantly revised its constitution to improve governance and address several of the long-standing issues that had bedeviled the country and contributed to the 2007 post-election violence. Consequently, the 2010 Constitution dedicated a Chapter to land and environment. In addition, the right to acquire and own property was included in the Bill of Rights as a fundamental human rights guaranteed to every Kenyan.⁵⁰⁵ Despite the Constitution recognizing several forms of property⁵⁰⁶ including intellectual property, money, goods and negotiable instruments, given that it is listed first in that definition and given the country's context, land is undoubtedly the most important form of property under the Kenyan Constitution. The inclusion of property rights within the Constitution guaranteed access to land and security of land rights for Kenyans. It sought to deal with past complaints of land grabbing and zoning of certain parts of the country for people who were not natives of those areas.

Despite its importance, Article 40 of the Constitution which captures property rights only dealt with the tenurial question. However, a comprehensive resolution of the land question requires both

⁵⁰² African Union Panel of Eminent Personalities, *Back from the Brink: The 2008 Mediation Process and Reforms in Kenya* (African Union Commission, 2014) page 297-301.

⁵⁰³ P.K. Mbote and K. Kindiki, "Trouble in Eden: How and Why Unresolved Land Issues Landed 'Peaceful Kenya' in Trouble in 2008" Forum for Development Studies, Oslo, Norway, Volume 1, 2008 (January 2009) pp. 167-193

⁵⁰⁴ IBID, at page 169.

⁵⁰⁵ Article 40, Constitution of Kenya, 2010.

⁵⁰⁶ Article 260, Constitution of Kenya, 2010.

issues of land tenure and land use to be addressed. Property rights include not just the rights to hold and dispose of the property in question, but also the rights to use it. Use is thus an incident of ownership. Honore, in defining ownership of property, popularized the metaphor of a bundle of rights⁵⁰⁷. One of the incidents of ownership is use of land. An owner of land has the right to use his land. In doing so, if within Kenya, he or she must adhere to requirements of equity, efficiency, productivity and sustainability encapsulated in Article 60 of the Constitution. Although Article 40 does not capture land use issues expressly, a holistic reading of the Constitution clearly demonstrates that land use is an important part of property rights since both Articles 60 and 66 of the Constitution focus on land use.

Article 60 of the Constitution 2010 stipulates that any holding, use or management of land must adhere to the principles of equity, efficiency, productivity and sustainability. Equity is about fairness. From a use perspective, the critical consideration must be how different users are treated and their interests balanced. In the past, there has been gender discrimination in accessing and using land, an issue that must be addressed to meet the constitutional dictates. The second concern is that of productivity. Land is an important factor of production. However, not all land in Kenya is arable land. Determining which use to put every category of land is essential to ensure economic returns from the land usage. This relates to the focus on promoting efficiency in the use of land. Efficiency is about comparing the cost of delivering a certain output. Ensuring that in utilizing land, there is positive balance between inputs and outputs is essential. Sustainable development is, however, more than just economic returns. Land is also important for ecological purposes. Consequently, strategies for land use must ensure that sustainability considerations are incorporated and respected in the country.

To ensure that the constitutional commitments are met, the State has an overarching power of regulating land use, a power captured in Article 66 of the Constitution. This is the power of development control, otherwise referred to as police power of the state. This power is an attribute

⁵⁰⁷ Abraham Bell Gideon Parchomovsky, "A Theory of Property" 90 Cornell Law Review 531-615 (2004-2005) at 546.

of the sovereignty of the state.⁵⁰⁸ In exercising this power the state does not extinguish property rights, merely regulating the use of land in defence of public rights.⁵⁰⁹ It does so without taking the private or community rights in the land. Consequently, no compensation ensues to the landowner from its exercise. In regulating land use, the state does so with a view to promoting public defence, public safety, public order, public morality, public health or land use planning.⁵¹⁰

Key Imperatives of the 2018 Policy

Kenya launched a new National Land Use Policy in 2018.⁵¹¹ The Policy problematizes the issue it seeks to resolve as being a “haphazard approach to managing the different land use practices and policy responses.”⁵¹² The policy identified the key uses of land in Kenya to include agriculture, industrial development, tourism, mining and energy, transport and infrastructure, natural resource management and environment. A key problem in the country has been the over-focus on agriculture as the main land use. This problem traces its roots to colonial policies, especially the 1954 *The Swynnerton Plan*.⁵¹³ The plan sought to enhance agricultural development in Kenya through improving security of land rights for African and increasing their access to credit for mechanized production.⁵¹⁴ This preference for agriculture as the most productive use of land has continued in Kenya even though only about 20% of Kenya’s land mass is categorized as medium to high potential.⁵¹⁵ Consequently, it is important to promote other uses of land and to deliver on the benefits of the land for society.

⁵⁰⁸ B.D. Ogolla and J. Mugabe, “Land Tenure and Natural Resource Management” in C. Juma and G. Hyden, *In Land We Trust: Environment, Private Property and Constitutional Change* (Initiative Publishers and Zed Books, Nairobi and London, 1996) 85-116 at 109

⁵⁰⁹ IBID.

⁵¹⁰ Article 66, Constitution of Kenya, 2010.

⁵¹¹ Republic of Kenya, *Sessional Paper Number 1 of 2007 on National Land Use Policy* (Government Printer, Nairobi).

⁵¹² IBID, Page 1.

⁵¹³ Swynnerton, RJM, *The Swynnerton Plan: A Plan to Intensify the Development of African Agriculture in Kenya*, 1954.

⁵¹⁴ Okoth-Ogendo, H.W.O, *Tenants of the Crown: Evolution of Agrarian Law and Institutions in Kenya (ACTS, 1991)*, page 69.

⁵¹⁵ Republic of Kenya, *Sessional Paper Number 3 of 2009 on National Land Policy*, (Government Printer, 2009); Sombroek, W.G., Braun, H.M.H. and van der Pouw, B.J.A. (1982). Exploratory Soil Map and Agro-

Despite the 2010 Constitution requiring that Kenya's land policy be developed and reviewed regularly must capture and deliver on the goals of efficiency, productivity, equity and sustainability an overriding focus continues to be that of productivity. Kenya remains a largely agrarian society, its current quest towards industrialization notwithstanding. Kenya's land reform process following the adoption of the 2010 Constitution grappled with two critical questions germane to the productivity quest. First was the debate on whether to tax idle land, with the rationale that land is a limited resource. If the constitutional imperative of equity, efficiency and productivity is to be achieved, then the past practice of hoarding large tracts of land coupled with the issue of absentee landlords require to be addressed. This is as opposed to the policy of expropriation of land from those with huge tracts and redistributing to those without that had been experimented in Southern Africa, especially Zimbabwe and would force owners of that land to either put it to productive use or sell it to those able to use it. This issue has been controversial since it was first mooted. Unfortunately, the 2018 National Land Use Policy does not provide clarity on whether this will be pursued, only stipulating that the government will institute a land taxation policy that seeks to provide a package of incentives to encourage productive and sustainable use of land and disincentives for keeping of idle land.⁵¹⁶ It fails to move beyond the general statement of intent to address the details on how this will be operationalized.

The second, related, issue is that of setting and implementing the amount of land that every Kenyan can hold. This was originally attempted in June 2005 when the then Minister for Lands, Honourable Amos Kimunya directed that subdivision of private agricultural land be limited to a minimum of 2.5 acres. This directive was criticized by Kenyan experts for being unrealistic since you could not have a blanket minimum land size without considering land uses and different ecological zones.⁵¹⁷ This idea was carried over to the Constitution, which required Parliament to enact legislation to prescribe minimum and maximum acreage of land that private land owners

Climatic Zone Map of Kenya, 1980; Adimo, O; Kenya: Description of Cropping Systems, Climate and Soils in Kenya, (Global Yield Gap Atlas. Available at <http://www.yieldgap.org/kenya>. (accessed on 18th May 2019).

⁵¹⁶ Supra, note 23 at page 39.

⁵¹⁷ See <https://www.ogiek.org/news/news-post-05-04-9.htm>.

could be allowed to have.⁵¹⁸ Despite, the requirement by the Land Act 2012 for the promulgation of regulations within one year to address the issue of minimum and maximum land acreage,⁵¹⁹ the efforts between then and 2015 were largely unsuccessful.

Circumventing the issue, the Land Act 2012⁵²⁰ was amended in 2016⁵²¹ to include a provision that minimum and maximum acreage would be subject to the Constitutional provisions of equity, sustainability and productivity.⁵²² Expectations that the 2018 National Land Use Policy would resolve the controversy were not met. The Policy only rehashes previous statements in both the 2010 Constitution and the Land Act 2012 to the extent that the Government would “enforce the constitutional requirement on minimum and maximum land holding acreages and also institute mechanisms for land adjustment programmes.”⁵²³ The lingering question on how this will be done has not been addressed by the 2018 Policy.

The other problem that the 2018 Policy should have provided clear direction on is conservation. Environmental degradation affects the use to which land is put. At the same time poor land use leads to environmental degradation. “To prevent any further degradation of the environment, it is important to curb extensive land use. It is true that the ultimate cause of environmental degradation stems from inappropriate land use, but it is the actual human activities on the land that affect the environment widely.”⁵²⁴ In the Kenyan context, several activities negatively impact on land and result to environmental degradation. These include soil erosion, pollution, unsustainable land use and waste disposal. These have been characterized in certain quarters

⁵¹⁸ Article 68 (C) (1), Constitution of Kenya, 2010.

⁵¹⁹ Collins Odote, “Land Acreage Bill Must Comply with the Law” Business Daily, Sunday, July 19, 2015. Available at <https://www.businessdailyafrica.com/analysis/Land-acreage-Bill-must-comply-with-the-law/539548-2798610-t02npm/index.html>.

⁵²⁰ Act Number 6 of 2012.

⁵²¹ The Land Laws (Amendment Act), Act Number 28 of 2016.

⁵²² Section 159, Land Act, Act Number 6 of 2012.

⁵²³ Supra, note 23.

⁵²⁴ Akio Morishima, “challenges of Environmental Law- environmental Issues and their Implications for Jurisprudence,” in Nathalie J. Chalifour, et al, Land Use Law for Sustainable Development (Cambridge University Press, 2007)6-24 at 7.

as land abuse.⁵²⁵ To deal with these abuses, the Kenya Land Alliance called for a National Land Policy.⁵²⁶ The 2018 Policy recognizes the importance of environmental conservation and recommends a raft of policy measures to ensure sound environmental management, conservation of critical ecosystems, conserve biodiversity, deal with the challenge of climate change, sustainably manage the blue economy, urban environmental management and conserve transboundary natural resources.⁵²⁷

One of the underlying challenges in Kenya's governance arrangements is the multiplicity of laws and policies and the consequential clash of mandates amongst institutions. The 2018 National Land Use Policy recognizes this challenge, recalling that lack of a land use policy resulted in uncoordinated Government action in efforts to address land use challenges.⁵²⁸ However, the Policy does not seek to harmonize the existing institutional architecture. Instead it creates a National Land Use Council and a Technical Implementation Committee. The continued existence of over ten agencies to deal with land use is not addressed by the Policy. Its solution to have a meeting chaired by Kenya's head of Public service will not solve the overlap in mandates.⁵²⁹ In addition, it does not clarify the relationship between the Council it creates and the overarching National Land Commission, which is a constitutional body. It treats the Commission as a sectoral agency.

⁵²⁵ Kenya Land Alliance, *Land Use in Kenya: The Case for a National Land Use Policy* (Kenya Land Alliance, 2015). Available at http://www.kenyalandalliance.or.ke/wp-content/uploads/2015/03/kla_land_use_in_kenya_case_for_policy.pdf.

⁵²⁶ IBID.

⁵²⁷ Supra, note 23.

⁵²⁸ IBID.

⁵²⁹ Collins Odote, "Kenya Needs a Workable Land Use Policy," *Business Daily Newspaper*, Sunday June 24, 2018. Available at <https://www.businessdailyafrica.com/analysis/columnists/Kenya-needs-workable-land-use-policy/4259356-4628644-omd9pt/index.html>.

Key lessons from Kenya

The adoption of the 2018 National Land Use Policy by Kenya marked an important milestone in the country's quest to address the perennial land problem. However, the Policy does not fully address the policy challenges that have bedevilled the land sector for so long. It is important to emphasise that it is not more policies and institutions that are necessary. The Policy should instead have enhanced policy coordination and institutional harmonization of mandates.

The adoption of the Policy despite its shortcomings demonstrates the desire of the country to move the land question debate beyond land tenure issues to how the land is used and managed so that the country can fulfil the constitutional desire of using land for prosperity and sustainability. This approach will help the country realize the Sustainable Development Goals whose focus is to eradicate poverty and hunger.⁵³⁰

⁵³⁰ UN, *Transforming Our World: The 2030 Agenda for Sustainable Development*, 2015, A/Res/70/1 Available at <https://sustainabledevelopment.un.org/post2015/transformingourworld>.

COUNTRY REPORT: JAPAN

The Latest Developments on Environmental Policy and Case Law (2018)

*Noriko Okubo**

First, this report clarifies the latest developments on Japanese environmental policy in terms of the Sustainable Development Goals (SDGs), especially in the fields of the sound material-cycle society as well as the low carbon society. Second, some remarkable judicial cases concerning State liability for non-use of regulatory power will be introduced.

Fifth Environmental Basic Plan and Sustainable Development Goals

Since 2015, the Japanese government has focused on promoting the SDGs, while also emphasizing a comprehensive and integrated approach based on the philosophy of the SDGs within its environmental policy.

In May 2016, the government established the SDGs Promotion Headquarters, a Cabinet body headed by the Prime Minister with all ministers as its members. In December 2016, the SDGs Promotion Headquarters drafted the SDGs Implementation Guiding Principles⁵³¹ and set out eight priority areas by reconstructing the SDGs in light of the national context. The first priority area is the empowerment of all people. Two priority areas are more narrowly connected with environmental policy: namely, the fifth priority area that is energy conservation, renewable energy, and climate change measures, and a sound material-cycle society, and the sixth priority area that is the conservation of the environment, including biodiversity, forests, and oceans. These areas

⁵³¹ English text is available at <<http://www.kantei.go.jp/jp/singi/sdgs/dai2/siryou1e.pdf>> accessed on 20 March 2019.

are closely related to other broader priority areas such as sustainable and resilient land use. Since 2018, the government has made, and intends to revise every year, an SDGs Action Plan.

At the same time the Cabinet adopted the Fifth Environmental Basic Plan (in pursuit of Article 15 (1) of the Basic Environment Law) in April 2018.⁵³² The Environmental Basic Plan is a basic plan specialized in the field of environment, while the SDGs Action Plan is a comprehensive and cross-cutting plan.

The Fifth Environmental Basic Plan encourages reliance on the philosophy of the SDGs as one of the basic tenets for the development of environmental policies in the future. It states as follows:

“Some of the SDGs may seem difficult to achieve together and some of them indicate a relationship of trade-offs. This is why an integrated approach is needed to create synergies. It is, indeed, important to broaden our horizons to consider other goals, which enables us to adopt a win-win approach. We can then pursue “both” objectives with one action simultaneously, as opposed to “either/or”.”⁵³³

Thus, the fifth plan proposes a new concept for the development of a “circulation and symbiosis-based society”.⁵³⁴ This means an “environmental and life-centred civilized society”⁵³⁵ that is self-reliant and decentralized while being in tune with local needs. It minimizes environmental impacts in three ways: 1) by enabling the “circulation” of materials and natural resources, 2) by facilitating the “symbiosis” between nature and human beings, as well as “symbiosis” between regions

⁵³² English text is available at <http://www.env.go.jp/policy/kihon_keikaku/plan/plan_5/attach/ref_en-01.pdf> accessed on 20 March 2019.

⁵³³ The Fifth Environmental Basic Plan, *ibid.*, p.16.

⁵³⁴ The Fifth Environmental Basic Plan, *ibid.*, p.3.

⁵³⁵ The Fifth Environmental Basic Plan, *ibid.*, p.3.

through the maintenance and rehabilitation of sound ecosystems, and 3) the realization of “low carbon” societies.

Sound Material-Cycle Society

(1) The Fourth Fundamental Plan for Establishing a Sound Material-Cycle Society

In conjunction the Fifth Environmental Basic Plan, the Fundamental Plan for Establishing a Sound Material-Cycle Society was also revised. This plan is based on the Basic Act on Establishing a Sound Material-Cycle Society (BA-ESMCS) (2000)⁵³⁶ and is to be harmonized with the Basic Environment Plan.

The Fourth Fundamental Plan for Establishing a Sound Material-Cycle Society⁵³⁷ (Article 15 (1) of BA-ESMCS) in June 2018 consists of five pillars: 1) the creation of a regional circulating and ecological sphere, 2) the circulation of resources throughout the entire lifecycle, 3) proper waste management and environmental restoration, 4) disaster waste treatment systems, and 5) international resource circulation.

Japan is facing an unprecedented population decline and an ageing population. From the perspective of the creation of a sound material-cycle society, the Fourth Fundamental Plan describes the prevailing situation in Japan in the following words:

⁵³⁶ Act No. 110 of 2000. English text is available at < <http://www.japaneselawtranslation.go.jp/law/detail/?re=01&dn=1&x=19&y=15&co=1&ia=03&yo=&gn=&sy=&ht=&no=&bu=&ta=&ky=%E5%BE%AA%E7%92%B0&page=13>> accessed on 20 March 2019.

⁵³⁷ English text is available at <https://www.env.go.jp/en/recycle/smcs/4th-f_Plan.pdf> accessed on 20 March 2019.

“while the amount of municipal waste per capita generated and the final disposal amount of industrial waste are steadily decreasing due to the promotion of the 3Rs and other efforts and the generation of waste is expected to fall along with the decline of the population, there is a concern that the labour shortage in waste disposal and resource circulation, insufficient recycling capacity of circulative resources”.⁵³⁸

To cope with the population decline, the Fourth Fundamental Plan emphasises the importance of “regional revitalization through the formation of diverse regional circulating and ecological sphere” (2.2) in line with the Fifth Environmental Basic Plan. There are three elements to promote the circulation of its natural environment, namely materials, human resources, and funds within itself to enhance its local ownership and charm for its revitalization.⁵³⁹ First, it is important to recycle calculative resources (such as food waste and plastics) on a scale that best suits the type of resource and the characteristics of the region in a small local network or a wider network, whichever is optimal. Second, renewable resources (such as wood and other renewable energy sources) that can be obtained by conserving and maintaining forests, rivers and so on, must also be utilized continuously in the region. Third, stock built up in the region (infrastructure and other buildings) must be used wisely for as long a time as possible to reduce resource input and waste generation.

