Governance for Sustainability

Issues, Challenges, Successes

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Klaus Bosselmann, Ron Engel and Prue Taylor

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Preface

This book, the result of a joint effort of the IUCN Commission on Environmental Law and the IUCN Environmental Law Centre, is a contribution to the ongoing discussions about environmental governance.

In an increasingly global world with growing demands on natural resources, this is a very timely publication which addresses three key issues: globalisation, democracy and sustainability.

It offers a thoughtful consideration of concepts which are critical to enhancing our understanding of how societies respond to environmental challenges. The book also provides a number of practical case studies, which look at the experiences faced by people and communities around the world as they address pressing local and national issues. These case studies demonstrate a range of governance models and highlight the obstacles faced by communities as well as their successes.

Importantly, the book does not attempt to conclude on the benefits or advantages of any one model or theory. Rather the authors invite all of us engaged in environmental issues to begin a renewed dialogue on the issue of governance for sustainability in order to seek solutions which will make a real difference on the ground. We hope that the readers will take up that difficult but important challenge.

Sheila Abed
Chair, Commission on
Environmental Law

Alejandro Iza
Head, Environmental Law Programme
Director, Environmental Law Centre

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The project owes its existence to the foresight and leadership of Sheila Abed, Chair of the IUCN Commission on Environmental Law. Her initiative at a Commission Meeting in Iguaçu, Brazil in June 2006 has led to a collaboration among the authors which then involved a wider community of environmental experts both within and outside CEL. Important stages of this two-year collaboration were a workshop in Paraty, Brazil in June 2007 and project meetings near Chicago in September 2007 and Berlin in July 2008. Sheila Abed has accompanied the entire process with generous financial support and great personal enthusiasm for which we are deeply grateful.

Twenty people from fourteen countries have given their expertise and time for the writing of case studies compiled in this report. The process of consulting with them and others whose contributions could not be included here, has been enjoyable and enriching. We express our sincere gratitude to each of them.

The participants of the workshop in Paraty provided valuable information and insights. We certainly sensed a strong interest amongst the members of CEL as well as the IUCN Academy of Environmental Law. In addition, members of CEL's Ethics Specialist Group supported this project in manifold ways.

The chapters of Part A have been written with research assistance of Bonnie Rowell, Nora Götzmann and Kathryn Kintzele who has also drafted the list of recommended reading.

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Introduction: What is governance for sustainability?

This report – if we can call it that – compiles information, evaluations, and case studies about governance for sustainability. The topic is serious and pressing, but also incredibly complex because it addresses the three key issues of globalization, democracy, and sustainability. Rather than trying to offer a definitive report that attempts to incorporate these three issues into one theory, we extend an invitation to the wider IUCN community – to academics and environmental activists – to take up the challenge and jointly search for a theory of sustainable governance that can make a difference in practice. This report should be seen as a first step towards such an initiative.

Relating the concept of governance to the concept of sustainability requires no less than reformulating the basics of democracy. It is clear that the past 20 years of neo-liberal economic globalization have eroded both the common good and democracy. Reclaiming lost ground, therefore, is paramount for disempowered communities and disenfranchised citizens. But this in itself will not be enough. The real issue is whether the common good, that is the sustainability of life, can be pursued through democratic forms of governance. While the word *sustainable* has been slapped onto everything from sustainable development to sustainable economic growth, sustainable communities to sustainable energy production, the theory of sustainability and what it means to the concept of (democratic) governance has hardly been discussed. Some might say that sustainability, like democracy, is a mere ideal toward which we strive, a journey more than a destination, a goal removed from politics.

But even if we accept that sustainability is an ideal, some clarity is urgently needed. Our democratic institutions – governments, political parties, and the media – are currently fixated on economic growth. What may have started with great promise has been compromised, if not abandoned, because of the global market ideology. The 'displacement of the political by the market' (J. Habermas) raises the question of how democracy and sustainability can ever be revived.

We strongly feel that the concepts of democracy and sustainability are both absolutely indispensable, and further that one cannot be realized without the other. However, we also believe that the concept of democracy must be reformulated based on commonly accepted principles, such as freedom, equity, justice, and also sustainability. The search for a principled approach to democracy has occupied the literature for some time. There is a host of new composite terms such as 'discursive democracy' (Habermas), 'deliberative democracy' (J. Elster), 'substantive democracy' (W. Bello), 'cosmopolitan democracy' (D. Held), 'normative democracy' (R. Falk), 'ecological democracy' (R. Morrison), 'sustainable democracy' (A. Przeworski) or 'Earth democracy' (V.Shiva). They all point to the blind spot of democratic decision making. Understood as a system of government through elected representatives, democracy is always at risk of losing sight of its political sovereign – its citizens. *Demos,* the Greek root of *democracy,* originally meant the *district*, or the *land,* and later came to mean *the people*. *Polis*, the root of politics, means *the city,* the Greek unit of government. Modern democracy has reduced citizens to consumers. Its ideal is not the actively involved citizen, but the

consumer voting on the basis of personal economic security. It is here, at the level of citizenship, where our search for better governance must begin.

The more than 20 contributors to this publication come from a variety of backgrounds, experiences, and cultures. But they are all motivated by a sense of citizenship that strives for the common good. The common good comprises social and ecological concerns of which economic concerns are only part. This perception may be in contrast to the perceptions of governments and corporations. It is, however, the only way to reflect citizenship. As membership in a society and community (originally a city), citizenship implies rights and duties. A responsible citizen, therefore, is concerned with the functioning and welfare of the community, not only with economics.

Conceptually, it may be possible to describe governance for sustainability in these terms. With the awareness of citizenship comes the realization of rights and duties towards the community. Rights are essential to protect individual freedom as much as social, democratic, or economic interests. They include the fundamental right to participate in public decision making. Equally, duties are essential to guarantee the functioning and welfare of the community. They include the fundamental duty to respect ecological boundaries. Without accepting such a duty, the community cannot be 'sustained'.

The idea of governance for sustainability differs from conventional theories of governance. The concept of 'good governance', for example, requires more than transparency, accountability, and participation. Good governance and good citizenship are interdependent. Thus, a clearer sense of citizenship is needed for governance for sustainability, one that implies duties alongside rights. This is best expressed by the notion of ecological citizenship. Sustainable governance then is the set of written and unwritten rules that link ecological citizenship with institutions and norms of governance. The emphasis is on 'link': no form of governance can succeed if there is no common bond between those who govern and those who are being governed.

This report reflects and further explores this brief sketch of sustainable governance.

Part A, ‘Issues, Resources’ sets out the general debate. How are governance and sustainability related? What are the tensions between democracy and sustainability? Is there a common ground or ‘covenant’ that we can rely on? These are conceptual questions that need to be raised but do not necessarily require final answers. Chapters 1 and 2 aim to identify issues, not to resolve them. Our underlying assumption is that the global sustainability movement needs to open a dialogue with governments. Such a dialogue must be based on partnership and be open to new ideas.

For this reason, we saw it useful to provide some stocktaking. How have governments and other agencies of governance addressed the sustainability issue? There are various levels of governance including the global level (e.g., the UN system), the regional level (e.g., the European Union), the national level (e.g., national governments), the local level (communities), and the corporate level (businesses). Underpinning it all are citizens and civil society. Each level of

governance is discussed in terms of its functions, institutions, shortcomings, and reform efforts.

As will be shown, the overall weakness of governments at all levels is owed fundamentally to a lack of civic virtues (e.g., common sense, foresight, and humanity). Economic rationality has been too dominant. Arguably, no society or community can exist without a sense of civility based on commonly shared values. We consider this aspect so important that we devote Chapter 2 to covenantal foundations. All forms of governance whether formal or informal, explicit or implicit, display marks of covenantal relationships. Ultimately, governance relies on mutual trust or a covenantal bond in much the same way that a government relies on its constituents. The better we, as individuals and communities, are able to formulate such a covenant, the better the chances for sustainable governance. That is why the Earth Charter is so crucially important; it provides a global framework of commonly shared values and principles.

Part B, 'Challenges, Successes', looks at practical experiences. The collection of case studies from around the world gives us insights into real life. The authors, all expert 'volunteers', provide a wealth of information. They reveal obstacles, failures, and successes of engaged citizens in their struggles for sustainability. Some case studies give testimony to the existence of covenantal relationships. Typically, these relationships exist within the concerned communities and citizens groups, but sometimes they underlie the entire process of decision making. When communities govern themselves through bottom-up approaches, covenantal relationships are most obvious. However, local governments can also form covenants, as some examples show.

The real challenge occurs when the top-down approach of steer, command, and rule clashes with values strongly held within the community. When this happens, either power or dialogue prevails. Most case studies impressively demonstrate the importance of leadership. When leaders act with personal integrity and public morality, they will be trusted and vice versa. Quite obviously, the prospects of governance for sustainability are determined by the degree of ethical awareness.

Another feature that can be observed in many case studies is the high success rate of proactive rather than reactive approaches. Working for a sustainable project rather than against an unsustainable project is 'healthier', more rewarding, and truly empowering. If the proactive approaches described in the case studies represents a general trend, then we might have an important clue that governance for sustainability must be proactive and inclusive rather than reactive and divisive. While resistance against ignorance and arrogance will always be part of political action, the driving force for sustainability is self-trust and mutual trust. Convinced that sustainability is the 'right' thing to do, the actors of sustainable governance will prevail. The problem is that those in power have not (yet?) realized the wisdom of ecological sustainability.

We have not attempted to draw conclusions in this report. Drawing conclusions would have precluded its main purpose: to inform and encourage rather than to instruct. A handbook of guidelines for sustainable governance would be premature. Such a handbook could only result from a process that has not yet

taken place. This process would involve a global dialogue among sustainability experts and activists accompanied by extensive research collaboration. If this report stimulates interest in a broad dialogue and collaboration on governance for sustainability, it has more than fulfilled its purpose.

Klaus Bosselmann, Ron Engel and Prue Taylor
Auckland and Chicago

August 2008

Part A:

Issues, Resources

Chapter 1: Governance for Sustainability

1.1 Introduction

This chapter explores the theme of governance in relation to sustainability. It defines the role of governance for meeting the global and local challenges of our time. Such challenges are not the same as those of the past. Today, even local challenges have global implications. They may manifest themselves as a lack of security, wealth, health, happiness, potable water, fresh air, or fertile soils at many levels: personal, local, regional, and national. Nevertheless, they are global in nature. The globalisation of our challenges is the signum of our age. Any credible governance model must, therefore, reflect on the global nature of the challenges we are facing.

Defining these challenges and relating them to the concept of governance makes it necessary to redefine the purpose and how we measure the success of governance. Good governance is reflective of community empowerment and ecological wisdom, the absence of good governance is characterized by the lack of either or both. This chapter will identify the various levels and forms of good governance and conclude with some essentials for a concept of governance for sustainability.

Any concept of governance aiming for sustainability needs to start from two *observations*. One is the *accurate and honest realization* that the world we live in is on an unsustainable path, and an understanding of why our path is unsustainable. The other is a *strong sense of ethics* to guide our search for a sustainable path. Analysis and therapy are in a dialectic relationship: the more accurate the analysis, the better the prospect for solutions. We can no longer afford vague recognitions of unsustainable development for what essentially is an unprecedented crisis of humanity. Likewise, we can no longer afford mere pledges for sustainable development when only a profound transformation of our thinking about governance can help us.

In 1995 the Commission on Global Governance (CGG), an independent group of 28 world leaders, proposed seven core values for sustainable governance: respect for life, liberty, justice, equity, mutual respect, caring, and integrity. It proposed a global civic ethic described as a new ethical, consensual philosophy of global stewardship and citizenship. However, in promoting this ethic, the CGG assumed the validity of institutions and instruments that have their origin in Western values and priorities. This is problematic. Without questioning their role in the current crisis, the plea for a consensual ethics remains flawed and the prospect for equity-based ecological sustainability diminished.

Governance for sustainability as conceptualised here, requires a profound shift towards ecological thinking. Most concepts of environmental governance reveal flawed thinking. We do not need low-carbon, resource-conserving economic growth, but rather ecological economies, not ‘sustainable development’, but sustainable communities, not balancing of economic and environmental interests, but ecological decision making, and so on.

We will explore some tensions between conventional theories and practices of governance and a theory of governance firmly grounded in sustainability ethics. A key proposition is that democratic processes – while necessary at all levels – will not alone be sufficient to achieve sustainability. Likewise, good governance practice alone will not produce sustainability. What is needed is a sense of ecological citizenship to guide all forms and levels of public decision making.

1.2 Tensions

1.2.1 Tensions between governance and sustainability

Our current forms of governance cannot keep pace with the increasing complexities and magnitude of social, economic, and ecological problems. In most cases this is because the conventional theories of governance have their origin in Western values and priorities that play a role in the very crisis we are in today. A major source of the problems derives from local, national, and international governmental structures in which responsibilities for the economic, social, and ecological dimensions of sustainability are assigned to competitive agencies that must be coordinated or balanced for meaningful policies to be adopted.[1] These agencies often have competing considerations and decisions are often based on striking a balance among their considerations. A key problem is that this view does not reflect the reality that society and the economy are totally dependent on the planet's ecosystems.[2] To address these problems, we must shift towards more ecological thinking and change the way we govern people and their interactions with the environment.

At the most general level, governance involves the formation of rules and decision-making procedures and the operation of social institutions guided by these rules.[3] However, governance does not require creating entities or organizations of the sort normally associated with governments to handle the function of governance. 'Governance' must be distinguished from 'government', which implies a centralized institutional arrangement as the basis of authority and order. All forces that can influence human behaviour are potential tools of governance.[4] Governance tries to achieve effectiveness and legitimacy of political arrangements in a flexible manner that encompasses networks, informal regimes, and customary linkages, with a minimum of bureaucratic centralism and a

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1 Rosenau, J. N. 'Globalization and Governance: Bleak Prospects for Sustainability', *International Politics and Society/International Politik und Gesellschaft*, No. 3, 2003, pp. 430-443.

2 Sanders, R. 'A Systems Approach to Governance for Sustainability' Queensland Department of Natural Resources and Mines: Brisbane., 2003. Bosselmann, K. *The Principle of Sustainability: Transforming Law and Governance* (Aldershot: Ashgate, 2008).

3 Young, O. R. 'Rights, Rules and Resources in World Affairs' in *Global Governance: Drawing Insights from the Environmental Experience*, (MIT Press: Cambridge, MA, 1997), p. 4. See also other works by Oran Young including *International Governance: Protecting the Environment in a Stateless Society* (Cornell University Press: Ithaca and London, 2004) and *The Institutional Dimensions of Environmental Change, Fit, Interplay and Scale* (MIT Press: Cambridge, MA, 2002).

4 Zaelke, D. Stilwell, M. and Young, O. 'What reason demands; making law work for sustainable development' In Zaelke, D. et al. (eds.) *Making Law Work: Environmental Compliance and Sustainable Development* (International Law and Policy: London 2005), p. 38.

maximum of political space for exploration and diversity.[5] Governance is created as a result of individuals recognizing that they are interdependent – that the actions of one can affect the welfare of others. However, growing interdependence can lead to conflict when members of society recognize that the efforts of some to achieve their goals will interfere with the efforts of others to achieve different goals. Left to their own devices in an interdependent world, players frequently suffer joint losses as a result of conflict – a classic collective action problem. However, interdependency can also be a basis for cooperation if group members recognize opportunities to improve the welfare of the group by coordinating their behaviour.[6] In a world of increasing interdependence among people and societies and with nature, new approaches to governance must be developed at the local, national, regional, and global levels. To respond to new and changing issues, governance systems must become more effective.

Defining good governance

The idea of 'good governance' is given different meanings by different organizations, but is generally characterized as referring to openness, participation, accountability, predictability, and transparency. The United National Development Programme (UNDP) refers to good governance as 'not only ridding societies of corruption but also giving people the rights, the means, and the capacity to participate in the decisions that affect their lives and to hold their governments accountable for what they do. It means fair and just democratic governance'.[7] According to the European Commission in *European Governance: A White Paper*, good governance consists of five principles; openness, participation, accountability, effectiveness, and coherence.[8] Rene Kemp, Saeed Parto and Robert B. Gibson note that the objective of the *White Paper* is to make formal institutions more accessible, accountable and relevant to the general population and to maintain a higher degree of relevancy, credibility, and legitimacy in the average person's mind. The *White Paper's* exclusive focus on formal institutions, however, overlooks the important role played by civil society groups and experts especially in policy formation and implementation.[9]

The Organization for Economic and Co-operative Development (OECD) identifies a similar set of fundamental elements for good governance:

- Openness, transparency, and accountability;
- Fairness and equity in dealings with citizens;
- Efficient and effective services;

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5 Falk, R. 'Humane Governance and the Environment: Overcoming Neo-Liberalism' in Gleesonm B. and Low, N. (ed) *Governing for the Environment: Global Problems, Ethics and Democracy* p. 222.

6 Zaelke, D. Stilwell, M. and Young, O., supra note 4, p. 39.

7 Nzongola-Ntalaja, G., Director, Oslo Governance Center, *UNDP Role in Promoting Good Governance*, presentation at the Congress of the Labour Party of Norway, Oslo (9 November 2002) pp. 4-5, available at www.undp.org/oslocentre/docsoslo/publications (2002)

8 Commission of the European Communities, *European Governance, A White Paper*, COM(2001) 428 final, available at europa.eu.int/eur-lex/en/com/cnc/2001/com2001_0428en01.pdf

9 Kemp, R., Parto S., and Gibson, R. B. 'Governance for sustainable development: moving from theory to practice', *International Journal of Sustainable Development*, Vol. 8, Nos. 1/2, 2005.

- Clear and transparent laws and regulations;
- Consistency and coherence in policy formation;
- Respect for the rule of law; and
- High standards of ethical behaviour.[10]

Good governance is more than a legal idea and more than a development strategy. It has also been identified as a set of social norms comprising the rule of law, honesty, and accountability.[11] These norms of good governance guide and constrain the exercise of power by limiting the government's power and limiting the market's power and control. Norms of good governance also promote norms of law-abidingness which are activated when people become aware of the consequences of their actions and feel a sense of obligation to prevent those consequences. As we will see later, good governance is conditional for achieving sustainability.

The rule of law

Good governance depends on the rule of law, which is generally characterised as a state's conduct governed by a set of rules that are applied predictably, efficiently, and fairly by independent institutions to all members of society including those who govern.[12] Established and endorsed by many international organizations, the rule of law generally includes independent, efficient, and accessible judicial and legal systems.

The World Bank identifies transparent legislation, fair laws, an accountable and legitimate government that maintains order and fights poverty, and predictable enforcement as key fundamentals of the rule of law.[13]

The European Commission describes the rule of law as having the following elements:

- A legislature that enacts laws that respect the constitution and human rights;
- An independent judiciary;
- Effective, independent and accessible legal services;
- A legal system guaranteeing equality before the law;
- A prison system respecting the human person;
- A police force at the service of the law;

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10 OECD, *Final Report of the Ad Hoc Working Group on Participatory Development and Good Governance*, Part 1,2, (1997), available at www.oecd.org/dataoecd/44/12/1894642.pdf (1997). See also Good Governance at the Supranational Scale: Globalizing Administrative Law by D. E. Esty, 115 Yale Law Journal 1490 for an analysis of how administrative law strategies and approaches comprise elements of good governance.

11 Licht, A. N., Goldschmidt, C. and Schwartz, S. H. *Culture Rules: The Foundations of the Rule of Law and Other Norms of Governance*, working paper 2006.

12 Zaelke, D. Stilwell, M. and Young, O, supra note 4, p. 40.

13 The World Bank, *Initiatives in Legal and Judicial Reform* 3 (2004).

- An effective executive that is capable of enforcing the law and establishing the social and economic conditions necessary for life in society and that itself is subject to the law; and
- A military that operates under civilian control within the limits of the constitution.[14]

Rule of law can be thought of as a social norm, which describes the degree to which law guides the behaviour of individuals, groups, and governments. Social norms that complement and support the rule of law must be considered as part of any effort to promote good governance and the rule of law.

Environment and governance

As important as the various ideas for good governance may be, they leave a key area unresolved. The environment does not feature in the good governance literature of the OECD, the World Bank, or the European Union. This omission has a fatal consequence because it assumes the validity of the current concept of environmental governance.

Environmental governance remains a minor concern in most societies, an add-on, or a minimalist, shallow program, designed to avoid litigation and voter disquiet. It is the poor cousin of economic governance (for ongoing growth in productivity, profit, and associated inequitable access to power). The current emphasis on economic governance is the product of the institutional accommodation of personal distress and oppression, and associated compensatory behaviour. It forecasts a future based on extrapolation, substitution, control, and technological fixes. This defensive, reactive, utilitarian, problem-solving focus is ecologically blind. It contrasts with our need for imaginative, proactive design and re-design approaches to personal and planetary well-being. In a word, we need to embrace ecological sustainability.

Sustainability is 'a higher-order social goal or fundamental property of natural or human systems'.[15] It can also be conceived as a fundamental principle to guide human conduct with respect to natural systems.[16]

The scope of sustainability ranges from maintaining the integrity of biophysical systems to offering better services to more people to provide freedom from hunger and deprivation, as well as choice, opportunity, and access to decision making, which are aspects of equity within and across generations.[17] The ongoing discussion about sustainability has produced a set of normative principles that are summed up as follows.

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14 *Draft Handbook on Promoting Good Governance in EC Development and Cooperation*, p. 57, available at europa.eu.int/comm/europeaid/projects/eidhr/pdf.themes-gg-handbood_enpdf.

15 B.J. Richardson,B.J. and Wood, S. 'Environmental Law for Sustainability' in *Environmental Law for Sustainability* (Hart Publishing: Oxford, 2006), p.13.

16 Bosselmann, K. supra note 2.

17 Kemp et al., supra note 9, p.14.

- The *integration principle* suggests that development decisions should take into account their environmental consequences.[18]
- The *principle of equity* has two major components. *Inter-generational equity* requires that the present generation ensure that the health of the planet is maintained or enhanced for the benefit of future generations.[19] *Intra-generational equity*, on the other hand, addresses justice among existing communities and nations.[20] Addressing the inequities between the global North and South is a crucial requirement of intra-generational equity, and yet one of the most troublesome environmental problems.
- The *precautionary principle* suggests taking preventive action before risks are decisively established, since delay may prove more costly to society and nature.[21]
- The principle of *internalization of environmental costs* addresses the environmental externalities of market transactions and the degradation of public goods that are undervalued by markets.[22]
- A different kind of norm, but equally as important is *guardianship* where 'the focus of the law changes from individual sovereign rights and interests to global concerns and responsibilities'.[23]

Governance for sustainability has its origins in holistic awareness and competence, benign empowerment, social equality, and responsible values, visions, and actions. However, there is as yet no defined concept of governance for sustainability.

Governance for sustainable development is said to have certain key features and components. Kemp et al. put forth four of these and describes them as follows.

- *Policy integration.* Effective integration for practical decision making centers on acceptance of common overall objectives, coordinated elaboration and selection of policy options, and cooperative implementation designed for reasonable consistency, and where possible, positive feedbacks. It needs to correspond with improved interaction between government and non-government institutions and the creation of a longer-term view in government.

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18 Margerum, R.D. and Born, S.M. 'Integrated Environmental Management: moving from theory to practice' *Journal of Environmental Planning and Management* Vol. 38, No. 3, 1995, p. 371.

19 See Weiss, E.B. *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (Transnational Publishers: New York,1989)

20 See Voinovic, I. 'Intergenerational and Intragenerational Equity Requirements for Sustainability' *Environmental Conservation* Vol. 11, No. 1, 1995, p. 223.

21 See Cameron, J. and Abouchar, J. 'The Precautionary Principle' *Boston College International and Comparative Law Review* Vol. 14, No. 4, 1991, p. 1.

22 See M. Massarrat, 'Sustainability through Cost Internalisation' *Ecological Economics* Vol. 22, No. 1, 1997, p. 29.

23 P. Taylor, 'The Global Perspective: Convergence of International and Municipal Law' in *Environmental Law for a Sustainable Society*, K. Bosselmann and D. Grinlinton (eds.) NZCEL Monograph Series Vol.1, 2002, p. 142.

- *Common objectives, criteria, trade-off rules and indicators.* These include:
  - Shared sustainability objectives;
  - Sustainability-based criteria for planning and approval of significant undertakings; and
  - Specified rules for making trade-offs and compromises;
- Widely accepted indicators of needs for action and progress towards sustainability;
- *Information and incentives for practical implementation.* Appropriate action can be guided by many kinds of policy instruments, such as tax reforms, procurement laws, liability laws, product labeling, and tenure agreements. There is also a need to make prices more accurate indicators of embodied costs; and
- *Programs for system innovation.* Policymaking frameworks should actively seek to identify, nurture, and coordinate action for more sustainable technological niches. They need to be accompanied by co-evolving societal processes characterized by continuous changes in formal and informal institutions. This also requires a fundamental change in the systems of goods provision by using different resources, knowledge, and practices.[24]

Transition management

A new model towards dealing with complex societal issues has been developed by Rotmans and Kemp for the Dutch government as a transition process for unsustainable functional systems to undergo in order to become sustainable.[25] Transition management is a governance-strategy that tries to combine long-term envisioning, multi-actor interaction and short-term actions based on innovation.[26] Transition management breaks with the old plan-and-implement model aimed at achieving particular outcomes. It is based on a different, more process-oriented philosophy. Its key features are:

- Development of sustainability visions and setting of transition goals;
- Use of transition agendas;
- Establishment, organization, and development of a transition arena (for innovative actors) besides the normal policy arenas;
- Use of transition experiments and programs for system innovation;
- Monitoring and evaluation of the transition process;

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24 Kemp et al, supra note 15, pp. 19-22.