One of the concrete initiatives for the integrated approach is the reduction of food loss, through measures such as food banks and food drives. Food banks involve the identification and collection of substandard products identified in food production processes or food loss products generated in distribution processes, and the distribution of such products free of charge to welfare institutions and other establishments. Food drives involve the collection of food donations from households, etc., and the distribution of such food free of charge to welfare institutions and other establishments. Food bank/food drive activities, such as in children's cafeterias, are rapidly spreading to various areas through close partnerships among NGOs, business operators, and

⁵³⁸ The Fourth Fundamental Plan for Establishing a Sound Material-Cycle Society, p.5.

⁵³⁹ The Fourth Fundamental Plan for Establishing a Sound Material-Cycle Society, p.16.

the administration. It is remarkable that such initiative contributes to making possibility for communication among lonely children in Japan, rather than a countermeasure against poverty.

(2) Plastic strategy

In June 2018, five of the G7 nations, without the US and Japan, have agreed to the “Ocean Plastics Charter” which aims at avoiding the unnecessary use of plastics and prioritizes the prevention of waste. There was strong criticism both at home and abroad that Japan did not sign the charter.

The effective utilization rate of waste plastic in Japan is 85.8%, but the recycling rate is only 27.8%, and the rate of heat recovery is high (58.0%). There are data indicating that the US is the largest generator of plastic packaging waste on a per capita basis, followed by Japan and the EU.⁵⁴⁰ Therefore, further efforts for plastic reduction, reuse, and recycling (3Rs) are indispensable.

The Japanese government announced shortly after G7 Charlevoix Summit 2018 that a comprehensive strategy for plastic material-cycling will be formulated by June 2019, before the next G20 summit scheduled in Japan. It also established the Subcommittee for Plastic Resources Recycling Strategy under the Sound Material-Cycle Society section of the Central Environment Council. It published the draft version of the strategy in November 2018 and conducted a public consultation (opening up the draft for public comments) over 40 days. On May 31, 2019, the Plastic Resources Recycling Strategy was finally adopted.

This Strategy consists of four pillars: 1) plastic resource circulation, 2) ocean plastic measures, 3) international development, and 4) infrastructure development. With regard to the plastic

⁵⁴⁰ C. Giacobelli, *Single-use plastics: A roadmap for sustainability* (UNEP 2018) p.5.

resource circulation it has six ambitious goals: 1) reducing one-way plastics by 25% by 2030, 2) designing reusable/recyclable plastic product by 2025, 3) 60% reuse/recycling of containers and packaging by 2030, 4) 100% reuse/recycle of used plastic by 2035, 5) doubled plastic recycling of by 2030, and 6) introducing 2 million tons of biomass plastic by 2030.

The measures for plastic resource circulation include: 1) reducing the use of plastics (e.g. ban on the free distribution of plastic bags), 2) full and efficient collection and recycling of disposed plastic resources and unused plastics, and 3) improvement and promotion of bioplastics to replace plastics made from fossil resources. Now, it is important to develop the concrete roadmap and system for each measure.

Low Carbon Society and Adaptation measures

Climate Change Adaptation is also one of the pillars of policies towards low carbon society. As this new Act is a framework law, concrete measures are to be clarified and implemented based on the National and Local Adaptation Plans. On November 27, 2018, the Cabinet formulated the first NAP which consists of three parts: 1) basic concept, 2) sectoral measures, and 3) basic international measures. Sectoral measures cover the various fields, such as agriculture, forestry, fisheries, water environment, natural ecosystem and human health. As an example, formulation of the drought response timelines is encouraged in the field of water management to cope with increase in drought due to decrease in the total amount of snowfall.

Case Law: State Liability Cases for non-use of regulatory power

State liability lawsuits have proven to be an effective means of challenging the non-use of the regulatory power in Japan. Recently, the courts have imposed State liability for the asbestos case and the Fukushima Nuclear Accident cases, both of which are presented below.

(2) Asbestos Case

Asbestos is a hazardous substance that causes diseases such as mesothelial tumor and asbestosis, which is a result of direct exposure to asbestos dust. The production and use of asbestos were gradually and totally prohibited in Japan. However, asbestos had been in use since the end of the 19th century. Around this time, the number of occupational victims of asbestos, as well as the number of victims of asbestos dust from environmental exposure around the former asbestos plants were on the rise. This implies that asbestos damage must be seen as a mixed challenge involving both labour and environmental cases.

On October 9, 2014, the Supreme Court held in the Sennan Asbestos case⁵⁴¹ that the State was liable for failing to promptly regulate asbestos based on the Labour Standards Act⁵⁴² and the Industrial Safety and Health Act.⁵⁴³ The case addressed the health damage caused by the former small asbestos factories. However, the Supreme Court admitted the compensation only for ex-workers and not for people who lived and worked as neighbours of the plants.

Before this judgement the Japanese government enacted the Act on Asbestos Health Damage Relief⁵⁴⁴ for the victims who were not compensated under the Labour Standards Act and introduced strict regulations of asbestos waste treatment, including the demolition of buildings containing asbestos. However, the extent of compensation awarded for asbestos related health damage was lower than the compensation offered to workers under the Labour Standards Act.

⁵⁴¹ Minshu Vol. 68, No. 8, 799.

⁵⁴² Act No. 49 of 7 April 1947. The text of the 2012 law is available in English at <http://www.env.go.jp/en/laws/policy/basic/index.html> accessed on 20 March 2019.

⁵⁴³ Act No. 57 of 8 June 1972. The text of the 2006 law is available in English at <http://www.env.go.jp/en/laws/policy/basic/index.html> accessed on 20 March 2019.

⁵⁴⁴ Act No. 4 of 10 February 2006. The text of the 2006 law is available in English at <http://www.env.go.jp/en/laws/policy/basic/index.html> accessed on 20 March 2019.

Therefore, the victims went to the court to require improving the administrative compensation system.

One of the critical issues in this field is related to construction workers. In the past, construction materials made of asbestos were used in many buildings for fire protection. Construction workers often worked for a variety of small subcontractors. Diseases related to asbestos take time to develop. Therefore, it might have been difficult to prove where a construction worker had been exposed to asbestos and which construction company was responsible under the Labour Standards Act for the health damage caused to the worker. This issue led to several State liability suits against the government. As of March 2019, there have been ten lower court decisions since 2012 (six district court decisions and four high court decisions) that recognized State liability. On September 20, 2018, the Osaka High Court ruled that the State and 22 construction materials manufacturers had to pay 31 victims 339 million yen in all.⁵⁴⁵ The plaintiffs' group and the defence group had called for a political solution by demanding improvements to the existing relief system. However, the State appealed to the Supreme Court and the case is still pending as of March 2019.

Fukushima Nuclear Accident Cases Victims of the Fukushima Nuclear Accident (2011) are free to refer their claims directly to a court of law, or to a special and administrative Alternative Dispute Resolution (ADR) organ, called the “Nuclear Damage Claim Dispute Resolution Centre”. Thus far, a majority of the disputes have been solved by the Reconciliation Committee. As of June 21, 2019, of the 23,846 claims against the Tokyo Electric Power Company (TEPCO), 19,223 settlements have been arrived at by the Reconciliation Committee. Victims are free to admit particular claims in the settlement including compensation for damage such as evacuation, life or physical damage, mental damage, business damage, inability to work, inspection costs, loss of property value, and decontamination costs, among others.

⁵⁴⁵ Lex/DB25561601.

However, some groups of evacuated victims filed lawsuits not only against TEPCO, but also against the State. A characteristic feature of most Fukushima Accident lawsuits is that the plaintiffs have demanded compensation for the loss of the hometown, which has been recognized by several lower courts. As of March 2019, there are about 30 collective lawsuits active in courts across Japan and lower courts have ruled in favour of State liability in five out of six decided cases. Most recently, on February 20, 2019, the Yokohama District Court ruled that the State and TEPCO had to pay 152 evacuees a total of 420 million yen, including damage for the infringement of their right to a peaceful life. The court ruled that it was predictable that the nuclear power plant would be flooded by a tsunami and lose power. The ruling also affirmed the defendant's responsibility and stated that if the auxiliary power sources on the site of the Fukushima nuclear power plant had been relocated to a higher place, the accident could have been prevented. Thus, the State was liable because it had failed to order TEPCO to meet the technical standards.

Challenges

The SDGs have had a significant impact on Japanese environmental policy in recent times. As this report shows, the integrated and cross-sectoral approach specific to the SDGs have been emphasized and adopted in Japan's process for drafting and implementing its policies. However, when compared with recent practices across the world, Japan does not have a strong political initiative to strengthen governance, public participation, and environmental democracy, as well as to recognize procedural and substantive environmental rights.

The Japanese government emphasizes the importance of partnership and considers it as an issue only under SDG 17 in the international context. SDG 16 is especially related to governance, because its targets include three elements of public participation which are access to information (target 16.10), public participation in decision-making (target 16.7) and access to justice (target 16.3). However, the Japanese government has not recognized the close relationship between SDG 16 and environmental issues. There are various reasons for this, informed by both national and international viewpoints. In order to change the deadlock in Japan, it would be useful to develop internationally better indicators for SDG 16 and to arrive at a common understanding of

the basic principles of environmental law by discussing them within the scope of international instruments such as the Global Pact for the Environment.⁵⁴⁶

⁵⁴⁶ Refer to the UNEP website < <https://www.unenvironment.org/news-and-stories/story/member-states-debate-need-global-pact-environment> > (accessed on 20 March 2019) for current discussions.

COUNTRY REPORT: SPAIN

Spain Joins the Energy Transition and The Fight Against Plastics in The Environment

Laura Presicce*

Introduction

In Spain during 2018, there was limited new regulatory activity in environmental matters at the state level, with most changes limited to modifying very specific aspects of existing laws.

This report highlights four legislative measures:

Law 1/2018, of 6 March, which adopts urgent measures to mitigate the effects produced by drought in certain river basins and modifies the revised text of the Water Law⁵⁴⁷; Law 7/2018, of 20 July, modifying Law 42/2007, of 13 December, on Natural Heritage and Biodiversity⁵⁴⁸; Royal Decree-Law 15/2018, of 5 October, on urgent measures for energy transition and consumer protection, which also has the status of law; and in addition, Law 9/2018, of 5 December, amending Law 21/2013, of 9 December, on environmental assessment; Law 21/2015, of 20 July, amending Law 43/2003 of 21 November on forestry; and Law 1/2005 of 9 March regulating the greenhouse gas emission allowance trading scheme⁵⁴⁹.

Regulations have been also approved but, except in specific cases (for example, Royal Decree 699/2018, of 29 June, declaring the Mediterranean Cetacean Migration Corridor a Marine Protected Area⁵⁵⁰), these also do not contain significant new measures but rather are limited to

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⁵⁴⁷ BOE n. 58 of 7 March 2018.

⁵⁴⁸ BOE n. 176 of 21 July 2018.

⁵⁴⁹ BOE n. 294 of 06 December 2018.

⁵⁵⁰ BOE n. 158 of 30 June 2018.

making changes to existing regulations or incorporating European directives into the Spanish legal system. Among others, the following should be highlighted:

- Royal Decree 7/2018 of 12 January establishing the documentation, possession and marking requirements for the trade in endangered species of wild fauna and flora, in accordance with European Union regulations implementing the Convention on International Trade in Endangered Species of Wild Fauna and Flora⁵⁵¹;
- Royal Decree 293/2018, of 18 May, on the reduction of consumption of plastic bags and the creation of the Register of Producers, transposing into Spanish Law the Directive (EU) 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags⁵⁵²;
- Royal Decree 818/2018, of 6 July, on measures to reduce national emissions of certain atmospheric pollutants, which aims to incorporate into Spanish law the Directive (EU) 2016/2284 of the European Parliament and of the Council of 14 December 2016 on the reduction of national emissions of certain atmospheric pollutants, amending Directive 2003/35/EC and repealing Directive 2001/81/EC⁵⁵³.

Change of Government and modification of ministerial departments

Before going on to review the most important state legislative developments, it is important to highlight a very relevant political event of 2018: on 1 June, Pedro Sánchez, leader of the Spanish socialist party (PSOE), became the seventh president of the Spanish Government when, for the

⁵⁵¹ BOE n. 23 of 26 January 2018.

⁵⁵² BOE n. 122 of 19 May 2018.

⁵⁵³ BOE n. 164 of 7 July 2018.

first time since the return to democracy in 1977, the motion of censure against Mariano Rajoy (Popular Party -PP-) was passed⁵⁵⁴.

The new President modified the basic structure of the existing ministerial departments⁵⁵⁵, and in particular, regarding environmental issues, abolished the Ministry of Agriculture and Fisheries, Food and the Environment as well as the Ministry of Energy, Tourism and the Digital Agenda. In their place two new ministries were created: The Ministry of Agriculture, Fisheries and Food,⁵⁵⁶ whose objective is to propose and implement the Government's policy on agricultural, livestock and fishery resources, the agri-food industry, rural development and food; and the Ministry of Ecological Transition,⁵⁵⁷ which will be responsible for proposing and implementing the Government's policy on energy and the environment for the transition to a more ecologically productive and social model. The new distribution of powers for the new Ministries corresponds to the Government's priority objectives (i.e., to design and implement environmental policies in the matter of climate change that advance towards a sustainable energy and ecological just transition) and its political program to achieve greater effectiveness in its actions and greater efficiency in the functioning of the State Administration.

Through Royal Decree 958/2018 of 27 July,⁵⁵⁸ the Inter-ministerial Commission for Climate Change and Energy Transition was also created and regulated. The Government's policy on ecological transition is aimed at strengthening and promoting awareness of issues related to the fight against climate change and the energy transition. This, together with the economic, environmental and social relevance of this matter, justifies the modification of the current Inter-ministerial Commission for Climate Change which, along with a name-change, has been adapted to promote the matter and in accordance with the new departmental plan. The Inter-ministerial Commission for Climate Change and Energy Transition, attached to the Ministry for Ecological

⁵⁵⁴ See "A new chapter", El País, Jun 11, 2018.

https://elpais.com/elpais/2018/06/11/inenglish/1528707549_869658.html

⁵⁵⁵ Royal Decree 355/2018, of 6 June, restructuring ministerial departments, BOE n. 138, of 7 June 2018.

⁵⁵⁶ Royal Decree 904/2018 of 20 July, developing the basic organisational structure of the Ministry of Agriculture, Fisheries and Food.

⁵⁵⁷ Royal Decree 864/2018 of 13 July, developing the basic organizational structure of the Ministry for Ecological Transition; Royal Decree 355/2018 of 6 June, restructuring ministerial departments; Royal Decree 595/2018 of 22 June, establishing the basic organizational structure of ministerial departments.

⁵⁵⁸ BOE n. 182, of 28 July, 2018.

Transition, was created with the aim of achieving the best treatment of public policies in this area, from a participatory and multidisciplinary perspective. It is assigned a wide variety of promotion and coordination functions, among others, to direct the actions of the concerned bodies of the General State Administration for the elaboration of the Draft Law on Climate Change and Energy Transition, the Integrated National Energy and Climate Plan and the strategy for the decarbonization of the economy by 2050.

State legislative analysis

In the period covered by this analysis, few laws and numerous regulations, in environmental matters, have been approved in different sectorial areas. It is important to highlight Royal Decree 293/2018 of 18 May on the reduction of the consumption of plastic bags and Royal Decree-Law 15/2018 of 5 October on urgent measures for energy transition and consumer protection.

Royal Decree 293/2018 of 18 May on reducing the consumption of plastic bags

Royal Decree 293/2018 of 18 May on reducing the consumption of plastic bags and the creation of the Producer Register, which incorporates into Spanish Law the Directive (EU) 2015/720 of the European Parliament and of the Council of 29 April 2015 amending Directive 94/62/EC as regards reducing the consumption of lightweight plastic carrier bags, have both introduced Important novelties in the fight against the dispersion of plastic waste in the environment.

The following measures have been adopted in Spain through this Royal Decree: firstly, from 1 July 2018, giving lightweight plastic bags to consumers free at point of sale is prohibited, and therefore, from that date, traders must charge a price for each lightweight plastic bag they give to the consumer. Exceptions to this measure are very lightweight plastic bags which are necessary for hygiene reasons, or which are supplied as primary packaging for bulk food. Secondly, from 1

January 2021, it will be prohibited to provide consumers, free of charge or not, at the point of sale, with lightweight and very lightweight non-compostable plastic bags.

In addition, to avoid damage to soils, water and biota resulting from the permanence of small particles of plastic in the environment, giving fragmentable plastic bags will also be prohibited from 1 January 2020, understood as plastic bags made of plastic materials that include additives that catalyse the fragmentation of plastic material into micro fragments. The Royal Decree outlines measures for adopting bags of a thickness equal to or greater than 50 microns. It makes charging for these bags' compulsory from 1 July 2018, except for those with a percentage of recycled plastic equal to or greater than 70%; and, moreover, it establishes the obligation that these bags contain, from 1 January 2020, a minimum percentage of 50% recycled plastic, and a lower price is proposed for these bags. All these measures will also affect bags that may be supplied in online sales, as well as those delivered to the consumer's home.

Royal Decree-Law 15/2018 of 5 October on urgent measures for energy transition and consumer protection⁵⁵⁹

In the framework of a "just energy transition", a few months after it was constituted the Government approved the Royal Decree Law 15/2018 of 5 October on urgent measures for energy transition and consumer protection, which was validated by Congress on 18 October and will be processed as a draft law by the urgent procedure⁵⁶⁰. The Royal Decree Law, as stated in its preamble, addresses the continuing increase in final energy prices, which are directly and immediately passed on to the final consumers of electricity. Therefore, to protect all consumers and especially the most vulnerable, this law aims to introduce specific mechanisms to increase

⁵⁵⁹ BOE n. 242 of 6 October 2018.

⁵⁶⁰ See Resolution of 18 October 2018, of the Congress of Deputies, ordering the publication of the Validation Agreement of Royal Decree-Law 15/2018, of 5 October, on urgent measures for the energy transition and consumer protection. BOE n. 259, 26 October 2018.

consumer information and protection and more incisive additional measures against energy poverty and provide protection for electricity consumers in particular situations of vulnerability.

In particular, Title I contain consumer protection measures, grouped into two chapters: the first chapter is dedicated to vulnerable consumers and the fight against energy poverty, and the second chapter contains measures aimed at increasing the information, protection and rationalisation of procurement mechanisms, thus increasing the protection of all electricity consumers.

Title II affects the regulation of self-consumption of renewable electricity. Among other things, it modifies Article 9 of Law 24/2013 of 26 December of the Electricity Sector (hereinafter LSE). The reform of Article 9 of the LSE, introduced by Article 18 of the Royal Decree Law, is based on three fundamental principles that govern renewable electricity self-consumption: the right to self-consume electricity without charge; the right to share self-consumption; and the principle of technical and administrative simplification.

Specifically, with respect to the previous wording of Article 9 LSE, we highlight the following changes and new items:

- The definition of self-consumption is broadened, making it possible for several consumers to share the production facilities.
- The classification of the self-consumption modes foreseen in art. 9 LSE is reduced to two typologies. Now the discrimination between one type or another will not be the contracted power, but rather whether there is a discharge of surplus into the network.
- There is a significant simplification of administrative procedures in line with the provisions contained in Directive 2009/28/EC⁵⁶¹, eliminating the obstacles in the legislation in force until now, especially in Royal Decree 900/2015 of 9 October, which regulates the administrative,

⁵⁶¹ Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC.

technical and economic conditions of the modalities of electricity supply with self-consumption and production with self-consumption (hereinafter RD Self-consumption).