25 Ibid., p. 23.

26 Loorbach, D. 'Transition Management: Governance for Sustainability' Paper for the Conference Governance and Sustainability 'New challenges for the state, business and civil society' Berlin, 30 September - 1 October 2002, 12. See this paper for figures of transition management and a thorough explanation of the process. See also the fast growing 'transition towns' network initiated in the UK; transitiontowns.org/

- Creating and maintaining public support;
- Portfolio management; and
- Use of learning goals for policy and reliance on circles of learning and adaptation.[27]

The transitional approach towards governance for sustainability seems a sensitive start. It allows for 'learning-by-doing' and step-by-step advances. However, like any strategy, the transitional approach also needs objectives, and central to these must be a defined idea of sustainability. As Sanders notes, governance structures would need to reflect a strong sustainability model with the economy nested within society and society nested within ecology. He imagines 'issues-based units and associated governance structures with regional, river basin, and local layers of governance. These would be entities with spatially defined responsibilities for managing the landscape and landscape process from an ecological, social, and economic point of view'.[28]

The conceptual basis for this form of governance is best described by the Earth Charter. 'The Earth Charter takes a systemic view on peace, security, social and ecological justice, human rights and democracy…its principles are…guidelines for the entire way nations and people ought to conduct their affairs. This makes the Earth Charter a suitable constitution for a new world order'.[29] The Charter provides the 'values and principles for a sustainable future'.[30] While Parts I ('Respect and Care for the Community of Life'), II ('Ecological Integrity') and III ('Social and Economic Justice') provide the substantive principles, Part IV (13) to (16) ('Democracy, Non-Violence, and Peace') provides the procedural principles of governance for sustainability. The combination of these normative and procedural principles makes up the material from which governance for sustainability should be created.

1.2.2 Tensions between democracy and sustainability

Principle 13 of the Earth Charter stipulates: 'Strengthen democratic institutions at all levels, and provide transparency and accountability in governance, inclusive participation in decision making, and access to justice'. The Earth Charter assumes that democracy is a legitimate and desirable form of governance. However, democratic governance is not perceived as an end in itself, but as a means towards achieving sustainability. The Earth Charter's principles are formulated as 'interdependent principles for a sustainable way of life' (Preamble), which means that they cannot be applied in isolation from each other. Rather, they are mutually reinforcing and the more this inter-relatedness is being followed, the stronger the prospect for 'democratic societies that are just, participatory, sustainable and peaceful' (Principle 3).

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27 Kemp et al., supra note 15, p. 25.

28 Sanders, supra note 2, p. 14.

29 Bosselmann, K. 'Ecological Justice and Law' In: Richardson and Wood, supra note 15, p. 162.

30 Earth Charter Commission, *Earth Charter: Values and Principles for a Sustainable Future 2002*, available at www.earthcharter.org

The Earth Charter's recognition of democratic governance must not be confused with a general endorsement of democracy as a political framework. To the contrary, so far democratic institutions have failed to reverse or even slow down unsustainable trends. Their strengthening 'at all levels' seems indispensable, yet there are no signs that democracies produce more sustainable outcomes. The inter-relatedness of democratic and sustainability principles is the key, but what does this mean in practice?

Fundamentally, we face a dilemma. If democratic societies have failed, so far, to meet the sustainability challenge, does democracy stand in the way of sustainability? Or is democracy prerequisite for achieving sustainability? Looking over the political debate we can find evidence for either view. A 'benevolent' authoritarian system may well be able to enforce more sustainable behaviour, but it can just as easily block any moves towards sustainability. Likewise, democratic societies may be more conducive to sustainability initiatives from their citizens, but may lack the necessary leadership to install change.

China offers an example of a centralised power that could mobilise resources for a shift towards sustainable development. Yet the reality of environmental degradation in China belies the idea of powerful leadership. In fact, any attempt to find a green model of governance among states must fail. It simply does not exist.

The links between democracy and sustainability seem obscured by the fact that both proponents and critics of democracy are unified in their advocacy for more sustainability. The fact that democracy is closely associated with capitalism has obviously blurred the distinction between the political and the economic systems. However, while it seems obvious that capitalism and sustainability are at odds with each other, the real challenge is to distill an idea of democracy that is conducive with, and supportive of, sustainability. How can democracy in a 'pure' sense be perceived and then linked to sustainability? The answer to this question, as important as it may be, cannot be given at present. For the moment, we must acknowledge the reality of a close nexus between liberal capitalism, with its focus on economic growth, and democratic societies.

Yet despite this nexus, democracy has the sovereignty of the people at its core. Democratically elected governments may have consistently promoted economic growth at the expense of ecologically sustainable development, but that does not tell us the full story of democracy as a political system. Governments are elected by the citizens, that is, by us. Only insofar civil society supports and reaffirms the idea of economic growth, can we blame governments for missing the point of sustainability. It would therefore be wrong to characterise democratic societies as inherently unsustainable. Such a generalisation would overlook the crucial importance of civil society. As both constituency and counterpart of governments, civil society can either be critical or supportive of economic growth. Likewise, civil society can either be indifferent or proactive with respect to sustainability. Given the fact that the environmental debate and, in fact, the sustainability agenda are closely associated with civil society, the prospects for democratic, sustainable societies are ultimately determined by the role that civil society is willing to play.

To assess the tensions between democracy and sustainability it is useful, therefore, to introduce civil society as a third category.

'Consultation on Democracy and Sustainability' was the theme of a conference in London in March 2008,[31] which asked the question: Can democracy be decoupled from its established 'growth model'? To answer this question, the relationships between democracy, civil society, and sustainability were examined, based on a commissioned paper that identified four propositions.[32] They are as follows:

1. *Democracy is crucial for humane and just sustainable development*. Democracy can be shown to be very closely associated with high standards of ecological protection and effective implementation of environmental law. We cannot begin to tackle big environmental challenges without democracy and all it is based on – rule of law, open society, free media, experimentation, and low levels of corruption. The worst cases of unsustainable development at local and regional scales are being exacerbated by the misrule of authoritarian regimes. The many non-democracies can tackle unsustainable development only by adopting democratic processes and moving to open societies based on the accountable rule of law.

2. *Democracy poses huge problems for sustainable development*. In the advanced liberal capitalist states, democracy is tightly coupled to the promise of economic growth, ever-rising consumption, and individual freedom. Representative democracies have become sclerotic and there is a widespread problem of public trust and apathy in the OECD world. Politicians cannot challenge vested consumer and producer interests for fear of losing votes, lobby and media support, and associated funding. This makes democracies incapable of mobilizing citizens to tackle collective action problems on a big scale such as climate disruption and the need for deep emission cuts.

3. *Sustainability NGOs are a massive success for civil society worldwide*. Without them, we would not have anything like the progress we have seen in the past half-century in protecting the environment, cutting pollution, raising resource efficiency, highlighting linked issues of environmental and social injustice, and saving wildlife and habitats from destruction. Without them, the discourse and practice of sustainable development would not have become established in governments worldwide, and huge issues such as climate disruption would not have been acknowledged or tackled sufficiently by governments and businesses. NGOs have been at the forefront of civil society's emergence in authoritarian states and have played a key role in fostering democratic trends and challenges to abuses of power.

4. *Sustainability NGOs are a massive failure by their own standards.* For nearly 50 years they have campaigned and educated citizens and governments and

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[31] http://democracy.sustainability.com/conference/ Elkington, J. and Lothrington, J. A *Summary Report* 2008 available at http://democracy.sustainability.com/downloads/ Democracy_& _Sustainability_summary_report_11-04-08.pdf

[32] Christie, I. *Democracy, Civil Society, Sustainability* 2007 http://democracy.sustainability.com/insight_and_analysis/christie.cfm

businesses worldwide; yet ecological damage continues on a vast scale, environmental injustices abound, and dangerous climate disruption seems to be unavoidable. NGOs have achieved limited gains in specific areas of policy, but have failed to mobilize and energize citizens on a large enough scale to put real pressure on politicians and businesses in the West and beyond.

Prima facie, the four propositions seem in conflict with each other. Why is democracy seen as crucial for achieving sustainability when democracies have shown to be incapable of tackling the real issues? How can the verdicts of both massive success and massive failure by NGOs be reconciled? And is there any justification for democracy as a political model when both civil society and governments have failed to turn unsustainable development into sustainable development?

At a second look, the various propositions are not conflicting, but complementary. The basic idea of democracy as an open society with the rule of law is not proven wrong only because it has been dominated by economic rationality. The 'huge problem' that democracy poses for sustainable development is essentially a crisis of the democratic process. If the democratic process reinforces the priority of short-term economics over long-term sustainability, then the nature and conditions of this process deserve closer inspection. The domination of economic rationality is not necessarily a reflexion of the democratic process itself, which after all is only part of the wider public sphere.

To further understand communication within the public sphere, Habermas' distinction between the 'system-world' and the 'life-world' may be helpful.[33] For Habermas, democracy is about creating communication between these two worlds. While the established democratic process, through elections and media, recreates abstract systems of money and power (the 'system-world'), the wider public sphere is also influenced by the perceptions, values, and every-day experiences of people (the 'life-world'). Human beings act in both worlds, but the legacy of modernity is the colonisation of the life-world by the system-world. The challenge, therefore, is one of decolonisation and reclaiming 'life' over, or within, the 'system'.

How such a challenge could be mounted may be a less pertinent question than the observation that the democratic process has been colonized. This would imply that the theoretical perspective of a dialogue has triumphed over 'real' issues. According to Habermas the domination and colonization process can never be completed since human motivations, values, and ideas about the good life underpin all forms of communication, no matter how dominant the world of money and power may have become. What happens then when, for example, the catastrophic impacts of climate change are strongly felt in the life-world, but totally marginalized by the system-world? If the gap between the two becomes too wide, the real experience of real people just might prevail and eventually create a new quality of debate. It is certainly for the members of civil society to insist on discussing the reality of climate change and to point out that the money-and-

[33] Habermas, J. *The Theory of Communicative Action, Volume 2: Lifeworld and System: A Critique of Functionalist Reason* (Beacon Press: Boston, 1985).

power discourse may be in denial of the real life-system. Only such insistence and persistence can reconcile sustainability with democracy.

Ultimately, civil society will determine whether and to what degree public concerns enter the democratic process. The 'system' is not detached from civil society. What is important here, however, is how sustainability-concerned citizens and groups perceive themselves and how they are perceived. Are they a mere voice in a chorus of many voices (so typical for 'pluralistic' democracy)? Or are they vanguards of an emerging or, at least, desirable new democracy or covenant (as described in Chapter 2)?

The difference between being a mere voice and being a vanguard may be a gradual process in practice, but conceptually it can produce a paradigm shift. What is the use of the democratic process if sustainability is negotiable? The debate can only be over the question how we get to sustainability, not about whether we should go there.

For too long sustainability has been kept at the sideline of the democratic process. Seen as an ethical and utopian idea, sustainability was never integrated into social, cultural, scientific, economic, political, and legal systems. As Luhmann maintains, systems are self-referential with each operating under its own type of rationality.[34] This makes it impossible to impose the idea of ecological sustainability from the 'outside'.[35] Only if the idea finds 'resonances' within a system, can it be integrated. With respect to law, for example, constitutional debates about ecological responsibilities created resonances with the effect of integrating sustainability into some laws.[36] On the whole, however, the sustainability dialogue has not changed the rationalities of society's systems. Sachs has argued that the 'sustainable development' discourse since the 1987 Brundtland Commission Report, which introduced the concept of sustainable development, has completely diverted the 'sustainability' discourse. In his view, the absorption of sustainability by the composite term 'sustainable development' has rendered its foundational character. Ever since the Earth Summit in 1992 the 'system-world' (Habermas) continues to think of prolonged economic growth when talking about sustainable development.

For such ecological deafness, perhaps we could blame the voice of sustainability for not being audible enough. The call came from the 'outside' and could not be heard inside the system. But there is another way to look at it. The voice of sustainability really comes from deep within and perhaps people have only differed in their ability to listen to this inner voice. The fact that virtually everyone agrees that sustainability somehow matters is an indication of 'resonance' from within. What seems to be missing is the ability to relate such inner resonance to the system-world of which we are all a part. This is where the vanguard comes in. Sustainability-concerned citizens have no reason to restrict themselves to being merely one voice among others. Their concern for the future positions them 'ahead' – not left or right – of the mainstream. 'Neither left nor right, but ahead' has

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34 Luhmann, N. *Social Systems* (Stanford University Press: Stanford, 1995).

35 Luhmann, N. *Ecological Communication* (University of Chicago Press: Chicago, 1989).

36 Bosselmann, K. *When Two Worlds Collide: Society and Ecology* (RSVP: Auckland 1995).

been the slogan of the Green Movement and it captures what more people have come to realize: political leaders have long lost genuine leadership leaving 'ordinary' citizens to lead so that their 'leaders' can follow.

The pioneering role of integrating the future into the present is the signum of the sustainability movement. This role is political in its most fundamental and radical sense. It adds a future dimension to politics. For this reason sustainability can be seen 'as a democratic term' and the strategy for sustainability as a development towards 'democratic sustainability'.[37]

Sustainability could fill the empty space of democracy. The money-and-power system may not have completely colonised the democratic process, leaving a vacuum of silence that can no longer be ignored. If, as many argue, sustainability is the most profound challenge to humanity, then now is the time to allow the voice of sustainability to speak loudly and clearly, and for democracy to listen.

Images of sustainability as 'filling an empty space', 'adding a missing link' or 'providing a foundation' are expressions of a search for direction that is missing in current governance and democracy, which lack a fundamental sense of responsibility for the future. This may be true only for the dominant *form* and not necessarily for the *concept* of democratic governance. The dominant form is representative democracy with institutions and timeframes that favour short-term gains over long-term responsibility. Overcoming this defect may well require a fundamental rethinking of governance. The reason for the short-term horizon of dominant governance is almost trivial. Representative democracy creates 'politicians', a type of decision-makers whose jobs depend on meeting the immediate needs of voters. In fact, their performance is measured solely by their success in meeting immediate needs. There is little to be gained from meeting less immediate needs, let alone the needs of future generations. Short-term achievements can be rewarded with re-election, long-term aspirations won't be rewarded. In this sense, unsustainable decisions are a key characteristic of representative democracy. In exceptional cases, politicians will respond to voters with a long-term perspective, but as a rule they make unsustainable decisions to keep their jobs.

A first step, therefore, is the attempt to reverse this logic and create some 'job security' for politicians. Knowledge of sustainability ought to be a requirement for running for public office. Several elements of the democratic system could be changed relatively quickly, for example:[38]

1. A *system of rolling elections* could be introduced that allows politicians to stay in their positions for an extended period of time, say 10 years. The risk of power accumulation would be alleviated by annual elections. Each year one tenth of parliamentarians or councillors would face election. This way

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37 Hansen, H.P., Tind, E. and Clausen, L. T. *Democracy and Sustainability – a challenge to modern nature conservation*, Paper presented at the 11th International Symposium on Society and Resources Management, Östersund, Sweden June 2005, p. 4; at www.ruc.dk/upload/application/pdf/b0d8da54/Democracysustainability.pdf

38 See also Nevill, J. *Democracy and Sustainability* November 2005, available at www.tucs.org.au/~cnevill/Democracy_and_sustainability.htm

continuity and change are more balanced than in the current three- or four-year terms in which everything is geared towards short-term results.

2. A *coercive legislative framework* could be created that obliges politicians, administrators, and judges to implement sustainability. The objective of ecologically sustainable development could be clearly defined in legislation[39] and constitutions.[40] This way, all levels of decision making, national, local, and corporate, would be underpinned with requirements to follow sustainability principles.

3. *Independent statutory authorities* could be established to participate in public decision making. Some would have an advisory function, while others would have veto power and legal standing, say as 'guardians of the future'. Joint decisions of governments and these independent bodies would be mandatory whenever the integrity of ecosystems is at risk.

These institutional and legal arrangements are not difficult. What is difficult is the process leading to them. By nature, governments do not have a sense of urgency. In their fixation with popularity, governments cannot admit their own insufficiency. Thus it is entirely left to civil society to initiate and organize change. Citizens, not governments, are in charge.[41]

Realizing the importance of citizenship is the key and only hope for democratic reform. Citizens need to *be* the change they want from democracy. We cannot demand that our governments establish solidarity with the poor, the environment, and the future unless we feel this solidarity ourselves. In other words, the sustainability issue calls for a new concept of citizenship as the cornerstone for any prospect of a functioning democracy.

This new concept of citizenship needs to be global and ecological. Without a strong sense of global ecological citizenship, governance for sustainability seems inconceivable. By taking the global citizen's perspective, we can better understand why current forms of governance are insufficient.

The following section examines the various forms and spheres of governance. What are they and what trends can be observed? The purpose of this overview is to understand the fundamental importance of the role of global citizenship. We can almost say that the emergence of environmental governance since the 1970s – at the international and national levels – has always been a search for global governance. Failures were caused by national egos and successes stemmed from a sense of global responsibility. Inevitably global responsibility came from a sense of global citizenship. At the end of the overview we will explore what it means to be a global, ecological citizen.

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39 An example is the overarching legislation in New Zealand, the Resource Management Act 1991 with ‘sustainable management’ as its key objective.

40 Bosselmann, K., supra note 2, ch. 4.

41 On which, after all, the legitimacy of democracy rests.

1.3 Spheres and forms of governance for sustainability

> *This image of a crisis in governance has become central to the global politics of the environment. While there is little dispute that better governance is required, a precise definition of what this means or what it requires is elusive.*[42]

> *The governance system is best understood and evaluated as part of a governance system of many interconnected and interactive elements.*[43]

This section will focus on the spheres and forms of governance for sustainability. As such, it will be an inquiry into what governance means and what it requires whilst examining the interconnectedness and interaction of various governance spheres. In an increasingly globalised and complex world we need multiple, effective, and integrated areas of governance to ensure sustainability. Hence, our premise of inquiry is that all spheres of governance – local, national, regional, corporate, and global – present both problems and opportunities. We posit that it is not a matter of deciding which is the 'best' forum to promote and encourage sustainability but rather, that each of these spheres should be looked at in terms of its potential to become one dynamic layer in a multi-layered, multi-dimensional framework of governance for sustainability. This approach is intended to encourage contextual, innovative, and effective problem solving, definition and re-definition of what governance for sustainability is and what it can become.

1.3.1 Global governance: Beyond UN reform

The ecological reality of a global environment

The environment is global in the sense that it does not know national boundaries. However, international governance organisations have been slow to develop an understanding of this fact because they operate under the principle of State sovereignty and because, in the current political climate, economic interests are prioritised over social and environmental concerns.[44] Nevertheless, growing awareness of issues such as trans-national harm (e.g. acid rain) and deterioration of the global commons (e.g. global warming) has gradually fuelled recognition of the urgent need for trans-national action and international cooperation.

What form should global governance take? Would an over-arching international institution like the United Nations be desirable or effective? Do we need new international governance institutions? What sort of underlying principles should be the basis of reform or any new institutions? Should we aim for more or less centralisation? Are current international environmental agreements reached by consensus adequate? What methods of increased enforcement of international law are desirable, achievable, and effective?

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42 Elliott, L. *The Global Politics of the Environment,* 2nd edition (Palgrave Macmillan: New York, 2004) p. 94.

43 Kanie, N. and Haas, P. M. (eds.), *Emerging forces in environmental governance* (United Nations University Press: Tokyo, 2004) p. 269.

44 Ayre, G. and Callway, R. (eds.), *Governance for Sustainable Development: A Foundation for the Future* (Earthscan: London, 2005) p. 12.

In this report, we do not suggest that one level of governance can provide a unilateral answer to providing governance for sustainability. Therefore, we do not support the thesis commonly proffered that recognition of global inter-connectedness is synonymous with the need for an over-arching global governance structure that replaces the authority of regional, national, and local entities. Nevertheless, international governance bodies can (and should) play a vital role when they act as an integral part of an international network of global, regional, national, and local governance.

Current bodies of international governance for the environment: UNEP and the need for reform

Since it was founded in 1972, the United Nations Environment Program (UNEP) has been a cornerstone of global governance for the environment. Recently however, the organisation has been called into question due to the increasing diversity of international organisations acquiring environmental responsibility and its perceived lack of effectiveness.[45] UNEP does not poses executive powers, rather its primary function is to monitor and coordinate environmental governance, which includes engaging in partnerships with other intergovernmental and non-governmental organisations.[46] UNEP's perceived ineffectiveness has been linked to the Nairobi-headquartered organisation's geographical isolation in the UN system, an insufficient mandate, lack of support from governments, and a low budget.[47] Essentially, critics argue that UNEP is too small, too poor, and too remote to coordinate and promote sustainability effectively.[48] This is particularly so as the international system of environmental governance becomes ever more decentralised and as other international organisations targeting environmental governance often have 'better funding, … clearer and stronger mandates, and greater support'.[49]

In response to the critiques of UNEP, several suggestions for reform or possible alternatives have been proposed. Some of these include:

1. Strengthening the UN General Assembly by reconstituting one of its committees as an environmental committee;[50]
2. Creating a standing commission on the environment and development or an international environmental ombuds-office;[51]

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45 See e.g., Elliott, supra note 42, p.102.

46 Ibid., p. 97.

47 Ibid., p. 98.

48 For a summary of these critiques see e.g., Downie, D.L. and Levy, M.A. 'The United Nations Environment Program at a turning point' in Chasek, P. (ed), *The Global Environment in the Twenty-first century* (United Nations University Press: Tokyo, 2000) pp. 355-375; Gehring, T. and Buck, M. 'International and transatlantic environmental governance' in Buck, M. Carius, A. and Kollmann, K. (eds.), *International Environmental Policymaking* (Ökom Verlag: Munich, 2002) pp.21-43.

49 Downie/Levy, supra note 48, pp. 358-9.

50 See e.g., Elliott, supra note 42, p. 103.

51 See e.g., Schrijver, N. 'International organization for environmental security' *Bulletin of Peace Proposals,* Vol. 20 No.2, 1989, pp. 115-122.

3. Reforming the Trusteeship Council into an Environmental Trusteeship Council;[52]
4. Incorporating environmental threats into the mandate of the Security Council or for the Security Council to convene special sessions on environmental insecurities;[53]
5. Creating a UN-based environmental protection council with binding law enforcement capabilities;[54]
6. Creating a Global Ministerial Environment Forum (GMEF);[55]
7. Replacing UNEP with a World Environment Organisation (WEO), also termed Global Environment Organisation(GEO);[56]
8. Strengthening international regimes;[57] and
9. Clustering Multilateral Environmental Agreements (MEAs).[58]

Collectively, these suggestions for reform raise two key issues for the future of global environmental governance, namely the role of the UN and of centralisation.

Notably, the majority of these suggestions are variants of UN reform. The retention of current UN structures and desire for incremental rather than radical reform of the governance system is supported by many governments. UNEP, for example, suggested that 'the process (of institutional reform) should be evolutionary in nature (…) A prudent approach to institutional change is required, with preference given to making better use of existing structures'.[59] Some

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52 See e.g., Imber, M. *Environment, Security and UN Reform* (Macmillan: London, 1994) p. 106 (referring to comment by the UNCED secretary-general Maurice Strong); Palmer, G. 'New ways to make international environmental law' *American Journal of International Law* Vol. 86, No. 2, 1992, pp. 259-283, 279 (referring to comment by the president of the World Federation of the United Nations Associations); UNSG (United Nations Secretary-General - Kofi Annan), *Renewing the United Nations: A Programme for Reform,* A/51/950 (United Nations Secretariat: New York, 1997) para 85.

53 See e.g., Elliott, supra note 42, p. 103.

54 See e.g., Palmer, supra note 52, p. 279 (referring to a New Zealand government proposal).

55 Governing Council of the United Nations Environment Programme, 'Global Ministerial Environment Forum'. S. S. VII/I. International Environmental Governance. UNEP/GC/21, February 2002.

56 A variety of WEO models have been proposed ranging from a hierarchical and centralised body with considerable powers to loose organisational structures such as the clustering of MEAs and their secretariats. Some proposals also suggest incorporating UNEP *into* a WEO structure. For useful summaries of the various proposals see especially, Biermann, F. and Bauer, S. (eds.), *A World Environment Organization* (Ashgate Publishing: Aldershot, 2005) pp. 9-10; Charnovitz, S. *A World Environment Organisation* (United Nations University Institute of Advanced Studies: Tokyo, 2002); Lodefalk, M. and Whalley, J. 'Reviewing proposals for a world environment organisation' *The World Economy,* Vol. 25, No. 5, 2002, pp. 601-617; Simonis, U. 'Advancing the debate on a world environment organisation' *The Environmentalist,* Vol. 22, No. 1, 2002, pp. 29-42.

57 See e.g., Young, O. R. (ed), *Global Governance: Drawing Insights from the Environmental Experience* (MIT Press: Massachusetts, 1997).

58 See e.g., Von Moltke, K. 'Clustering International Environmental Agreements as an Alternative to a World Environment Organization' In Biermann, F. and Bauer, S. (eds.), *A World Environment Organization* (Ashgate Publishing: Aldershot, 2005) pp. 175- 204.

59 Supra note 55.

commentators also state a clear preference for utilising and reforming existing institutions and structures rather than developing new international governance frameworks.[60] However, not everyone agrees that the UN is a suitable actor. Falk, for example, argues that UN reform is impossible due to its inherent realist mindset and political pre-conditions operating within the organisation.[61] He notes the geo-political closure (lack of consensus, problematic leadership, and U.S. dominance), the UN charter (too rigid), and the fundamentally hierarchical and patriarchal structure of the organisation as key obstacles to any meaningful reform.[62]

In arguments for reform, two key themes have emerged. First, the perceived need for an authoritative environmental body with the capacity to control and deploy resources.[63] Second, the increased need for effective coordination among various governance actors due to the growth, diversification, and increasingly complex system of international environmental governance.[64]

The extent of centralisation and whether it is even desirable are illustrated in the debate surrounding proposals for a WEO. Key advantages of centralisation are:

- Concentration of resources – which may increase the ability to develop and utilise compliance mechanisms, greater ability to impose sanctions for non-compliance;[65]
- Concentration of power – allowing a challenge to other powerful international actors such as the WTO or IMF to become possible;[66]
- Consolidation of information-regimes and MEAs centralised in one place – easing access and administrative burden and avoiding crossover and duplication;[67] and
- Increased uniformity of international sustainability norms and principles.

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60 See e.g., Ayre/Callway, supra note 44, p. 205 (Arguing that 'the collective case for strengthening and reforming our current processes is a far stronger one than for either the development of new institutions or for states to act independently'); Gehring, T, and Oberthür, S. 'Was bringt eine Weltumweltorganisation? Kooperationstheoretische Anmerkungen zur institutionnellen Neuord nung der internationalen Umweltpolitik' *Zeitschrift für Internationale Beziehungen,* Vol. 7, No. 1, 2000, pp. 185-211 (arguing in favour of using resources we have through current structures); Gehring, T. and Oberthür, S. 'Reforming International Environmental governance: An Institutional Perspective on Proposals for a World Environment Organization' In Biermann, F. and Bauer, S. (eds.), supra note 56, pp. 205- 235; Najam, A. 'Neither Necessary, Nor Sufficient: Why Organizational Tinkering Will Not Improve Environmental Governance' In Biermann, F. and Bauer, S. (eds.), supra note 56, pp. 235- 256.