- The charges imposed on consumers under the self-consumption modalities, which have been called the "sun tax", and which have had a strong disincentive effect for investment in this sector, have been eliminated. The right, stated in the preamble of the Royal Decree Law, to self-consume electrical energy without charges is specified in the provision of Article 9.5 LSE, which establishes the exemption "of all types of charges and tolls" for self-consumed energy of renewable origin, cogeneration or waste, and in the subsequent repeal of Articles 17 and 18 of the RD Self-consumption.

Title III introduces a series of regulatory actions aimed at accelerating the transition to a decarbonized economy, so that the regulatory barriers that prevented agents from making the necessary decisions for the transition to take place as quickly as possible have been removed.

The measures are grouped into two areas: the first chapter is devoted to the integration of electricity from renewable energy sources, with the aim of ensuring that the necessary investments are made and completed to meet the renewable penetration targets for 2020.

Chapter II of Title III is devoted to sustainable mobility, especially electric vehicles, as they require a regulatory impetus to solve the logistical problems that prevent their mass deployment. Among the main barriers is the insufficient development of charging infrastructures, which prevents many users from purchasing a plug-in electric vehicle due to the limited availability of public charging points. In order to resolve the situation described above, the present royal decree-law liberalises the activity of electric recharging, eliminating the figure of the charge manager provided for in the LSE, which has proved to be excessively rigid and a disincentive to the activity.

Finally, a series of measures related to fiscal regulations have been adopted with the main objective of moderating the evolution of prices in the wholesale electricity market: these are specifically fiscal measures that affect the Tax on the Value of Electrical Energy Production and the Tax on Hydrocarbons.

Environmental case law of the Constitutional Court on fracking

Regarding the environmental rulings of the Constitutional Court (hereinafter CC), it is worth mentioning two judgments on fracking: judgment n. 8/2018 of 25 January⁵⁶² and judgment 65/2018 of 7 June. In the first, the CC resolved the appeal of unconstitutionality filed by the President of the Government in relation to various articles of Law 6/2015 of the Basque Parliament (30 June), on additional environmental protection measures for the extraction of unconventional hydrocarbons and hydraulic fracture. In the first ruling, the CC confirmed its previous jurisprudence,⁵⁶³ declaring the unconstitutionality of the legal precepts that extend subnational (regional) competence to the territorial sea, and as well as the subnational law prohibiting, absolutely and unconditionally, fracking, a technique of investigation and exploitation of hydrocarbons instead admitted by basic national legislation⁵⁶⁴. As the CC ruled, the use of fracking must be considered case by case by means of an environmental impact assessment.⁵⁶⁵

However, in ruling 65/2018, of 7 June,⁵⁶⁶ the CC declared the constitutionality of certain provisions of the Law of Castilla-La Mancha,⁵⁶⁷ which establish additional measures for the protection of public health and the environment, for the exploration, research and exploitation of hydrocarbons through the use of the fracking technique. This had been challenged by the President of the Government for alleged infringement of several national powers. Specifically, the above-mentioned subnational (regional) provision enables the competent subnational administration to establish a zoning of the territory of the Autonomous Regions delimiting areas of action in which, on the basis of legally predetermined criteria, the fracking technique is excluded, restricted or permitted. This is a change in jurisprudence on the part of the CC that gives a certain margin of

⁵⁶² BOE n. 46 of 21 February 2018.

⁵⁶³ See, for example, ruling CC 106/2014, 24 June; 134/2014, 22 July and 208/2014, 15 December.

⁵⁶⁴ Law 34/1998 of 7 October 1998 on the hydrocarbons sector (LSH) and Law 21/2013 of 9 December 1993 on environmental assessment (LEA).

⁵⁶⁵ Specifically, the CC considers that Articles 3 and 5 of the aforementioned law, which modify the Basque Country's urban planning and water laws, respectively, limiting or prohibiting the use of the fracking technique in their respective fields of application, are intended to render ineffective State legislation.

⁵⁶⁶ BOE n. 164, 7 July 2018.

⁵⁶⁷ Law 1/2017, of 9 March, of Castilla-La Mancha, establishing additional measures for the protection of public health and the environment for the exploration, research or exploitation of hydrocarbons using the hydraulic fracture technique.

decision to subnational entities so that, based on subnational (regional) competence,⁵⁶⁸ it would be possible to draw up individual regulations by means of which the use of fracking could be prohibited, restricted or permitted. On the other hand, it is not possible, through a subnational (regional) law, to prohibit, absolutely and unconditionally, fracking.

It should, however, be noted that the future Spanish Law on Climate Change, currently being drafted, will prohibit new hydrocarbon prospecting and the use of the fracking technique throughout the national territory. Specifically, authorizations will not be granted for exploration activities, research authorisations or concessions for exploitation of hydrocarbons, nor can be developed activities of hydraulic fracture. The draft Law also establishes that current extensions may not continue beyond December 31, 2042

⁵⁶⁸ Article 149 of the Spain Constitution, with articles 148 and 150, delimits the distribution of competences between the State and the Autonomous Communities (Regions).

ESPAÑA SE SUMA A LA TRANSICIÓN ENERGÉTICA Y A LA LUCHA CONTRA EL PLÁSTICO EN EL MEDIO AMBIENTE

Spain Country Report 2018

Laura Presicce*

Introducción

Durante el período objeto de análisis (enero - diciembre 2018) en España, a nivel estatal, se ha registrado una actividad normativa en materia ambiental poco remarcable.

Destacamos únicamente cuatro normas con rango de Ley (la *Ley 1/2018, de 6 de marzo*, por la que se adoptan medidas urgentes para paliar los efectos producidos por la sequía en determinadas cuencas hidrográficas y se modifica el texto refundido de la Ley de Aguas;⁵⁶⁹ la *Ley 7/2018, de 20 de julio*, de modificación de la Ley 42/2007, de 13 de diciembre, del Patrimonio Natural y de la Biodiversidad;⁵⁷⁰ el Real Decreto-ley 15/2018, de 5 de octubre, de medidas urgentes para la transición energética y la protección de los consumidores, que también tiene rango de ley y la *Ley 9/2018, de 5 de diciembre*, por la que se modifica la Ley 21/2013, de 9 de diciembre, de evaluación ambiental, la Ley 21/2015, de 20 de julio, por la que se modifica la Ley 43/2003, de 21 de noviembre, de Montes y la Ley 1/2005, de 9 de marzo, por la que se regula el régimen del comercio de derechos de emisión de gases de efecto invernadero⁵⁷¹), aunque la mayoría de estas se limitan a modificar aspectos muy puntuales de leyes ya existentes.

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⁵⁶⁹ BOE núm. 58, de 7 de marzo de 2018.

⁵⁷⁰ BOE núm. 176, de 21 de julio de 2018.

⁵⁷¹ BOE núm. 294, de 06 de diciembre de 2018.

Las demás normas aprobadas son de rango reglamentario y, excepto casos puntales (por ejemplo, el *Real Decreto 699/2018, de 29 de junio*, por el que se declara Área Marina Protegida el Corredor de migración de cetáceos del Mediterráneo⁵⁷²), no contienen novedades de gran calado, sino que se limitan a aportar modificaciones a la normativa existente o a incorporar en el ordenamiento jurídico español directivas europeas. Entre otras, cabe destacar las siguientes:

- el *Real Decreto 7/2018, de 12 de enero*, por el que se establecen los requisitos de documentación, tenencia y marcado en materia de comercio de especies amenazadas de fauna y flora silvestres, de acuerdo con lo establecido por la reglamentación de la Unión Europea en aplicación de la Convención sobre el comercio internacional de especies amenazadas de fauna y flora silvestre;⁵⁷³
- el *Real Decreto 293/2018, de 18 de mayo*, sobre reducción del consumo de bolsas de plástico y por el que se crea el Registro de Productores y que incorpora al ordenamiento jurídico español la Directiva (UE) 2015/720 del Parlamento Europeo y del Consejo, de 29 de abril de 2015, por la que se modifica la Directiva 94/62/CE en lo que se refiere a la reducción del consumo de bolsas de plástico ligeras;⁵⁷⁴
- el *Real Decreto 818/2018, de 6 de julio*, sobre medidas para la reducción de las emisiones nacionales de determinados contaminantes atmosféricos, que tiene como objetivo incorporar al ordenamiento jurídico español la llamada “Directiva de Techos”, la Directiva (UE) 2016/2284 del Parlamento Europeo y del Consejo, de 14 de diciembre de 2016, que establece los compromisos de reducción de emisiones de los Estados miembros para las emisiones atmosféricas antropogénicas.⁵⁷⁵

Cambio de Gobierno y modificación de los departamentos ministeriales

Antes de entrar a reseñar las más importantes novedades legislativas estatales, nos parece relevante destacar un acontecimiento al que no podemos dejar de hacer referencia: el 1 de junio,

⁵⁷² BOE núm. 158, de 30 de junio de 2018.

⁵⁷³ BOE núm. 23, de 26 de enero de 2018.

⁵⁷⁴ BOE núm. 122, de 19 de mayo de 2018.

⁵⁷⁵ BOE núm. 164, de 7 de julio de 2018.

Pedro Sánchez, líder del PSOE, se ha convertido en el séptimo presidente del Gobierno de España tras prosperar, por primera vez desde la vuelta a la democracia en 1977, la moción de censura contra Mariano Rajoy (Partido Popular). Después de la publicación del nombramiento, el nuevo Presidente ha modificado la estructura básica de los departamentos ministeriales existente⁵⁷⁶ y, en concreto, para lo que concierne al medio ambiente, desaparece el Ministerio de Agricultura y Pesca, Alimentación y Medio Ambiente así como el Ministerio de Energía, Turismo y Agenda Digital y se crean dos nuevos ministerios: el Ministerio de Agricultura, Pesca y Alimentación⁵⁷⁷, cuyo objetivo es la propuesta y ejecución de la política del Gobierno en materia de recursos agrícolas, ganaderos y pesqueros, de industria agroalimentaria, de desarrollo rural y de alimentación; y el Ministerio para la Transición Ecológica⁵⁷⁸, que se ocupará de la propuesta y ejecución de la política del Gobierno en materia de energía y medio ambiente para la transición a un modelo productivo y social más ecológico. La novedosa distribución competencial para los nuevos Ministerios responde a la más adecuada expresión de los objetivos prioritarios del Gobierno, es decir diseñar e implementar políticas medioambientales en materia de cambio climático y que avancen hacia una transición energética y ecológica sostenible y de su relativo programa político en aras a lograr mayor eficacia en su acción y mayor eficiencia en el funcionamiento de la Administración General del Estado.

A través del Real Decreto 958/2018, de 27 de julio⁵⁷⁹, se crea y regula, además, la Comisión Interministerial para el Cambio Climático y la Transición Energética. La política del Gobierno en materia de transición ecológica se dirige a reforzar y promover la atención de los asuntos relacionados con la lucha contra el cambio climático y con la transición energética, lo que, unido a la relevancia económica, ambiental y social de esta materia, justifica la modificación de la actual Comisión Interministerial para el Cambio Climático, adecuándola al impulso en la materia, modificando su denominación y ajustándola a la nueva planta departamental. La Comisión Interministerial para el Cambio Climático y la Transición Energética, adscrita al Ministerio para la Transición Ecológica, se crea con el fin de lograr el mejor tratamiento de las políticas públicas en esta materia, desde una perspectiva participativa y multidisciplinar, y se le asigna una amplia

⁵⁷⁶ Vid. Real Decreto 355/2018, de 6 de junio, por el que se reestructuran los departamentos ministeriales, BOE núm. 138, de 7 de junio de 2018.

⁵⁷⁷ Vid. Real Decreto 904/2018, de 20 de julio, por el que se desarrolla la estructura orgánica básica del Ministerio de Agricultura, Pesca y Alimentación.

⁵⁷⁸ Vid. Real Decreto 864/2018, de 13 de julio, por el que se desarrolla la estructura orgánica básica del Ministerio para la Transición Ecológica; Real Decreto 355/2018, de 6 de junio, por el que se reestructuran los departamentos ministeriales; Real Decreto 595/2018, de 22 de junio, por el que se establece la estructura orgánica básica de los departamentos ministeriales.

⁵⁷⁹ BOE núm. 182, de 28 de julio de 2018.

variedad de funciones de impulso y coordinación y, entre otras, promover las actuaciones de los órganos concernidos de la Administración General del Estado, para la elaboración del Anteproyecto de Ley de cambio climático y transición energética, del Plan Nacional Integrado de Energía y Clima o de la estrategia para la descarbonización de la economía a 2050.

Análisis legislativo estatal

En el período objeto de este análisis han sido aprobadas pocas normas con rango de ley y numerosas normas de rango reglamentario en materia ambiental, en diferentes ámbitos sectoriales. Nos parece relevante destacar el Real Decreto 293/2018, de 18 de mayo, sobre reducción del consumo de bolsas de plástico y el Real Decreto-ley 15/2018, de 5 de octubre, de medidas urgentes para la transición energética y la protección de los consumidores.

1.1. Real Decreto 293/2018, de 18 de mayo, sobre reducción del consumo de bolsas de plástico

Importantes novedades para la lucha contra la dispersión de los residuos plásticos en el medio ambiente han sido introducidas por el Real Decreto 293/2018, de 18 de mayo, sobre reducción del consumo de bolsas de plástico y por el que se crea el Registro de Productores y que incorpora al ordenamiento jurídico español la Directiva (UE) 2015/720 del Parlamento Europeo y del Consejo, de 29 de abril de 2015, por la que se modifica la Directiva 94/62/CE en lo que se refiere a la reducción del consumo de bolsas de plástico ligeras.⁵⁸⁰

A través del Real Decreto objeto de análisis, se adoptan en España las siguientes medidas:⁵⁸¹ en primer lugar, desde el 1 de julio de 2018 se prohíbe la entrega gratuita de las bolsas de plástico ligeras a los consumidores, en los puntos de venta y, por ende, desde esa fecha los comerciantes deben cobrar un precio por cada bolsa de plástico ligera que entreguen al consumidor. Se exceptúan de esta medida las bolsas de plástico muy ligeras (las bolsas de plástico de menos de 15 micras de espesor) que son necesarias por razones de higiene, o que se suministran como

⁵⁸⁰ BOE núm. 122, de 19 de mayo de 2018.

⁵⁸¹ *Vid.* art. 4 Real Decreto 293/2018, de 18 de mayo, sobre reducción del consumo de bolsas de plástico y por el que se crea el Registro de Productores.

envase primario para alimentos a granel. En segundo lugar, desde el 1 de enero de 2021 se prohíbe la entrega –gratuita o no- a los consumidores, en los puntos de venta, de bolsas de plástico ligeras y muy ligeras no compostables. Asimismo, para evitar los perjuicios sobre los suelos, las aguas y la biota derivados de la permanencia en el medio ambiente de los plásticos, pero en partículas de menor tamaño, se prohíbe también la entrega de bolsas de plástico fragmentable a partir del 1 de enero de 2020, entendiendo como tales las bolsas de plástico fabricadas con materiales plásticos que incluyen aditivos que catalizan la fragmentación del material plástico en microfragmentos. A través del Real Decreto se han adoptado medidas para las bolsas de un espesor igual o superior a las 50 micras. Por una parte, se obliga al cobro de un precio por dichas bolsas desde el 1 de julio de 2018 excepto para las que tengan un porcentaje de plástico reciclado igual o superior al 70%; y, por otra, se establece la obligación de que estas bolsas contengan, a partir del 1 de enero de 2020, un porcentaje mínimo de plástico reciclado del 50 %, y se propone para las mismas un precio orientativo menor. Todas estas medidas afectarán también a las bolsas que puedan suministrarse en la venta online, así como a las entregadas a domicilio.

1.2. Real Decreto-ley 15/2018, de 5 de octubre, de medidas urgentes para la transición energética y la protección de los consumidores.

El marco de una “transición energética justa”, el actual Gobierno ha aprobado a los pocos meses de su constitución, el Real Decreto Ley 15/2018, de 5 de octubre, de medidas urgentes para la transición energética y la protección de los consumidores,⁵⁸² que ha sido convalidado por el Congreso el 18 de octubre⁵⁸³ y que se tramitará como Proyecto de Ley por el procedimiento de urgencia. El citado Real Decreto Ley, como pone de manifiesto su preámbulo, ha resultado necesario para hacer frente a la continua subida de los precios finales de la energía, que se repercuten de manera directa e inmediata sobre los consumidores eléctricos finales. Por este motivo, con el fin de proteger al conjunto de los consumidores y sobre todo a los más vulnerables, pretende introducir mecanismos concretos que aumenten la información y protección de los

⁵⁸² BOE núm. 242, de 6 de octubre de 2018.

⁵⁸³ *Vid.* Resolución de 18 de octubre de 2018, del Congreso de los Diputados, por la que se ordena la publicación del Acuerdo de Convalidación del Real Decreto-ley 15/2018, de 5 de octubre, de medidas urgentes para la transición energética y la protección de los consumidores. BOE núm. 259, de 26 de octubre de 2018.

consumidores y medidas adicionales más incisivas contra la pobreza energética, de protección para los consumidores eléctricos en particulares situaciones de vulnerabilidad.

En concreto, el título I contiene medidas de protección de los consumidores, agrupadas en dos capítulos: el primer capítulo es dedicado a los consumidores vulnerables y la lucha contra la pobreza energética y el segundo capítulo contiene medidas tendentes a aumentar la información, protección y racionalización de los mecanismos de contratación, aumentando la protección del conjunto de los consumidores de electricidad.

El Título II incide en la regulación del autoconsumo eléctrico renovable, disponiendo entre otras cosas la modificación del artículo 9 de la Ley 24/2013, de 26 de diciembre, del Sector Eléctrico (de ahora en adelante LSE). La reforma del artículo 9 de la LSE, introducida por el artículo 18 del citado Real Decreto Ley, se rige por tres principios fundamentales, que tienen que dirigir el autoconsumo eléctrico renovable: el derecho a autoconsumir energía eléctrica sin cargos; el derecho al autoconsumo compartido; y el principio de simplificación técnica y administrativa.