61 Falk, R. *Predatory Globalization: A Critique* (Polity Press: Cambridge, 1999) pp.111-112.

62 Ibid., 113-115.

63 The Commission on Global Governance, *Our Global Neighbourhood* (Oxford University Press: Oxford, 1995) p. 4. See also, supra note 60, on support for a centralised WEO.

64 See e.g., Ayre/Callway, Supra note 44, p. 28; Elliott, supra note 42, p. 102. These arguments are sometimes referred to as advocating *international pluralism*.

65 See e.g., Kanie/Haas, supra note 43, p. 272; Commission on Global Governance, supra note 63, p. 4.

66 Kanie/Haas, supra note 43, p. 272.

67 Ibid.

Certainly the arguments for centralisation (especially on certain issues, such as water) – to avoid cross-over, and increase effectiveness and efficiency in administration – are compelling.[68] Yet centralisation may also maintain the problems commonly associated with hierarchical organisational structures, such as lack of accountability and transparency and skewed power dynamics in decision making, agenda setting, and prioritisation of issues.[69] Overall, it appears that suggestions for less centralised types of global governance structures place more emphasis on, and allow more room for, the importance of coordination among governance actors (including non-State actors and interest groups) and current governance structures (e.g. clustering of MEAs). Rather than focusing on the possible gains that a centralised governmental organisation may bring, arguments in favour of less centralised global governance structures note the importance of greater integration and dialogue among existing structures.[70]

Proponents of centralised and non-centralised reform proposals both recognise the importance of increased transparency and strengthening of the democratic framework, greater coordination across policy areas and institutions, and better enforcement of non-economic treaties such as MEAs.[71]

North-south relations: International decision-making, agenda-setting and equity

Irrespective of the form(s) of governance adopted at a global level – be it reform of the United Nations, development of a WEO, or the clustering of MEAs – a central guiding principle must be north-south equity. In general it appears fair to state that centralisation has been viewed with disfavour in terms of achieving north-south equity because the power dynamics in centralised global governance structures usually operate to the disadvantage of countries from the global south.[72] As Gupta notes, the issues that dominate the international agenda on global environmental governance are often reflective of western domestic agendas.[73] Furthermore, due to weaker bargaining power, the global south is usually unable to challenge such inequities in agenda setting.[74] Simms cites the example of a northern focus on climate change, in the face of a reality for many in the global south for whom issues such as acute poverty and lack of healthcare and education may be higher priorities.[75] Indigenous communities have frequently experienced frustration in

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68 See e.g., Ayre/Callway, supra note 44.

69 For criticism of centralisation see e.g., Gehring/Oberthür (2000), supra note 60; Gehring/Oberthür (2005), supra note 60; Von Moltke, supra note 58; Newell, P. 'A World Environment Organisation: the Wrong Solution to the Wrong Problem' *The World Economy,* Vol. 25, 2002, pp. 659-671.

70 See e.g., Ayre/Callway, supra note 44, p. 28.

71 Ibid. (Arguing that we need 'greater vertical and horizontal integration of dialogue and decision-making across organisations').

72 See e.g., Gupta, J. 'Global Environmental Governance: Challenges for the South from a Theoretical Perspective' In Biermann, F. and Bauer, S. (eds.), supra note 56, pp. 57-86 (Arguing against a WEO on the premise that centralisation will work against the interests of the global south).

73 Ibid., 65.

74 Gupta, supra note 72, p.78.

75 See e.g., Barry, J. and Eckersley, R. (eds.), *The State and the Global Ecological Crisis* (MIT Press: Massachusetts, 2005) p. 270; Simms, A. 'Economy: The Economic Problem of Sustainable Governance' In Ayre. G. and Callway, R. (eds.), supra note 44, pp. 73-89.

participation in international negotiations because their interests have gained little recognition or address.[76]

If global environmental governance is to achieve sustainability, social and environmental justice must form the basis of institutional structures and governance principles. This requires the urgent redress of the current dichotomy between the global north and south in international governance structures and decision making.

1.3.2 Regional governance: Is the European Union a model?

Adoption of sustainability norms into the EU

The European Union (EU) seemed quick to reply to international calls for sustainability, responding to the 1992 Earth Summit by adding norms of sustainability to its constitutional framework.[77] Two key examples are the Fifth Environment Action Programme (EAP) and the Amsterdam Treaty on the European Union (TEU).

The fifth EAP 'explicitly takes up the definition of sustainable development proposed by the Brundtland Commission' and as such, is 'widely considered the firmest expression so far of this idea in the EU'.[78] The objective of the fifth EAP was to transform patterns of growth within the EU community in a manner that promotes sustainability.[79] Instrumentally, the EAP marked a departure 'from a "command-and-control" approach' in favour of 'shared responsibility between various actors – government, industry and the public – (which) is considered to be necessary to achieve progress towards sustainability'.[80] An example of this in practice was the Commission's creation of the European Consultative Forum on the Environment and Sustainable Development (Forum) in 1997. This Forum is an independent advisory body with membership from NGOs, business and industry, consumers, farmers, local and regional authorities, and academic communities.[81] However, the sixth EAP noted a lack of willingness of member states to implement

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76 See e.g., Fogel, C. 'The Local, the Global, and the Kyoto Protocol' In Jasanoff, S and Long Martello, M. (eds.), *Earthly Politics: Local and Global in Environmental Governance* (MIT Press: Massachusetts, 2004) pp. 103-125, 103 (Discussing Indigenous peoples relationship to climate change negotiation she argues: 'Indigenous peoples saw themselves as unrepresented in the discourse of either the inter-governmental Panel on Climate Change (IPCC) or the official Kyoto protocol negotiations. Responding to this they demanded that governments acknowledge their existence and contributions, the specialized knowledges that they hold and their rights to participate in global climate change institutions that impact on their sovereign territories').

77 Bosselmann, K. 'The Environmental Governance of the European Union: Institutional and Procedural Aspects of Sustainability' In Lilly, I and Bosselmann, K. (eds.), *Repositioning Europe: Perspectives from New Zealand,* NCRE Research Series No. 2 (University of Canterbury: Christ church, 2003) pp. 9-30, 11.

78 Ibid.

79 See, *Fifth European Community Environment Programme: Towards Sustainability*. Available at www.europea.eu.int/scadplus/leg/en/lvb/128062.htm.

80 Bosselmann, supra note 77, p. 12.

81 Ibid., p. 19.

the fifth EAP.[82] In the sixth EAP advocated a more inclusive approach including more specific targets and an increased use of marked-based measures.[83] The sixth EAP also focussed on better integration of environmental concerns into other policies.[84]

In an effort to strengthen implementation and compliance, the Commission announced it would:

- Increase pressure on member states by making implementation failures better and more widely known;
- Encourage closer collaboration with the market; and
- Ensure greater involvement of various stakeholders.[85]

The second key example of the EU's integration of sustainability norms is provided by the Amsterdam Treaty which granted quasi-constitutional status to the idea of sustainability.[86] Of particular note are Article 6 and Article 3.[87] Article 6 strengthens the requirement of integrating environmental considerations into sectoral economic policies and effectively makes integration a basic organising principle of the EU.[88] The revised Article 3 clarifies that 'integration' refers to all EU policies and activities laid out in Article 3. It explicitly links integration to the achievement of sustainable development and thereby creates a cornerstone of the EU's current constitutional framework. The (rejected) Draft European Constitution did not add anything of substance.[89] In essence, the Draft Constitution failed to ensure the necessary repositioning of sustainability as the basic and fundamental organising principle of all other policy. This omission was significant as it left the traditional environmental paradigm unchanged.[90] Rather than emerging as a new guiding paradigm from which to reformulate policy, integration, and institutional activity, the current framework of sustainability has evolved as a mere extension of traditional environmental policies.[91]

Institutional integration and implementation of normative principles

The Cardiff Process

The Cardiff process, launched in 1998, concerns the integration of the environment into sectoral policies.[92] It is questionable, however, whether the integration process

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82 See, *Sixth Environment Action Programme. Environment 2010: Our Future, Our Choice*. Available at www.europa.eu.int/comm/environment/newprg.

83 Bosselmann, supra note 77, p. 12.

84 Ibid., p. 13.

85 Ibid., p. 12.

86 Ibid., p. 13.

87 Amsterdam Treaty. Available at www.eurotreaties.com/amsterdamtext.html.

88 Bosselmann, supra note 77, p. 13.

89 Ibid.

90 Ibid., p. 14.

91 Ibid.

92 Bosselmann, supra note 77, p. 14.

aims for sustainable development or just for better coordination. For example,

- The Cardiff focus is on environmental integration into EU policies whilst lacking essential defining elements that are necessary to achieve sustainability.
- By centering around the Council the Cardiff process leaves out other EU institutions and limits wider stakeholder involvement.
- As the Cardiff focus is specifically directed at EU policy, it omits international, national, and local dimensions.[93]

Despite several summits discussing the Cardiff process in view of developing a comprehensive and integrated strategy for sustainability, it has remained unclear exactly how and to what degree the Cardiff process can be linked to the agenda of sustainability.[94] At the Copenhagen conference of the European Environment Agency (EEA) for instance, an attempt was made to link the Cardiff process and the sixth EAP to the adoption of an overall sustainability strategy.[95] To ensure the increased coordination necessary for this to be successful, the EEA recommended a 'system of integrated monitoring and reporting' operating with 'headline indicators' that measure progress in the areas of structures, institutions and policies.[96] The fundamental criticism put forward by the EEA is that the EU has made little progress towards sustainability.[97] This criticism stems from EEA's vital recognition that sustainability 'will not come directly from environmental policies, but from socio-economic policies, guided by sustainability paradigms'.[98]

The EU Strategy for Sustainable Development

The failure of adequately accommodating the recognition stated earlier is illustrated clearly by the EU Strategy for Sustainable Development (SDS).[99] Once again, this EU initiative simply re-states the ideal of sustainability as a key goal of the future rather than establishing new principles to guide all policies *based on the paradigm of sustainability.*[100] In part, this problematic is compounded by the lack of a clear definition of sustainability itself. The SDS gives no definition for sustainable development nor any indication of its content or guiding principles.[101] As such, it does not resolve key issues of defining sustainability, in particular the exact

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93 Ibid., p. 15.

94 Ibid. Referring to, Fergusson, M. et al., *The Effectiveness of EU Council Integration Strategies and Options for Carrying Forward the 'Cardiff' Process* (Institute for European Environmental Policy, March 2001) pp. xii +66.

95 Bosselmann, supra note 77, p. 16. (Referring to, Domingo Jimenez-Beltran (Executive Director, European Environment Agency), 'Making Sustainability Accountable: The Role and Feasibility of Indicators. From Gothenburg to Barcelona' (Speech delivered in Brussels, 9 July 2001).

96 Bosselmann, supra note 77, p. 16.

97 Ibid.

98 Jimenez-Beltran, supra note 95.

99 *A Sustainable Europe for a Better World: A European Strategy for Sustainable Development* (15 May 2001) 264 final, Commission of the European Communities.

100 Bosselmann, supra note 77, p. 16.

101 Ibid., p. 17.

relationship among the economic, social, and environmental spheres in the meaning of sustainability. As for the Cardiff process, the SDS appears to focus on increasing the effectiveness and efficiency of environmental policies but does not provide a paradigm shift towards sustainability.

The White Paper on EU Governance

In contrast to the Cardiff process and the SDS, the White Paper by the Commission appears to create a possibility for a new approach to institutionalising sustainability. Notably, the White Paper is not directly concerned with the concept of sustainability, but is a reaction to the perceived dissatisfaction of EU citizens towards the EU's political institutions.[102] Despite the official focus of the White Paper on generating 'good governance' in EU institutions, some proposals are directly relevant to sustainability.[103] The five main principles of the White Paper are:

- Openness;
- Participation;
- Accountability;
- Effectiveness; and
- Coherence.[104]

Incidentally, these principles are intended to reinforce two key principles of the EU: subsidiarity and proportionality.[105] The White Paper is an acknowledgement that the Union needs to 'phase out a top-down approach to policy and regulation making and to readdress the use of non-legislative instruments to implement policy'.[106] The White Paper's focus on decentralisation, which is to be 'achieved not through delegation but by opening up the policy-making and policy-delivery processes to involve more people and organisations', is a reflection of this acknowledgment.[107] Thus, it should be noted that the White Paper attempts to step beyond a mere concern with improved policy, regulatory and enforcement mechanisms to address the more substantial need for a fundamental 'refocussing of institutions' in accordance with the framework of sustainability.[108] This is certainly an improvement on the Cardiff and SDS strategies, which exhibit a greater complacency with 'tinkering' of policy and processes rather than presenting a paradigm shift.

Perhaps most importantly, the final part of the White Paper recognises that governance is not only about processes but 'also about competence and

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102 White paper, supra note 8.

103 Bosselmann, supra note 77, p. 18.

104 White Paper, supra note 8.

105 Bosselmann, supra note 77, p. 18.

106 Taylor, P. 'Reforming the Governance of the European Union: A Greater Voice and Expanded Planning Role for Local Government in EU Affairs?' In Lilly and Bosselmann (eds.), supra note 77, pp. 31-54, 33.

107 Taylor, supra note 106, pp. 32-33.

108 Ibid., p. 33.

power'.[109] In its final paragraphs, the paper refers to building the Union upon a 'multi-level system of governance', stating that: 'In a multi-level system the real challenge is establishing clear rules for how competence is shared – not separated; only that non-exclusive vision can secure the best interests of all the Member states and all the Union's citizens'.[110] Thus, here we have a clear recognition of the need for broadening governance, and in particular the heightened need for equitable communication, coordination, and cooperation among different spheres: EU, national, and local. Importantly, this push for a multi-level governance approach also appears consistent with the recognition that internal EU reform has wide-ranging effects on global governance.[111] Given the indivisibility of the environment and the need for trans-national action, this is an important recognition.

Despite these positive trends, the White Paper is not without its problems. First, the goals set by the White Paper for reforming EU institutions and processes are arguably too modest and thus likely to result in limited progressive innovation or fundamental change.[112] Second, although it is not explicitly stated, 'it is relatively clear that the EU Commission conceives the multi-level system of shared governance as primarily comprising the Commission and the Member states' thus continuing the exclusion of other stakeholders such as local government or civil society in governance processes.[113]

The EU as multi-level governance: Role of civil society and local governments

The importance of integrating local sectors into EU governance must not be underestimated. Within Europe, the democratic ideal of the right of citizens to participate in the conduct of public affairs has long been recognised. It has also been acknowledged that it is at the local level that this right can be most directly exercised.[114] As observed by the White Paper, there has been growing dissatisfaction amongst EU citizens with the current governance institutions. The prospect of the EU becoming 'broader and deeper' has compounded pre-existing feelings that governance is too centralised, that Europe is controlled by EU institutions at the expense of national and local institutions. This has resulted in feelings of alienation, mistrust, and disinterest.[115] The greater involvement of civil society and local forms of governance are crucial in mitigating this discontent and ensuring the successful implementation of sustainability norms into the broader EU institutional framework. On a conceptual level greater involvement of civil society in governance processes can help define the very concept of sustainability and help link this concept to institutional implementation.[116] On a more institutional level, widening the governance dialogue to ensure a diversification of stakeholder

109 Ibid., p. 34.

110 White paper, supra note 8, p. 35.

111 Taylor, supra note 106, p. 48.

112 Ibid., p. 34.

113 Ibid., p. 44.

114 Ibid., p. 37.

115 Ibid.

116 Bosselmann, supra note 77, p. 26.

involvement (including the increased participation of civil society) can assist in advocating the need for a paradigm shift. Local government can play a key role in facilitating this shift.[117]

Better integration of all levels of government and the increased participation of civil society in governance processes can help ensure that sustainability becomes the over-arching paradigm from which governance is designed rather than being the intended outcome of current governance structures.

Conversely, the European debate on sustainable development governance is severely affected by the EU's attempt to keep institutional and procedural issues separate from conceptual issues.[118] Effectively, there is no content to the concept of sustainable development. The concept is not institutionalised in EU policy making because as yet there is no agreed-upon concept – only a variety of interpretations.[119] An essential part for achieving consistency and commitment is still missing: the dialogue between the EU's governance institutions and Europe's civil society.

1.3.3 National Governance: The State as a mediator

The State as a mediator in the globalised context

With the globalisation of environmental, social, and economic spheres, the role and authority of the state has become significantly challenged. For example, viewing the state as a unilateral actor within the international arena is no longer sufficient in the face of trans-boundary and global environmental problems.[120] It has been argued that globalisation and the accompanying ideological ascendance of neo-liberalism is rapidly displacing the power of the state.[121] In response to the growing inadequacy of the Westphalian system, arguments for reform have tended to fall into three categories:

1. *Pro-state arguments* focussed on strengthening the role and capacity of the state
2. *Anti-state arguments* focussed on rejecting the state in favour of either global structures of governance that supersede the state or local forms of governance also aimed at challenging the centrality of the state
3. *Content arguments* such as, 'The strategic choice facing the green movement is not a simplistic one between pursuing political projects within the state or opposing the state. Rather, the question seems to be, *What sort of state ought the green movement seek to create and engage with*…?'[122]

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117 See generally, Taylor, supra note 106.

118 Bosselmann, K. 'Missing the Point? The EU's Institutional and Procedural Approach to Sustainability' In: Pallemaert, M. and Azmanova, A. (eds.), *The European Union and Sustainable Development: internal and external dimensions*, (VUPress: Brussels, 2006) pp. 105,123.

119 Ibid., p. 125.

120 Elliott, supra note 42, p. 93.

121 See e.g., Barry/Eckersley, supra note 75, p. ix; Falk, supra note 61, pp. 50-51.

122 Barry/Eckersley, supra note 75, p. 255 (emphasis added).

We suggest that the third approach, which is the most instructive as to moving beyond the statism versus anti-statism paradigm, allows a more comprehensive focus on which elements of critique and reform from both lines of argument may be useful in reconfiguring the role of the State in governance for sustainability. Although the authority of the State is no doubt diminishing, State actors nevertheless continue to play a key role in international environmental governance presenting an important intersection between national civil societies and trans-national bodies of governance. For example, the State continues to play a key role in regulating economics, implementing and enforcing environmental laws and regulations, and integrating international norms of sustainability into domestic policy. From a pragmatic point of view, the State thus remains a useful governance institution because it can use the domestic legal system to enforce clear and effective laws supporting sustainability, play a vital role as mediator between domestic and international spheres, and ensure that the rules of economic activity are compatible with environmental and social justice.[123]

Rather than rejecting the State outright in favour of trans-national or local governance structures it appears more useful to think of the State as a site of transformation where possibilities for governance change can be explored. Barry and Eckersley term this the 'strategic-instrumental attitude towards the state'.[124] They argue that to focus on the State is not to 'discount other potential avenues of ecological reform beyond the state, such as grassroots community environmental initiatives' but to 'explore how states might better facilitate these and other initiatives (including hybrid state-nonstate initiatives) as part of a more concerted effort to orchestrate local and global ecological sustainability'.[125] Similarly, Falk argues that the State can make an important contribution to global governance, so long as it can be 'reempowered to exercise a responsible sovereignty' that expresses the 'balance between globalization-from-above and -below'.[126] Thus, Falk raises a key issue that must be addressed if the future role of the State is indeed to play a facilitating and mediating role in governance for sustainability: the revision of state sovereignty.

Revision of State sovereignty and the social contract

Falk argues that the 'states system as a self-sufficient organizing framework for political life on a global level is essentially over'.[127] Under the traditional Westphalian conception of sovereignty, the State is legitimised internally through the social contract between government and citizens and externally through the anarchic international system denoting that a State's internal affairs are not subject

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123 See e.g., Ayre/Callway, abvove note 44, 26; Barry/Eckersley, supra note 75, pp. 255-256, 267; Falk, supra note 61, pp. 4, 7.

124 Barry/Eckersley, supra note 75, p. 266.

125 Ibid., pp. xi-xii (The authors suggest thinking of the state nationally as a 'container of social processes', which provides a set of facilities for society to organise and regulate itself. Internationally states act as 'key nodes' in a complex network of governance).

126 Falk, supra note 61, p. 4.

127 Ibid., p. 35.

to higher authority.[128] However, by and large it is acknowledged that this traditional conception of State sovereignty is a legal and political fiction as sovereignty is severely undermined by the forces of globalisation from above and below. In terms of environmental issues, it is particularly the idea of territoriality, the bedrock of Westphalian sovereignty, which is challenged as international cooperation and the prioritisation of collective interest and action over narrower national interests is essential in targeting global environmental problems.[129] It is thus suggested, that both the internal and external tiers of sovereignty need to be revised so that the role of the state can be reshaped to partake effectively in governance for sustainability.

Falk argues that despite the resilience of the State, 'somewhat paradoxically, to retain primacy, the State must give up many of its Westphalian attributes, especially those resting upon the claims and practices of territorial sovereignty'.[130] He and others suggest that the State could regain its legitimacy by forging a new social contract resting on revised normative principles that determine the obligations between citizens and government.[131] Key elements of a revised social contract include:[132]

- Increased democratisation and decentralisation of decision making including greater involvement of civil society in governance;
- Environmentally and socially sustainable economics;
- Effective and efficient integration of international sustainability norms into domestic agendas;
- Increased transparency and accountability of state conduct both internally and externally;
- Increased prioritisation of human rights and public goods over economic interests; and
- Re-definition of national interest and citizenship in light of (inter)national considerations.

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128 For a good explanation of state sovereignty see e.g., Schrijver, N. 'The Dynamics of sovereignty in a changing world' in Ginther, K. et al. (eds.), *Sustainable Development and Good Governance* (Kluwer Academic Publishers: United States, 1995) pp. 80-89.

129 On the ecological challenge to state sovereignty see especially, Birnie, P. and Boyle, A. (eds.), *International Law and the Environment* 2nd ed. (Oxford University Press: Oxford, 2002) p. 37; Bosselmann, K. 'Environmental Governance: A New Approach to Territorial Sovereignty' In Glodstein, R. J. (ed), *Environmental Ethics and Law* (Ashgate Publishing: Aldershot, 2004) pp. 293-313, 297; Kiss, A. and Shelton, D. (eds.), *International Environmental Law* 3rd ed. (Transnational Publishers: Ardseley, 2000) p. 26. See generally, Kuehls, T. *Beyond Sovereign Territory: the space of ecopolitics* (University of Minnesota Press: Minneapolis, 1996); Litfin, K. T. (ed), *The Greening of Sovereignty in World Politics* (MIT Press: Massachusetts, 1998).

130 Falk, supra note 61, p. 33.

131 Ibid., p. 3. On the historical importance of the state and social contract theory see generally, Schrijver, supra note 128, pp. 80-84; Segesvary, V. *World State, Nation States or Non-Centralised Institutions? A Vision of the Future in Politics* (University Press of America: Boston, 2003), p. 24.

132 See generally, Eckersley, R. 'Greening the Nation-State: From Exclusive to Inclusive Sovereignty' In Barry, J and Eckersley, R. (eds.), supra note 75, pp. 159-180, 175-176; Elliott, supra note 42, p. 111; Falk, supra note 61.

Under these norms, State actors could play a key role in governance by becoming the 'local agents of transboundary democracy and the common ecological good'.[133]

In the external tier, revision of sovereignty would be based on similar normative principles focussing on the prioritisation of social and environmental justice over territorial autonomy, resource exploitation, and neo-liberal economics. International law for example, should be revised so that the principle of territorial sovereignty does not override environmental concerns. Currently, whilst norms such as the common heritage of mankind, recognise that resources exist in a global – not national – context, the state, by virtue of the Stockholm principle 21 (and Rio principle 2) is still allowed free reign over the resources within its national boundaries.[134] Under a revised concept of sovereignty, State authority over its territory could be defined in less absolute terms.[135] For example, a State's sovereignty could be constrained by the over-riding global ecological interest. In view of such an understanding, the State could play a vital role in governance for sustainability as the guardian of its national territory recognising that external and internal legitimacy is defined by the global environmental context.

In summary, this revised concept of State sovereignty creates a new role for the State and displaces (not replaces) the State as the sole legitimate governance actor. Sovereignty thus becomes 'a multilayered, multifaceted concept and practice' incorporating concern for all human and non-human communities, ecosystems, and future generations.[136]

1.3.4 Local governance: Empowering communities

The importance of active and empowered local communities

> *The roots of the ecological crisis at the institutional level lie in the alienation of the rights of local communities to actively participate in environmental decision making.*[137]

As identified by Shiva (amongst others) the active involvement of local communities in governance is crucial for sustainability. Local environmental governance by community groups, local governments, NGOs, and businesses (to name a few key stakeholders) is widely held to be a fundamental tenant in governance for sustainability. The local level is particularly apt at providing forums for democratic participation of civil society in decision-making, finding local solutions to environmental problems, and encouraging action for change. Whilst local governance should never be taken as synonymous with principles of social and environmental justice, it is certainly arguable that through decentralised

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133 Eckersley, supra note 75 (cited in the introduction, xvi).

134 Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972) Principle 21; Declaration of the United Nations Conference on the Environment and Development (Rio De Janeiro, 1992) Principle 2.

135 See e.g., Bosselmann, supra note 129, pp. 294, 296-297.

136 Elliott, supra note 42, p. 111. See also Bosselmann, supra note 2, Ch. V.

137 Shiva, V. 'The greening of the global reach' in Sachs, W. (ed), *Global Ecology: A New Arena of Political Conflict* (Zed Books: London, 1993) p. 155.

governance frameworks local governance encourages more participatory and democratic forms of decision making and problem solving, which in turn, are linked to active community engagement in creating social change. As such, it is suggested that local governance be guided by several key principles:

- Democratisation – more direct and participatory decision making;
- Decentralisation – favouring non-hierarchical structures; and
- Social and environmental justice – as sustainability norms.

These principles should not only be invoked in reference to community involvement but also incorporated into the design and functioning of the institutions of local governance.

Democratisation and Decentralisation

The importance of decentralised and democratic forums of decision making is a key factor of governance for sustainability. Some commentators define sustainability as the local, active, and direct involvement of citizens in environmental governance. Although democratisation and decentralisation are not always necessarily linked, there are strong arguments that both are necessary for sustainability.