En concreto, respecto a la redacción anterior del artículo 9 LSE, destacamos las siguientes novedades:

a) Se amplía la definición de autoconsumo, abriendo las puertas a la posibilidad de que varios consumidores compartan las instalaciones de producción.

b) Se reduce la clasificación de las modalidades de autoconsumo prevista en el art. 9 LSE a dos tipologías. Ahora la discriminación entre un tipo u otro no será la potencia contratada, sino si hay o no vertidos de excedentes en la red.

c) Se dispone una importante simplificación de los trámites administrativos en línea con las disposiciones contenidas en la Directiva 2009/28/CE, eliminando los absurdos obstáculos previstos en la legislación hasta ahora vigente, sobre todo en el Real Decreto 900/2015, de 9 de octubre, por el que se regulan las condiciones administrativas, técnicas y económicas de las modalidades de suministro de energía eléctrica con autoconsumo y de producción con autoconsumo (de ahora en adelante RD Autoconsumo).

a) Se eliminan los peajes de respaldo al autoconsumo energético, el llamado “impuesto al sol”, que ha tenido un fuerte efecto desincentivador para las inversiones en el sector. El derecho plasmado en el preámbulo del Real Decreto Ley de autoconsumir energía eléctrica sin cargos,

se concreta en la previsión del art. 9.5 LSE, que fija la exención “de todo tipo de cargos y peajes” para la energía autoconsumida de origen renovable, cogeneración o residuos, y en la consiguiente derogación de los arts. 17 y 18 del RD Autoconsumo.

En el título III se introduce una serie de actuaciones normativas encaminadas a acelerar la transición a una economía descarbonizada, de forma que se eliminen de manera inmediata las barreras normativas que impiden a los agentes tomar las decisiones necesarias para que la referida transición se lleve a cabo con la mayor celeridad.

Las medidas se agrupan en dos ámbitos: el capítulo primero está dedicado a la integración de electricidad de fuentes de energía renovables, con el objetivo de asegurar que se lleven a cabo y se culminen las inversiones necesarias para cumplir los objetivos de penetración de renovables asumidos en 2020.

El capítulo II del título III está dedicado a la movilidad sostenible, especialmente a los vehículos eléctricos, ya que requieren un impulso normativo que resuelva los problemas de coordinación que impiden su implantación masiva. Entre las barreras principales se encuentra el insuficiente desarrollo de las infraestructuras de recarga, que detrae a muchos usuarios de adquirir un vehículo eléctrico enchufable ante la baja disponibilidad de puntos de recarga públicos.

Para resolver la situación descrita, el presente real decreto-ley liberaliza la actividad de recarga eléctrica, eliminando la figura del gestor de cargas prevista en la LSE y que se ha revelado como excesivamente rígida y desincentivadora de la actividad.

Por último, se adoptan una serie de medidas relacionadas con la normativa fiscal, con el objetivo principal de moderar la evolución de los precios en el mercado mayorista de electricidad: se trata en concreto de medidas fiscales que afectan al Impuesto sobre el Valor de la Producción de Energía Eléctrica y al Impuesto sobre Hidrocarburos.

Jurisprudencia ambiental del Tribunal Constitucional en materia de fracking

Respeto a la jurisprudencia ambiental del Tribunal Constitucional (de ahora en adelante TC) cabe mencionar dos sentencias en materia de fracking: la sentencia 8/2018, de 25 de enero⁵⁸⁴ y la sentencia 65/2018, de 7 de junio. En la primera el TC resuelve el recurso de inconstitucionalidad interpuesto por el Presidente del Gobierno en relación con diversos preceptos de la Ley del Parlamento vasco 6/2015, de 30 de junio, de medidas adicionales de protección medioambiental para la extracción de hidrocarburos no convencionales y la fractura hidráulica. En la citada sentencia el TC, confirma su jurisprudencia anterior,⁵⁸⁵ declarando la inconstitucionalidad de los preceptos legales que extienden la competencia autonómica al mar territorial, y prohíben, de manera absoluta e incondicionada el fracking, una técnica de investigación y explotación de hidrocarburos, admitida por legislación básica estatal,⁵⁸⁶ cuya utilización ha de ponderarse caso por caso mediante la evaluación de impacto ambiental.⁵⁸⁷

En cambio, en la Sentencia 65/2018, de 7 de junio,⁵⁸⁸ el TC declara la constitucionalidad de determinados preceptos de la Ley de Castilla – La Mancha⁵⁸⁹ que establecen medidas adicionales de protección de la salud pública y del medio ambiente para la exploración, la investigación o la explotación de hidrocarburos mediante el empleo de la técnica del fracking, impugnados por el Presidente del Gobierno por presunta vulneración de varios títulos competenciales. En concreto la norma autonómica citada habilita a la Administración autonómica competente para que establezca una zonificación del territorio de la Comunidad Autónoma delimitando áreas de actuación en las que, en base a criterios legalmente predeterminados, se excluya, restrinja o permita la técnica del fracking. Se trata, a nuestro entender, de un cambio de jurisprudencia por parte del TC, que deja un cierto margen a las comunidades autónomas de

⁵⁸⁴ BOE núm. 46, de 21 de febrero de 2018.

⁵⁸⁵ Entre todas, *vid.* SSTC 106/2014, de 24 de junio; 134/2014, de 22 de julio y 208/2014, de 15 de diciembre.

⁵⁸⁶ Ley 34/1998, de 7 de octubre, del sector de hidrocarburos (LSH) y de la Ley 21/2013, de 9 de diciembre, de evaluación ambiental (LEA).

⁵⁸⁷ En concreto, el TC considera que los artículos 3 y 5 de la citada ley, que modifican las leyes de urbanismo y aguas del País Vasco, respectivamente, limitando o prohibiendo el uso de la técnica del fracking en sus respectivos ámbitos de aplicación, pretenden dejar sin eficacia las normas dictadas por el Estado.

⁵⁸⁸ BOE núm. 164, de 7 de julio de 2018.

⁵⁸⁹ Ley 1/2017, de 9 de marzo, por la que se establecen medidas adicionales de protección de la salud pública y del medio ambiente para la exploración, investigación o explotación de hidrocarburos utilizando la técnica de la fractura hidráulica.

manera que, con fundamento en títulos competenciales autonómicos, tendrían la posibilidad de elaborar normativa autonómica mediante la cual prohibir, restringir o permitir la utilización de la citada técnica. Sin embargo, cabe destacar que la futura Ley española de Cambio Climático, actualmente en fase de tramitación, prohibirá las nuevas prospecciones de hidrocarburos y el uso de la técnica del fracking en todo el territorio nacional. En concreto, a partir de la entrada en vigor de la misma no se otorgarán autorizaciones para actividades de exploración, permisos de investigación ni concesiones de explotación de hidrocarburos, ni tampoco se podrán desarrollar actividades de fractura hidráulica. La Ley además establece que las prórrogas vigentes no podrán seguir más allá del 31 de diciembre de 2042

COUNTRY REPORT: UKRAINE

Climate policy, climate justice and renewable energy solutions in Ukraine in 2019

Svitlana Romanko*

Climate policy is a part of state environmental policy - the activity of state bodies, aimed at ensuring the constitutional right of everyone to the safe and healthy environment and compensation for damage caused by violation of this right. Over the last few years, and including this past year, the subject matter of Ukraine's environmental policy has drastically changed. This is reflected in new legislative acts which are analysed below.

Climate policy

For over ten years domestic, environmental policy has been formed by the Ministry of Ecology and Natural Resources. Until recently,⁵⁹⁰ the Ministry of Environmental Protection had simultaneously elaborated and implemented an environmental policy on the regulation of the adverse impacts of and adaptation to climate change and compliance with the requirements of the United Nations Framework Convention on Climate Change and the Kyoto Protocol to it, and the Paris Agreement.

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⁵⁹⁰ And in accordance with the Resolution of the Cabinet of Ministers of Ukraine "On Approval of the Regulation on the Ministry of Ecology and Natural Resources of Ukraine» adopted on 21 of January, 2015 p. № 32

The newest Law of Ukraine «About the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the period up to 2030», adopted February 28, 2019 and effective January 1, 2020⁵⁹¹ [the 2019 Law] transforms state environmental policy, shifting the focus of policy development from the Ministry to local -government, and public administration in the regions and territorial Communities. The State policy of Ukraine in the field of local -government is based on the interests of residents of territorial communities and the decentralization of power. This enables local government to develop, adopt and implement the state regional policy.⁵⁹² The Law on Cooperation of Territorial Communities⁵⁹³ created a mechanism for solving common community problems: recycling and waste management, shared infrastructure, climate and energy, environmental solutions. It has done this by:

- delegating to local government agencies none or more tasks with the transfer of relevant resources;
- delegating the implementation of joint projects, which envisages coordination and joint implementation of certain activities by delegated authorities;
- establishing joint financing (maintenance) of enterprises, institutions and organizations of communal ownership;
- providing for the formation of joint utilities, institutions and organizations;
- providing for the formation of joint bodies of cooperation by the local government agencies for joint fulfilment of the powers defined by law⁵⁹⁴.

⁵⁹¹ Law of Ukraine "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period until 2030"// The Official Bulletin of Ukraine. 12.04.2019 - 2019, No. 28, p. 29, article 980, act code 93969/2019

⁵⁹²Defined in article 1 of the Law On the Principles of State Regional Policy on February 5, 2015 as a system of goals, measures, means and concerted actions of central and local executive authorities, local self-government bodies and their officials to ensure high quality of life of people throughout Ukraine, taking into account natural, historical, environmental, economic, geographical, demographic and other features regions, their ethnic and cultural identity.

⁵⁹³Law on Cooperation of Territorial Communities (2014). The Official website of Verkhovna Rada of Ukraine (the Parliament) <https://zakon.rada.gov.ua/go/1508-18>

⁵⁹⁴ Article 4 of the Law on Cooperation of Territorial Communities.

According to official reports on the results of the first stage of decentralization in 2014-2018,⁵⁹⁵ at the end of 2018, 325 cooperation agreements had already been implemented and 975 communities have participated in the process of cooperation on the Law on Principles of State Regional Policy.⁵⁹⁶ This reform was combined with the Laws on Amendments to the Budget and Tax Codes of Ukraine. These changes have led to financial decentralization when local budgets have increased by UAH 165.4 billion in recent years: from \$ 68.6 billion in 2014 to UAH 234 billion in 2018. State support for regional and community infrastructure has increased 39-fold, from \$ 0.5 billion in 2014 to \$ 19.37 billion in 2018. Due to this support, more than 10,000 projects were implemented in regions and communities in 2015-2018.⁵⁹⁷ Some of these are energy efficiency, waste management and sustainable land use projects.

At the strategic level, the priorities of environmental policy have been defined in the 2019 Law. This new Law replaced the Law of Ukraine "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period until 2020" and has the aims of:

- preserving such a state of the climate system as will make it possible to increase the risks to the health and well-being of people and the environment; and meet the Sustainable Development Goals (SDGs), which were approved at the United Nations Summit on Sustainable Development in 2015;
- promoting balanced (sustainable) development in relation to the components of development (economic, ecological, social);
- integrating environmental requirements when developing and approving documents of state planning, sectoral, regional and local development, and in the process of

⁵⁹⁵ Results of the first stage of decentralization in Ukraine 2014-2018. About the reform. Decentralisation website <https://decentralization.gov.ua/about>

⁵⁹⁶ Law on the Principles of State Regional Policy. Official website of Verkhovna Rada of Ukraine. <https://zakon.rada.gov.ua/laws/show/156-19>

⁵⁹⁷ Results of the first stage of decentralization in Ukraine 2014-2018. About the reform. Decentralisation website <https://decentralization.gov.ua/about>

implementing planned activities that can have a significant impact on the environment; cross-sectoral partnerships and the involvement of interested parties; prevention of emergencies of natural and man-made nature, which envisages the analysis and forecasting of environmental risks based on strategic environmental assessment, environmental impact assessment, and integrated monitoring of the state of the environment;

- providing for ecological safety and the maintenance of ecological balance in the territory of Ukraine, and an increased level of ecological safety in the exclusion zone;
- ensuring liability for violations of environmental legislation; application of the principles of precaution, prevention (prevention), "polluter pays"; priority elimination of sources of harm to the environment;
- responsibility of the executive authorities and local governments for the availability, timeliness and reliability of environmental information;
- the stimulation by the state of domestic enterprises that reduce greenhouse gas emissions, reduce energy and resource intensities, and modernize production aimed at reducing the negative impact on the natural environment, including improving the environmental tax system for environmental pollution and payments for the use of natural resources;
- implementation of the latest means and forms of communication and effective information policy in the field of environmental protection.⁵⁹⁸ These are recognized as the main principles and instruments of a state in chapter II of the 2019 Law.

According to paragraph 3 of the 2019 Law, the Cabinet of Ministers of Ukraine shall, within six months of the effective date of the Law, elaborate and approve the National Action Plan for the Protection of the Environment. They are responsible for the preparation of a report on the accomplishment of the Law of Ukraine "On the Basic Principles (Strategy) of the State

⁵⁹⁸ Law of Ukraine "On the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period until 2030", adopted February 28, 2019 and effective January 1, 2020.

Environmental Policy of Ukraine for the Period until 2020" and submission of the report to the Verkhovna Rada of Ukraine (as the Ukrainian Parliament is responsible for adoption and monitoring the state environmental policy effectiveness).⁵⁹⁹

It is critical to draft a new State concept of adaptation to a climate change at a national level after climate impacts in 2017-2019⁶⁰⁰ have become very visible and caused a lot of damage to a state and local citizen interests as extremely high temperatures and precipitation combined with heavy floods in 2019.⁶⁰¹ Presidential Decree №325 / 2019 "On urgent measures to overcome the consequences of natural disasters emergency in some areas of the Zakarpattia and Ivano-Frankivsk regions, adopted on 25 of May 2019, aimed to:

- ensure the elimination of the consequences of an emergency situation, including carrying out emergency rescue, repair, and construction works for the reconstruction of dwelling houses, transport infrastructure, housing and communal services, engineering structures and communications, to organize carrying out flood control works;
- put in place measures for the provision to provide the population of drinking water, necessary medical care and medicines, and other essentials;
- to promptly, fully inform the population about the situation in the affected territories and the measures taken to overcome the consequences of the emergency and normalization of life.

⁵⁹⁹ Section IV of the Constitution of Ukraine (Articles 75-101) details the composition, authority and procedure of organizing the work of the Verkhovna Rada of Ukraine.

⁶⁰⁰ During the forum "Climate change in Ukraine: is an imminent catastrophe?», Candidate of Geographical Sciences, Senior Researcher at the Ukrainian Hydrometeorological Institute of the The State Emergency Service of Ukraine and the National Academy of Science of Ukraine, Vera Balabukh noted that Ukraine is one of the regions of our planet where the temperature rise has been the highest in the world for the last 30 years. Ukrinform Agency. <https://www.ukrinform.ua/rubric-society/2699791-zmini-klimatu-v-ukraini-temperatura-roste-nadzvicajno-svidko.html>

⁶⁰¹ BBC news Ukraine. Official website <https://www.bbc.com/ukrainian/news-48451184;RBK> Ukraine. Official website <https://www.rbc.ua/ukr/stylar/stihiynoe-bedstvie-goroda-zapadnoy-ukraine-1558428300.html>

In the meantime, while the national adaptation strategy is at the early stages of its development, local communities have begun to develop their plans for meeting the adaptation risks.⁶⁰²

As stated by the Minister of Ecology and Natural Resources of Ukraine Ostap Semerak “Ukraine has finally chosen a state-based environmental policy that focuses on preparedness, rather than overcoming the consequences”.⁶⁰³ The development of the second Nationally-Determined Contribution (NDC) of Ukraine has also started.⁶⁰⁴ These developments combined represent an exponential step towards a green, resource efficient, low waste and low-carbon economy for the Ukraine.

Renewable energy solutions in Ukraine

Renewable Energy legislation has been meaningfully changed in 2018-2019 after 4 cities of Ukraine committed to make a transition towards the use of 100% of energy from renewable sources in the energy supply of the city by 2050.⁶⁰⁵ Thus, there is an extensive need for nationally driven renewable solutions to become a focus of the public and legislators. As an example, significant changes in legal regulation were made by the adoption of the Law “On Amendments to Some Laws of Ukraine on Ensuring Competitive Conditions for the Production of Electricity from Alternative Energy Sources” in force since April 25, 2019. This Law first addressed the definition and existence of an energy cooperative as a legal entity established in accordance with

⁶⁰² Action Plan on Adaptation community Kamenskoe to climate change. Climate Forum East, 2016.

Website : https://climateforumeast.org/uploads/files/___final_1.pdf

⁶⁰³ Official website of Ministry of Ecology and Natural Resources of Ukraine // <https://menr.gov.ua/news/33165.html>

⁶⁰⁴ with the support of the E with the support of the EBRD Project "Support to the Government of Ukraine for the updating of NDC" by ad hoc group of fifty representatives BRD Project "Support to the Government of Ukraine for the updating of NDC" by ad hoc group of fifty representatives Official website of Ministry of Ecology and Natural Resources of Ukraine // <https://menr.gov.ua/news/33079.html>

⁶⁰⁵ Cities for Life website. <https://cityforlife.org/документи/>

the Law of Ukraine "On Cooperation" and the Law of Ukraine "On Consumer Cooperatives».⁶⁰⁶ The main purpose of it is the carrying out of economic activities for the production, procurement or transportation of fuel and energy resources, as well as for the provision of other services. The first energy cooperative was officially created in Slavutych, Ukraine, where the energy cooperative "Sunny City" will have solar power plants with a total capacity of 20.28 MW on leased roofs of multistory buildings in 2019.⁶⁰⁷

Other legislative changes relate to the green tariff for electricity. When the energy is been produced by consumers -- including energy co-operatives -- from solar energy, wind power, biomass, biogas, using hydropower, geothermal energy by generating installations, or installed power not exceeding 150 kW, these parties have the right to sell their excess energy to the city grid for a green tariff. According to the Law,⁶⁰⁸ the right to install a home solar power plant up to 30 kW is recognized as a legal right of every consumer. About 7500 private households in Ukraine have installed solar panels, using the legal rights, recognized by this Law.⁶⁰⁹

Additionally, the new Law on the Electricity Market of Ukraine⁶¹⁰ was adopted April 13, 2019.