What precisely do we mean by these terms? And, more concretely, what are the links between decentralisation and democratisation? Decentralised democratic decision making may be loosely defined as:

> *The broad-scale participation by civil society in collective decision making where such decision making is transparent, accountable, non-hierarchical, and equitable.*

As Elliott notes, debate about participation and democratisation in regards to environmental governance has generally focussed on two areas. The first concerns the broader inclusion of non-State actors in global processes of negotiation and governance, that is, an emphasis on international pluralism. The second stresses the significance of global civil society as a site for political action.[138] As such, the second strand is partly a reaction to perceived inadequacies of the first. Many NGOs and grassroots movements recognise that pluralist forms of democratisation (whilst very important) have done little to ensure equitable environmental outcomes as the world's poorest and most marginalised sectors of societies continue to remain disproportionately affected by environmental degradation.[139] Marginalisation itself, is often identified as the primary cause for the limited success of environmental governance. Greater participation of civil society is therefore seen as fundamental to ensure the 'effective control of change by those most directly affected'.[140] Democratisation in this context is 'about opening a political space for marginalized voices and those for whom environmental

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138 Elliott, supra note 42, p. 113.

139 Ibid.

140 Hontelez, J. 'Friends of the Earth International: an international movement to fight for environment and a better future for humankind' In Asia-Pacific People's Network (ed.), *Global Development and Environment Crisis* (Sahabat Alam Malaysia: Penang, 1988) p. 762.

degradation is symptomatic of a broader structural oppression and silencing'.[141] Furthermore, democratisation is about 'increasing the number of spaces where citizens can exercise their right to participate in decision making on matters concerning them'.[142]

Opening up such political spaces is particularly effective at the local level of governance where there are many avenues for direct and participatory forums of community decision making. Whilst such decision making does not always guarantee equitable outcomes, strong arguments suggest that democratic and participatory forms of decision making heighten the likelihood of equitable outcomes, community engagement, and finding effective solutions to environmental problems. Political theorists like Carole Pateman, or pedagogical thinkers like Paulo Freire for instance, identify the benefits of direct and participatory community learning and decision making.[143] Direct participation by citizens in decision making has several significant effects, such as:

- Fostering people's awareness of their political, social, and environmental context;
- Increasing tolerance, empathy, and understanding of pluralism;
- Heightening awareness of the implications of individual action on broader social and environmental context; and
- Generating community empowerment as individuals and groups recognise their capacity to change and influence their surroundings.

A useful contextual example is offered by Anna Carr's study of Australian environmental stewardship groups. Carr summarises the principles that communities identified as essential in local environmental governance as follows:

- *Building and maintaining a sense of community* fostered through involvement and belonging, reinforcement (e.g. for skill or effort), emotional attachment (to both the local place and the group), influence (of group on member and vice versa and of group on issues and vice versa);[144]
- *Local knowledge* such as awareness and recognition of a problem, ways of knowing (i.e. learning new skills and ways of understanding things), local and traditional knowledge (dispersed via non-hierarchical systems);[145] and
- *Self-determination* both horizontal integration – equity (i.e. same-scale group-to-group interaction) and vertical integration – self-reliance and self-determination (to what extent does a group feel it can take over issues).[146]

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141 Elliott, supra note 42, p. 114.

142 Bobbio, N. *The Future of Democracy: a defence of the rules of the game* (Minnesota Press: Minneapolis, 1987) p. 32. See also, Mason, M. *Environmental Democracy* (Earthscan: London, 1999) p. 51.

143 See e.g., Freire, P. *Pedagogy of the Oppressed* (Penguin: London, 1996); Pateman, C. *Participation and Democratic Theory* (Cambridge University Press: Cambridge, 1970).

144 Carr, A. *Grass Roots & Green Tape: Principles and Practices of Environmental Stewardship* (Federation Press: Sydney, 2002) pp. 164-176.

145 Ibid., pp. 177-186.

The fundamental idea embedded in participatory democracy is that of community empowerment. As summarised by Figuerora, 'Ultimate empowerment happens when beneficiaries are given the powers to make decision themselves'.[147] To state this another way, to 'own' decision making is to be compelled to take action, where such action, through the participatory process, is necessarily informed by an understanding of one's position in relation to the broader social and environmental context. As such, the likelihood of generating sustainability is significantly increased through participatory and democratic forms of decision making.

Decentralisation is a necessary tenant of direct and participatory democracy. On the importance of decentralisation, Hayward states, 'Among the major reasons why decentralization is so important is that it means hierarchies are broken down and people are empowered by being members of small political communities'.[148] Other authors similarly identify the fundamental idea embedded in decentralisation as being that people must feel part of their community in order to participate meaningfully rather than pursuing narrower self-interests.[149] Friedmann summarises, 'The empowerment approach (…) places the emphasis on autonomy in the decision making of territorially organised communities, local self-reliance (but not autarchy), direct (participatory) democracy, and experiential social learning. Its starting point is the locality, because civil society is most readily mobilised around local issues'.[150]

Women

It is widely acknowledged that women are disproportionately affected by poverty and environmental degradation, particularly in the global south. This insight has led many commentators to argue that it is essential to ensure the increased participation of women in decision making and to centralise women's issues and perspectives in the sustainability discourse.[151] These sentiments are supported by international documents such as Agenda 21. Principle 20 for example states, 'Women have a vital role to play in environmental management and development. Their full participation is therefore essential to achieve sustainable development'.[152]

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146 Ibid., pp. 187-198.

147 Figueroa Küpcü , M., 'Society: Participation and Engagement' In Ayre, G. and Callway, R. (eds.), *Governance for Sustainable Development: A Foundation for the Future* (Earthscan: London, 2005) pp. 90-108, 103.

148 Hayward, T. *Ecological Thought: An Introduction* (Polity Press: Cambridge, 1994). On the benefits of decentralisation see further, Eckersley, R. *Environmentalism and Political Theory: towards an ecocentric approach* (UCL Press: London, 1992) p. 145; Bookchin, M. *Ecology and Revolutionary Thought* (Green Program Project: Vermont, undated (first published in 1964)) p. 14 (arguing that far-reaching decentralisation and a truly regional concept of social organisation is necessary if resources are to be used sustainably).

149 See e.g., Dalton, J. H., Elias, M. J. and Wandersman, A. *Community Psychology: Linking Individuals and Communities* (Wadsworth Publishing: Stamford, 2001); Goodin, R. E. *Green Political Theory* (Polity Press: Cambridge, 1992) pp. 149-150.

150 Friedmann, J. *Empowerment: the Politics of Alternative Development* (Blackwell: Cambridge, 1992) p. vii.

151 See e.g., Elliott, supra note 42, pp. 125-126.

152 United Nations Conference on Environment and Development (UNCED), *Report of the UN Conference on Environment and Development: Agenda 21,* A/CONF.151/26 (vol. I-III) (12 August 1992).

Despite such acknowledgments, women continue to be significantly marginalised within the global governance discourse. Furthermore, women's increased participation needs to extend beyond mere numerical representation or raising 'women's issues' in decision making to also challenging underlying structures. As Elliott states, 'Incorporation and participation in a structure that has systematically marginalized women may be counterproductive if the underlying gender inequities and power relationships within those structures are not acknowledged and addressed at the same time'.[153]

However, 'In stark contrast to a rather limited presence in the formal institutional structures of environmental governance, women have been especially active and effective participants in non-governmental organizations and in grassroots movements'.[154] Examples of this are the Green Belt movement in Kenya (begun by the National Council of Women in 1977) and the Chipko Movement, which began in northern India as a grassroots opposition to logging and forest destruction.[155] Shiva identifies the importance of viewing women not simply as victims of environmental degradation but as 'voices of liberation and transformation'.[156] Elliott summarises:

> This grass-roots activism is therefore not simply a response to marginalization from formal structures of governance. It is an act of agency by which women seek to reclaim their rights as subjects in environmental governance rather than as objects of environmental management programs. It contributes to a global movement of women working for environmental protection and alternative environmental and political practices which emphasises, equity, justice, emancipation and bottom-up forms of governance.[157]

Indigenous peoples

Indigenous cultures, economies, and identities are frequently linked inextricably to lands and resources resulting by and large in sound environmental practice. The Declaration of Indigenous Peoples on Climate Change, for example, states:

> Earth is our mother. Our special relationship with earth as stewards, as holders of indigenous knowledge cannot be set aside. Our special relation with her has allowed us to develop for millennia a particular knowledge of the environment that is the foundation of our lifestyles, institutions, spirituality and worldview. Therefore, in our philosophies, the earth is not a commodity, but a sacred space that the creator has entrusted to us to care for her, this home where all beings live.[158]

Environmental degradation affects many Indigenous peoples directly through damage to lands by economic activities associated with modernisation and

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153 Elliott, supra note 42, p. 128.

154 Elliott, supra note 42, p. 128.

155 Ibid.

156 Shiva, V. *Staying Alive: Women, Ecology and Development* (Zed Books: London, 1989) p. 47.

157 Elliott, supra note 42, p. 129.

158 Second International Indigenous Forum on Climate Change (SIIFCC), *Declaration of Indigenous Peoples on Climate Change* (2000).

development.[159] Consider for example, widespread deforestation, the Carajas Dam project in Brazil, or the destruction of traditional Huaorani fishing grounds in Ecuador through oil contamination.[160] Nevertheless, the particular perspectives, needs, and rights of Indigenous peoples are frequently ignored and excluded in government and other environmental decision making and policies. As Elliott notes for instance, despite many international agreements paying lipservice to Indigenous concerns, 'There are substantial political silences in these agreements. There is little overt recognition of the fundamental features of indigenous empowerment – land rights and political autonomy'.[161] Furthermore, it is sometimes the case that when Indigenous peoples are included, it is primarily for the benefit of industrial society, rather than out of the recognition that Indigenous peoples perspectives, needs, and rights should play a key part in formulating and participating in governance structures.

It is essential that Indigenous peoples not be considered the saviours of human kind, who's duty it is to ensure a sustainable future.[162] Nevertheless, it is also clear that Indigenous peoples' perspectives on the environment can provide vital lessons that may guide future forms of governance for sustainability.

1.3.5 Corporate responsibility: Economics as if people matter

Revision of normative principles and broadening of stakeholder involvement

Recent literature on corporate governance, sustainability, and the environment clearly recognises the need for a paradigm shift.[163] This recognition is a result of the growing acknowledgment that our ecological reality requires the adoption of sound normative principles in relation to corporate activity and governance.[164] Clarke usefully summarises the emergence and necessity of this shift in thinking, 'For too long corporate governance was defined both in law and practice in terms of the narrow pursuits of shareholder value, allowing the dismissal of the wider social and environmental impact of corporate activity as *externalities*' leading to large scale destruction of natural environments and communities in the pursuit of wealth and profit. This 'irresponsible approach to free enterprise' however, 'has reached its limits in a world threatened with irreparable ecological damage. The *license to operate* of corporations now inescapably involves the imperative of social and environmental sustainability'.[165]

That corporations play an influential role in the world economy and world politics is undeniable. Through their large-scale control of capital, corporations:[166]

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159 Elliott, supra note 42, p. 130.

160 Ibid.

161 Ibid., p. 134.

162 See e.g., Elliott, supra note 42, pp. 130, 134.

163 See e.g., Benn, S. and Dunphy, D. (eds.), *Corporate Governance and Sustainability: Challenges for Theory and Practice* (Routledge: London/New York, 2007).

164 See e.g., The Nine Principles of the United Nations Global Compact (1999).

165 Clarke, cited in Benn/Dunphy, supra note 163, p. xv (original emphasis).

166 See e.g., Barry/Eckersley supra note 75, p. 263; Elliott, supra note 1, pp. 116-117.

- Can exert significant power over government decision making;
- Have made a major contribution to resource depletion and global pollution;
- Influence the setting of MEA standards;
- Have adopted network and coalition strategies; and
- Have established a prominent presence at international environmental negotiations.

Despite some acceptance of social and environmental responsibility on behalf of corporate actors (for example in the form of voluntary codes of conduct), corporate activities remain questionable from ethical and environmental viewpoints. For example, trans-national corporate activity (and the accompanying difficulty in regulation) has been documented as frequently leading to human rights abuses and environmental exploitation, particularly in the global south. Furthermore, because the corporate ethic remains enshrined within the dominant paradigm of neo-liberal economics, corporate activity remains predominantly at odds with principles of sustainability.[167]

A paradigm shift towards sustainability orientated corporate practice requires a fundamental change in ethics from neo-liberalism to sustainability. This shift necessarily requires the revision of modes of decision making (including a broadening of stakeholder involvement in such decision making) and a revision of regulatory enforcement mechanisms. To be effective, a revised corporate ethic requires the active involvement of business, states, international bodies, and civil society.[168]

The dominance of neo-liberal economics in corporate governance has been frequently criticised as inconsistent with principles of sustainability. Falk for example, argues that we need a transformation of current structures, replacing neo-liberalism with 'shared world order values', which he defines as 'protecting the planet and its inhabitants from current destructive tendencies'.[169] Similarly, Benn and Dunphy critique the current economic system on the count that it 'gives no accord to the management of public goods, such as ecosystem needs'.[170]

As well as a change in fundamental ethics, the revision of modes of decision making, has also been identified as crucial in facilitating the shift to sustainability. Benn and Dunphy for example, argue that 'the top-down governance of the powerful bureaucracies and corporations of the industrial era is counterproductive' and that traditional modes of corporate organisation are outdated.[171]

Within the corporate structure itself, reform suggestions have focussed on:

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167 For a good critique of neo-liberal ideology and its relationship to the globalisation of the economy see e.g., Falk, supra note 61, pp. 1-2.

168 See e.g., Agenda 21, Chapter 30: Strengthening the role of business and industry; Barry/Eckersley, supra note 75, p. 260.

169 Falk, supra note 61, p. 3.

170 Benn/Dunphy, supra note 163, pp. 2-3.

171 Benn/Dunphy, supra note 163, pp. 2-3.

- Replacing top-down hierarchical models with more adaptive and flexible systems of governance;
- Replacing short-termism with long-termism; and
- Replacing organisational competition with notions of interdependence and mutuality.[172]

In relation to the corporation's connection to the wider community, an increase in inclusive decision making and sensitivity towards the power dynamics between different stakeholders has been suggested as vital.[173] 'The goal should be to create an inclusive system based on recognition of diversity; the tools for achieving this are decentralized networks, including community-based networks rather than selected individuals acting on behalf of communities.'[174] This push for greater and more *direct* involvement of the wider community in corporate agenda setting and regulation has also been noted as highly necessary in relation to the international network. As Barry and Eckersley point out, NGOs and other environmental organisations are currently by and large frozen out of international trade agreement negotiations by bodies such as the WTO.[175] The diversification of stakeholder involvement, in particular the improved participation of civil society and NGO's in corporate governance, serves several key purposes in the pursuit of sustainability:

- Increasing accountability and transparency of corporate activity;
- Fostering self-critique, which is necessary for an organisation to become responsible and sustainable; and
- Ensuring that corporate activities and agendas are more transpirable and enforceable.

Whilst a change in ethics and communication is crucial, as is creating effective mechanisms for enforcement of corporate social and environmental responsibility (CSR). The following four sections will examine (1) voluntary corporate codes of conduct (COCs) and the roles of (2) States, (3) international bodies such as the World Trade Organization (WTO) and the International Monetary Fund (IMF), and (4) civil society in developing and implementing such mechanisms.

Soft law enforcement : Voluntary codes of conduct

Predominately, corporate response to assuming greater responsibility for social and environmental impact has been through the adoption of COCs.[176] Being

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172 Ibid., pp. 2, 31.

173 Ibid., p. 2.

174 Ibid., p. 31.

175 Barry/Eckersley, supra note 75, p. 264.

176 *Codes of conduct, codes of ethics* and *codes of practice* have become extremely popular over recent years and have been widely adopted across industries, countries and sectors. See e.g., Dashwood, H. 'Corporate social responsibility and the evolution of international norms' In Kirton, J. J. and Trebilcock, M. J. (eds.) *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate: Aldershot, 2004) pp. 189-202; Kirton, J. J. and Trebilcock, M.J. (eds.), *Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance* (Ashgate, Aldershot, 2004) p. 17; Leipziger, D. *The Corporate Social Responsibility Code Book* (Greenleaf Publishing: Sheffield, 2003); Sethi, S. *Setting Global*

voluntary, COCs represent a clear contrast to mandatory governmental regulation and as such, may be considered part of the wider move towards 'reflexive regulation'.[177] Bondy, Matten, and Moon identify three key factors contributing to the increasing use of COCs:

1. The institutional failure of governmental institutions to maintain high levels of regulation;
2. Political and ideological retreat (the decline of the neo-liberal state in social/private regulation); and
3. Increased internationalisation of economic, social, and political processes (globalisation).[178]

The benefits of COCs include:

- Flexibility and adaptiveness – meaning they can be tailored to the specific needs of particular corporations, industries, countries, international contexts and issues or groups;
- Self-regulation can operate across borders as COCs are not tied to any particular political system or territory;
- Less costly to create, implement, administer, monitor and enforce than legislation or legal regulation (and any costs are borne internally); and
- They create a benchmark against which corporations can be measured, audited and held publicly accountable. [179]

Limitations on the other hand include: a persistent lack of accountability mechanisms (such as monitoring provisions and sanctions), and the inability or unwillingness of corporations to effectively implement code commitments.[180] These limitations stem in part from:

- Vague formulation (frequently COCs express broad philosophical ideas rather than plans for concrete practical action);

Standards: Guidelines for Creating Codes of Conduct in Multinational Corporations (J.Wiley: Hoboken/NJ, 2003).

177 On 'reflexive regulation' see e.g., Orts, E. W. 'Reflexive Environmental Law' *Northwestern University Law Review,* Vol. 89, No. 4, 1995a, pp. 1227-340; Orts, E. W. 'A Reflexive Model of environmental regulation' *Business Ethics Quarterly,* Vol. 5, No. 4, 1995b, pp. 779-94, 780 ('reflexive regulation' is 'a legal theory and a practical approach to regulation that seeks to encourage self-reflective and self-critical processes within social institutions concerning the effects they have on the natural environment').

178 Bondy, K. Matten, D. and Moon, J. 'Codes of conduct as a tool for sustainable governance in MNCs' In Benn, S. and Dunphy, D (eds.), *Corporate Governance and Sustainability: Challenges for Theory and Practice* (Routledge: London/New York, 2007) pp. 165-186, 166-7.

179 See e.g., Aaronson, S. and Reeves, J. *The European Response to Public Demands for Global Corporate Responsibility* (National Policy Association, 2002). Available at www.bitc.org.uk/docs/NPA_Global_CSR_survey.pdf; Bondy/Matten/Moon, supra note 178, pp. 173-176; Victor, D. Raustialla, K. and Skolnikoff, E. (eds.), *The Implementation and Effectiveness of International Environmental Commitments* (MIT Press: Cambridge, 1998).

180 Bondy/Matten/Moon, supra note 178, pp. 176-7 (The authors note that, 'Since codes are intended to fill regulatory voids, the concern over implementation is a serious one').

- The fact that most corporations adopting COCs are already leaders in consideration of CSR issues within their industry; and
- The fact that codes are rarely made visible to employees in different countries and often lack effective complaint procedures.[181]

In summary, despite some benefits of COCs, the extent of their actual effectiveness in regulating corporate conduct remains doubtful.[182] Though COCs have the potential to be powerful tools of self-regulation, 'Codes themselves cannot change a corporation's behaviour. The success or failure of a code is dependent on the corporation's desire, ability and available resources to implement code commitments'.[183] As some authors have noted, misplaced complacency with COCs can be damaging as it leads to the view that stricter governmental or legal regulation is unnecessary.[184] Thus, it should be concluded 'that CSR cannot be solely left to the voluntary or private sector and that an international regulatory framework is vital for the consistent adoption of minimal standards of acceptable behaviour'.[185]

Hard law enforcement: The role of the State

As outlined in the earlier section on national governance, the authority and ability of State actors in regulating international economic activity is compromised by the forces of globalisation. Nevertheless, State actors remain significant players in formulating, regulating, and perhaps most importantly, implementing economic rules and regulations. The mediating and facilitative role that States can play in seeking fair, efficient, and effective mechanisms of enforcing corporate regulation can be significant. Notably, however, the capabilities of States should be carefully distinguished. On a global level, northern States yield the vast majority of economic power. Northern States own the largest share of corporate assets, politically dominate trade negotiations, and usually poses functioning legal systems capable of enforcing corporate regulation. Southern States by contrast, have a much lesser concentration of wealth and bargaining power and frequently lack effective legal enforcement mechanisms. In light of this disparity, it is arguable that the onus on State actors to provide effective and efficient means of enforcing trans-national corporate regulation falls particularly on northern States.

The civil regulation of corporations: Towards stakeholder democracy[186]

The activities of civil society and NGOs in demanding corporate responsibility and accountability can be powerful tools that influence changes in corporate policy through encouraging participatory democratic governance of the global

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181 Ibid.

182 Ibid., pp.179-180. See also, Ayre/Callway, supra note 44, p. 32.

183 Bondy/Matten/Moon, supra note 178, pp. 179-180.

184 See e.g., Klein, N. *No Logo* (Flamingo: London, 2000).

185 Dashwood, supra note 176 (cited from the introduction, p. 17).

186 Please note that this sub-heading is taken directly from the respective chapter: Bendell, J. and Sharma, A. 'The civil regulation of corporations: towards stakeholder democracy' In Benn, S. and Dunphy, D. (eds.), *Corporate Governance and Sustainability: Challenges for Theory and Practice* (Routledge: London/New York, 2007) pp. 206-218.

economy.[187] Bendell and Sharma identify four key ways in which civil groups can influence corporate behaviour to instigate the adoption of sustainable practices.

Civil groups can:

1. *Force change* (e.g. by activist level 'pester pressure' tactics such as boycotts or media stunts);
2. *Promote change* that is to operate from 'outside' the market on a voluntary basis through creating dialogue between civil groups, companies, and consultants (e.g. advising companies on best practice, negotiating agreements, endorsing best practice, conducting and publishing useful research);
3. *Facilitate change,* that is to operate from 'inside' the market by selling their services to facilitate change (e.g. providing consultative services to help companies with strategy, policy, and organisational change); and
4. *Produce change* that is to provide alternative production and trading systems based on a different value system from mainstream business practices (e.g. fair trade or organic agriculture standards).[188]

Although the importance and value of civil society in influencing a corporate governance shift towards sustainability should not be underestimated, it is essential that the activities of civil society be guided by the principles of social and environmental justice, in particular an awareness of north – south dynamics. Bendell and Sharma point out that frequently the interests of civil groups in the north fail to genuinely account for the impact that they have on southern interests, which they claim to serve.[189]

1.3.6 Citizenship and civil society: Catalysts for change

Ecological citizenship

The discourse on citizenship has been posed by some authors as a useful vehicle for generating a more sustainable relationship between individuals, society, and the environment. The concept of *ecological citizenship* epitomises this endeavour.[190] In its re-configuration of the relationship between the human and non-human world, ecological citizenship raises several key issues:

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187 Ibid., p. 206.

188 Ibid., pp. 210-213.

189 Bendell/Sharma, supra note 186, pp. 215-216 (The authors argue for a good information exchange with intended beneficiaries in order that activities have credibility and a mandate from those beneficiaries).

190 Note that some authors make a distinction between *environmental* and *ecological* citizenship associating the former with more reformist tendencies the latter with more radical visions of change. See e.g., Dobson, A. *Citizenship and the Environment* (Oxford University Press: Oxford, 2003). Many scholars however, do not seek to make such a distinction instead using *environmental*, *ecological* and *green* citizenship interchangeably. See e.g., Latta, A. and Garside, N., 'Perspectives on Ecological Citizenship: An Introduction' *Environments Journal,* Vol. 33, No. 3, 2005, pp. 1-8, 1.

- The relationship of the concept of citizenship to sustainability (i.e., the theoretical and practical utility of a concept of ecological citizenship in effecting sustainability);
- The re-formulation of duties and obligations entailed in ideas of citizenship; and
- The interaction between ethical responsibility and political activism in the meaning of citizenship.

Whilst some literature acknowledges that in the Western discourse of citizenship the relationship between nature and citizenship is not new, the idea of ecological citizenship has been developed relatively recently.[191] Consequently, some argue that it presents a logical progression in the evolution of the citizenship discourse arising in response to heightened awareness of the current ecological crisis. Dobson, Saiz, and Bell for example, pose that a turn towards the discourse of citizenship reflects the recognition that sustainability requires a shift in attitudes and behaviour at a deep level.[192] As this revision of citizenship stems from growing ecological concerns, the concept of ecological citizenship necessarily questions liberal ideology and raises the need for an eco-centric ethic to inform our understanding of the obligations and responsibilities entailed in ideas of citizenship.[193] Furthermore, ecological citizenship activates a renewed focus on the importance of political activism in defining citizenship. Political activism is identified as crucial in working towards sustainability.[194]

Despite general consensus on the need to address liberal ideology, the role of an eco-centric ethic, and the pragmatic purpose of generating sustainability; there is some divergence on the exact formulation of ecological citizenship. According to Smith, the concept falls broadly into two categories. The first privileges philosophy or environmental ethics as a guide to the normative conduct of politics, alongside expanding the moral community to include future generations, non-humans, and ecosystems.[195] The second, uses 'conceptions of the political community to establish realistic objectives through which ecological citizenship can be achieved, to squeeze the gap between "law and justice"'.[196]

The first category is more common. Essentially, it seeks to reformulate the construct of citizenship by extending the moral community, thus requiring humans to exercise a duty of care towards non-human species, unborn generations,

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191 Latta/Garside, supra note 190, p. 2.

192 Dobson, A. and Bell, D. (eds.), *Environmental Citizenship* (MIT Press: Cambridge, 2006) p. 4; Dobson, A, and Sáiz,, A. V., 'Introduction' *Environmental Politics,* Vol. 14, No. 2, 2005, pp. 157-162, 157.

193 Whilst many authors argue that ecological citizenship must be underpinned by an eco-centric ethic, some do not, maintaining instead that the concept of citizenship is an inherently anthropocentric construct. See e.g., Dobson, supra note 191, p. 111.

194 See e.g., Latta/Garside, supra note 190, p. 6.

195 Smith, M., 'Obligation and Ecological Citizenship' *Environments Journal* Vol. 33, No. 3, 2005, pp. 9-26, 10.

196 Ibid., (drawing on the works of Dobson [2003] and Bell [2005]).

ecosystems, and so on.[197] In addition, it is argued that such an extension of the moral community must be premised on an eco-centric ethic as it is the only way that the anthropocentric liberal conception of citizenship can be effectively challenged to give rise to a meaningful construct of ecological citizenship.[198] As Mills argues, the purpose of expanding the moral community is not an expansion of the existing ethic to new members, but rather a change in those ethics themselves.[199] Eckersley similarly argues that eco-centricity must be logically prior to all other political matters because consideration for the non-human world can only be ensured when a non-anthropocentric ethic is taken.[200]

Despite differences, the various discourses on ecological citizenship exhibit several recurring themes, namely:

- Challenging national-boundaries;
- Rethinking notions of obligation entailed in citizenship; and
- Stressing the need for practical political engagement.

The use of national boundaries to demarcate citizenship is, as a matter of logic, called into question by ecological citizenship. Christoff, for example, identifies the trans-national nature of many environmental problems as emphasising the need to move beyond a narrow state-based and legalistic conception of citizenship in favour of a more global understanding.[201] He states, 'It is helpful to look at notions of citizenship from a completely different angle and turn to conceptions of citizenship based on moral responsibility and legal participation in the public sphere rather than those defined formally by legal relationships to the state'.[202] He observes further, 'Because of the nation-state's territorial bound-ness, ecological citizens … increasingly work "beyond" and "around" as well as "in and against" the state'.[203]

Thus, the concept of ecological citizenship challenges the bounds of the nation state by increasing awareness of the trans-national nature of ecological

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197 For the specific incorporation of such arguments into the citizenship discourse see e.g., Christoff, P. 'Ecological Citizens and Ecologically Guided Democracy' In Doherty, B. and de Geus, M. (eds.), *Democracy and Green Political Thought: Sustainability, Rights and Citizenship* (Routledge: London, 1996).

198 See e.g., Eckersley, R. *Environmentalism and Political Theory: towards an ecocentric approach* (UCL Press: London, 1992) p. 57; Mills, M. 'Green Democracy: the search for an ethical solution' In Doherty, B. and de Geus, M. (eds.), *Democracy and Green Political Thought: Sustainability, Rights and Citizenship* (Routledge: London, 1996) pp. 97-114. Contrast Dobson, supra note 148, who argues for an anthropocentric version of ecological citizenship.

199 Mills, supra note 198.

200 Eckersley, supra note 198, p. 57.

201 Christoff, supra note 197, p. 161 (he conceptualises this as the intersection of *moral* citizenship (understood in terms of individual and community action) and *legal* citizenship defined by the nation state, the latter of which becomes increasingly questioned by trans-national elements).

202 Ibid., p. 157.

203 Ibid., p. 160. See also Christoff, supra note 197 (he argues that individuals are significantly limited in debating international environmental concerns and effecting international change so long as citizenship is conceived within the bounds of the nation-state as individuals are thus limited in their international arena action to acting indirectly *through* their state).

concerns, highlighting the global network of the citizenship community and emphasising the need for active engagement of citizens. Furthermore, by displacing the State as the decameter of citizenship, a primarily legalistic definition is replaced by a focus on the *dynamic content* of citizenship. As such, ecological citizenship may pose a useful tool in governance for sustainability as it heightens citizens' awareness that they exist within a global ecological context. At the same time, the ability and need to act in terms of trans-national environmental interests is also encouraged as citizenship is defined in global rather than national terms.

Perhaps most importantly, ecological citizenship poses a new relationship between humans and the natural world that stresses non-reciprocal obligations and responsibilities. For Smith, for example, obligation is a key aspect of ecological citizenship that does not need to be accompanied by obedience to a greater authority.[204] He argues, 'In short, the adoption of an ethical standpoint which embraces eco-centrism involves a shift in social and political thought to a new "politics of obligation"'.[205] Similarly, Marzall stresses the role of ethics in reformulating citizenly responsibilities. She advocates an *ethical sensibility* based on an ethic of ecological care rather than an overarching set of rules for sustainable conduct.[206] According to Marzall, humans have a unique capacity to understand their place in the environment and this gives rise to a responsibility to adjust the impact of our lives on the environment. She concurs with Smith's notion that humans have a unique obligation towards the environment that does not necessarily arise out of traditional ideas of citizenly reciprocity (i.e. the social contract giving rise to rights and obligations) or notions of obedience (also entailed in traditional notions of citizenship). This conceptualisation of non-contractual citizenly duties and obligations of humans towards fellow human beings, the natural world, and future generations is crucial for a sustainable future.

Literature on ecological citizenship is also adamant in understanding the concept as a *practical tool,* a vehicle for facilitating societal change, rather than a mere articulation of a theoretical concept.[207] This pragmatic approach stresses the need for citizens' political engagement, pluralism, and cultural diversity. Mark Smith in discussion of what he terms 'citizenly subject positions', notes the importance of understanding ecological citizenship as facilitating *active engagement* in political discourses.[208] Marzall also focuses on the ability of ecological citizenship to generate meaningful individual and collective action. She draws primarily on Paulo Freire to highlight the importance of reflexive and collective processes of learning, decision making and action in working towards

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204 Smith, supra note 195.

205 Smith, M. (ed.), *Thinking Through the Environment: A Reader* (Routledge: London, 1999) p. 407. See also Smith, M. *Ecologism: Towards Ecological Citizenship* (Open University Press: Buckingham, 1998) p. 99.

206 Marzall, K. 'Environmental Extension: promoting ecological citizenship' *Environments Journal,* Vol. 33, No. 3, 2005, pp. 65-78.

207 Latta/Garside, supra note 190, p. 6.

208 Smith, supra note 205. See also, Christoff, supra note 197 (arguing that the revitalisation and extension of civil society are essential in remodelling citizenship).

achieving sustainability.[209]

Bart van Steenbergen[210] differentiates between three approaches towards ecological citizenship: the first is of increasing inclusion challenging the idea that only existing human beings can be citizens, an approach followed by the animals' rights movements; the second concentrating on human responsibility for nature emphasising the existence of not only social but also ecological responsibility; and a third stressing the global dimension of ecological citizenship.[211]

In addition, Steenbergen distinguishes two types of global environmental citizens: (1) the *earth citizen*, who is aware of the earth as a living organism (Gaia) and his or her origin from earth, which leads to a approach of care rather than control and views humans as participants rather than subjugators; and (2) the *world citizen*, who perceives of the environment as a matter of 'big science' and the planet an object of global management, which requires large-scale organisation and government.[212] Steenbergen emphasises the attitude aspect of citizenship.

Aldo Leopold[213], in his landmark *A Sand County Almanac*, analysed what it means to live in harmony with the land and with one another. Leopold's understanding of conservation is that of a 'state of harmony between men and land'. By 'land', he means all of the things earth as one organism has to offer. 'Harmony with land is like harmony with a friend; you cannot cherish his right hand and chop off his left'. His holistic view was based on the logic that if the land mechanism as a whole is good, then every part is good irrespective of humankind's knowledge of its function.[214]

He considered a land ethic to change the role of homo sapiens from conqueror of the land-community to plain member and citizen of it. This land ethic implies respect for fellow members and respect for the community.

Notwithstanding important philosophical differences among the proponents of ecological citizenship, they agree on many prerequisites for it: the normative idea of a community of humankind, the assumption of a community of life, the existential recognition that the future of the human species depends on the preservation of ecological integrity, and an aspiration to an increasing sense of responsibility for planetary welfare.

Considering the fundamental importance of citizenship for governance and democracy, we can conceive of ecological citizenship as an extension of identity and loyality. We can imagine ourselves as citizens of a wider community that includes the living world of which we are all a part. This community is probably

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209 Marzall, supra note 206.

210 van Steenbergen, B., Towards a global ecological Citizen, In: *The Condition of Citizenship* (Sage Publications: London,1994), pp. 141-152.

211 Ibid., pp.143-151.

212 Ibid., pp.148-151

213 See www.aldoleopold.org/ and www.naturenet.com/alnc/aldo.html as well as Leopold, A. *A Sand County Almanac*, Oxford University Press, Oxford, 1949.

214 Ibid., pp. 145-146.

most strongly felt at local level, but ecological citizenship is not 'local' as opposed to 'global', but is inclusive of both. Another defining aspect of ecological citizenship is the recognition of non-human beings as 'fellow citizens'. The notion of non-human citizens is purely metaphoric, of course, but it is helpful to acknowledge a fiduciary relationship between citizenship and non-human entities. Ecological citizenship adopts a guardianship responsibility for entities not currently represented in the political decision-making process.

The key attribute of responsibility and care makes ecological citizenship highly political. In this regard, the 'ecological citizen' has little in common with his or her counterpart, the old-type 'national citizen'. A sense of rivalry between different nations, cultures, religions, and other groupings seems almost inconceivable for someone who *cares*. Too much is at stake – as arguably most citizens on this planet know. Perhaps the new-type national citizen is also ecological.

Civil society as a catalyst for change

Implicit in much of the discussion on ecological citizenship is its collective and activist dimension. The concern for the active engagement of civil society is, of course, part of the sustainable development agenda. All international and national statements on sustainable development stress the need for partnerships with civil society. But what constitutes 'civil society'?

The notion of 'civil society' was popularized in the 1980's when dissident intellectuals in Eastern Europe created a social platform for resistance and political change.[215] If civil society was responsible for the most radical system change in recent times, it is perceivable that it is capable of more. During the last decade or so, we have been seeing the globalisation of a 'green civil society'.[216]

In international environmental law, the pressures of civil advocacy are particularly strong. This branch of international law would not even exist were it not for the worldwide environmental movement putting global environmental degradation on the agenda of State conferences. UNEP, for example, is largely shaped through the input of environmental groups.[217]

Global civil society builds on the autonomy of civil society bodies within their own nation states and links them within a trans-national realm independent of all nation states.[218] It represents the whole network of international relationships and

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215 Carter, A. *The Political Theory of Global Citizenship* (Routledge: London and New York, 2001) p. 79.

216 Alkoby, A. 'Globalising a green society: in search for conceptual clarity' In: Winter, G. (ed.) *Multilevel Governance of Global Environmental Change*, (Cambridge University Press, 2006), pp. 106-146.

217 Barcena, A. 'Global, Environmental Citizenship' *Our Planet* Vol. 25, No. 8, UNEP. January 1997 shows how UNEP's Global Environmental Citizenship Programme has developed strategic alliances with parliamentarians, consumers, local authorities, educators, religious groups, media and other key civil society groups.

218 Carter, supra note 215, p. 80.

organizations that underlie society outside the sphere of established political institutions.[219]

While globalisation has curtailed nation-states' capacity to regulate key areas, it has also opened up new spaces to be filled by other actors. States are no longer just tolerating civil society groups, they depend on them to make up for lost political power. In this respect, globalisation cuts both ways. Originating from these grassroots movements, sometimes very powerful NGOs[220] have succeeded to set the international agenda.

However, despite the positive influence global civil society can have on global governance, it lacks democratic legitimacy and accountability in its classical sense. Ultimately, while its policies might impact on citizens' lives, citizens in turn do not have any democratic means to control civil society.[221] Moreover some argue that civil society has been dominated by western and northern states and therefore carries the immanent danger of endorsing the moral concepts of the more privileged parts of global society.[222] Thus, global expansion could export western values, westernisation, and cultural imperialism.[223]

Civil society, in its present form, cannot substitute for a representative system of governance, but it could be legitimised by an emerging ecological citizenship. To the degree that citizenship is associated with global civil society, its mandate becomes stronger. As Attfield points out, legitimizing and monitoring institutions of global governance could be the main effect of global citizenship.[224]

It is possible to imagine governance without States or governance based on a partnership between governments and civil society. Both scenarios are part of envisioning our future. What matters more than institutions are the values and aspirations that underpin them. These values must be those of sustainability. Our future literally depends on it.

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219 Attfield, R. 'Global Citizenship and the Global Environment' In: Dower, N. and Williams, J. (eds.), *Global Citizenship: A Critical Reader* (Edinburgh University Press: Edinburgh 2002), p. 197.

220 Apart from NGOs, civil society consists of various other groups such as trade unions, business associations, religious bodies, academic institutions, student organizations, ethnic lobbies, community groups, and so forth. Similarly defined in Dower and Williams (eds.), supra note 219, p. xxi.

221 Engin, I. and Wood, P. K. *Citizenship and Identity* (Sage Publications: London, 1999) p. 117.

222 Ibid., pp. 121-122.

223 Ibid., pointing out to the fact that, so far, globalization has meant westernization.

224 Attfield, supra note 219, p. 200.

Chapter 2: The Covenantal Foundations of Governance for the Community of Life

2.1 Introduction

A strong democratic society or state demands a people with a strong covenantal identity. Citizens in a democracy are obliged to show greater solidarity and commitment to one another in joint political projects than is demanded by hierarchical societies; citizens must do what rulers would otherwise do for them, but this will happen only if they have a strong bond, or love, for their political community and for their homeland.

Similarly, a sustainable society demands a people with a strong covenantal identity. Sustainability requires what covenantal commitment alone can offer: sacrifices for the common good, including the survival and well-being of all members, self-limitations on individual and collective behavior, and responsibilities that reach across the generations.

The case studies marshalled for this study exemplify efforts to achieve forms of governance that are both strongly democratic and strongly sustainable. They also reveal – most implicitly, a few explicitly – the critical role that covenantal relationships played in their success. Taken as a whole, the case studies suggest that new forms of ecologically informed and motivated democratic self-government are emerging that seek the flourishing of the whole community of life by drawing on human beings' deep-seated covenantal ideas and capacities for loyalty to one another and to the Earth they share. A few case studies go further to suggest that the liberating and Earth-affirming democratic and scientific values of modernity can find greater power and adequacy by drawing more explicitly on the covenantal teachings of the world's indigenous traditions.

A new prospect is opened to view, a prospect of no little moment given the geopolitical and environmental realities of the world in 2008: these case studies give us reason to believe that a more richly covenantal understanding of citizenship may enable our modern faith in democratic citizenship to be redeemed. The notion that the prime mark of human dignity is the right and responsibility to use reason to govern oneself in community with others according to universal moral principles and for the common good – this fundamental, but more often than not un-acknowledged, assumption that undergirds most contemporary efforts by civil society and progressive political leadership to make economic and political power more just, non-violent and sustainable – has been severely battered in the 20th and 21st centuries. But now the possibility is presented that by focusing our attention on the largely neglected, if not sometimes outright rejected, covenantal dimensions of democratic citizenship, such as mutual entrustment, self-limitation, the common good, personal responsibility for the whole, and commitment to future generations, we may find reason to believe that human beings can morally self-govern themselves within the evolutionary and historical conditions of life on this planet.

That, at least, is the promise of the civil society initiatives on behalf of vigorous democratic forms of sustainable governance occurring throughout the

world today, a cross-section of which are treated in this study, and of the international network of legal scholars, environmental experts, moral philosophers, and theologians who are seeking to understand and further this work. The upshot is the vision – distant, but nonetheless on the horizon – of a new form of global democratic covenant, a new 'natural contract' with the creative evolutionary and ecosystemic processes of life as the basis for a new Earth jurisprudence.[225] As Michel Serres writes in *A Natural Contract*:

> Through exclusively social contracts, we have abandoned the bond that connects us to the world, the one that binds the time passing and flowing to the weather outside, the bond that relates the social sciences to the sciences of the universe, history to geography, law to nature, politics to physics, the bond that allows our language to communicate with mute, passive, obscure things – things that, because of our excesses, are recovering voice, presence, activity, light. We can no longer neglect this bond.[226]

This is the bond that is now being affirmed in such international declarations as the World Charter for Nature,[227] The Earth Covenant,[228] The Earth Charter,[229] The Manifesto for Earth,[230] and The Manifesto for Life.[231]

In order to make explicit the covenantal dimensions of contemporary efforts to achieve forms of governance that are both strongly democratic and strongly ecological or sustainable, this chapter will:

- Briefly review the history of covenant in modern public life and indicate how covenant can be differentiated from other forms of social agreement;
- Provide reasons for the claim that democratic governance for sustainability is not accidentally or contingently, but rather essentially and inevitably covenantal and may be characterised as a particular way of responding to the ontological demands of human existence;
- Identify the primary empirical and normative characteristics that make up what we may call the 'prism' of contemporary democratic and ecological covenant making;

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225 Cullinan, C. *Wild Law: A Manifesto for Earth Justice* (Green Books: Totnes, Devon, 2003).

226 Serres, M. *The Natural Contract* (University of Michigan Press: Ann Arbor, 2000) translation of *Le Contrat Naturel*, 1990), p.48.

227 Burhenne, W. E. and Irwin, W. A. *The World Charter for Nature: A Background Paper* (Erich Schmidt Verlag: Berlin, 1983).

228 The Earth Covenant was circulated by Global Education Associates and signed by over 2 million people worldwide in 1996.

229 Soskolne, C. *Sustaining Life on Earth* (Lexington Books: Lanham, Maryland, 2007), pp. 425-432. Several prominent proponents of the Earth Charter have explicitly referred to it as a 'covenant with Earth' or 'Gaia'. See Engel, J. R. 'A Covenant Model of Global Ethics' *Worldviews* Vol. 8, No. 1, 2004, pp. 29-46.

230 Mosquin, T. and Rowe, S. 'A Manifesto for Earth' *Biodiversity*, Vol. 5, No. 2, 2000, pp. 3-9.

231 A manifesto for life: in favor of an ethic of sustainability' *Capitalism, Nature, Socialism*, Vol. 13, No. 4, 2002, pp. 121-125.

- Suggest why the contemporary struggle for greater democratic participation and sustainability should be seen as a struggle between competing ideas of covenant for global loyalty; and
- Indicate some of the ways in which the case studies of this report suggest the quest for new democratic ecological covenants is being successfully pursued.

2.2 The eclipse and recovery of covenant in world history

Covenants are open, unconditional commitments to be faithful to others regarding our most fundamental values and behaviours, and they have historically served as the spiritual and moral authority for foundational political agreements such as national constitutions and international treaties. This fact does not receive immediate recognition or approval in many cultures of the world today and our use of the term therefore requires explanation.

Perhaps the most important factor responsible for the eclipse of the term in public rhetoric is the process of secularization that took hold of western society after the religious wars of the 17th century and which separated the political order of the state from religious belief and affiliation. The latter became increasingly a matter of private and voluntary choice rather than state or national identity. 'Covenant' was originally a religio-political term unifying these two spheres.[232] The actual history of covenant in the last several centuries is a double narrative – the first carried through religious traditions and organizations, and the second through political and social institutions and histories.

In the religious tradition, covenantal ideas remained explicit in the ritual practices of the church, such as the sacrament of marriage, and in confessional creeds and theologies. The strong association of covenant with the Abrahamic family of religious faiths – Judaism, Christianity, and Islam – further contributed to a notion that the very idea of covenant was somehow exclusively linked to these traditions. In fact, of course, covenantal relationships are common throughout the cultures of the world, from Scandinavian oath societies to Native American sacred pipe ceremonies to the vows of the Buddhist *sangha* and the Hindu practice of tying the rakhi.

In the political or secular tradition, covenantal ideas, purposes, and energies were channeled into less explicitly theological forms of public commitment and shared purpose, such as the ideal of the 'commonwealth'.[233] The Declaration of Independence of the United States of America, for example, is a classic covenantal agreement, authorised by the 'laws of nature and nature's God'.[234] The fact that it

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232 Elazar, D. 'Covenant as a Theo-political Tradition' In *Covenant and Constitutionalism* (Transaction Publishers: New Brunswick, New Jersey, 1998), pp. 243-272.

233 Elazar, D. *Covenant and Commonwealth: From Christian Separation through the Protestant Reformation* (Transaction Publishers: New Brunswick, New Jersey, 1996), pp. 311-335.

234 The Declaration includes the six basic elements of the covenantal formula that has been passed down from generation to generation from earliest times: 1) a preamble indicating the parties to the covenant; 2) a prologue, historical or ideological, establishing the setting or grounding of the covenant; 3) the operative section of the covenant, as stipulations, or what is agreed; 4) provisions for public reading (proclamation) and deposit of the text for safekeeping; 5) the divine witness to the covenant; and 6) the advantages of performance (blessings) and

was followed by a written Constitution helped establish a pattern that has been often followed in subsequent legal history. A 'soft law' declaration or covenantal commitment to broad ethical purposes is followed by a 'hard law' constitution or treaty that derives its moral authority from the previous declaration.

In the case of the United States, this relationship is evident in the state constitutions that preceded the federal constitution. For example, one of the oldest written constitutions in modern history, the Massachusetts State Constitution, adopted in 1780, between the Declaration of 1776 and the Constitution of 1787, opens with an explicit acknowledgement that it is a covenantal relationship:

> The body-politic is formed by a voluntary association of individuals. It is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation, and a faithful execution of them; that every man may, at all times, find his security in them.[235]

In the two 1966 United Nations Covenants on Human Rights, which gave legal force to the 1948 Universal Declaration of Human Rights, the terminology of covenant was retained. In 1989 the IUCN Commission on Environmental Law launched a Draft Covenant on Environment and Development based on the United Nations General Assembly's 1983 endorsement of the World Charter for Nature.[236]

In the field of international law, the term 'covenant' has continued to be the word of choice for agreements in which one party's non-performance does not effect the other party's duty to perform. Rights and duties are not mutually linked as in a classic contract ('*do ut des*'). While not a unilateral promise, a covenant is a mutual promise of two (or more) parties that is valid independently of whether the parties deliver on their promise or not. This gives a covenant a higher, more solemn validity than an ordinary contract, treaty, or convention.

Declarations, charters, compacts, conventions, manifestos, constitutions, treaties, even contracts may carry forward covenantal forms and aspirations in secular guise. 'Compact' shares with covenant, for example, the expectation that the parties will feel obligated to respond to each other beyond the letter of the law, and both require mutual consent to be abrogated, designed as they are to be perpetual or of unlimited duration. In the view of Emile Durkheim, a 'social contract' can have covenantal characteristics. Underlying every contract, Durkheim

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sanctions for nonperformance (curses). Elazar, D. *Covenant and Constitutionalism* (Transaction Publishers: New Brunswick, NJ, 1998), pp. 47-75.

235 Ibid., p.75. The Constitution required all state officials to swear a full oath to the Constitution and the commonwealth before the people and their representatives in full assembly. See Witte, J. Jr. *God's Joust, God's Justice: Law and Religion in the Western Tradition* (William B. Eerdmans Publishing Company: Grand Rapids, Michigan, 2006), p.154ff for the New England covenantal political theology informing this document, and the conventional view that the oath was a 'a cement of society' and 'one of the principal instruments of government' for it invoked and induced the 'fear and reverence of God'.

236 IUCN Commission on Environmental Law, *Draft International Covenant on Environment and Developmen*t (IUCN: Gland, Switzerland, 1995).

observed, is a 'non-contractual element', meaning that the contract between citizen and state – if it is binding – necessarily involves more than mutual self-interest. It is a 'code', he argued, a deep agreement or sacred bond that reflects moral relationships believed to be inherent in reality itself. It is not a mere consensus, however enlightened, in which everyone's self-interest, values, or choices coincide and which therefore exists by human agreement alone.[237]

In recent years, both the word and idea of covenant have begun to re-emerge in public intellectual life. In 1994 United States President Bill Clinton launched a 'Covenant with America' in pointed contrast with neo-conservative Newt Gingrich's 'Contract with America', and in 2006 Marion Wright Edelman and a consortium of progressive black leaders launched 'The Covenant with Black America'.[238] International political affairs theorists Robert Jackson and David Held have each written books setting forth their respective visions for global governance under the heading of covenant.[239]

2.3 The ontological roots of covenant and governance

All forms of human governance, formal and informal, explicit and implicit, display marks of covenantal relationships to such a degree that it is plausible to think of 'governance' as essentially a matter of the 'modes of collective discipline'[240] that are involved in the making, keeping, and reforming of covenants.

No community can long be governed without some form of mutual trust or covenantal bond that provides identity and purpose to its members and that is judged to be a fair distribution of powers, benefits, rights, and obligations. And no covenant can be successfully formed and kept that does not provide for a constitution or other legal structure that institutionalises the norms and political processes (or government) by which decisions regarding the relationships between the parties to the covenant will be made and implemented.

It follows that differences between forms of political governance may be traced ultimately to the different kinds of covenants in which they are embedded. Differences between covenants, in turn, may be traced to the different ways we choose to relate to one another and to the whole.

All human relationships, whether to self, other persons, nature, or God, are ambiguous – involving conflicts, competitions, and uncertainties as well as reciprocities, dependencies, and regularities. We each are born into a world of separate and unique individuals alongside other separate and unique individuals yet dependent upon other individuals and the relationships between us. We are

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237 Bellah, R. and Hammond, P. E. *Varieties of Civil Religion* (Harper and Row: New York, 1980), p. 202.

238 Smiley, T. *The Covenant with Black America* (Third World Publishers: Chicago, 2006).

239 Jackson, R. H. *The Global Covenant: Human Conduct in a World of States* (Oxford University Press: New York, 2000); Held, D. *The Global Covenant: the Social Democratic Alternative to the Washington Consensus* (Polity Press: Cambridge, 2004).

240 Taylor, C. 'Living with Difference' In Allen, A. L. and Regan, M. C. (eds.) *Debating Democracy's Discontent: Essays on American Politics, Law and Public Philosophy* (Cambridge: Belknap Press, 1998), p. 222.

both autonomous and interdependent, free and determined, voluntary and involuntary, nodes of discontinuity in the midst of continuity.

John Briggs calls it the 'primary paradox':

> You and I and everyone else are, each of us, simultaneously separate and isolated individuals, and inseparable and indivisible from others, from humanity, from the universe – indivisible from All Else, the whole. We die alone yet death binds us in a common destiny. That is only one of many forms this paradox takes![241]

This existential dilemma is expressed philosophically as the doctrine of 'internal relations' according to which 'relations are not extraneous to an agent but constitutive, albeit not wholly determinative, of an agent's being and character'.[242]

One way to understand covenant is to see it as the most elemental way in which we resolve the ambiguity inherent in self-other relationships. In the primordial act of 'self-government' we bind ourselves to ourselves, to others, and to what we believe to be the comprehensive and true ordering of society and nature, and this becomes the paradigm, world view, or ultimate justification, in light of which we govern ourselves and our world.

What form of resolution elicits our ultimate commitment, differs, of course, among covenants. We may try to deny our essential relationality and bind ourselves to other individuals by whatever advantageous 'deals' or limited contracts serve our purposes, the dominant utilitarian rationality of contemporary public and economic life.[243] Or we might lift our sights higher and seek on the basis of an ontology of the autonomous individual certain 'universal' rules of moral action for which all persons are duty-bound, such as the 'categorical imperative' offered by Immanuel Kant, or a social contract based upon a principle of 'justice as fairness' such as the ethical theory offered by John Rawls.[244] Or we may go the opposite extreme and try to deny our essential individuality and diversity and make restrictive covenants based on common and inherited racial, gender, genealogical, or cultural identities.[245] Or we may make hierarchical covenants, as in the fidelity of a vassal to his feudal lord, that resolve the ambiguity of being persons-in-relationship through power relationships, submission to authority, or some assumed distinction between inferior and superior qualities of being.[246]

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241 Briggs, J. 'Ambivalence' unpublished paper presented at the Oracle Institute, Black Earth, Wisconsin, 2005, p. 5.