The Law gained much publicity because of an innovative system which takes into account the requirements of the Third Energy Package.⁶¹¹ According to those requirements the current

⁶⁰⁶ Official website of Parliament of Ukraine // <https://zakon.rada.gov.ua/laws/show/2265-12>

⁶⁰⁷ In Slavutych, the energy cooperative will install sun roofs with a total capacity of 20 MW // Ecotown resource <https://ecotown.com.ua/news/U-Slavutychi-enerhokooperatyv-vstanovyt-dakhovi-sonyachni-stantsiyi-zahalnoyu-potuzhnistyu-20MVt/>

⁶⁰⁸ Draft Law on Amendments to Article 9-1 of the Law of Ukraine "On Alternative Energy Sources" on Regulation of Electricity Generation by Private Households, adopted June 3, 2019

⁶⁰⁹ State Agency on Energy Efficiency and Energy Saving of Ukraine. Official website. <http://saee.gov.ua/uk/news/2764>

⁶¹⁰ Law "On the Electricity Market of Ukraine" Official website of a Parliament of Ukraine <https://zakon.rada.gov.ua/laws/show/2019-19>

⁶¹¹ The package consists of two Directives, one concerning common rules for the internal market in gas (2009/73/EC), one concerning common rules for the internal market in electricity 2009/72/EC) and three Regulations, one on conditions for access to the natural gas transmission networks ((EC) No 715/2009), one on conditions for access to the network for cross-border exchange of electricity ((EC) No 714/2009)

regional energy supply enterprises are obliged to separate their distribution activities from electricity supply activities. In essence, energy providers should be divided into two separate companies: (i) the operator of the distribution system – which provides reliable and safe operation, maintenance and development of the distribution system and distributes the electricity; — (ii) the supplier, who sells electricity to consumers, using networks of distribution system operators. If we talk about the risks of unfair competition and monopolism in the energy generation and supply industry as it stands⁶¹² it should be noted that the issue of demonopolization is not directly resolved by the law. Existing research analyses the prerequisites of risks in the current legislation and highlights that it does not provide formal grounds for claiming the existing energy market players are monopolies⁶¹³. New Law of Ukraine "On Electricity Market contains a provision to prove that⁶¹⁴. Consequently this law abolishes manual regulation and creates conditions for the establishment of market prices for electricity generation. This means that administrative control over electricity producers is weakening, and prices are formed by market mechanisms, provided by law, without regulator interference New Resolution of National Energy and Utilities Regulatory Commission (NEURC), adopted April 26, 2019, has established two main parts of the regulation:

- approved the Methodology of pricing for ancillary services
- the State Enterprise "Energoynok" monthly to the date of introduction of the new electricity market, to calculate the weighted average price of electricity sales by producers in the Wholesale Electricity Market of Ukraine (hereinafter - WEM) from alternative sources of

and one on the establishment of the Agency for the Cooperation of Energy Regulators ACER ((EC) No 713/2009). They were adopted in July 2009. // http://europa.eu/rapid/press-release_MEMO-11-125_en.htm?locale=en

⁶¹² These are monopolies such as Akhmetov's energy holding DTEK and power companies, which have been privatized by several smaller oligarchs. At present, the problem is ensuring non-discriminatory third-party access to oblenergia networks - source is https://dt.ua/energy_market/scho-nam-dast-i-scho-zabere-zakon-pro-rinok-elektroenergiyi-240471_.html

⁶¹³ Overview of electricity market reform. The practice of limiting monopolization of generation in the electricity markets of leading foreign countries // <https://ua.energy/wp-content/uploads/2018/01/5.-Reformuvannya-rynkiv-elektroenergiyi.pdf>

⁶¹⁴ The aim of the new Law of Ukraine "On Electricity Market" is to introduce competitive mechanisms for the functioning of the electricity market, to freely select contractors and to ensure the consumer's right to freely choose the electricity supplier. The law provides for various mechanisms for the purchase and sale of electricity - bilateral agreements, a day-ahead market and a daily market.

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energy) for the 12 calendar months preceding the month of calculation and to provide the value of such price to SE "NEK" UKRENERGO .

COUNTRY REPORT: THE BAHAMAS

The Effects of Delayed Implementation of Legislation upon Environmental Protection

Alexandria Russell*, Monique Millar*, Keath Smith* and Clyde Newton*

With assistance from Raquel Williams**

Introduction

The Bahamas is an archipelagic nation of over 700 low-lying islands and cays whose vulnerable marine resources face threats due to overfishing, unregulated foreign development, plastic pollution and the adverse effects of climate change. This Report discusses the delayed implementation of the *Freedom of Information Act 2017*, proposed amendments to the fisheries legislation and initiatives addressing plastic pollution and climate change. It also examines the consequences of the delayed legislative progression upon the protection and conservation of the environment.

Illegal Unregulated and Unreported Fishing

Illegal, unregulated and unreported fishing (IUUF) within Bahamian waters have been a cause of concern for many years. The year 2018 saw successful efforts by the Royal Bahamas Defence Force (RBDF) to protect our fishery resources and economic livelihood against IUUF. The arrest of over 100 fishermen from the Dominican Republic (the Dominican fishermen) for poaching resulted in their prosecution and the imposition of hefty fines and terms of imprisonment.

The Port States Measures Agreement (PSMA)⁶¹⁵ which entered into force on June 15, 2016 is an international response to common challenges with IUUF. It was seen to proffer “many benefits that would aid in The Bahamas’ conservation of marine life and regulating fishing practices”.⁶¹⁶ States’ ability to exercise effective control over vessels flying their flags and good information exchange are factors which contribute to the effectiveness of the PSMA. Measures such as verification by maritime vessels seeking entry into ports that they have not engaged in IUUF also serve to further the objectives of the PSMA. However, a factor limiting the effectiveness of the PSMA, and noted by The Bahamas in its declaration upon accession to the PSMA, is that “the number of port calls by foreign fishing vessels is negligible”.⁶¹⁷ Further, the Dominican Republic, which is known to have citizens who engage in IUUF in Bahamian waters⁶¹⁸, are not listed as signatories to the PSMA.⁶¹⁹

At the national level, the fight against IUUF is dependent on strong regulatory and law enforcement mechanisms. Persons engaged in IUUF in The Bahamas may be charged under the *Fisheries Resources (Jurisdiction and Conservation) Act* (the *FRJC Act*)⁶²⁰ with offences which include illegal fishing in the exclusive fishery zone, harvesting young fishery resources and harvesting fishery resources during spawning season. The maximum penalty under Section 20 of the *FRJC Act* that may be imposed on the owner, master or other person in charge of a fishing

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⁶¹⁵ The Agreement on Port State Measures to Prevent, Deter and Eliminate Illegal, Unreported and Unregulated Fishing is available at http://www.fao.org/fileadmin/user_upload/legal/docs/037s-e.pdf Accessed January 22, 2019

⁶¹⁶ See ‘Country Report: The Bahamas, Environmental Litigation and The Bahamas’ Signing of the Port State Measures Agreement by Megan Curry, Berchel Wilson and Andrew Smith with assistance from Lisa Benjamin IUCN eJournal 2017(8), <http://www.iucnael.org/en/e-journal/current-issue#>, Accessed January 12, 2019

⁶¹⁷ IBID 3

⁶¹⁸ Krishna Russell, Poacher Sentences ‘Cause of Concern’ (December 18, 2018) <http://www.tribune242.com/news/2018/dec/19/poacher-sentences-cause-concern/> Accessed January 2, 2019

⁶¹⁹ IBID 3

⁶²⁰ Chapter 244 of the Statute Laws of The Bahamas available at laws.bahamas.gov.bs/cms/images/LEGISLATION/PRINCIPAL/1977/1977-0013/FisheriesResourcesJurisdictionandConservationAct_1.pdf Accessed December 18, 2018

vessel and on any person, who uses such vessel for engaging in foreign fishing⁶²¹ within the exclusive fishery zone is \$50,000 or imprisonment for a term of one year or both.

One of the most notable of the IUUF incidents occurred on July 8, 2018. The RBDF apprehended a Dominican fishing vessel as it attempted to flee into Cuban waters and confiscated approximately 33,000 pounds of fish which included undersized Nassau Grouper and crawfish taken during the closed season (April 1, 2018 to July 31, 2018).⁶²² Captain Hernandez and his 46 crew members were charged with various offences under the *FRJC Act* to which they pleaded guilty before a Magistrate and were fined \$53,000 each, resulting in fines totalling more than 2.3 million Bahamian Dollars. Captain Hernandez was also convicted for possession of an unlicensed firearm and ammunition and was convicted and sentenced to 18 months' imprisonment.⁶²³ The vessel was forfeited, and the haul confiscated. The ruling was praised by environmentalists as a "landmark decision" and as a demonstration of "strong enforcement of the fisheries regulations".⁶²⁴ The fishermen appealed to the Court of Appeal (the Hernandez appeal).⁶²⁵

On December 10, 2018 the Court of Appeal delivered its ruling in the Hernandez appeal. The Court of Appeal, while not disturbing the fines, reduced the prison terms from one year to six months. The Court of Appeal observed that "uppermost in the mind of the magistrate was the issue of deterrence," and found that more consideration ought to have been given to the guilty

⁶²¹ Foreign fishing under the *FRJC Act* means fishing by a vessel other than a vessel owned by a Bahamian.

⁶²²Nico Scavella, Poachers Jail Terms Cut in Half (December 12, 2018) www.tribune242.com/news/2018/dec/12/poachers-jail-terms-cut-half/ Accessed January 8, 2019

⁶²³ Three Dominican Republic fishing 'motherships' interdicted in Bahamas waters (October 15, 2018) <https://www.caribbeannewsnow.com/2018/10/15/three-dominican-republic-fishing-motherships-interdicted-in-bahamas-waters/> (Accessed January 4, 2019)

⁶²⁴ BNT Press Release: Poaching Convictions – August 15, 2018 <https://bnt.bs/bnt-and-bahamian-fishermen-satisfied-with-landmark-ruling/> (Assessed January 4, 2019)

⁶²⁵ For other incidents see footnote 10 and Seven Dominican Fishermen of Poaching (December 17, 2018) <http://www.tribune242.com/news/2018/dec/17/seven-dominican-fishermen-guilty-poaching/> Accessed January 4, 2019

pleas. The Court of Appeal did not disturb the 18 months' term of imprisonment imposed on Captain Hernandez in relation to the unlicensed firearm offence.⁶²⁶

The 1988 ruling of Justice Georges in the case of Bello v Commissioner of Police⁶²⁷ demonstrates that IUUF is an old problem which is exacerbated by the failure to update the 1977 *FRJC Act* to meet the changed socio-economic and environmental conditions of The Bahamas today.

Justice Georges heard the sentencing appeal by Dominican fishermen and examined the relevant considerations when sentencing IUUF offences under the *FRJC Act*. Justice Georges indicated that magistrates “ought to bear in mind that the Act is intended to preserve the natural resources of this country”. “[T]he punishment, therefore, is intended to sound a fairly serious warning to neighbouring countries not to intrude into The Bahamas’ exclusive zone for the purpose of fishing” and “the message ought to be taken back to the neighbouring country that this is an activity which is fraught with risk, and there is the real likelihood of punishment both in terms of financial penalty and the possibility of a term of imprisonment”.⁶²⁸ Justice Georges also addressed other considerations such as the means of the accused to pay the fine, prior convictions, the seriousness of the offence, the quantity of fish removed and whether young or spawning fish had been harvested. The message was received by the Dominican Republic. The delegation sent to The Bahamas to discuss the incarcerated Dominican fishermen committed to do more to discourage IUUF in our waters including using indicators to monitor Dominican fishing vessels.⁶²⁹

The Court of Appeal’s judgment reminds us that mitigating factors must be considered by courts when sentencing poachers. The judgment may be interpreted as setting the precedent that poachers who plead guilty to similar offences should receive a prison sentence of no more than

⁶²⁶ Hernandez & others v The Commissioner of Police MCCRAp & CAIS No. 177 of 2018

⁶²⁷ [1988] BHS J No. 92; No 29 of 1988

⁶²⁸ IBID 14

⁶²⁹ IBID 6

six months under the present law. IUUF directly impacts the economic livelihood of Bahamian fishermen and our tourism industry both of which are dependent on the sustainability of our fisheries resources and the preservation of our marine ecosystems. The aim of deterring poaching would be better advanced by increasing the maximum penalties, (both fines and sentences), as this would enhance the court's power to apply harsher penalties even while weighing mitigating factors. Promises by the previous administration to increase the fines under the FRJC Act "five-fold" failed to materialize.⁶³⁰ The present Minister of Fisheries has promised to table before Parliament legislation with "stiffer penalties."⁶³¹ He also indicated Cabinet approval of funds for drone technology to aid in surveillance and the detection of poaching activities.

The Freedom of Information Act and Environmental Impact Assessments

The year 2018 ended with controversy over the non-disclosure of the environmental impact assessments (EIAs) for two proposed foreign investment deals - Oban Energies and the Disney Cruise Line's Lighthouse Project. Both investment projects have the potential to negatively impact the environment but received governmental approval without prior public discussion. The approval of these projects again underscored the necessity for full implementation of the *Freedom of Information Act (FOIA) 2017* which would grant public right of access to documents held by public authorities.

The importance of access to information and in holding governments accountable to "higher environmental standards" through disclosure of EIAs and public consultation in the decision-making process was addressed in the 2018 IUCN Country Report for The Bahamas.⁶³² Without

⁶³⁰ Nico Scavella, Fines Against Poachers in Bahamian Waters 'Increased Five-Fold', (October 28, 2014) <http://www.tribune242.com/news/2014/oct/28/fines-against-poachers-bahamian-waters-increased-f/> Accessed December 18, 2018

⁶³¹ Morgan Adderley, Pintard Promises Stiffer Penalties Against Poachers (October 17, 2018) <http://www.tribune242.com/news/2018/oct/17/pintard-promises-stiffer-penalties-against/?news> Accessed December 8, 2018

⁶³² See Country Report: The Bahama, Save The Bays and the Freedom of Information Act 2017 by Andrew Smith, Nyanne Olander, Shanae Petty and Monique Millar with assistance from Lisa Benjamin, www.iucnael.org/en/e-journal/current-issue# Accessed January 18, 2019

access to the EIAs for the developments by Oban Energies and Disney Lighthouse Point, environmental organizations such as Save The Bays are unable to give meaningful consideration to the impact of the developments on the environment.

Oban Energies Deal

February 10, 2018 marked the first signing by the Government of a Heads of Agreement (the HOA) with Oban Energies for a \$5.5 billion oil refinery and storage facility in East End Grand Bahama (the Oban deal). This was done without prior public notice. A “ceremonial signing” of the HOA followed on February 17, 2018 with Peter Krieger, the non-executive chairman of Oban Energies signing on its behalf.⁶³³ The Oban deal was met with criticisms concerning the secret signing of the HOA and its hasty approval without the benefit of an EIA. The presence of a clause in the HOA restricting the government’s ability to rescind the deal in the event of concerns with the EIA compounded the issues. Under the HOA the government was instead required to work with Oban Energies to address any environmental concerns. To date the EIA has not been disclosed.

East End Grand Bahama has miles of beautiful beaches and a thriving local fishing industry, both of which would be greatly affected for example by a possible oil spill. Environmentalists also raised health concerns due to gas emissions.⁶³⁴ The experiences of the residents of Grand Bahama of oil spills and gas emissions from the Bahamas Oil Refining Company (BORCO), a United States based company operating an oil storage facility on Grand Bahama, is a potent

⁶³³ Save the Bays wants Oban to be “transparent” in 2019 (December 31, 2018) www.tribune242.com/news/2018/dec/12/poachers-jail-terms-cut-half/ Accessed January 18, 2019

⁶³⁴ Denise Maycock, “Refinery ‘A Death Knell’” (February 22, 2018) <http://www.tribune242.com/news/2018/feb/22/refinery-death-knell/> Accessed December 21, 2018

reminder of the health, safety and environmental issues connected with oil refineries such as Oban Energies.⁶³⁵

Oban Energies touted the deal as a much-needed revival of the struggling Grand Bahama economy which would create “600 direct and 1,000 indirect jobs” in the construction phase and on completion provide “250 permanent well-paying jobs”.⁶³⁶

Amidst public outcry, the Prime Minister admitted to “missteps” in the process⁶³⁷ and appointed a team led by the Minister of Labour to negotiate a new HOA. At the close of 2018, the EIA was completed⁶³⁸ but had not been disclosed, leading to renewed calls for governmental accountability and transparency.⁶³⁹ The Minister of Labour indicated that the EIA would not be disclosed until after the new HOA was executed.⁶⁴⁰

⁶³⁵Residents seek relocation from BORCO (April 17, 2013)

https://www.bahamaslocal.com/newsitem/70873/Residents_seek_relocation_from_BORCO.html

Accessed January 18, 2019

⁶³⁶Taneka Thompson, Oban Promises Homes for Workers (April 23, 2018)

www.tribune242.com/news/2018/apr/23/oban-promises-homes-workers/ Accessed January 4, 2019

⁶³⁷ Ricardo Wells, Oban 2 Deal? Umm, Maybe Next Month (December 12, 2018)

<http://www.tribune242.com/news/2018/dec/12/oban-2-deal-umm-maybe-next-month/> Accessed January 4, 2019

⁶³⁸ Denise Maycock, Oban Boss Insists: We’re Going Ahead (December 24, 2018)

<http://www.tribune242.com/news/2018/dec/24/oban-boss-insists-were-going-ahead/> Accessed January 4, 2019

⁶³⁹ Tamara McKenzie, Save the Bays wants Oban to be “transparent” in 2019 (December 31, 2018)

<https://ewnnews.com/save-the-bays-wants-oban-to-be-transparent-in-2019> Accessed January 4, 2019

⁶⁴⁰ Ava Turnquest, “Impact of Oban Deal Being Kept a Secret” (December 26, 2018)

<http://www.tribune242.com/news/2018/dec/27/impact-oban-deal-being-kept-secret/> (Accessed January 3, 2019).

The Disney Lighthouse Project

On August 31, 2018, Disney Cruise Line (Disney) proposed plans to construct a port for its ships at the Lighthouse Point located on the peninsula of the family island of Eleuthera. Environmental groups raised concerns as to the impact of dredging on the marine ecosystem.⁶⁴¹ After approval of the Disney proposal it was revealed that the EIA would take months to complete.⁶⁴²

The Effect of Delays in implementing the FOIA 2017

In the case of Great Guana Cay decided in 2009 before enactment of freedom of information legislation, the Privy Council considered that EIAs and documents related thereto were not subject to public disclosure.⁶⁴³ However, the 2018 IUCN Country Report for The Bahamas which examined the FOIA 2017 posited the view that as EIAs contain technical data they may fall within the exceptions mentioned in Section 21(3) of the FOIA 2017 and therefore be disclosable.⁶⁴⁴

⁶⁴¹ Sancheska Brown, Save The Bays Chairman pleads with the gov't to say no to Disney (October 16, 2018) <https://ewnews.com/save-the-bays-chairman-pleads-with-the-govt-to-say-no-to-disney> Accessed January 4, 2019)

⁶⁴² Morgan Adderley "Disney's Lighthouse Point Plan Impact Study to Take Months" (October 23, 2018) <http://www.tribune242.com/news/2018/oct/23/disneys-lighthouse-point-plan-impact-study-take-mo/> Accessed December 22, 2018

⁶⁴³ For a full discussion of the case, Country Report: The Bahamas, Access to environmental information, EIAs and Public Participation in Development Decisions by Lisa Benjamin, IUCN eJournal 2014(5), http://iucnael.org/en/component/docman/doc_download/1137-iucn-academy-of-envionmental-lawejournal-issue-5-2014.html Accessed January 4, 2019.