242 Sturm, D. *Community and Alienation: Essays on Process Thought and Public Life* (University of Notre Dame Press: Notre Dame, 1988), p.12.

243 Brown, W. *Edgework: Critical Essays on Knowledge and Politics* (Princeton University Press: Princeton, 2005), pp. 37-59.

244 See Mudge, L. S. 'Moral Hospitality for Public Reasoners: Covenantal Models for Contemporary Social Contracts?' In Mudge, L.S. and Wieser, T. (eds.) *Democratic Contracts for Sustainable and Caring Societies* (WCC Publications: Geneva, 2000), pp. 23-47.

245 Mills, C. *The Racial Contract* (Cornell University Press: Ithaca, 1999); Pateman, C. *The Sexual Contract* (Stanford University Press: Stanford, 1988).

246 See Hillers, D. R. *Covenant: the History of the Biblical Idea* (Johns Hopkins University Press: Baltimore, 1969) for an account of how the suzerainty treaties of the ancient Near East were the source of early western covenantal ideas.

2.4 The democratic ecological covenant

Or we may make covenants that seek to hold together the reality of both our individual autonomy and our communal interdependence, what are here named 'democratic ecological covenants'. Such covenants encompass our obligations to ourselves, one another and the 'greater whole of which we are a part' – the Earth, the 'greater community of life', if not the universe itself.[247]

Alfred North Whitehead defines the metaphysical basis of democracy conceived as a normative social and ecological ideal in precisely such terms:

> The basis of democracy is the common fact of value experience, as constituting the essential nature of each pulsation of actuality. Everything has some value for itself, for others, and for the whole. This characterises the meaning of actuality. By reason of this character, constituting reality, the conception of morals arises. We have no right to deface the value experience which is the very essence of the universe. Existence, in its own nature, is the upholding of value intensity. Also no unit can separate itself from the others, and from the whole. And yet each unit exists in its own right. It upholds value intensity for itself, and this involves sharing value intensity with the universe. Everything that in any sense exists has two sides, namely, its individual self and its signification in the universe. Also either of these aspects is a factor in the other.[248]

Conversely, Daniel Elazar uses comparable terms to define the ontology of covenant as intrinsically democratic:

> What is characteristic of the covenantal approach as distinct from other kinds of pacts is the covenantal emphasis on the achievement of true liberty and equality within the framework of community while at the same time insisting that true community can only be a community that fosters liberty and equality… it (is) in the nature of the covenantal world view that once equality (is) found for some, equality (has) to be found for others, if not for all.[249]

Although democracy has been often linked over the course of western history with Promethean and anthropocentric outlooks on the world,[250] and with merely procedural rather than substantive philosophies of law and politics,[251] there have also been many subversive democratic movements that have sought to counter these tendencies and faithfully hold to what David Korten calls 'true democracy'.[252] Indeed, it is precisely the presence of a strong covenantal dimension that makes the difference between Promethean, anthropocentric, individualistic, and

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247 Quotations are from the Earth Charter, supra note 229, p. 430, p. 425.

248 Whitehead, A. N. *Modes of Thought* (Macmillan: New York, 1938), p.111.

249 Elazar, D. supra note 233, p. 343.

250 Deneen, P. J. *The Democratic Faith* (Princeton University Press: Princeton, 2005).

251 Engel, J. R. 'The Earth Charter as a New Covenant for Democracy' In Miller, P. and Westra, L. (eds.) *Just Ecological Integrity: The Ethics of Maintaining Planetary Life* (Rowman and Littlefield: Lanham, MD, 2002), pp. 37-52.

252 Korten, D. C. *The Great Turning: From Empire to Earth Community* (Kumarian Press: Sterling, VA, 2006), p. 353.

procedural interpretations of democracy and relational, ecological, community-centered ones.

In the 17th century, in the face of a rising Cartesian dualism, true democratic movements allied their protests on behalf of the dignity of the underclass with the belief that even the most 'lowly' and mundane of material reality is alive and pregnant with the potential for life and beauty.[253] Natural rights doctrines were a primary source of notions of democratic human rights.[254] The democratic and ecological ideas associated with figures such as Alexander von Humboldt, Henry David Thoreau, and William Wordsworth found new voice in 20th century covenantal commitments to 'land citizenship' and the 'integrity, stability, and beauty of the biotic community', famously associated with Aldo Leopold,[255] and the determined efforts of Vandana Shiva to save the planet's native seed stocks for the sake of 'Earth democracy'.[256] Today there is a burgeoning literature on ecological democracy, which in the main consists of so many attempts to critically theorise the democratic covenantal commitments of the world's struggling conservation, green, environmental justice, civic environmentalist, and sustainability movements.[257]

Nelson Mandela could find no more powerful way in his 1994 Inaugural Address to bring all South Africans together into a new post-Apartheid covenant than by evoking the natural piety of a shared democratic ecological covenant:

> I have no hesitation in saying that each one of us is as intimately attached to the soil of this beautiful country as are the famous jacaranda trees of Pretoria and the mimosa trees of the bushveld. Each time one of us touches the soil of this land, we feel a sense of personal renewal . . . That spiritual and physical oneness we all share with this common homeland explains the depth of the pain we all carried in our hearts as we saw our country tear itself apart in a terrible conflict, and as we saw it spurned, outlawed and isolated by the

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253 Toulmin, S. *Cosmopolis: The Hidden Agenda of Modernity* (Free Press: New York, 1990); Hill, C. *The World Turned Upside Down* (Penguin Books: London, 1972).

254 Nash, R. *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press: Madison, 1989).

255 Engel, J. R. 'What Covenant Sustains Us?' In Bosselmann, K., Westra, L., and Westra, R. (eds.) *Reconciling Human Existence and Ecological Integrity* (Earthscan: London, 2008), p. 288.

256 Shiva, V. *Earth Democracy: Justice, Sustainability, and Peace* (South End Press: Cambridge, MA, 2005), pp. 1-12.

257 Representative English language texts include: Barry, J. and Dobson, A. 'Green Political Theory: A Report' In Gaus, G. (ed.) *Handbook of Political Theory* (Sage: London, 2004), pp. 180-191; Curtin, D. *Chinnagounder's Challenge: The Question of Ecological Citizenship* (Indiana University Press: Bloomington, 1999); Dobson, A. *Citizenship and the Environment* (Oxford University Press: Oxford, 2003); Dobson, A. and Eckersley, R. (eds.) *Political Theory and the Ecological Challenge* (Cambridge University Press: Cambridge, 2006); Doherty, B. and de Geus, M. (eds.) *Democracy and Green Political Thought: Sustainability, Rights and Citizenship* (Routledge: New York, 1996); Dryzek, J. S. *The Politics of the Earth: Environmental Discourses* (Oxford University Press: Oxford, 1997); Eckersley, R. *The Green State: Rethinking Democracy and Sovereignty* (The MIT Press: Cambridge, MA, 2004); Mathews, F. (ed.) *Ecology and Democracy* (Frank Cass: London, 1996); Minteer, B. A. and Taylor, B. P. (eds.) *Democracy and the Claims of Nature: Critical Perspectives for a New Century* (Rowman and Littlefield: Lanham, MA, 2002); Morrison, R. *Ecological Democracy* (South End Press: Boston, 1995).

> peoples of the world . . . We enter into a covenant that we shall build the society in which all South Africans, both black and white, will be able to walk tall, without any fear in their hearts, assured of their inalienable right to human dignity – a rainbow nation at peace with itself and the world.[258]

2.5 The prism of covenant

How do we describe the qualities of those kinds of covenants we are calling democratic and ecological and that are inspiring new forms of governance for sustainability? Covenant is prismatic, with many faces, a complex reality revealing different meanings from different angles of vision. The following is an attempt to give a multi-dimensional account of the phenomenon of democratic ecological covenant, some of whose features have been anticipated in the previous discussion.

2.5.1 The sacred reality of life

All covenants, as we have seen, are founded on some kind of comprehensive ordering of separate and inseparable individuals. This becomes the sacred reality – the ultimate truth and justification – in light of which we govern ourselves and our world. In the democratic ecological covenant sacred reality is conceived as a world of social individuals, a plurality of individual integrities bound in a common whole, and variously identified as the community of life, the evolutionary process, the spirit, or creativity of life, or through metaphorical extension, the 'covenant of being'.[259]

2.5.2 The response of gratitude, reverence, and love

A covenant with the Earth begins in responses of gratitude, reverence, and love for particular persons, places, and forms of life that are experienced as gifts of this sacred reality. As theologian Paul Tillich well noted, religion is 'being grasped by ultimate concern' but 'one is concerned not *in abstracto*, one is concerned concretely'.[260] The most fundamental gift is the gift of life itself, the opportunity to participate in the communion of gift-giving and receiving, the sacred community-building processes of life. Covenant has its origin, in other words, in sacrament (from Latin *sacramentum,* oath of allegiance, solemn obligation*)* and is traditionally marked by a symbolic exchange marking the unity of vital powers of life such as a mixing of blood, exchange of rings, or sharing a common meal.

Democratic ecological covenants universalise these responses. They bear strong attachments to particular communities of shared origin and citizenship, and the places or geographies with which they are associated, and through them to the embracing universal community of shared origin and citizenship, the community of humankind and the life of the planet as a whole – what is sometimes referred to as planetary democracy or 'Earth patriotism'.

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258 Mandela, Nelson, *In His Own Words* (New York: Little Brown and Company, 2003), pp. 68-69.

259 Engel, J. R. 'What Covenant Sustains Us?' supra note 255, p. 281.

260 Adams, J. L. *Prophethood of All Believers* (Beacon Press: Boston, 1986), p. 207.

2.5.3 Mutual entrustment

Through the gift exchanges of the community of life we receive the entrustment of the lives of others, as we entrust our own lives to them. We are born into, inherit, inevitably become participants in overlapping communities of mutual entrustment. This has fundamental moral import: our responsibilities and obligations to others are grounded in expectations built into the fabric of being, not something we invent and 'add' from outside. But we are fundamentally challenged how to respond. The act of covenant making is a commitment to others, directly or symbolically, that we are accepting the entrustment of their lives to us, and entrusting our lives to them and the deliberate acknowledgement of the responsibilities this entails. The covenants of democratic ecological citizenship make the consenting act of covenant making a conscious and deliberate acceptance of the fact that not only human lives, but all life now throughout the planet, has been 'entrusted' to us, and that we are being called in return to entrust the future of our species to the continuing flourishing of life. In this way notions of 'stewardship' and 'public trust' are grounded in covenantal obligations.

2.5.4 Trust

The acceptance of mutual entrustment implies relationships of 'trust' within the covenanted democratic community. By entrusting ourselves to our fellow citizens we entrust ourselves to their exercise of political power and we thereby risk all we have, including our very lives. We must 'trust' they will exercise that power responsibly. However, whether or not they do so in no way affects our responsibility for their entrustment, for their person hood or wellbeing, and our need, therefore, to act in a trustworthy way toward them. Here are grounds for the democratic covenantal obligation of treating even the criminal, the enemy, or the abuser non-violently, with compassion, and as a person with rights and moral claims for respect and care.

2.5.5 Promises

Democratic ecological covenantal commitment is a pledge of unconditional, open-ended faithfulness to the community of life, to the integrity and dignity of each of its members, to the principles and purposes that will enable its perpetual survival and flourishing, and to the persons and communities that share such a pledge. Covenantal promises, in contrast to contracts, are for good, for the long-term, and for this reason it is plausible to say that the aims of sustaining life 'to the seventh generation', and for new forms of 'sustainable governance', are inherently covenantal in nature.

2.5.6 Comprehensive ethical principles, purposes, virtues and laws

The principles to which we commit ourselves in covenant are comprehensive – that is, they affirm a vision, a purpose, a telos, a cause, a universal natural or moral law, a set of virtues, that when embodied in human conduct will fulfill the common good of the whole community of life. The comprehensive norms of democratic ecological covenants are necessarily broad and universal: they encompass virtues such as care, humility, respect, truthfulness, steadfastness, compassion; and principles such as righteousness (right relations); equity (fair treatment), justice

(equal treatment), well-being, peace as wholeness of being; and human civil, political, economic and social rights. In democratic ecological covenants, these moral purposes, principles and laws, associated in most of human history with purely social conduct, are now extended to embrace our relations with nature as well, and in the process new content emerges, such as human rights to a healthful environment, and new purposes, such as preserving 'the integrity, stability, and beauty of the biotic community'.[261]

2.5.7 The common good

Covenantal relationships of mutual entrustment often carry a strong sense of the common good. The 'common good' is that in which all the members of a community share, and not merely a collection of the goods of its individual members. This means that justice is a common good that involves a right relationship among the citizens of a community and their government and not only an attribute of individuals. In today's interdependent world, the community of life which blankets the Earth as a whole is the only self-sufficient community whose integral relationships can provide the conditions necessary for sustaining human and all other forms of life. It is therefore our greatest 'common good', whose primary public goods, such as the atmosphere, the oceans, the diversity of species and ecosystems, and the common cultural heritage of humankind, must be governed in common.

2.5.8 Self-rule and self-limitation

One of the most morally profound and politically significant aspects of covenant is the fact that it entails the act of human beings voluntarily binding themselves to moral, political, and cultural limits, or restraints on their behavior, individually and collectively. Here is a primary source of the rule of law in the governance of human affairs. The covenantal understanding of 'self-rule' and 'self-constraint' as integral to the 'collective disciplines' of human moral and political self-government urgently needs to be reclaimed today in face of the ecological and social limits of the planet.

Covenantal self-limitation is the recognition that life is ineluctably finite – we are, and will always be, limited creatures alongside other limited creatures, in a limited world. Yet we have the unique obligation as humans to self-impose the limits that are required to live sustainably and abundantly in this world. There is no escaping this reality. Even the Faustian 'pact' with the Devil for unlimited power over others and gratification of every human desire – the hidden covenant that so largely governs the world's commercial life today – requires adherence to limits, such as the lifetime of Faust himself.[262] Humans can turn their capacity for covenant to perverse and demonic ends. We are therefore in constant need to remind ourselves that we are not 'limitless animals', but are created to live democratically, by self-rule, by self-imposed principles of mutual respect, care, and entrustment, or we cease to be human.

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261 Leopold, A. *A Sand County Almanac* (Oxford University Press: New York, 1949), p. 224.

262 Berry, W. 'Faustian Economics: Hell Hath no Limits' *Harper's Magazine*, May, 2008, pp. 35-42.

2.5.9 Dialogue

Democratic ecological covenants place a special value on dialogue because of the centrality of mutual persuasion and public debate and dissent to uncoerced covenantal consent and deliberative self-government. It also reflects the importance of attentive listening to the 'voices' of nature in environmental protection and restoration. Dialogue may be conceived as both means and end of covenant. Unless there is covenantal loyalty to dialogue, including commitment to critical reason and truth in the shared search for justice and sustainability, the uncertainties and conflicts involved in thinking together, agreeing and disagreeing, cannot be made mutually accountable and discussion will cease. But beyond this, a life of loving and free communication constitutes a profound realization of the potentialities of a relational universe as they have emerged in the course of human evolution.

2.5.10 New beginnings

Covenants are made in the midst of covenants; seldom if ever, are they unprecedented. Yet they are also always in some sense a 'new beginning' in that they seek to transform previous commitments so as to improve them in some way. 'New' covenants are occasioned when previous ones are disrupted by loss, threat, or conflict; or in the face of a betrayal that has occasioned an alienation or injustice that needs to be remedied; or when previous commitments are judged oppressive of the values and capacities of its members; or when new patterns of inter-dependence emerge and new responsibilities become recognised that need to be covenantally formalised as in the founding of a new community or political order. Democratic ecological covenants mark such a 'new beginning' for the human species in the radically interdependent world we inhabit today.

2.5.11 Reconciliation

Because of their transformative capacity, covenants, in contrast to other modes of moral life, have ways of addressing the wrongs humans do so as to restore human self-respect and moral standing in the community. By acts of forgiveness, repentance, compensatory justice, and truth-telling, relationships can be healed, reconciliation can take place, and new covenantal beginnings can be made. Democratic ecological covenants in countries like South Africa are pioneering practices such as 'reconciliation ecology' that seek in a similar way to compensate for the abuses humans have perpetuated on nature. In other social contexts 'restoration ecology' is being pursued as a way of transforming and renewing our covenants with the community of life.

2.5.12 Power

Perhaps more than any other modern political philosopher, Hannah Arendt has emphasised how political compacts or covenants in which persons bind themselves together by promises based on comprehensive principles of reciprocity and mutuality, presupposing equality, create liberating political power. This was the engine, she argued, for the emergence of self-governing democratic communities in the modern world, for it contains *in nuce* the republican principle, according to which power resides in the people, and there is a mutual subjection

and constitution of laws for the common good. Her eloquent description of what enabled the success of the 18th century revolutions equally accounts for the success of the civil society organizations that have taken leadership in achieving democratic governance for sustainability in this study:

> Power comes into being only if and when men join themselves together for the purpose of action, and it will disappear when, for whatever reason, they disperse and desert one another. Hence, binding and promising, combining and covenanting are the means by which power is kept in existence; where and when men succeed in keeping intact the power which sprang up between them during the course of any particular act or deed, they are already in the process of foundation, of constituting a stable worldly structure to house, as it were, their combined power of action. There is an element of the world-building capacity of man in the human faculty of making and keeping promises. Just as promises and agreement deal with the future and provide stability in the ocean of future uncertainty where the unpredictable may break in from all sides, so the constituting, founding, and world-building capacities of man concern always not so much ourselves and our own time on earth as our successor and posterities. Action is only human faculty that demands a plurality of men; and the syntax of power is that power is the only human attribute which applies solely to the worldly inbetween space by which men are mutually related, and combine in the act of foundation by virtue of the making and the keeping of promises…[263]

2.5.13 A covenanted people

Those who witness to each other's oath or pledge of covenantal fidelity become a covenanted people. Judgments of success or failure fall on this covenanted community as a whole as well as on each individual. The covenant of democratic ecological citizenship is thus an explicit commitment to the inclusive community of life as the primary community of mutual entrustment and loyalty, and to all nations, peoples, and parties who join in commitment to the fulfillment of that inclusive community. The many 'declarations' of global ethics, such as the Earth Charter, now seeking to influence the trajectory of geo-political and economic development worldwide, will need to become the 'charters' of such a covenanted movement, locally and internationally, if they are to materially impact human behavior and social policy.

2.5.14 Federalism

A federal political structure is one composed of equal confederates that freely bind themselves to one another in a common whole that retains their respective identities. Daniel Elazar argues that societies based on democratic covenants inevitably lead to federal forms of constitutional and international political arrangements:

> Polities founded by covenant are essentially federal in character, in the original meaning of the term, whether they are federal in structure or not. That

[263] Arendt, H. *On Revolution* (Viking: New York, 1963), p. 174.

is to say, each polity is a matrix compounded of equal confederates who freely bind themselves to one another so as to retain their respective integrities even as they are bound in a common whole. Such polities are republican by definition and power within them must be diffused among many centers or the various cells within the matrix.[264]

The model of global democratic and ecological governance inherent in the covenantal principle may be called 'cosmopolitan/regionalism'; pacts are built on pacts from the ground up; each society's power is both limited and shared with every other society. Each citizen and each society exercises 'common but differentiated responsibilities' for the Earth as a whole in recognition of the fact that the community of life is something that can only be realised as a whole, a covenant of covenants. We realise our lives not separately, but as individuals-in-community – the foundational promise of democratic ecological covenant.[265]

2.6 The covenantal struggles of our time

The covenantal allegiances we choose are the decisions we make regarding what part we will play in the covenantal dramas of history. From the moment of birth we are enmeshed in a plurality of competing, overlapping covenantal obligations and narratives – covenants of family, friendship, gender, race, class, profession, party, religion, nation, culture – each competing for our allegiance. The stories of our personal and collective lives move between remembrance of covenantal foundings, faithfulness, betrayals, and reformations and the promise of covenantal fulfillments, renewals, and new beginnings, always with the present under judgment, pregnant with possibilities for the future, and requiring us to decide whether and how to honor the covenantal pledges of the past to which we are still bound. Often some crisis occurs, such as the one now facing the world in respect to the sustainability of the ecological integrity of the biosphere, that requires a response that will have more than ordinary consequences for the future of ourselves and our society. At such times we are compelled to decide where in the great unfolding dramas of history we will take our stand – which covenant, or which interpretation of covenant, we will give our ultimate or primary loyalty.

The various covenantal traditions of the world have widely different views concerning who and what is included in the covenanted community and what commitments are entailed; how covenants are to be transmitted and kept and whether and how they are open to reform or termination; the penalties for challenging, breaking, or betraying them (their definitions of treason, heresy, an apostate, infidelity); and on what terms they should be open to persons of different cultural, ethnic, or political backgrounds. Such views play a determinative role in shaping the course of human history, and in no way more so than in our history with nature.

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[264] Elazar, D. *Covenant and Polity in Biblical Israel: Biblical Foundations and Jewish Expressions* (Transaction Publishers: New Brunswick, NJ, 1995), p. 38.

[265] Engel, J. R. 'A Covenant of Covenants: A Federal Vision of Global Governance' In Soskolne, C. (ed.) *Sustaining Life on Earth: Environmental and Human Health Through Global Governance* (Lexington Books, a division of Rowman & Littlefield Publishers: Lanham, MD, 2007), pp. 27-40.

Although they may not name it as such, proponents of sustainable forms of democratic governance such as those represented in the case studies of this study recognise that our present historical crisis requires us to engage in a struggle for the covenantal loyalties of contemporary human societies.

2.7 Making, keeping, reforming and renewing the democratic covenant of life

There is widespread consensus that the areas of environmental law in which greatest progress is occurring are at local, state, and regional levels.[266] There is also growing recognition of the contributions that local communities are and can potentially make to the reform of international law.[267] In *Global Environmental Politics*, Ronnie Lipschutz assesses the various approaches to strong global environmental protection that might succeed and finds greatest promise in political and legal actions at the local level:

> [A]ctivists must still affect the beliefs and behaviours of real human beings, whose social relations are, for the most part, highly localised. Ideas do not fall from heaven or appear as light bulbs; they must resonate with conditions as experienced and understood by those real human beings, in the places that they live, work, and play. Moreover, it is in those local places that politics, activism, and social power are most intense and engages people most strongly.[268]

Rebecca Todd Peters and Richard Falk, in their respective reviews of the major theories of globalization currently vying for political and economic supremacy, concur in their judgment that the approach characterised as 'globalization from below' is the most ethically justified.[269]

The case studies that follow evidence the creative civic activity that is taking place in local, national, and regional arenas in the field of environmental law. They show a decided shift away from 'management' and toward 'governance' as the decisive factor in sustainability of ecosystems and natural resources.[270] It is not surprising, therefore, in light of the previous discussion regarding the covenantal foundations of governance and law, that they also provide evidence for how the making and keeping of democratic ecological covenants is influencing and guiding

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266 Engel, K. and Saleska, S. 'Subglobal Regulations of the Global Commons: The Case of Climate Change' *Ecology Law Quarterly* Vol. 32 No. 2, 2005, pp. 183-233.

267 Rajagopal, B. *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge University Press: New York, 2003); Santos, B. and Rodríguez-Garavito, C. A. (eds.) *Law and Globalization from Below: Towards a Cosmopolitan Legality* (Cambridge University Press: New York, 2005).

268 Lipschutz, R. D. *Global Environmental Politics* (CQ Press: Washington, D.C., 2004), p. 175.

269 Peters, R. T. *In Search of the Good Life: The Ethics of Globalization* (Continuum: New York, 2004); Falk, R. *On Humane Governance: Toward a New Global Politics, The World Order Models Project Report of the Global Civilization Initiative* (Pennsylvania State University Press: University Park, 1995), pp. 73-75.

270 A further example is the work being done on the Theme on Governance, Equity, and Rights (TGR) by the IUCN Commission on Environmental, Economic and Social Policy, see www.iucn.org/themes/ceesp/TGER.html

this activity, and the positive changes in political and legal agreements and decisions this is effecting in different societies across the world.

There are a variety of ways in which the influence of democratic ecological covenant-making and keeping, and reform and renewal may be discerned in these case studies.

2.7.1 Normative democracy

The first, and most apparent, is the way all these case studies demonstrate a strong commitment to the principles of what Richard Falk calls 'normative democracy', and others 'good governance'.[271] These principles as explicated by Falk reappear frequently in contemporary literature on governance and in environmental legal theory and practice, and constitute what in effect is a massive consensus and commitment (an implicit if not explicit covenant) to democratic values and practices: consent of citizenry; rule of law; human rights; participation; accountability; public goods; transparency; and nonviolence.

Louis J. Kotzé, for example, speaks of the new 'democratic order' that was established in South Africa in 1994 with 'new democratic laws' focused on 'greater transparency, public inclusion in the broader governance effort, promotion of equality and justice, and upliftment of the previously disadvantaged and former excluded sectors of society'. Porto Alegre is an internationally celebrated democratic experiment in participatory budgeting.[272] Melinda Janki shows how the Guyana tribes were successful in negotiating an agreement with the government that gave them ownership of tribal lands well beyond what had pertained previously by working non-confrontationally within the democratic constitutional framework of their country.

2.7.2 Civil society

Most case studies demonstrate how mutually committed or covenanted voluntary associations seeking strong sustainability and justice goals, and working under the banner of inclusive citizen or ‘multi-stake holder’ participation, are the primary agents of positive social and legal change.

Christina MacLeod documents effective outcomes from 'cooperative management schemes and collaborative efforts to be inclusive of all stakeholders' in Canada, and Willemien du Plessis draws a portrait of the activities of the civil society organization Earthlife, which took responsibility for advancing the rights and claims of all citizens to a sustainable ecology. In consequence, it earned the admiration of South African courts because 'their interest and motivation is selfless, being to contribute to environmental protection in the common good'. Earthlife was concerned to exercise the 'positive freedom' made possible in a democratic society, which is another way of speaking about citizens taking covenantal responsibility for their biotic and human communities.

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271 Falk, R. *The Declining World Order* (Routledge: New York, 2004), pp.95-99,

272 Santos, B. 'Two Democracies, Two Legalities: Participatory Budgeting in Porta Alegre, Brazil', in Santos, B. and Rodriguez-Garavito, C. A., supra note 271, pp. 310-338.

2.7.3 Covenants with the sacred reality or law of life

The case studies provide two examples of democratic covenants that are explicitly conceived as covenants with the reality of nature or the sacred source of existence, and therefore more than agreements among humans.

Ricardo Libel Waldman emphasises the importance of grounding the process of democratic citizen participation in Porto Alegre in an objective reality or natural law if relativism is to be avoided:

> There is a reality in which we all live and define ourselves, though we can not know all about it. It's only with that in mind that we can make any sense of political debate. If the reality is irrelevant, because it is not knowable independently of political or other point of view there is no way debate can win any level of rational consensus.

Jack Manno gives a striking account of how the Onondaga land rights suit against the State of New York is ultimately grounded in the covenant of the Great Law of Peace which the Haudenosaunee people considered the underlying spiritual and ethical constitution for all their practices of community governance and the 'silver chain' of treaty-making. The Great Law is the covenant of life described by the Peacemaker in his 'Thanksgiving Address', an oral tradition handed down from generation to generation. Manno describes it in these terms:

> Every human being who is a member of a family, clan and nation has certain responsibilities and rights. Everyone has a responsibility to help protect and to preserve the earth, Our Mother, for the benefit of her children seven generations to come. Everyone has the right to come and to go, free to live in harmony with the laws of nature, free to enjoy liberty, to live in a natural way, as long as one continues to give thanks for all land and life.

The covenant of life is not limited to human beings. In the Thanksgiving Address 'each part of the community of life is acknowledged and appreciated for carrying out its [common but differentiated] duties and following its original instructions from the Creator'.

Manno also shows how the example of the Haudenosaunee covenant of life and the special status it accorded women in the community served as an inspiration for American reformers and deepened their understanding of democracy.

2.7.4 Making new covenants

Examples of how new principles and policies of governance are established as a result of extensive processes of 'covenant making' may be found in Julien Bétaille and Ricardo Stanziola Vieira's account of the recent French '*Grenelle de l'environnement*', modeled on the Grenelle Accords that were negotiated during the May 1968 riots at the French Labor Ministry, located on the Rue de Grenelle in Paris; and Karen Bubna-Litic's description of the struggles of the members of a new eco-village in Australia to articulate the fundamental covenantal obligations that will inform their community's governing constitution and enable it to realise its aim of 'Caring for the Earth, caring for people, living creatively together'.

2.7.5 Holding societies accountable to covenants

Several other case studies focus on holding societies accountable to authoritative moral and legal commitments in existing constitutions, treaties and domestic legislation. Nicola Wheen describes efforts to hold New Zealand accountable to the international responsibilities it assumed under the Convention on Biological Diversity with regard to the protection of endemic Cetaceans. Louis Koetzé describes how plantiffs won a suit on the basis of the pace-setting covenantal commitment of the South African Constitution to environmental rights:

> Everyone has the right:
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
>
> (i) prevent pollution and ecological degradation
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

2.7.6 The power of re-covenanting

Several case studies disclose how the process of re-covenanting can provide opportunities for correcting covenantal abuse or improving covenantal understandings. These opportunities can come about as a result of two kinds of circumstance: (1) from betrayals or failures to live up to previous covenants that were democratically agreed upon and included strong ecological responsibilities, or (2) because the founding agreement included the expectation of re-covenanting as a part of the original covenant.

The grievances of the Maori landowners described in Nicola Wheen's case study are longstanding and stem from breaches of the principles of the 1840 Treaty of Waitangi, an example of the first circumstance.

Jack Manno's two case studies illustrate both situations. In one case study, the Onondaga are seeking to engage in a process of re-covenanting with the United States because of its betrayal of its original treaty with them. In his second case study, he describes the Great Lakes Water Quality Agreement between the United States and Canada as having several basic covenantal qualities. It seeks collaboration on how to achieve a set of shared goals rather than negotiation on how to achieve a balance of interests or to protect the rights of each party; by shared commitment to the maintenance of the 'ecological integrity' of the Great Lakes, it functions implicitly as a covenant between the people of this vast region and the freshwater ecosystem that defines it; and it explicitly calls for regularly scheduled opportunities for improvements in the stipulations of the agreement, that is, for a process of re-covenanting.

2.7.7 Conclusion

These case studies show how in many societies throughout the world membership in the covenant of democracy, and grateful celebration of the common but differentiated contributions all members make to its fulfillment, is being extended to the whole community of life. As a consequence, these societies are achieving greater social justice and self-determination for their people, and greater sustainability for their environments. We conclude that all contemporary societies will require such a transformation in their covenantal identity, an acknowledgement of the mutual entrustment that binds all their citizens with one another and with the rest of nature, if they are to continue to enjoy the great gift exchanges of life on planet Earth.

Part B:

Challenges, Successes

Chapter 3: Introduction to the Case Studies

Part B is a collection of 19 governance case studies from around the world. Our intention is to provide real-life examples of how diverse communities of interest are currently wrestling with emerging aspects of governance for sustainability. These case studies are intended to inform our understanding of what challenges exist and where patterns of success or failure might be detected. The purpose of this introduction is to inform readers about the process by which they were selected and to identify some common themes that emerged.

This project was conceived at a workshop held in Paraty, Brazil in June 2007 as part of the 5th Annual Colloquium of the IUCN Academy of Environmental Law. The workshop was also used to solicit suitable case studies. It was followed by the preparation of a basic template and the distribution to participants of a more detailed concept. Case studies were submitted and a selection process was used to accept those that were relevant and illustrative. A review of the geographical distribution of the case studies revealed a number of gaps and additional case studies from particular regions were sought. This search relied on personal contacts and resulted in an improved, but not perfect, geographical distribution. In broad terms, we have case studies from North and South America, Europe (France and Wales), Asia/Pacific, and South Africa. In summary, the process was 'organic' rather than methodological. It relied heavily on the voluntary contributions of a select community of environmental lawyers who are associated with the Commission on Environmental Law (CEL) and the Academy of Environmental Law. As a consequence, many case studies involve an interface between ecological and social objectives and legal frameworks and processes. The case studies also reflect each author's understanding and interpretation of 'governance for sustainability' within the circumstances of their case studies as shown in the evaluative section at the end of each case study.

Given the informal process by which the case studies were gathered, a detailed analysis of their content would not be appropriate. This said, it is helpful to identify some common themes that emerge from them. First, there is the element of 'covenant'. As demonstrated in Part A: Chapter 2, the covenantal element can take many forms in human society. But ultimately, irrespective of whether it finds formal (as in a constitution) or informal (as in a promise or vision) expression, it is a force that both 'brings together' and has the power to 'hold together' for the good of nature and human communities. The various ways in which the case studies reveal covenantal elements and the power of these elements, are analysed in Chapter 2, sections 2.1 and 2.7.

A second theme is the responses to the various forms of 'democratic deficit' in institutions, processes, or outcomes. Some case studies reflect a gradual move away from reliance on traditional governance institutions and processes that steer, command, or rule. However, in moving away from the traditional, what should we move towards? In the view of the authors, there is a trend towards governance based on widely varying local abilities and cultural traditions to create and/or recognise context-specific social-environmental relationships. This observation reinforces what we have known for many years, but which nevertheless requires a different paradigm of democracy, governance, and citizenship. Many ecological

and social issues require highly context-specific bottom-up (as opposed to top-down) responses. To be fully effective and enduring, these responses must be systematically facilitated and enabled by traditional higher-level institutions and processes evolved to embrace a common sense of common responsibility and vision for a just and sustainable world.

A third theme is that most case studies do not report direct challenges to international law and its institutions despite the fact that most problems reported in the case studies are of an international or global nature. Some case studies report on actors who avail themselves of international legal commitments to give impetus to national environmental initiatives. For the most part, we see people around the world attempting to use (with varying success) the provisions and processes that exist within national jurisdictions. Whether full or partial success or failure is the outcome, there is a willingness to engage and to push towards forms of human governance that operate within the limits of natural systems while being cognisant of the needs of society. This observation raises many inter-related questions beyond the scope of this preliminary study. For example, will this growing activism at the local level, and the associated changes to governance, permeate both horizontally and vertically to exert a greater transformative influence?

Finally, a fourth theme is that almost half of the case studies involve what might be termed 'proactive action', as opposed to ‘reaction’ towards ecological problems. This trend may well represent the emergence of different value systems and changed priorities in respect of the human-nature relationship.

As noted earlier in this Introduction, the case studies were provided by a group of expert ‘volunteers’. The authors are grateful for their efforts and their generous contributions of time spent on original writing and on the editing process that followed. We must make it very clear that any observations drawn from these case studies and indeed the whole report, represent the views of the report authors and *not* the views of the case study authors.

Chapter 4: Case Studies

4.1 EIA as the Start of a Social Bargaining Process: The Malampaya Deepwater Gas-to-Power Project

Jay L. Batongbacal, Esq.[273]

Abstract

The Malampaya Deepwater Gas-to-Power Project won a UN Environmental Programme/International Chamber of Commerce World Summit Business Award for Sustainable Development Partnerships in 2002. The project pioneered the 'social acceptability' criteria under the Philippine environmental impact statement system in 1996, and serves as an important example of the challenges of environmental governance within a complex social environment. It also shows that an environmental impact assessment (EIA) process that involves extensive public participation may be seen as a form of social bargaining that can contribute to governance long after the regulatory approvals have been secured. Unlike traditional public participation, a social bargaining process places certain demands and creates expectations on the part of the participants, especially community stakeholders, and continues beyond the initial decisions to foster environmental management. Viewing the EIA as such a process enables an analysis that addresses issues such as consent *ex post facto* and the importance of 'social sustainability' in the concept of governance for sustainability.

4.1.1 Introduction

The Malampaya Deepwater Gas to Power Project (Malampaya) was the first commercial natural gas production project in the Philippines. Between 1998 and 2001, it was constructed under budget and ahead of schedule astride environmentally sensitive areas while pioneering the 'social acceptability' criteria of the Philippine environmental impact statement (EIS) system. In business circles, the project's implementation is considered a major success, having garnered a World Summit Business Award for Sustainable Development Partnerships from the United Nations Environment Programme and the International Chamber of Commerce at the World Conference on Environment and Development at Johannesburg in 2002.[274] The experiences of the companies involved now circulate as case studies of how the petroleum industry can successfully operate in socially and environmentally sensitive environments, with special attention on the public consultation process.[275] However, independent research into the experience

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273 Jay L. Batongbacal is a JSD candidate at the Marine Environmental Law Institute, Dalhousie Law School, Halifax, Nova Scotia, Email: jbatongb@dal.ca . This case study is drawn from the author's JSD research. The author gratefully acknowledges the assistance provided by the Pierre Elliot Trudeau Foundation, Montreal, Quebec, for the conduct of fieldwork for this research.

274 International Chamber of Commerce, *Shell Wins Major International Sustainable Development Award* ,Press Release (30 August 2002), available at www.shell.com/home/content/ph-en/news_and_library/press_releases/2002/malampaya_award_0830.html.

275 Sohn, J. (ed.) *Development without Conflict: The Business Case for Community Consent* (World Resources Institute: Washington DC, 2007). International Finance Corporation, *Stakeholder Engagement: A Good Practice Handbook for Companies Doing Business in Emerging Markets*

of the local communities reveals important issues that were not adequately treated in published case studies and indicate ways forward in conceptualising public participation processes in environmental governance. One way is to view public participation as a social bargaining process that places different demands on and creates different expectations among the participants. This view points to different approaches to improving regulatory regimes that rely on processes such as environmental impact assessments (EIAs).

4.1.2 Description

In 1989, a large offshore natural gas reservoir was discovered northwest of the island-province of Palawan and became the keystone of the new Philippine natural gas market. The Malampaya project comprises nine undersea wells connected by an undersea manifold to a production platform mounted on a concrete gravity structure about 50 kilometres from the nearest shore. A 504-kilometre pipeline takes the gas through the coastal waters of the island provinces of Palawan and Mindoro Oriental to an onshore natural gas processing plant in Batangas province in southwestern Luzon. There the gas is processed for distribution to three combined-cycle-turbine power plants generating a total of 2,760 megawatts of electricity, equivalent to 18 percent of the country's total power-generating capacity in 2001.

Considering the huge investments involved (US$ 4.5 billion), the massive technical and logistical challenges, and the strict project implementation timeline of three and a half years, the project's proponents, Royal Dutch Shell and Occidental Petroleum (Shell-Oxy) could not afford any unexpected or uncontrollable delays. At the time, the most likely source of delay was public rejection of the project. In the early 1990s, the Philippine government closed or abandoned several high-profile projects at huge expense because of public protests. March 1996 was further marked by the Marcopper Mining Disaster, possibly the worst environmental disaster in the country.[276] As a result, the Philippine Department of Environment and Natural Resources (DENR) revised the procedures for its EIS system just as the Malampaya project was about to commence.

The most important modifications were the inclusion of 'social acceptability'[277]

(International Finance Corporation: Washington DC, 2007). Solleza, C. M. and Barnes 'Shell Malampaya,' (Case study, unpublished, Asian Institute of Management, Synergos Institute: Makati City and New York, 2003).

276 In this incident, the mine-tailings dam of Marcopper Mining Corporation broke, releasing millions of tons of toxic material into the two main rivers which served as the freshwater and fishing resource of the capitol and main population center of the small island-province of Marinduque. The island and its populace have never truly recovered from that disaster. For more information, see UNEP Division of Technology Industry and Economics, 'MRF Incidents: Marinduque (Marcopper Mine) – Tailings Dam Failure, Philippines, March 1996', United Nations Environment Program, www.mineralresourcesforum.org/incidents/Marinduque/index.htm (Accessed 21 April 2008).

277 The EIA rules defined social acceptability as 'the result of a process mutually agreed upon by the DENR, key stakeholders, and the proponent to ensure that the valid and relevant concerns of the stakeholders, including affected communities, are considered and/or resolved in the decision-making process for granting or denying the issuance of an ECC'. Department of Environment and Natural Resources, *DENR Administrative Order No. 96-37 Revising DENR Administrative Order*

as a key criterion for issuing an Environmental Compliance Certificate (ECC), the introduction of a project 'scoping' stage preparatory to the actual EIA, and extensive public participation opportunities throughout the process. The revised rules tied these requirements into the 1991 Local Government Code, which obliged any national project taking place in or affecting the environment of any local government unit to be subject to public consultations and to the endorsement of the local government unit.[278] Thus, local endorsement became a pre-condition for the issuance of the ECC. This condition was consistent with the policy of local autonomy guaranteed by the 1987 Philippine Constitution. Acknowledging that any opposition or rejection by any of the affected communities could threaten the project, Shell-Oxy committed to undertake its EIA in accordance with the new guidelines, even though they took effect after the Malampaya EIA had commenced.

Shell-Oxy allocated 16 months beginning in November 1996 for compliance with the Philippine EIS system. The massive scale of the project required the participation of the local government units: 3 provinces, 2 cities, 14 municipalities, and scores of *barangay* (villages), which either hosted or were adjacent to the project's facilities. Beyond the vicinity of these was the site used to construct the massive concrete gravity structure of the production platform. The construction necessitated building a new dry dock in Agusuhin village in the province of Zambales, whose residents had to be relocated to make way for this facility.

In preparation for the EIA, the Pilipinas Shell Foundation, Inc. (PSFI), a foundation used by Shell for its charitable works in the Philippines, conducted informal meetings and community outreach interviews at the grassroots throughout the three provinces. In 1996, a consulting company was engaged to conduct the EIA. Aside from scientific and economic assessments, the EIA eventually also involved an extensive social assessment component involving seven scoping workshops, nine public consultations/validation sessions, five focus group discussions, three perception surveys, eight key informant interviews, and separate presentations to the *sangguniang bayan* and *panlalawigan* (municipal legislative councils and provincial legislative councils) of the local government units.[279] The proponents also met separately with the local chief executives concerned, down to the municipal level, and conducted a public information, education, and communication (IEC) campaign through print and radio.

Royal Dutch Shell, the prime contractor at the time, asserts that the input of the communities did influence the project's design. The informal consultations conducted prior to the actual EIA led to the decision to locate the pipeline entirely offshore, even though it was three times more expensive, instead of routing it over

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No. 21, Series of 1992, to Further Strengthen the Implementation of the Environmental Impact Statement System, (Department of Environment and Natural Resources, 1996) Article I, Section 1.0.cc.

278 *Republic Act No. 7160, An Act Providing for a Local Government Code of 1991*, 1991 (Philippines) Sec. 26 and 27.

279 Woodward-Clyde Inc., 'Environmental Impact Statement, Malampaya Gas Project: Final Report Appendices F and G' (DENR Environmental Management Bureau: Quezon City, 1997). Hereafter 'Malampaya EIS, App. F & G') (Woodward-Clyde Inc.: 1997)

land through the island of Mindoro,[280] to avoid affecting the rich biodiversity in Mindoro.

Although the government did not specify any minimum standards for a procedure to be regarded as a valid consultation apart from indicative examples of proof for the purposes of the EIS system, the activities enumerated above could be seen as rather extensive. The scoping stage and validation consultations were the most pivotal, since they were the main opportunities for the public to be formally informed and to interact with the project proponents. For the scoping sessions, participants were invited to various venues, usually the municipal hall, for an orientation about the EIA process, and then given information on the proposed project. Participants included the officials of the local governments, representatives of locally active nongovernmental organisations (NGOs), civic groups, and church and other community leaders, but the sessions were open to anyone interested. Meeting participants usually broke into groups to discuss possible effects, issues, and concerns generated by the proposed project. The results of the discussions were then presented at a plenary session. The outcomes of the scoping workshops were synthesized and validated in a second series of workshops in the affected areas, at which the proponent also presented measures intended to address the concerns raised. The results of these activities form part of the EIS, which after submission was subjected to public hearings and a third round of consultations by the DENR.

The overwhelming response of the participants revolved around perceived risks to their livelihoods and the direct benefits they felt their communities should receive from the project. The process documentation from the scoping and consultation stages, included in the proponent's EIS, details requests for direct benefits in the form of livelihood assistance, social development and infrastructure projects, funds, and various activities that the participants felt should be due to their respective communities. These responses were made in view of the perceived possibility of disaster and the publicised expectations of natural gas revenues to the national government and the country in general, but not to the local communities directly.

Throughout the consultations, and probably to ensure that objections and issues were not left unanswered to escalate into more serious actions, Shell-Oxy's public engagement strategy was flexible and not constrained to the EIA scheduled events. However, despite the extensive activities scheduled, the scoping process was still unable to account for some stakeholders and issues. There were at least two documented instances in which local stakeholders not identified during the scoping stage emerged much later in the EIA process with concerns that had been overlooked. In Palawan, the *Tagbanua* indigenous peoples later objected because their ancestral waters were thought to be traversed by or adjacent to the pipeline, and a group of pearl farmers objected that their operations would be placed at risk

[280] However, records of these initial consultations are not publicly available as they were not part of the formal EIS documentation. Facundo Roco, Executive Director of the PSFI at the time, asserts that due to these informal consultations, which revealed biodiversity and local community concerns, an onshore pipeline passing through Mindoro Oriental was not chosen as a first option. See Roco F. and Agabin, K. *Power From the Deep: The Malampaya Story*, Vol. 1 (Shell Philippines Exploration BV: Makati City Philippines, 2005) p. 39-40.

by a pipeline leak. Even after the ECC had been issued and construction was underway, there were two more instances in Mindoro Oriental. NGOs complained that proper consultations had not been conducted, and fishers protested the pipe-laying for fear of its impending impact on their fishing grounds. In all cases, Shell-Oxy responded by holding additional consultations and meetings with the groups to address the concerns raised. In hindsight, even sceptical NGOs from both Palawan and Mindoro appreciated the responsiveness of Shell-Oxy to the emergence of new groups and issues throughout the process.

One major and potentially damaging issue was the issuance of the ECC without the prior approval of the Palawan Council for Sustainable Development (PCSD). The PCSD is a separate regulatory body, unique to Palawan, established for the management of Palawan's sensitive environment, which is regarded the country's last frontier because of its relative underdevelopment and rich biodiversity.[281] Under a 1994 memorandum of agreement with the DENR, the prior approval and endorsement of the PCSD, as well as the prior endorsement of each of the local government units affected, was needed before an ECC could be issued. However, the ECC was issued in 1998 with only a certification from the Provincial Governor who was at the time also the chair of the PCSD. This endorsement did not bear the PCSD's name, nor that of other local government units in Palawan. Thus, when Shell-Oxy finally made a formal presentation to the PCSD in 1999, after construction was already underway, the lack of prior endorsements became a major local controversy that strained not only the province's relations with Shell-Oxy but also its relations with the national government. A significant exchange of position papers occurred between Shell-Oxy and the Palawan NGO community, which opposed the project because of Nigeria's negative experience with Shell. In the end, however, after a number of meetings and hearings and a review of its EIS and ECC, the PCSD approved the project. Despite their misgivings, the NGO community agreed to continue engaging the proponent by participating in the monitoring of the project's operations.

NGO participation in monitoring was formalised through the establishment of a Multi-Partite Monitoring Team (MMT) tasked with monitoring compliance with the terms and conditions of the ECC. It was composed of representatives of the national and local governments, provincial and municipal environment officers, NGOs, and community leaders. It had a two-tiered structure: each of the three provinces had its own provincial monitoring team, which in turn reported to an executive committee at the national level. In both cases, the composition was multi-sectoral. The sectoral monitoring teams maintained contact with counterparts at the municipal levels to carry out the MMT's monitoring functions.

Aside from requiring compliance with the regulatory parameters for environmental quality such as permissible emissions, the ECC also contained conditions beyond the scope of impact mitigation. For example, the proponent is required to develop and fund an information, education, and communication program to explain to stakeholders all of the project's environmental mitigation,

[281] *Republic Act No. 7611, An Act Adopting the Strategic Environmental Plan for Palawan, Creating the Administrative Machinery for Its Implementation, Converting the Palawan Integrated Area Development Project Office to Its Support Staff, Providing Funds*, 1992 (Philippines).

health, and safety measures. The campaign was to be implemented by a tri-sectoral team comprised of the DENR, the proponent, and 'a highly credible NGO'.[282] Most significantly, the proponent must implement a social development program including a comprehensive human resource development program, and 'gender-responsive livelihood projects, technical, vocational and entrepreneurial skills training programs, and sustainable livelihood projects'.[283] This program was initially undertaken by the PSFI, but since 2006 was taken over by the Malampaya Foundation, Inc., a new foundation established and funded by all the consortium partners.[284]

In a recent publication of five case studies, the World Resources Institute (WRI) presented the Malampaya project as the only example in which free, prior, and informed consent of the communities was successfully integrated into the business decision making, with resulting benefits in terms of costs and sustainability.[285] The case study focused on Sitio Agusuhin, where the concrete gravity structure was built, and the Province of Batangas, which hosts the gas processing plant and the three power plants. The report noted that the project's design went through significant changes due to interaction with local communities, and the proponents exerted considerable effort to establish and cultivate its relationships with the affected communities throughout the project's operations.[286] WRI also noted that although the ECC does not require the proponent to maintain community satisfaction and consent to the project, the MMT mechanism is an important means by which the public is able to participate in monitoring the project's operations and address any new concerns as they arise. This mechanism has indeed been tested several times since Malampaya began production.[287]

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282 Department of Environment and Natural Resources, *Environmental Compliance Certificate No. 9708-001-207c* paragraph 20.

283 Ibid., paragraphs 21-22.

284 In 2000, a year prior to full operation, Chevron Texaco of the United States and the Philippine National Oil Company bought a 45 percent and 10 percent stake, respectively, in the project.

285 Sohn, (ed.) *Development Without Conflict: The Business Case for Community Consent*, pp. 19-26.

286 Ibid.

287 For example, within the first year of operations, there were reports from Bulalacao, the southernmost municipality of Mindoro Oriental, that the pipeline, located within 5 kilometres from its shores, was generating noise that was keeping the fish away from the municipal fishing grounds. This was also reported in the Municipality of Pola, further north. These reports were sent to the MMT in April 2002, and in response a scientific team was commissioned to conduct noise-monitoring activities. After two monitoring expeditions in November 2002 and January 2003, the team did not find evidence of the reported unusual noise. Sometime in 2005, an unusual algal bloom (red tide) was sighted in the waters of northern Palawan where the pipeline passed through on its way to Mindoro. The local communities reported this to the MMT because they thought it was the result of a pipeline leak. The ensuing investigation revealed that the bloom actually originated somewhere in the northeastern waters of Palawan and was being carried by ocean currents on a westerly course through the area. In 2006, the Palawan monitoring team investigated a reported oil spill that washed up along the shores of El Nido, the municipality closest and adjacent to the offshore production platform took samples and sent them for analysis in Manila. Although the origins of the oil slick could not be ascertained, analysts concluded that it was likely to have come from fishing boats, ocean-going vessels, or other drilling activities west of Palawan rather than the natural gas production platform itself. These and

However, what the WRI report does not address is the fact that consent to the project could not be characterised as being entirely free nor unanimous among all the local government units involved, especially in the 'non-site' provinces. The difficulty with involving such a large number of communities is the greater improbability of consensus, considering the many different impacts, perspectives, expectations, and interests. In Palawan, not all of the affected local government units issued the prior written endorsements officially required, and PCSD's consent came after a *fait accompli* when the project was already underway. Several municipalities in Oriental Mindoro withheld their endorsements, and a considerable number submitted ambiguous, qualified, and conditional endorsements, which indicate that they had not yet clearly consented to the project when the EIA was completed.[288]

4.1.3 Evaluation

People commonly see EIAs as scientific and methodological procedures to determine the probability of risks and impacts and identify appropriate means to mitigate adverse effects of an activity: EIAs are intended to aid planning and decision making. This conception is manifest in Principle 17 of the Rio Declaration,[289] which links EIAs with national government decisions that affect the environment. However, in recent years attention has been called to the need to broaden the scope of the EIA process. Traditional EIA tools and methodologies emphasize the planning stage, concentrate on biophysical factors, and are ill-equipped to fully comprehend and balance the scope of factors that a society may deem relevant for making decisions. One of the most important categories of non-biophysical factors are social concerns, which straddle the economic, political, and cultural spheres and which can influence the process of decision making. The Akwé:Kon Voluntary Guidelines concretely manifest the need to deliberately and systematically address these factors in the case of biodiversity conservation.[290] It is obvious that for 'sustainable development' and 'sustainability' to be achieved, activities must be not only capable of biophysical perpetuation, but also 'socially sustainable', that is, permitted and accepted by society to be continued indefinitely. Thus, social acceptability is a threshold criterion for sustainability, even prior to biophysical and economic considerations.