⁶⁴⁴ See Country Report: The Bahamas, Save The Bays and Freedom of Information Act 2017 by Andrew Smith, Nyanne Olander, Shanae Petty and Monique Millar with assistance from Lisa Benjamin IUCN ejournal 2018(9) (Accessed December 21, 2018); See also Country Report: The Bahamas Legislative Developments by Theomonique Nottage, Renee Farquharson and Megan Curry with assistance from Lisa Benjamin IUCN ejournal 2016(7)

The purpose of the *FOIA 2017* and its legislative history and deficiencies were discussed in previous country reports.⁶⁴⁵ Last year's report concluded that the *FOIA 2017* had rectified some of the problems that plagued prior versions of the Act and noted that the only provisions which were enacted involved the appointment of the Information Commissioner. This Commissioner is a key functionary responsible for an effective FOIA with powers to conduct investigations and to compel the production of evidence and witness testimony.⁶⁴⁶ However, some 6 years after the *FOIA* was first introduced, the government remains in preparatory mode with little progress to report other than training of personnel⁶⁴⁷ and the enactment of the *Section 47 of the FOIA 2017* (the whistle-blower provision).⁶⁴⁸

The consequences of the delay in full implementation of the *FOIA 2017* as seen with the Oba development and Disney Lighthouse project are that the government remains the sole determiner of when and what, if any, information ought to be publicly disclosed and short of public pressure little can be done to compel public access to environmental information including EIAs.

Plastic Pollution

There are many studies on the dangerous effects of plastic pollution to the environment including its harmful physical impacts on marine creatures that become entangled in, smothered by or ingest plastic waste.⁶⁴⁹ Many countries have joined the effort to ban single use plastics and

⁶⁴⁵ IBID 35

⁶⁴⁶ IBID 35

⁶⁴⁷ Ava Turnquest, "Full Steam Ahead for FOI Act, The Tribune (April 23, 2018) <http://www.tribune242.com/news/2018/apr24/full-steam-ahead-foi-act/> (accessed December 21, 2018)

⁶⁴⁸ Candia Dames, Whistle blower protection provision of FOIA enacted (March 8, 2018) <https://thenassauguardian.com/2018/03/08/whistle-blower-protection-provision-of-foia-enacted/> (Accessed December 18, 2018)

⁶⁴⁹ EPA State of the Science White Paper A Summary of Literature on the Chemical Toxicity of Plastics Pollution to Aquatic Life and Aquatic-Dependent Wildlife available at

Styrofoam and some have already enacted legislation. Consequently, the announcement by the Minister of Environment and Housing in April 2018 of the government's initiative to ban single-use plastics and Styrofoam containers by 2020⁶⁵⁰ was a step supported by environmental advocates.⁶⁵¹ The announcement was followed by the commissioning of a Plastic Task Force⁶⁵² and the execution of a Memorandum of Understanding (MOU)⁶⁵³ with the Bahamas Chamber of Commerce & Employers' Federation (the Chamber) , a non-profit organization that provides business advice and advocacy for the private business community.

The objectives of the MOU are to educate the public and increase awareness of the negative environmental impacts of single-use plastics with the end goal of altering the ingrained habits of a public accustomed to the ease and convenience of using disposable plastics and bringing about the voluntary reduction and, ultimately, elimination of these harmful plastic products. The initial focus is on plastic shopping bags, food utensils, straws and Styrofoam food containers. The Chamber committed to promote the use of suitable eco-friendly alternatives to plastic products.

As the MOU is non-binding,⁶⁵⁴ there are no legal consequences flowing from non-observance and any progress in transitioning to eco-friendly alternatives is choice driven. There is therefore a need to educate the business community and public in general so as to change attitudes and behaviour, reduce negative reactions and facilitate the smoother enactment of the ban. However, with 2020 on the horizon, the government must now move beyond these preparatory stages to the drafting

<https://www.epa.gov/sites/production/files/2016-12/documents/plastics-aquatic-life-report.pdf> Accessed December 18, 2018

⁶⁵⁰ <https://thenassauguardian.com/2018/04/24/single-use-plastics-ban-by-the-year-2020/> (April 24, 2018) Accessed November 27, 2018

⁶⁵¹ Minister Ferreira announces initiative to ban single use plastic by 2020 (ZNS Bahamas, April 24, 2018) <https://znsbahamas.com/2018/04/24/minister-ferreira-announces-initiative-to-ban-single-use-plastics-by-2020/> Accessed December 18, 2018;

⁶⁵² IBID 42

⁶⁵³ The MOU is available on the Chamber's website

<http://www.thebahamaschamber.com/reports/MOU%20Between%20BCCEC%20and%20Ministry%20of%20Environment%20and%20Housing%202018.pdf> (Accessed December 9, 2018)

⁶⁵⁴ IBID 44

and enactment of legislation imposing a ban on the distribution, manufacture, import and use of plastic and Styrofoam products.

Climate Change

The Bahamas is vulnerable to climate change due to its geographic, economic and population characteristics as it is exposed to sea level rise, increased flooding coastal erosion and changes in habitats.⁶⁵⁵ The Bahamas is party to the United Nations Framework Convention on Climate Change (UNFCCC) as well as the Paris Agreement 2015. The Paris Agreement saw countries agreeing to act to limit the effects of global warming by implementing measures to keep temperatures below a 1.5-degree Celsius rise.

Although The Bahamas accepted this mandate and acknowledged the serious environmental threats to the country, “there is only one existing policy that specifically addresses climate change”.⁶⁵⁶ Developed in 2005 the *National Policy for the Adaptation to Climate Change* contains directives on addressing climate change “in different sectors including agriculture, coastal and marine resources and energy”.⁶⁵⁷ While a *National Energy Policy* was developed in 2013 with the goal of implementing renewable sources of energy many of the other directives have not been implemented. A national land use and management plan that provides for the impact of climate change to regulate the location of development is yet to be formulated.⁶⁵⁸

While it must be acknowledged that the major contributors of the emissions causing global warming are larger industrial countries, the government has also done little by way of firm resolve to limit its own carbon footprint. Draft legislation for example the proposed Environmental Health

⁶⁵⁵ Perceptions of Climate Change risk in The Bahamas Adelle Thomas & Lisa Benjamin J Environ Stud Sc (2018) 8:63-73 ODI 10.1007/s13412-017-0429-6

⁶⁵⁶ IBID 46

⁶⁵⁷ IBID 46

⁶⁵⁸ IBID 46

(Vehicle Emissions) Regulations 2013 which would subject vehicles to emission testing was not implemented. Similarly, plans such as the solarization programme which would reduce use of harmful energy sources such as oil and gasoline exist only on paper.

It is clear that our international commitments have not translated into positive results. Hence the criticism that there is “insufficient policy development and implementation and limited public education about climate change risks”.⁶⁵⁹

Conclusion

The government has made bold announcements of its plans to enact and amend legislation and implement policies that will serve to better protect the environment. However, the *FOIA 2017*, fisheries amendments and other initiatives are languishing in the legislative pipeline. It is imperative these legislations and initiatives do not remain in limbo and that the government move to enact and implement the relevant legislation and policies so that The Bahamas and its peoples can benefit from the enforcement of laws that protect our resources and way of life. This in turn will lead to a healthier environment that Bahamians and tourists alike can enjoy for years to come.

⁶⁵⁹ IBID 46

COUNTRY REPORT: HONG KONG

A Baby Step to Improve Hong Kong's Environmental Impact Assessment Regime in Light of Sustainable Development

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This article begins with an introduction to the Environmental Impact Assessment Ordinance and how it works on designated projects. It follows on with discussion of the judicial reviews brought against those projects in 2018 based on the ecological assessment. With the increasing awareness of sustainable development, this paper tries to examine any possible ways to improve the existing regime without amending the Ordinance.

Keywords: *Hong Kong, environmental impact assessment, sustainable development, biodiversity*

Introduction

Environmental impact assessment (EIA) has been a statutory requirement for designated projects since the *Environmental Impact Assessment Ordinance* came into force in 1998.⁶⁶⁰ As of January 2019, Hong Kong's Environmental Protection Department has received 309, 260 and 567 accumulative applications for study briefs, EIA reports and environmental permits respectively.⁶⁶¹

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⁶⁶⁰ Environmental Impact Assessment Ordinance, cap 499 (Hong Kong) ('EIA Ordinance').

⁶⁶¹ Hong Kong Environmental Protection Department, *Monthly Update of Applications under Environmental Impact Assessment Ordinance: Summary of Applications for the Period between 1 April 1998 and 31 January 2019* <https://www.epd.gov.hk/eia/english/whatnew/monthly_update_applications.pdf> accessed 28 February 2019.

The integrated waste management facilities in Shek Kwu Chau are one of those designated projects that the Government of Hong Kong Special Administrative Region has intended to build for tackling the surging urban waste problem.⁶⁶² Its EIA report for phase 1 was approved in January 2012.⁶⁶³ Shek Kwu Chau is an islet situated in the south of Lantau Island where it is in close proximity to the habitat of Indo-Pacific finless porpoise.⁶⁶⁴ This wild mammal is listed as a vulnerable species on the Red List of Threatened Species of the International Union for Conservation of Nature (IUCN) and in Appendix I of the *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*.⁶⁶⁵ It is protected under the *Wild Animals Protection Ordinance* and the *Protection of Endangered Species of Animals and Plants Ordinance*.⁶⁶⁶ Nevertheless, their numbers have reportedly reduced by 90 per cent since the baseline survey before construction commenced.⁶⁶⁷

Environmental sustainability is not a novel concept; the burgeoning global concern with sustainable development is traced back to 1987 when the *Report of the World Commission on Environment and Development: Our Common Future*⁶⁶⁸ was published. Nor is it confined to nature

⁶⁶² Hong Kong Environmental Protection Department, *Integrated Waste Management Facilities* <https://www.epd.gov.hk/epd/english/environmentinhk/waste/prob_solutions/WFdev_IWMF.html> accessed 10 January 2019. See especially, *Leung Hon Wai v Director of Environmental Protection* (2015) FCAV No 2 of 2015. The Court of Final Appeal dismissed the judicial review that the Director of Environmental Protection can be the project proponent.

⁶⁶³ Ibid. See especially, Hong Kong Environmental Protection Department, *Engineering Investigation and Environmental Studies for Integrated Waste Management Facilities Phase 1 – Feasibility Study* (Agreement No CE 29/2008 (EP)) <https://www.epd.gov.hk/eia/register/report/eiareport/eia_2012011/index.htm> accessed 15 January 2019.

⁶⁶⁴ Hong Kong Agriculture, Fisheries and Conservation Department, *Marine Conservation: Finless Porpoise* <http://www.afcd.gov.hk/english/conservation/con_mar/con_mar_fin/con_mar_fin_fin/con_mar_fin_fin.html> accessed 15 January 2019.

⁶⁶⁵ Ibid. See also, *Ho Loy v Director of Environmental Protection* (2016) CACV 2016/2014. This judicial review was about the spotted seahorses found in the Lung Mei site, which it is also a vulnerable sea creature in the IUCN Red List.

⁶⁶⁶ Ibid.

⁶⁶⁷ 潘柏林 [Pak Lam Poon], 《焚化爐偷步施工 江豚劇減 90%》 [Incinerator Construction Jumped the Gun, Finless Porpoises Sharp Decline of 90%], *Apple Daily* (Hong Kong), 25 December 2018, A7.

⁶⁶⁸ Development and International Co-operation: Environment, GAOR, 42nd sess, UN Doc A/42/427 (1987).

conservation noted by the Government's blueprint.⁶⁶⁹ Hence, it is time to revise the EIA practices in order to keep them up-to-date and consistent with the global trend.

How Does the EIA Regime Work?

The Ordinance entered into force in 1998. Apart from its long and short titles, section 16 (8) concerning the expiry of technical memorandum is the only sub-section that has been amended (in 2002) due to the enactment of the Extension of Vetting Period (Legislative Council) Ordinance. Schedule 2 concerning the designated projects requiring environmental permits have been amended twice.

For those projects listed in Schedules 2-3 of the *EIA Ordinance*, the project proponents shall apply for a study brief from the beginning in order to proceed the study.⁶⁷⁰ A project profile drafted in compliance with the technical memorandum (TM), must be submitted.⁶⁷¹ Once the Director of Environmental Protection receives the profile, s/he should inform and forward a copy to the Advisory Council on the Environment (the Council).⁶⁷² Members of the Council and the general public could comment on the environmental issues covered in the TM.⁶⁷³ If the Director does not give any written refusal within 45 days of receipt, that would be regarded as a consent.⁶⁷⁴

When the study brief is issued, the proponent could proceed with the preparation of the EIA report according to the requirements set out in the study brief and TM applicable to the assessment.⁶⁷⁵

⁶⁶⁹ Hong Kong Environment Bureau, *Hong Kong's Path to Become a Sustainable City: Environmental Report 2012-2017* (2017).

⁶⁷⁰ Environmental Impact Assessment Ordinance s 5(1)(a).

⁶⁷¹ Ibid s 5(2)(b).

⁶⁷² Ibid s 5(3).

⁶⁷³ Ibid s 5(6).

⁶⁷⁴ Ibid s 5(7).

⁶⁷⁵ Ibid s 6(1).

The Director is given 60 days to decide whether the application meets those requirements.⁶⁷⁶ The applicant would be instructed to submit a copy to the Council or the EIA subcommittee, to exhibit the EIA report for public inspection, and/or to advertise specific material in the next step.⁶⁷⁷ The role of Director is a proactive one;⁶⁷⁸ s/he shall either approve, approve with conditions, or reject the EIA report within 30 days after the public inspection period is expired or the receipt of comments from the Council.⁶⁷⁹ Approved reports would be put on the official register.⁶⁸⁰ For example, the EIA report of the integrated waste management facilities was approved with conditions that the proponent, inter alia, “shall advance the preparation works for the designation of the marine park in the waters between SKC and Soko Islands”.⁶⁸¹

Having an approved EIA report is a prerequisite⁶⁸² and is a *raison d'être* for granting an environmental permit.⁶⁸³ It is illegal to construct or operate a designated project without the environmental permit issued for that particular project or to act contrary to the conditions set out in that permit.⁶⁸⁴ The Director could stipulate any conditions,⁶⁸⁵ but these ought to be guided by relevant TM.⁶⁸⁶ Inaction for 30 days by the Director following from the receipt is considered as a *bona fide* approval.⁶⁸⁷ The issuance and, if any, subsequent amendment of TMs is clearly set out in the *EIA Ordinance*.⁶⁸⁸

⁶⁷⁶ Ibid s 6(3)(a).

⁶⁷⁷ Ibid s 6(4).

⁶⁷⁸ Ibid s 8(4).

⁶⁷⁹ Ibid s 8(3).

⁶⁸⁰ Ibid s 8(5).

⁶⁸¹ Hong Kong Environmental Protection Department, 'Development of Integrated Waste Management Facilities Phase 1' (EIA Report in the Register: AEIAR-163/2012)

<<https://www.epd.gov.hk/eia/register/report/conditions/aeiar2012011.pdf>> accessed 10 January 2019.

⁶⁸² EIA Ordinance, s 10(1).

⁶⁸³ Ibid s 10(2).

⁶⁸⁴ Ibid s 9(1).

⁶⁸⁵ Ibid s 10(5).

⁶⁸⁶ Ibid s 10(6).

⁶⁸⁷ Ibid s 10(4).

⁶⁸⁸ Ibid s 16.

What Are the Problems?

An ecological baseline survey is required to outline the ecological profile by providing adequate and accurate baseline information. This is needed in order to facilitate the subsequent impact assessment and mitigation stipulated in the TM on EIA Process Annex 16 Section 5.1.1.⁶⁸⁹ Guidance Note 11 on methodologies for marine ecological baseline surveys directly addresses cetaceans.⁶⁹⁰

With reference to the most recent environmental permit of the integrated waste management facilities,⁶⁹¹ the proponents are required to submit, for instance, a detailed monitoring programme on finless porpoise and waste management plan before the construction commenced.⁶⁹² However, there is no hard and steadfast rule on assessing the ecological impact. In *Ho Loy v Director of Environmental Protection* ('the 3RS Case'),⁶⁹³ one of the key issues addressed by the High Court was "whether EIA report fails to comply with study brief and technical memorandum in relation to ecological impact assessment concerning Chinese White Dolphins". Chow J stated that the "temporary" habitat loss and its affected area have been considered and recognised in the EIA report.⁶⁹⁴

An associated issue is the cumulative impact assessment of the habitat loss. The EIA application submitted for the Tung Chung New Town Extension noted 26 concurrent projects in the North

⁶⁸⁹ Hong Kong Agriculture, Fisheries and Conservation Department and Hong Kong Environmental Protection Department, *Environmental Impact Assessment Ordinance, Cap. 499 Guidance Note: Ecological Baseline Survey for Ecological Assessment* (EIAO Guidance Note No 7/2010, 2010).

⁶⁹⁰ Hong Kong Agriculture, Fisheries and Conservation Department and Hong Kong Environmental Protection Department, *Methodologies for Marine Ecological Baseline Surveys* (EIAO Guidance Note No 11/2010, 2010)

⁶⁹¹ Hong Kong Environmental Protection Department (n 3).

⁶⁹² Hong Kong Environmental Protection Department, 'Further Environmental Permit to Construct and Operate a Designated Project' (Environmental Permit No FEP-01/429/2012/A) <<https://www.epd.gov.hk/eia/register/permit/latest/fep1772017.htm>> accessed 11 January 2019.

⁶⁹³ *Ho Loy v Director of Environmental Protection* (2015) HCAL 21 & 22/2015 ('the 3RS case').

⁶⁹⁴ *Ibid* [93]-[95].

Lantau waters, including the 3RS and the Hong Kong-Zhuhai-Macau-Bridge projects.⁶⁹⁵ Chow J has distinguished and justified the cumulative impact of direct or permanent loss of the Chinese White Dolphins habitat in the Hong Kong-Zhuhai-Macau-Bridge project outside Hong Kong waters.⁶⁹⁶ Despite the 3RS case being dismissed, Chow J referred to it in comments made obiter dictum:

I should add that if, contrary to my view, *such an assessment ought to have been carried out and expressly mentioned in the EIA Report*, it seems clear on the evidence that the omission would have no material impact on the Director's decisions or on the environment. I would not therefore be minded, in the exercise of my discretion, to grant any relief in this application for judicial review on this ground.⁶⁹⁷

Avoidance, mitigation, compensation and enhancement are four underlining principles in EIA across the world. The “temporary” habitat loss could be compensated and enhanced because it might not cause fatal damage. But a substantial number of concurrent projects could lead to an irreparable loss. Moreover, Hong Kong is a small coastal city sharing its border with China. It might be legally justifiable that the EIA should not be extended outside the boundary of Hong Kong. But wild animals do not need a passport to cross the human-made border. Thus, it makes sense that one of the proposed actions in the *Biodiversity Strategy and Action Plan* is “to enhance habitat connectivity and establish ecological corridors across the boundary”.⁶⁹⁸

⁶⁹⁵ Hong Kong Civil Engineering and Development Department, 'Tung Chung New Town Extension: Environmental Impact Assessment Report' (Document Reference 219844-REP-121-03) < https://www.epd.gov.hk/eia/register/report/eiareport/eia_2332015/html/EIA/Text/General/Combined_html%20version.htm> accessed 14 January 2019 [9.9.1.3].

⁶⁹⁶ *Ho Loy* (n 34) [98(4)]-[98(5)].

⁶⁹⁷ *Ibid* [98(7)] (emphasis added).

⁶⁹⁸ Hong Kong Environment Bureau, *Hong Kong Biodiversity Strategy and Action Plan 2016-2021* (2016) 52.

What Could Be A Possible Solution?

Striking the right balance between economic growth and environmental protection, as well as conservation and development may be challenging. The Government, in 2010, tried to shed light on sustainable development as

“the ways to increase prosperity and improve the quality of life while reducing overall pollution and waste; meeting our own needs and aspirations without doing damage to the prospects of future generations; and reducing the environmental burden we put on our neighbours and helping to preserve common resources.”⁶⁹⁹

Hong Kong citizens are becoming more aware of environmental protection. Ecological assessment in the EIA regime has often been ratcheted up as one of the contested reasons, if not the only one, in administrative and judicial reviews⁷⁰⁰ attempting to block any large-scale development projects, especially those proposed by this unpopular administration.

Leaving aside the debates, the Ordinance has not been amended significantly. Despite the fact that the *Convention on Biological Diversity*⁷⁰¹ and the *Cartagena Protocol on Biosafety*⁷⁰² were adopted by Hong Kong on 9 May 2011, four pieces of directly related existing legislation⁷⁰³ remain

⁶⁹⁹ n 31.

⁷⁰⁰ Six judicial reviews have been heard since the EIA Ordinance entered into force. They are *Kowloon-Canton Railway Corporation and Director of Environmental Protection* (2001) Environmental Impact Assessment Appeal Board 2 of 2000; *Shiu Wing Steel Limited v Director of Environmental Protection* (2016) FACV 28 of 2005 (‘the *Permanent Aviation Fuel Facility* case’); *Chu Yee Wah v Director of Environmental Protection* (2011) CACV 84/2011; *Leung Hon Wai v Director of Environmental Protection* (2015) FACV No 2 of 2015; *Ho Loy v Director of Environmental Protection* (2016) CACV 216/2014; *Ho Loy v Director of Environmental Protection* (2016) HCAL 21 & 22/2015. Apart from the *Permanent Aviation Fuel Facility* case, ecological concerns were raised in the other five cases.

⁷⁰¹ Convention on Biological Diversity (Rio de Janeiro, 5 Jun. 1992) 1760 U.N.T.S. 79 (1992), *entered into force* 29 Dec. 1993.

⁷⁰² Cartagena Protocol on Biosafety to the Convention on Biological Diversity (Montreal, 29 Jan. 2000) 2226 U.N.T.S. 208 (2000), *entered into force* 11 Sep. 2003.

⁷⁰³ These four pieces of existing legislations are: Forests and Countryside Ordinance, cap 96 (Hong Kong), Wild Animals Protection Ordinance, cap 170 (Hong Kong), Protection of Endangered Species

untouched. The *Genetically Modified Organisms (Control of Release) Ordinance*⁷⁰⁴ was the only one adopted in order to implement the *Caragena Protocol*. The adoption of these new pieces of legislation did not bring any fundamental and structural changes to the EIA regime at all.

The purposes, objectives and detailed requirements of study briefs and EIA reports are clearly articulated in the TM.⁷⁰⁵ Annexes 12-19 outline the guidelines on areas from air quality assessment to the impact on cultural heritage sites.⁷⁰⁶ For instance, a habitat survey is an inseparable constituent of the ecological baseline information according to the guidelines for ecological assessment in the TM,⁷⁰⁷ which requires the identification and description of any habitats in the surrounding area.⁷⁰⁸

Four corresponding guidance notes have been published on the ecological assessment: one is general observations,⁷⁰⁹ the others are about ecological baseline survey,⁷¹⁰ methodologies for terrestrial and freshwater ecological baseline surveys⁷¹¹ and marine ecological baseline survey.⁷¹²

of Animals and Plants Ordinance, cap 586 (Hong Kong), and Fisheries Protection Ordinance, cap 171 (Hong Kong). The enactment of Protection of Endangered Species of Animals and Plants Ordinance was the adoption of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 3 Mar. 1973) 993 U.N.T.S. 243 (1973), *entered into force* 1 Jul. 1975.

⁷⁰⁴ Genetically Modified Organisms (Control of Release) Ordinance, cap 607 (Hong Kong).

⁷⁰⁵ Hong Kong Environmental Protection Department, *Technical Memorandum on Environmental Impact Assessment Process (Environmental Impact Assessment Ordinance, Cap. 499, S. 16)* (1997) 4-7.

⁷⁰⁶ Ibid 41-72.

⁷⁰⁷ Ibid 55-56.

⁷⁰⁸ Ibid 56.

⁷⁰⁹ Hong Kong Agriculture, Fisheries and Conservation Department and Hong Kong Environmental Protection Department, *Some Observations on Ecological Assessment from the Environmental Impact Assessment Ordinance Perspective* (EIAO Guidance Note No 6/2010, 2010).

⁷¹⁰ Hong Kong Agriculture, Fisheries and Conservation Department and Hong Kong Environmental Protection Department (n 30).

⁷¹¹ Hong Kong Agriculture, Fisheries and Conservation Department and Hong Kong Environmental Protection Department, *Methodologies for Terrestrial and Freshwater Ecological Baseline Surveys* (EIAO Guidance Note No 10/2010, 2010).

⁷¹² Hong Kong Agriculture, Fisheries and Conservation Department and Hong Kong Environmental Protection Department (n 31).

TMs are “not subsidiary legislation”.⁷¹³ Consequently, their amendments would need to go through the Legislative Council where different stakeholders could highly probably agitate for fierce socio-political debates. In contrast, guidance notes are drafted with the aim of providing general reference and good practice. They could be amended by relevant departments without prior notice. Additionally, those four guidance notes were among the whole bundle being last amended in 2010. Revision might be overdue.

The Government has recognised “the importance of conserving biodiversity and developing sustainably to the city’s long-term prosperity ... particularly when challenges like climate change have emerged”.⁷¹⁴ Thus, the *Biodiversity Strategy and Action Plan 2016-2021* incorporates biodiversity considerations in the planning and development process.⁷¹⁵ Twenty-three action points mark short term, medium term, long term and ongoing action. An action point is specified to “enhance the practices in addressing ecological impacts of projects through EIA process” by “developing and updating guidelines and practice notes”, as the Government has already proposed.⁷¹⁶ Nevertheless, no significant progress has been made under this ongoing action point when the Council released the progress report in 2018.⁷¹⁷

When some EIA report applications were presented to the EIA subcommittee for discussion, the members did take this opportunity to question the project proponents and offer recommendations on environmental sustainability. At least 10 project proponents have been recommended, for instance, to apply green building standards in the last three years.⁷¹⁸ As such, it would be to have

⁷¹³ Environmental Impact Assessment Ordinance, s 16(12).

⁷¹⁴ Hong Kong Environment Bureau (n 37) 2.

⁷¹⁵ Ibid 58-59.

⁷¹⁶ Ibid 59.

⁷¹⁷ Advisory Council on the Environment, *Progress of Implementation of Hong Kong Biodiversity Strategy and Action Plan 2016-2021* (ACE Paper 1/2018) 6.

⁷¹⁸ See, Environmental Impact Assessment Subcommittee, *Confirmed Minutes of the 135th Meeting of the Environmental Impact Assessment Subcommittee on 24 October 2016 at 9:30 am* (Item 2: *The EIA Report on “Hung Shui Kiu New Development Area”* (ACE-EIA Paper 7/2016)) [22] and (Item 3: *The EIA Report on “Kai Tak Multi-purpose Sports Complex”* (ACE-EIA Paper 5/2016)) [91]; Environmental Impact Assessment Subcommittee, *Confirmed Minutes of the 136th Meeting of the Environmental Impact Assessment Subcommittee on 18 November 2016 at 2:00 pm* (Item 3: *Discussion on the EIA report on “Proposed Low-rise and Low-density Residential Development at Various Lots and their Adjoining Government Land in D.D. 104, East of Kam Pok Road, Mai Po, Yuen Long, New Territories”*

these recommendations be adopted and become new guidance notes, so that green construction and other sustainability concepts would be routinely taken into account by project proponents in the first place.

Conclusion

When conducting an environmental impact assessment, the project proponents bear the onus of proving the project's environmental sustainability. Having said that some designated infrastructural projects, for example, the Hong Kong-Zhuhai-Macau-Bridge and the 3RS projects have been subjected to administrative or judicial reviews. Undoubtedly, we could anticipate there would be more challenges in the future, given the increasing awareness to environmental sustainability. Apparently, the Government does not seem to have any plan to amend the *EIA Ordinance* in the foreseeable future. Despite that, it did not prevent individual EIA subcommittee members from identifying the gaps. Their constructive recommendations are unofficial and non-binding as if temporary measures, where the Environmental Bureau should not take it for granted. Instead the Government ought to take action to review and amend the guidelines and practice notes as it is proposed in the *Biodiversity Strategy and Action Plan*

(ACE-EIA Paper 8/2016)) [30]-[31]; Environmental Impact Assessment Subcommittee, *Confirmed Minutes of the 137th Meeting of the Environmental Impact Assessment Subcommittee on 21 November 2016 at 2:00 pm* (Item 2: EIA REPORT ON "Expansion of Sha Tau Kok Sewage Treatment Works" (ACE-EIA Paper 9/2016)) [20] and (Item 3: EIA Report on "Port Shelter Sewerage Stage 3 – Sewerage Works at Po Toi O" (ACE-EIA Paper 10/2016)) [69], [80]-[84]; Environmental Impact Assessment Subcommittee, *Confirmed Minutes of the 138th Meeting of the Environmental Impact Assessment Subcommittee on 20 February 2017 at 2:00 pm* (Item 2: Discussion on the EIA report on "Outlying Islands Sewerage Stage 2 – South Lantau Sewerage Works" (ACE-EIA Paper 1/2017)) [71]-[72] and (Item 3: EIA Report on "Outlying Islands Sewerage Stage 2 – Upgrading of Tai O Sewage Collection, Treatment and Disposal Facilities" (ACE-EIA Paper 2/2017)) [94]; Environmental Impact Assessment Subcommittee, *Confirmed Minutes of the 140th Meeting of the Environmental Impact Assessment Subcommittee on 11 September 2017 at 2:00 pm* (Item 3: Discussion on EIA reports on "Proposed Comprehensive Residential and Commercial Development atop Siu Ho Wan Depot" and "Siu Ho Wan Station and Siu Ho Wan Depot Replanning Works" (ACE-EIA Papers 4/2017 & 5/2017)) [9], [12], [36]-[37], [62], [64]; Environmental Impact Assessment Subcommittee, *Confirmed Minutes of the 141st Meeting of the Environmental Impact Assessment Subcommittee on 16 October 2017 at 9:30 a.m.* (Item 3: Discussion on EIA report on "Housing Sites in Yuen Long South" (ACE-EIA Paper 6/2017)) [13], [67]; Environmental Impact Assessment Subcommittee, *Confirmed Minutes of the 143rd Meeting of the Environmental Impact Assessment Subcommittee on 17 September 2018 at 2:00 p.m.* (Item 3: Discussion on EIA report on "Lei Yue Mun Waterfront Enhancement Project" (ACE-EIA Paper 2/2018)) [81]-[82].

BOOK REVIEW

ANIMAL WELFARE AND INTERNATIONAL ENVIRONMENTAL LAW: FROM CONSERVATION TO COMPASSION

REVIEWED BY: Iyan Offor*

Since J Baird Callicot wrote that environmental ethics and animal ethics grow out of ‘profoundly different cosmic visions’, animal ethics have been troublingly and needlessly divorced from environmental ethics. This situation is mirrored in law. Legal actors overlay regulatory circumstances that feed this fiction: pest control (supposedly compassionless by nature) is required for ecosystem flourishing; ballooning population levels necessitate more intensive animal farming (as if it weren’t true that the livestock industry is a protein factory in reverse (Peter Singer, *Animal Liberation*)); and mass adoption of vegan diets is unsustainable (evidently we ought to breed and feed billions of mutated, mutilated, and overgrown farm animals instead). Such false claims run rampant within the academy. Consequently, the title of this collection alone is bound to draw scorn. Scholtz and the contributors to this collection deserve the greatest praise for their bravery and intellectual integrity in supporting a compassionate approach to conservation. May the scorners read on and pay heed to this book’s groundswell of movement-building ideas.

Environmental lawyers’ shudder at animal liberationists’ conceptualization of conservation as anthropocentric, utilitarian and lacking in compassion. After all, conservation is necessary for healthy ecosystems and animals are a part of that. Surely that’s enough? Not so. Schaffner (chapter two) reveals that choosing conservation as a tool to regulate animals involves conceptualizing animals as resources maintained for use by future populations. This is hardly consonant with animals’ intrinsic value. Schaffner argues we must emphasize protection and preservation over conservation in order to avoid instrumentalization. Sykes (chapter eight) and Scholtz (chapter seven) both concur, favouring ‘protection’ which can encompass both welfare and conservation.

Bilchitz (chapter six) deconstructs the meaning of 'conservation', illuminating and problematizing our species-centric understanding of the term. It is not self-evident that conservation ought not to promote respect for the individuals that are integral to a species' survival. Accordingly, Bilchitz promotes an integrative approach to conservation that respects individuals. The alternative aggregative approach is self-defeating because it facilitates dispositions towards treating animals instrumentally.

These deconstructions are resisted by conservations who believe individualized, compassionate approaches to conservation are sentimentalist, inappropriately womanly, and emotional (thus irrational). This book adds to the rich canon of work demonstrating that there is nothing irrational about compassion for animals. Nevertheless, emotion is a valid, though markedly undervalued, knowledge-form and animal lawyers ought not to shy away from referencing insightful anger or despair.

This book displays commendable clarity in outlining the void of compassion in legal approaches to wild animals. Scholtz (chapter one) identifies wildlife welfare as situated at the very fringes of environmental law. Scholtz favours a seismic shift whereby animal welfare bounds for the centre of international environmental law. The time is now because of the shrinking wild, increasing globalization and trafficking/trade, and deep entanglement of animal interests with transnational environmental protection. Each contribution to this collection offers a puzzle piece fitting within this burgeoning corpus of work. Its conclusions invite more puzzlers to the table, for we are just beginning to see clarity in the picture.

Two contributors propose ethical ideas to underpin compassionate conservation. Schaffner (chapter two) explores the concept of value, for humans only protect that which they attribute value to. International environmental instruments increasingly recognise animals' intrinsic value but require no related action. Indeed, respecting intrinsic value requires a compassionate conservation which remains unrealized. Scholtz credits Schaffner with establishing the ethical context for the other contributions. Value *is* ethical, but also exceedingly economic and persistently anthropocentric. This is but one of many possible approaches to ethically grounding

compassionate conservation. Future research ought to pick up this thread, revisiting oft-quoted heavyweights of animal ethics (Peter Singer, Tom Regan, etc), but also exploring critical animal ethics of significance for global issues like conservation. These include the application of earth jurisprudence to animals, feminist care theory, and other-facing ethics like Donna Haraway's posthumanism. Bowman (chapter three) paves an alternative route of ethical enquiry which, like the rest of the book, is reformist in nature. He proposes applying existing concepts of human dignity and intrinsic value to animals, forming a bioethical approach to normatively underpin a more cohesive international order. This proposal is likely to instigate fascinating conversation with more abolitionist animal ethicists.

Some chapters address the overemphasized cases of conflict between species conservation and individual welfare. Scholtz (chapter seven) addresses situations where sustainable use and killing is thought to be required for overall conservation. Riley (chapter four) addresses the problematic dichotomization of animals that are harmful (pests and alien or invasive species) and those that are useful. It is to this book's credit that it does not shy away from these tricky issues that have seen animal welfare subordinated to conservation.

Two chapters are more forward-looking in nature. White (chapter five) parallels other chapters by reviewing burgeoning global regulatory pronouncements on animal welfare. His favoured approach is the establishment of a 'distinct international organization focused solely on animal welfare protection'.⁷¹⁹ Finally, Sykes (chapter eight) argues that the World Trade Organization does not pose an obstacle to the development of a compassionate wildlife law. In fact, the dispute settlement body's recognition of animal welfare as a matter of global concern in the *EC – Seals* dispute⁷²⁰ may aid development of such a law. Sykes' chapter is a highlight and ought to be referenced as a definitive guide to the WTO disputes relating to animals.

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⁷¹⁹ At 200-201.

⁷²⁰ (Appellate Body, *EC – Seal Products* (2014) WT/DS400/AB/R, WT/DS/401/AB/). In this dispute, the WTO Appellate Body determined that the EU ban on marketing of seal products was a restriction on trade that could be justified under an exception to WTO free trade rules based on public morality. Revision of

I was fortunate to attend the first two iterations of the conference from which this book stems: the Lincoln University Conference on Animal Welfare and International Law. I wish here to reiterate an idea about doing *global* animal law. We ought to be mindful that the calls for compassionate conservation are emanating primarily (exclusively?) from Western scholars; it is our responsibility now to reach out to non-Western academics, non-academics, indigenous communities, and marginalised people. We cannot go much further without inviting them to the discussion. This book is an integral building block for welfare-conscious wildlife law. It is encouraging to see that the conference's kindling drive for compassionate conservation has sparked to life in this collection.

the measure was required in order to tighten an exception for indigenous hunts. However, the EU was ultimately able to continue enforcing its measure.

BOOK REVIEW

International Environmental Law and The Global South, Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, And Jona Razzaque, (Eds.) (Cambridge University Press, 2015)

REVIEWED BY: Anastasia Telesetsky*

In the world today approximately 80% of the global population comes from a country that might self-identify with the label of the Global South.⁷²¹ When one considers that four out of five persons alive today are nationals from states traditionally identified as Global South states, it becomes apparent how significant these voices are for the future of international environmental law (“IEL”) as a problem-solving discipline. Little progress can be made in stemming environmental degradation and securing environmental protection without active support from a broad demographic. The discipline of IEL is rapidly moving beyond the formal halls of United Nations and the national ministries of foreign affairs; IEL in the past two decades has instead become a tool for non-governmental groups and community groups to express their intentions for a more just and equitable future as they demand climate justice, freedom from hazardous waste, and food and water sovereignty.⁷²² Many of these contemporary non-state voices who are changing fundamental social norms are emerging from the Global South including Nigerian forest restorationist Wangari Maathai or Indonesian land reform activist Henry Saragih.

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⁷²¹ This calculation is based on 2011 statistics from the Organization of Economic Cooperation and Development providing global and national demographics. The database is available at http://stats.oecd.org/Index.aspx?DatasetCode=POP_FIVE_HIST

⁷²² See e.g. Petition to the Inter-American Commission on Human Rights Seeking Relief from Violations of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada (2013) http://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf or the Third World Network lobbying effort to support the implementation of the Basel Convention on the Transboundary Movement of Hazardous Waste

IEL is a young field within international law. While there are earlier examples of law being applied to resolve transboundary environmental conflicts,⁷²³ IEL as a sub-discipline of international law gained momentum in the early 1970s when several states suffering from the impacts of acid rain initiated international dialogue on issues involving consequences of industrialization and organized the United Nations Convention on Environment and Development. Yet in spite of innumerable meetings and hundreds of treaties, progress has been generally slow on collective action problems such as ending marine overfishing or weaning our economy from carbon rich energy resources. Given the urgency of these shared problems in a world that is getting hotter and more crowded, why hasn't IEL played a more prominent role in creating the conditions for cooperation?

The answer to this critical question is at the heart of the Cambridge University Press 2015 publication *International Environmental Law and the Global South* edited by Shawkat Alam, Sumudu Atapattu, Carmen C. Gonzalez, and Jona Razzaque.⁷²⁴ This volume is a landmark contribution to the literature on international law because it seeks to offer answers to why there is a growing divide in how states that identify with the Global North and states that identify with the Global South approach the discipline and practice of IEL.⁷²⁵ The thesis of the book spelled out across 29 chapters by authors from five continents has the potential to be paradigm shifting if taken to heart by policymakers. The authors argue that it is the continuing divide between the Global North and the Global South which has created the barriers to achieving the socio-political integration and cooperation that is necessary to make progress towards global solutions to shared environmental challenges. Significantly, the authors are clear that this political divide is not permanent. Today, it exists because of a complex history born of colonialism, neoliberalism, and enduring poverty. But the future trajectory of relations between Global North and Global South states is not pre-determined. To move beyond the divide, the first step is to acknowledge the

⁷²³ North Pacific Fur Seal Treaty, U.S. Department of State, *Foreign Relations of the United States* (U.S. Government Printing Office, 1911): 256-259; Trail Smelter Arbitral Tribunal" (1939) 33 AM. J. INT'L L. 182; Trail Smelter Arbitral Decision (US v. Can.) (1941) 35 AM. J. INT'L L. 684.

⁷²⁴ INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, Shawkat Alam, Sumudu Atapattu, Carmen G. Gonzalez, and Jona Razzaque, (eds.) (Cambridge University Press, 2015)

⁷²⁵ The term "Global South" has been used at various times to encompass the BASIC state (Brazil, South Africa, India, and China) and the Least Developed Countries. The term "Global North" typically refers to the OECD States responsible for the largest share of the world's GDP. United States Mission to the Organization for Economic Cooperation and Development, <http://usoecd.usmission.gov/mission/overview.html> (OECD States account for 63% of the world's GDP)

differences in perspective and how these differences manifest in a number of contemporary conflicts that invoke simultaneously both human rights and environmental concerns. *IEL and the Global South* takes this giant step.

The book is divided into five parts covering the history of the North-South divide, several studies of the contemporary divide, existing conflicts between economic law and IEL obligations, the experience of vulnerable groups embedded in the Global South, and, finally, options for addressing the divide.

From the very first chapter of the book, the authors are conscientious to avoid the pitfalls of essentialism. While the term “Global South” is used colloquially to refer to alliance of States in Asia, Africa, Latin America, Oceania, and South America that identify with similar modern histories of underdevelopment and resource exploitation, the authors are quick to recognize that the term resonates more widely than simply a geographical category. As Professor Seck notes in her chapter on mining, there are communities physically located in the Global North whose experiences with a chronic lack of substantive and procedural justice resonates strongly with the experience of other Global South communities.⁷²⁶

In spite of the title of the book referring to “the Global South”, a number of contributions take issue with any attempt to speak about a singular “Global South.” As Professor Atapattu and Gonzalez note, there are many different manifestations of the Global South depending on the context.⁷²⁷ For example, when examining climate emissions, China may self-identify with the Global South but other states in the Global South particularly the Alliance of Small Island States resist China co-opting a Global South identity while continuing to emit large quantities of greenhouse gases. One of the great strengths of this book is how nuanced the authors are in analyzing the political dynamism associated with the label of the Global South. Where the term may have historically been used to differentiate centers from peripheries, the term as used in *International*

⁷²⁶ Sara L. Seck, *Transnational Corporations and the Extractive Industries*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4.

⁷²⁷ Sumudu Atapattu and Carmen G. Gonzalez, *The North-South Divide in International Environmental Law: Framing the Issues*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4 at p. 149

Environmental Law and the Global South emphasizes opportunities for forging common links between most of the UN States who seek different futures than those offered by neo-classical economics and the Washington consensus.

This book provides astute commentary that has both broad and narrow implications for a substantial number of areas including biotechnology,⁷²⁸ sustainable food production,⁷²⁹ mining,⁷³⁰ water delivery,⁷³¹ energy production,⁷³² climate adaptation and mitigation,⁷³³ biodiversity protection,⁷³⁴ hazardous waste management,⁷³⁵ disaster risk reduction,⁷³⁶ and international trade

⁷²⁸ Jorge Cabrera Medaglia, *Access and Benefit Sharing: North-South Challenges in Implementing the Convention on Biological Diversity and its Nagoya Protocol*, INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4.

⁷²⁹ Carmen G. Gonzalez, *Food Justice: An Environmental Justice Critique of the Global Food System* in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4; Chidi Oguanaman, *Sustainable Development in the Era of Bioenergy and Agricultural Land Grab*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4.

⁷³⁰ Seck, *supra* note 6.

⁷³¹ Jackie Dugard and Elisabeth Koek, *Water Wars: Anti-Privatization Struggles in the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH *supra* note 4.

⁷³² Lakshman Guruswamy, *The Contours of Energy Justice*, INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4.

⁷³³ Maxine Burkett, *A Justice Paradox: Climate Change, Small Island Developing States and the Absence of International Legal Remedy*, INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4; Elizabeth Ann Kronk Warner, *South of South: Examining the International Climate Regime from an Indigenous Perspective* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4.

⁷³⁴ Medaglia, *supra* note 8.

⁷³⁵ Zada Lipman, *Trade in Hazardous Waste*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4.

⁷³⁶ Paul J. Govind and Robert R.M. Verchick, *Natural Disaster and Climate Change*, in IEL and the Global South *supra* note 4.

and investment.⁷³⁷ The authors of the individual chapters offer not just excellent interpretations of international law but also astute commentary on national implementation of IEL obligations.⁷³⁸

In order to understand the contemporary global divide, the authors of *International Environmental Law and the Global South* address a number of key cross-cutting themes in their chapters. The remainder of this book review distils two of these themes and then describes two of the proposals offered by the books' authors to bridge the divide.

Cross Cutting Theme 1: Conflicting Worldviews

The first theme focuses on the relationship between worldviews and the role of IEL. In spite of international summits like Rio +20 and producing final documents such as "The Future We Want",⁷³⁹ the Global North and Global South frequently do not share a common vision of a "we" on priorities for the present leading to divergent outlooks for the future. In her chapter, Professor Atapattu articulates an important distinction between the Global North as a group of states prioritizing resource and land conservation to promote intergenerational equity and the Global South as another set of states focused on achieving intragenerational equity through fundamental human development.⁷⁴⁰ Professor Mickelson captures in her chapter the mutual frustration over

⁷³⁷ Shawkat Alam, *Trade and the Environment: Perspectives from the Global South* in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4; Shalanda Baker, *Project Finance and Sustainable Development in the Global South*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4; Benjamin Richardson, *International Environmental Law and Sovereign Wealth Funds*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4; Shyami Puvimanasinghe, *From a Divided Heritage to a Common Future? International Investment Law, Human Rights and Sustainable Development*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4.

⁷³⁸ Daniel Bonilla Maldonado, *International Law, Cultural Diversity, and the Environment: The Case of the General Forestry Law in Colombia*, in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH *supra* note 4.

⁷³⁹ United Nations, General Assembly, The Future We Want A/RES/66/288 (2012)

⁷⁴⁰ Sumudu Atapattu, *The Significance of International Environmental Law Principles in Reinforcing or Dismantling the North-South Divide* in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH *supra* note 4 at p. 149

incompatible worldviews where the Global North perceives that the Global South exhibits “either intransigence or a lack of understanding of the severity of the environmental challenge” and the Global South perceives that the Global North exercises an “unwillingness to fully comprehend an alternative vision of international environmental law as part of a much broader struggle to find models of global governance that reflect concerns about equity, equality, and human well-being.”⁷⁴¹

This difference in outlook is captured in the legal practices associated with the development of IEL since the 1970s. Leaders within the Global North seek to curtail consumption to ensure survival of resources for the future generation and promote a precautionary approach to resource use. This explains the strong emphasis on establishing and investing in protected areas. Meanwhile, policymakers in the Global South assert principles of permanent sovereignty over natural resources and common heritage of mankind to increase access to resources for this generation. Understanding the discipline of IEL as a contested terrain between the North and South, which is a notable contribution of the *International Environmental Law and the Global South* volume, helps to explain some of the existing outcomes in terms of what law is negotiated and eventually implemented. For example, the contemporary stalemate between U.S. and China over the implementation of the mitigation targets under the Kyoto Protocol reflects these diverging perspectives about the objectives of IEL. The U.S. rightly understood that China as the world’s factory was increasing greenhouse gas emissions at a phenomenal rate and demanded that China participate in mitigation. China also correctly noted that the U.S. had long benefited from using conventional energy sources like coal and oil to further US development and demanded that the U.S. support China’s economic development goals to improve livelihood of Chinese citizens. Until very recently, the two countries had refused to budge as they waited for the other to step aside and mitigate for emissions.⁷⁴²

⁷⁴¹ Karin Mickelson, *The Stockholm Conference and the Creation of the South-North Divide in International Environmental Law and Policy* in *INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH*, *supra* note 4 at p. 166

⁷⁴² The political behavior of China and the U.S. in the context of the climate mitigation is reminiscent of Theodore Geisel’s North-bound and South-bound Zax in *The Sneetches and Other Stories* (1961) (“Never budge! That’s my rule. Never budge in the least! Not an inch to the west! Not an inch to the east! I’ll stay here, not budging! I can and I will if it makes you and me and the whole world stand still!”)

This recognition of the different starting priorities will be critical for future negotiations. There can be no workable compromise if Global North states continue to insist on sacrificing basic needs of this generation for future generations. Likewise, the Global South states, many of them ruled by elites' classes, must be prepared to acknowledge that they are not entirely victims of the global markets but also complicit in perpetuating environmental crises. Nigeria and Venezuela rely upon oil exports to fuel their national economies at the expense of not just their own citizens, but all citizens impacted by the release of greenhouse gas emissions locked in hydrocarbons. Even though states have seemingly diverging starting places for negotiation and agenda-setting, they share more in common in terms of expectations for the future than they might publicly acknowledge.

Cross Cutting Theme 2: Dependence and Connection

The second cross-cutting theme in the book identifies interactive spaces between the Global North and the Global North. While the Global South has suffered a disproportionate share of the burden of environmental damage particularly from the extractive industries, the long-term fate of the Global South matters to the global North. For example, as highlighted in *International Environmental Law and the Global South*, the Global North is dependent on what enterprises mostly based in the Global North have treated as environmental commons available for all to use in a competitive fashion. This idea of open access to the global South is particularly palpable in the case of hazardous waste, land grabbing, genetic resources, and markets.⁷⁴³ The lands of the South are perceived as new frontiers for the development of new supply chains such as raw materials for biotechnology or new outposts for Northern goods or Northern waste. Basic equity and respect for human rights suggest the need for developing new relationships that are based on meaningful connection recognizing human dignity and human interdependence.

⁷⁴³ Oguamanam, *supra* note 9; Medaglia, *supra* note 8; Lipman, *supra* note 15.

Yet, as the authors indicate through excellent case studies on international agricultural policy, sovereign wealth funds, and project financing, the world may be contracting in terms of communication technologies and global markets without the provision of meaningful connections between those in the Global North and Global South.⁷⁴⁴ Again, it is the existing divide between states that has been either systematically embedded within the law (e.g. WTO treaties) or entirely ignored by the law (e.g. management of sovereign wealth fund investments) that hampers the ability to achieve systematic progress towards global sustainable development.⁷⁴⁵

Bridging the Divide: Applying the Common but Differentiated Responsibility Principle to achieve Environmental Justice Outcomes

Based on the case studies offered in the book, it becomes clear that in spite of promises the Global North has failed to make a “good faith” effort to support the type of capacity building that will achieve both human well-being and environmental protection.⁷⁴⁶ The Global North has a significant moral and legal responsibility for supporting the Global South in its efforts to achieve economic, environmental, and social progress.

One means of fulfilling this responsibility is to recognize common but differentiated responsibilities (CBDR) and provide support to the Global South as they strive to meet their responsibilities to their citizens. A number of the authors recognize that CBDR has been controversial particularly when demanded by certain States such as China in the context of climate change, but many of these authors recognize that acknowledging the primacy of CBDR is essential for bridging the

⁷⁴⁴ Baker, *supra* note 17; Gonzalez, *supra* note 9; Richardson, *supra* note 17.

⁷⁴⁵ Gonzalez, *supra* note 9 at p. 565 (Explaining how the WTO Agreement on Agriculture explicitly provided for tariff schemes that separate the interests of the Global North and Global South); Richardson, *supra* note 17 at p. 522 (Explaining how the Sovereign Wealth Funds as a form of financing for Global South projects have no specific mandate to support positive development outcomes in the Global South.)

⁷⁴⁶ Dugard and Koek, *supra* note 11 at 637-666 (Describing how privatization of water supplies by Northern companies has failed to improve water security for Global South states)

divide.⁷⁴⁷ Chronic inequality between parties decreases the long-term chances for cooperation. For example, in “ultimatum” games, a party will forego a minimal benefit in order to demonstrate to the other party the necessity of basic reciprocity.⁷⁴⁸ For decades, states from the Global North have been playing an “ultimatum” game with states from the Global South. Here as detailed in the chapters on history, there is a chronic degree of inequality.⁷⁴⁹ CBDR has been a key legal mechanism for remedying the historical inequities that continue to inform contemporary social and economic relations and narrowing the divide between the Global North and Global South. Yet CBDR has not been respected as a legal principle by states in the Global North. The challenge will be ensuring that regular funding is forthcoming to ensure that sustainable development goals can be achieved.⁷⁵⁰

Bridging the Divide: Achieving Sustainable Development Across International Regimes

Professor Atapattu and Gonzalez aptly remind readers that international law can be both hegemonic but also emancipatory.⁷⁵¹ The key to law being applied as a tool of emancipation is for all States to recognize the substantial difference between needs and wants. Achieving global sustainable development requires States to prioritize basic human needs that include access to

⁷⁴⁷ See e.g. Atapattu *supra* note 20; Shawkat Alam and Jona Razzaque, *Sustainable Development versus Green Economy: The Way Forward?* in INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH *supra* note 4 at p. 832.

⁷⁴⁸ Matthew Rabin, Incorporating Fairness into Game Theory and Economics, *American Economic Review* 1281, 1284 (December 1993). (Describing a game in which a “proposer” offers a fixed amount of money to a “decider” who has the power to either take or reject the offer. If the “decider” rejects the offer, then neither party receives anything. Describing the finding that “deciders” will punish unfair offers and that most “proposers” will make fair offers.)

⁷⁴⁹ Alam, *supra* note 17.

⁷⁵⁰ In spite of pledges for Global North states to provide .7% of their gross national product to foreign development aid, most countries fail to achieve this target including the United States who has in 2016 only allocated \$17.6 billion for economic, social, and environmental development aid out of a \$4 trillion budget for a total of .44% of the US budget. See e.g. UN Millennium Project, *The 0.7% target: An In-depth Look*, <http://www.unmillenniumproject.org/press/07.htm> ; Foreign Assistance, available at ForeignAssistance.gov (Identifying \$3.7 billion of economic aid, \$1 billion environmental aid, \$8.8 billion health aid, \$1.2 billion educational aid, and \$2.9 human rights and good governance aid for a total of \$17.6 billion. The other aid identified by this source is largely short-term political aid for peace, security, and humanitarian aid.); Poncie Rutch, *Guess How Much of Uncle Sam's Money Goes to Foreign Aid. Guess Again!* (February 10, 2015) <http://www.npr.org/sections/goatsandsoda/2015/02/10/383875581/guess-how-much-of-uncle-sams-money-goes-to-foreign-aid-guess-again>

⁷⁵¹ Atapattu and Gonzalez, *supra* note 7.

energy, a homeland, food, and water.⁷⁵² This is especially true for vulnerable communities whose needs can be legally acknowledged through human rights-based approaches to promoting environmental rights.⁷⁵³ The global community is embracing this approach through the recently concluded Sustainable Development Goals which can as Professor Koh and Professor Robinson note “provide a platform for South-South, North-South, and global cooperation.”⁷⁵⁴ Articulating goals is laudable, but implementing these goals in a timely manner to meet the needs of much of the world’s population will be even more demanding.

The authors emphasize that incorporating sustainable development practices into specific international systems including finance, trade and investment, food production, and waste disposal in order to achieve just outcomes will constitute a meaningful step towards reconciling the existing differences in world view between the Global North and South. The authors correctly conclude in the various chapters that it is possible to live in a world where both intragenerational and intergenerational rights can be simultaneously embraced. This is the 21st challenge for both international environmental law and international economic law. Ultimately, the well-being of the Global South depends on the courage of the Global North to sacrifice its desire for constant expansion and growth to meet the basic needs of countless communities; the fate of the Global North depends on the Global South pursuing sustainable pathways.⁷⁵⁵

International Environmental Law and the Global South is essential reading for policymakers, scholars, and others who want to understand how we have reached an impasse in creating and implementing effective environmental policy and how to cross this impasse. The authors offer a vision of a world where there is no chronic division between the Global North and the Global

⁷⁵² Guruswamy, *supra* note 12; Oguamanam, *supra* note 9; Gonzalez *supra* note 9; Carlos Bernal, *The Right to Water: Constitutional Perspectives from the Global South* in *International Environmental Law and the Global South*, *supra* note 4.

⁷⁵³ Louis J. Kotze, *Human Rights, the Environment and the Global South* INTERNATIONAL ENVIRONMENTAL LAW AND THE GLOBAL SOUTH, *supra* note 4 at 266.

⁷⁵⁴ Koh Kheng-Lian and Nicholas A. Robinson, *South-South Cooperation: Foundations for Sustainable Development* in *IEL and the Global South*, *supra* note 4 at 770.

⁷⁵⁵ It is not possible to replicate the standard of living of the Global North with the remaining planetary resources. Ruth Gordon, *Unsustainable Development* in *International Environmental Law and the Global South*, *supra* note 4 at 110.

South. The first step towards achieving this vision of a world where there are no boundaries based on gross inequities is theoretically straightforward. 80% of the global population must be offered a fair deal and the freedom to satisfy their needs by reimagining our existing international laws as contracts for the common good.