This calls attention to the need to inquire into the very conception of social acceptability in the context of governance and the relationships between the national government (and the polity it symbolizes) and local government units (and the local communities they represent). If society is viewed not as a monolithic and

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other instances indicate that the MMT is indeed an active and responsive mechanism sensitive to reports and observations from the local communities.

288 Woodward-Clyde Inc., 'Malampaya EIS, App. F & G'

289 United Nations, 'Declaration on Environment and Development' UN Doc.A/CONF.151/5/Rev.1. (31 I.L.M. 814, 1992).

290 Secretariat of the Commission on Biological Diversity, *Akwé: Kon Voluntary guidelines for the conduct of cultural, environmental, and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities*. (Secretariat Convention on Biological Diversity: Montreal, 2004).

pyramidal social organisation, but rather as a fluid and dynamic network of institutions with varied degrees of autonomy at different levels, then consent (and social acceptability) must be produced not by hierarchy-based regulatory or administrative decision- making processes, but by processes of bargaining between competing social actors and institutions.[291]

The Malampaya case study is a vivid example of the social bargaining that can take place within and after an EIA exercise. What happened was essentially an informal risk – benefit assessment regarding the entry of the project into or near the community's perceived territory. The subject of bargaining was an acceptable trade-off for the perceived unwanted exposure to risks, and the intuitively unequal allocation of benefits. This social bargaining was complicated by the multi-stakeholder environment, which increased the difficulty of consensus in proportion to the number and diversity of stakeholder communities. Although the WRI study showcases Malampaya as a good case of free, prior, and informed consent with respect to 'site' communities in Zambales and Batangas that hosted the construction and landfall facilities, a different picture emerges with respect to the 'non-site' communities in Palawan and Mindoro Oriental where it is more difficult to characterize the outcome.

In Palawan, when the EIA was conducted, there was a jurisdictional conflict between the DENR and the PCSD over the implementation of the EIA regulations. In addition, there was still no clear guidance on the role and process of scoping and public consultations; in fact, the Malampaya EIA was the forerunner and testing ground for EIAs that followed. For example, when the PCSD called the proponent to account for its possession of an ECC without PCSD endorsement or approval, it was also stating that there was a shortcoming in the requirement for prior and informed consent due to the lack of the corresponding endorsements of the PCSD and all local government units affected.

Mindoro Oriental likewise may not have unanimously granted consent to the pipeline, which lies in the waters of 12 of its 15 municipalities. A few municipalities like Naujan and Bulalacao actually withheld consent by not issuing any endorsements of the project, while a considerable number of municipalities issued only qualified certifications indicating that although the proponent consulted them about the project, they had yet to issue any resolutions of approval or disapproval.[292] The difficulty, however, is that the law is silent as to whether a

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[291] This is the challenge posed by the concept of governance in modern society. The concept of the network society was proposed in Manuel Castells. *The Rise of the Network Society*. 2nd ed. (Malden; Oxford; Victoria: Blackwell Publishing, 2000), while the development of the concept of public governance is described in Bovaird, Tony. 'Public Governance: Balancing Stakeholder Power in a Network Society'. *International Review of Administrative Sciences* Vol. 71, No.2, 2002, pp. 217-228 . The resulting complexities and challenges of governance are described in Cash, D. et al.. 'Scale and cross-scale dynamics: Governance and information in a multi-level world' *Ecology and Society* Vol. 11, No. 2, p. 8.
Available at www.ecologyandsociety.org/vol11/iss2/art8/

[292] Woodward-Clyde Inc., 'Malampaya EIS, App. F & G'.(Woodward-Clyde Inc.: 1997).Copies of the submitted municipal certifications are included in Appendix F. Non-endorsement by Naujan and Bulalacao were verified in field interviews; this means that the municipal councils of the said municipalities did not issue any formal resolutions about the project.

pipeline passing through municipal waters gives rise to any legal obligation on the part of the pipeline's owner, or entitlements on the part of the municipality.

Despite the legal ambiguities in both cases, the parties found the means to arrive at a *modus vivendi* through the the ECC requirement for provision of a social development program and participation in the MMT. These conditions became the basis for continuing engagement between the proponent and the local governments. The EIA process still resulted in stringent parameters that enabled Shell-Oxy to design the project in a way that minimised its operational environmental impact and address the environmental risks and safety concerns. The ECC framed a direct dialogue with the stakeholders around the themes of environmental compliance and social development assistance.

Mindoro Oriental was not originally regarded as an equal participant in the MMT because it was considered a non-site province; at first it was only entitled to a member in the executive committee and did not have its own provincial monitoring team. But its representatives argued that because Mindoro Oriental was adjacent to the pipeline, and because the pipeline was within the jurisdictional waters of the municipalities, Mindoro Otiental was entitled to equal footing with Palawan or Batangas. They argued that the project was an integrated whole and not compartmentalised into the production platform, pipeline, and gas plant. The proponent was eventually persuaded, and a separate provincial monitoring team for Mindoro Oriental was belatedly organised. The province continues to benefit from the project's social development programs.

Palawan has been most active in project monitoring through participation in the MMT, with the PCSD and the NGO representatives being especially vigilant. The proponent's social development programs have been pursued in earnest, particularly those related to the provision of health services for the poor.[293] The MMT is currently struggling with how to properly monitor and determine compliance with the social development program condition under the ECC, since monitoring the success of livelihood projects and other social programs are not within the competence of most of the MMT's members. Thus, Palawan continues to seek accountability from the proponent implying that the consent secured, though possibly flawed initially, is nonetheless ratified for as long as the proponent fulfils its public commitments toward environmental safety and social development.

4.1.4 Conclusion

EIAs can become the basis for broader and more flexible mechanisms for social interaction. They can not only to establish conditions and standards for environmental monitoring, but also establish a social bargaining process between the proponent and the affected stakeholders. As indicated earlier, a flexible, continuing, and open-ended engagement is key to the social acceptability of Malampaya's operations. Through such engagement the proponent and

[293] The proponent sponsored a provincial anti-malaria campaign which is seen as having been successful in substantially reducing malaria cases in the years after its commencement, and is currently supporting an innovative *barangay* health services and insurance program.

stakeholders are able to continually make claims and negotiate settlements that influence environmental management options and decisions. Similar to a contract, the EIA established the terms and conditions, as well as the venue, for a *modus vivendi* about the continuing impact of the project and it operations on the adjacent communities, which regard it as a source of continuing risk as well as an entitlement for compensatory benefits. Aside from pioneering social acceptability, Malampaya also provides an example by which the EIA process can contribute beyond planning into long-term public engagement and environmental governance. It demonstrates a possible mechanism by which prior missteps and flaws in the regulatory process may be addressed and resolved while still protecting environmental conditions. Because of the MMT and the ECC conditions, the proponent is obliged to ensure its best performance and responsiveness to stakeholder concerns and issues. This is important especially in cases where projects are time- or cost-sensitive and stakeholders are so numerous and varied that they may not have all been involved at the same level, or according to expectations, throughout the decision-making process. Continuing social acceptability is essential to social sustainability, which is crucial for ensuring that environmental management is not limited to scientific or regulatory activities, but also evolves into a governance framework for sustainability that clearly supports and addresses social needs.

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4.2 Public Engagement and Local Benefit Sharing in the Northwind Bangui Bay Project, Philippines

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Abstract

The first wind farm in the Philippines, the Northwind Bangui Bay Project, at the foreshore of the coastal Municipality of Bangui in the Province of Ilocos Norte on the northwestern tip of Luzon facing the South China Sea, benefits not only its operators and the country generally, but more importantly, the local communities and their province. This article examines how the project established 'social sustainability' through integration with the affected stakeholders, continuing public engagement, and by assuring that tangible benefits of the operation of the wind farm were concretely and visibly shared.

4.2.1 Introduction

The first wind farm in the Philippines, the Northwind Bangui Bay Project, is located on the foreshore of the coastal Municipality of Bangui in the Province of Ilocos Norte on the northwestern tip of Luzon facing the South China Sea. Unlike some wind-farm projects elsewhere in the world, this one was welcomed by the affected communities without the opposition often associated with wind-farm proposals. The wind farm directly benefits not only its operators and the country generally, but more importantly and tangibly, the local communities and their province. This wind farm offers a case study for establishing 'social sustainability', to which relatively less attention has been paid by sustainable development literature.

4.2.2 Description

Among the pillars of Philippine energy policy has been self-reliance and energy independence through diversification of energy sources.[295] Since the 1970s, the Philippines pursued a diverse energy mix based on conventional fossil fuels and alternative sources such as geothermal and hydroelectric energy. An acute energy shortage in the early 1990s led to accelerated growth in fossil fuels due to the need for additional conventional thermal plants.[296] Renewable energies, however,

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295 See Philippines Department of Energy, *Mandate, Mission, Vision* available at www.doe.gov.ph/About%20DOE/Mandate,%20Mission,%20Vision.htm, 2005 (accessed 5 April 2008); Also Philippines Department of Energy, *Energy Sector Accomplishments in 2005: Energy Independence* 2006, available at www.doe.gov.ph/EnergyAccReport/Energy%20Independence.htm, (accessed 4 April 2008); and Philippines Department of Energy, *Philippine Energy Plan 2006,* available at www.doe.gov.ph/PEP/PEP%202006.htm (accessed 4 April 2008).

296 See Energy Information Administration, *Country Analysis Briefs: Philippines* (Energy Information Administration 2006) available at www.eia.doe.gov/emeu/cabs/Philippines/Electricity.html, 2006 (accessed 4 April 2008). Originally, the Bataan Nuclear Power Plant constructed under the

remained an option, and incentives for the use of ocean, solar, and wind power were available even in 1997.[297] Wind power is among these potential resources, and a survey completed in 2001 by the U.S. National Renewable Energy Laboratory confirmed significant potential for the country.[298]

During an industry conference on electrification in 2000, Neils Jacobsen, a Danish expatriate and entrepreneur, happened to meet Ferdinand Dumlao, a lawyer and resident of Ilocos Norte, an agricultural coastal province in the northwestern tip of Luzon, the second largest island of the Philippines. Jacobsen at the time was promoting the development of wind power, and Dumlao, a close ally of the provincial governor, was interested in the project's potential as a solution to his province's perennial power reliability problems. Ilocos Norte is located so far at the northern periphery of the Luzon power grid that it receives less voltage than the national standard, and must endure periodic fluctuations and outages. There were no power plants in the province because the provincial government did not welcome conventional plants that caused pollution.[299] For the next couple of years, the two worked together to secure the governor's support, locate a suitable area, have a wind assessment conducted, organize the Northwind Power Development Corporation (Northwind for short) based in Manila, and prepare proposals for funding by the Danish Development Agency (DANIDA) and to avail itself of the World Bank's Clean Development Mechanism (CDM).

DANIDA eventually approved the proposal as a development assistance project subject to the necessary regulatory compliance. The wind farm is located in the Municipality of Bangui, an agricultural town on the shores of Bangui Bay facing the South China Sea. It occupies a foreshore area 9 kilometres by 100 metres with 20 towers each 70 metres high mounting turbines with blades 82 metres in diameter. The wind farm was planned to be completed in two phases: first 15 towers were erected in 2005, followed by 5 more towers in mid-2008. The area of the first phase traverses the coastal frontage of three coastal *barangay* (villages) that depend on farming and seasonal fishing; the second phase would extend into two more *barangay*. A transmission line connects the wind farm to the Ilocos Norte Electric Cooperative (INEC), which holds the franchise for electricity distribution in the province and is located 57 kilometres away.

Since the wind farm was acceptable to the national and provincial levels of government, local social acceptability was the key regulatory issue. These

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administration of President Ferdinand E. Marcos was to have borne the additional demand, but the project was mothballed just as it was finished after the Peoples Power Revolution of February 1986.

297 *Executive Order No. 462, Enabling Private Sector Participation in the Exploration, Development, Utilization, and Commercialization of Ocean, Solar, and Wind Energy Resources for Power Generation and Other Energy Uses*, 1997 (Philippines,

298 Elliot, D. et al., *Wind Energy Resource Atlas of the Philippines* (National Renewable Energy Laboratory: Golden CO, 2001).

299 Personal interview with the Pedro S. Agcaoili, Provincial Planning and Development Officer, Ilocos Norte, 7 March 2007. In a separate personal interview with Jose Ildebrando Ambrosio, Esq., Director and Corporate Secretary, Northwind Power Development Corporation, 15 March 2007, stated that some years prior, the East Asia Power Company offered to establish a conventional power plant in Ilocos Norte, but was refused.

communities are politically represented by the Municipality of Bangui and the five *barangay*. Social acceptability is an essential threshold to ensure that the affected communities allow the project activity to continue over the long term. Social acceptability hinged on two factors: compliance with the public consultation requirements and local benefits from the project.

Under the implementing rules of the Philippine environmental impact statement (EIS) system, the wind farm was not required to undergo a full-blown EIA, and needed to submit only an Initial Environmental Examination Report.[300] But in order to qualify for the Prototype Carbon Fund of the World Bank, a complete EIA was needed under the World Bank's 'Safeguard Policies'.[301] Northwind therefore commissioned a separate and more comprehensive EIA.[302] However, regardless of the format and depth of detail, both the Initial Environmental Examination Report and the World Band Safeguard policies required public consultations with the potentially affected local communities. In addition, a consultation requirement for any project that could affect a community's natural environment is embedded in the Philippine Local Government Code.[303] The convergence of this consultation requirement from three separate vectors necessitated that Northwind ensure the social acceptability of the project.

The Public Engagement Process

Northwind's approach to public consultations could best be described as simple, down-to-earth, and personal. Neils Jacobsen and Ferdinand Dumlao, as Corporate President and Chairman of the Board respectively of the company, personally went to each of the communities, introduced themselves, and established personal rapport and open communication channels with the key leaders and citizens. They explained every aspect of the project and forthrightly responded to concerns as they were raised. They did this as early as during the wind assessment phase, throughout the hearings and consultations required for the issuance of the government clearances, and every time they visited the area. They had clearly established continuing and direct relationships with the community residents and leadership. The establishment of these relationships qualified as a public

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300 See *Presidential Decree No. 1586 Establishing an Environmental Impact Statement System, Including Other Environmental Management-Related Measures and for Other Purposes,* 1978 (Philippines). *DENR Administrative Order No. 30, Series of 2003, Implementing Rules and Regulations of the Philippine Environmental Impact Statement (EIS) System*, 2003 (Philippines) and Department of Environment and Natural Resources, *Revised Procedural Manual for DENR Administrative Order No. 30, Series of 2003* (Department of Environment and Natural Resources: Quezon City, Philippines, 2007).

301 The World Bank, *The World Bank Operational Manual, Operational Policies Op 4.01: Environmental Assessment.* (The World Bank: Washington D.C., 2007) available at go.worldbank.org/9LF3YQWTP0, 2007 (accessed 20 April 2008).

302 Gaia South Inc. and Northwind Power Development Corporation, *Marine Ecosystem Baseline Study for the Northwind Project*, Vol. 1 (unpublished: Northwind Power Development Corporation, Pasig City, Philippines, 2004). Electronic copy available from The World Bank, 'Philippines: Northwind Bangui Bay Project' available at web.worldbank.org/external/projects/main?pagePK=64283627&piPK=73230&theSitePK=40941&menuPK=228424&Projectid=P087464, 2008 (accessed 21 April 2008).

303 *Republic Act No. 7160, An Act Providing for a Local Government Code of 1991*, 1991 (Philippines), Sec. 26 and 27.

engagement, not merely a consultation, process.[304] 'Public engagement' as used here refers to a broad interactive process that results not only in reaching a decision for a pre-defined issue, but that can itself change the context and scope of issues to be resolved. It also implies that the process will continue beyond the decisions.

As a lawyer and resident of the nearby town of Pasuquin, Dumlao is well-respected in the communities. He spoke the same language as local residents and the establishment of direct personal linkages clearly contributed to the clear communication of the project's intentions and impacts. Today, he acts as the main intermediary between the community leaders and the company. This is a significant function considering that he is also the Chairman of the Board of Directors of the company.

Although a Danish expatriate, Northwind President Jacobsen's regular presence was also important for the community leaders because they were able to directly relate with a real person rather than an abstract corporate entity. Jacobsen also felt that because the two leaders were present locally, the people could see for themselves that they were being open and honest about the project whenever they answered questions.

The establishment of direct relationships allowed the project to be designed with accommodation of local activities in mind. The main concerns raised were the possible impacts on fishing in the bay and the gathering of decorative pebbles from the foreshore area. These concerns were addressed by assuring the community of continued complete unrestricted access to the wind farm. The physical impact of the project was reduced to the areas occupied by the towers' bases. Jacobsen notes that residents of the communities now secure the area on their own, and even use the shadows of the gigantic towers as shades for their livelihood activities on the beach.[305]

Local Benefit-sharing

As a power-generating company, Northwind does not have a franchise to distribute electricity; this function is undertaken by INEC. Thus, Northwind cannot directly provide electricity to the local community. However, the project has provided other significant benefits to the communities before and after it commenced operations in May 2005.

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304 The literature on public participation often posits a continuum of actions for the public ranging from merely being informed on one end, to actually taking part as a decision maker on the other. Consultation is usually located somewhere in the middle ground between the two. See for example, Bass, S., Dalal-Clayton, B. and Pretty, J. *Participation in Strategies for Sustainable Development* (International Institute for Environment and Development: London, 1995). The continuum of public participation methods have also been adapted for the community-based co-management framework, such as that elucidated in Pomeroy, R.S., and Berkes, F. 'Two to tango: The role of government in fisheries co-management', *Marine Policy*. Vol. 21, No. 5, 1997, pp. 465-480.

305 Personal Interview with Neils Jacobsen, President, Northwind Power Development Corporation, 15 March 2007.

At the outset, the law requires power development projects to give priority to local residents for jobs during the construction phase. Northwind employed up to 220 people during construction, and now employs 20 people, many of whom are from the locality, for regular operations and maintenance. It has also sponsored the education and training of three engineers from the province who will take over the facility's technical management that is currently provided by foreign contractors.

Under prevailing energy regulations,[306] a local government unit hosting a power generating facility is entitled to a royalty of 0.01 peso for every kilowatt hour generated.[307] The revenue is to be used for electrification (25 percent), development and livelihood (25 percent), and reforestation, watershed management, health, and/or environmental enhancement (50 percent). The royalty is distributed among the three levels of local government according to a principle of radiating benefits. The three *barangay* where the facility is actually located receive 25 percent, the municipality retains 40 percent, and the province receives the remaining 35 percent. To the Municipality of Bangui, the project has been worth about 2 million pesos annually. These revenues are indeed significant when one considers that Bangui's net income was only 4.9 million pesos in the year prior to the establishment of the wind farm.[308]

Pursuant to the same regulations, Northwind has committed to set aside funds for social development projects for Bangui. As of 2006, after the first year of operations, programs in connection with the tourism potential of the area were under consideration. As the first operational wind farm in the country, Northwind has drawn substantial local tourism. Bangui itself is a pleasant and quiet town, next to the already-developed beach destination of Pagudpud located on the northern end of Bangui Bay. Jacobsen noted that to harness the wind energy, they could have arranged the turbines into a compact cluster; however, they deliberately spread the turbines in a line along the coast occupying a visually larger and longer area in order to make it more aesthetically pleasing when viewed against the landscape. This configuration was intended to boost tourism for the municipality. Travelers often stop at Bangui to see the wind turbines, or come by boat from Pagudpud beach resorts. Educational tours for engineering students from the Don Mariano Marcos State University in Batac, another town in Ilocos Norte, have become common. Northwind sees the tourism development as a possible complementary livelihood source for local residents, and thus plans to build a viewing deck, information center, and multi-purpose hall in coordination with the municipal government.

Bangui also benefits directly through the business taxes it has been able to collect from the operation of the turbines. In its second year of operation, Northwind paid its first annual real estate taxes of 3.9 million pesos well ahead of the tax deadline as part of its corporate social responsibility policy. This alone represents more than a sevenfold increase in Bangui's real property tax revenue.

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306 *Department of Energy Regulations No. 1-94, Rules and Regulations implementing Section 5(i) of Republic Act No. 7638 of 1992, otherwise known as the Department of Energy Act of 1992*.

307 As of April 2008, US$1 was equivalent to 42 Philippine pesos

308 Commission on Audit, *Annual Financial Reports Volume III-B: Local Governments*, *Annual Financial Reports* (Quezon City: Commission on Audit, Philippines, 2005), p. 258.

Northwind also pays an annual business tax of 500,000 pesos. The increase in local revenues promotes Bangui's classification from a fifth class to a fourth class municipality under the Local Government Code. This is important because a municipality's fiscal performance is used by the national government to determine budgetary allocations, entitlement to foreign and local loans and grants, and allotment of shares in national revenues.[309] According to municipal budgeting rules, the real estate tax revenues are divided between the municipality and the host *barangay* where Northwind's facilities are actually located. So far this has resulted in additional annual revenue of about 120,000 pesos for the each *barangay*. Village officials plan to use the additional funds to improve their meager public health services and facilities.

The province sees the project as a major strategic gain for its economy. Northwind now supplies 40 percent of the province's electrical needs pollution free and priced at a 7 percent discount. With the stabilization of the electrical output, it is hoped that the province can move forward with its long-term economic development plans that rely on agriculture and light manufacturing. It has also incorporated the project into its recommended tourism site listings, and hopes to attract other wind farms for other suitable areas.[310]

4.2.3 Evaluation

In this case, the legal EIA requirement was abbreviated by the absence of a full EIA and use of only an Initial Environmental Examination Checklist, which is mainly a questionnaire answerable by 'yes', 'no', and short explanations in bullet-form. The extended EIA was not part of the public sector decision-making process, but rather a requirement of a financial institution. The absence of a full EIA, however, did not dispense with the obligation to directly interact with the local community through public consultations. As noted, even without the EIA, the local government code would have still required this consultation. Thus, the social purpose of the EIA process, which is to enable the public to become aware of the activity, provide inputs, raise concerns, and establish linkages with the project proponent, was still achieved. While the approach taken by Northwind may be characterized as being personally driven by its leaders, it has established close and direct relationships and long-term engagement between the local communities and the company. This engagement contributed to the company's integration into the community, not merely as another business operation sited within the community's territory.

Northwind, through its executives, was integrated into the local community through the public engagement process. Undoubtedly, the facts that the director of the company was a local resident, and that there was direct and constant interaction between the CEO and the locals, played a key role in bridging the two

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309 Municipalities are divided into six classes depending on their income, with the sixth being considered the poorest. See *Republic Act No. 7160, an Act Providing for a Local Government Code of 1991*, 1991 (Philippines), Sec. 284-288; and Bureau of Local Government Finance, *LGU Fiscal and Financial Profile, CY 2004 Statement of Income and Expenditures*, Vol. 1 (Department of Finance: Manilla, 2005), pp. 42-43.

310 Earlier, another wind farm had been proposed in the neighboring town of Burgos, also on the shores of Bangui Bay, but it was not implemented prior to Northwind's operation.

entities. It should also be noted that from the beginning Northwind was concerned not only with its own profit, but also with benefiting the local community. This is manifest in its initial design decision and its subsequent full and unreserved compliance with the royalty, taxation, and local benefit regulations.

Public participation is generally assumed to be needed to improve the quality of public decision making in order to avoid or mitigate environmental impacts. This is clearly reflected in Principle 10 of the Rio Declaration, which asserts that 'environmental issues are best handled with participation of all concerned citizens, at the relevant level', and conditions such participation upon access to information and opportunity to participate in decision-making processes, enforceable by judicial and administrative proceedings if necessary.[311] Because it usually happens in the planning stages, public participation is often seen as a component of administrative processes. Much of the literature on public participation revolves around finding the role and procedures for the public to ensure that the decision makers make the 'right' decisions in the 'right' manner. This concept of public participation is reinforced by the principle of precaution, which also seeks to engage the greater public in environmental decision making to better identify and anticipate the widest possible range of risks and impacts before decisions are made.

The concept of public participation needs to be reconsidered in light of its potential for establishing relationships between communities and entities engaging in activities that affect the environment as well as its contribution to expanding the information base for decisions. This requires a shift in perspective from public consultations, which imply a relatively short-term procedural stage, to public engagement, which is long term and extends beyond procedures. As in the case of Northwind and Bangui, such a perspective allows the consideration of opportunities for partnership and synergy between the project proponent and the host community that can result in decisions that are not only environmentally sound but, more importantly, socially beneficial and relevant.

The principle of public participation should not be limited to contributing to and improving decision making. After decisions have actually been made, public participation should extend to tangible benefits to the public that accrue from such decisions. This ensures that public participation processes do not become merely procedural and bureaucratic mechanisms for legitimizing decisions. If the affected public has a tangible stake in the outcomes, whatever they may be, and beyond simply non-disturbance, they would have a greater interest in substantial and meaningful participation. The realization of such interests establishes a concrete linkage between the activity and continuing community participation and/or consent.

In this case, the Bangui wind farm generates direct benefits to the host community by way of tangible revenues and revenue opportunities. Not only the national government or the company receive the financial benefits of clean power generation, but also the local government units. The revenue benefits that flow to

311 United Nations, 'Declaration on Environment and Development', UN Doc.A/CONF.151/5/Rev.1. (31 I.L.M. 814, 1992).

them through royalties, taxation, a trust fund for social development, and an informal partnership with the energy company, directly provide them with tangible and useful economic revenues that can be turned toward social development needs. Even clean technologies and environmentally friendly activities take up space and resources, and to the extent that they do so within any community, they may represent a reduction in the community's useable space and resources. This may be a disincentive for communities to welcome them, unless continuing compensatory and cooperative benefit mechanisms such as those in this case study are present.

4.2.4 Conclusion

The public consultation and engagement process must be seen as an opportunity for integration of a project proponent into the affected host community. Local integration proves social acceptability; becoming part of the local community and the social landscape is the ultimate expression of social sustainability. For sustainable development to equally promote human and social development, there is a need to include benefit-sharing into the concept of public participation. The case of Northwind is a good example of how social sustainability can be established through simple and direct interaction and integration with the affected stakeholders and by assuring that the benefits of an activity are concretely and visibly shared. Social sustainability in turn is vital to rendering environmental policy and management less vulnerable to the dangers of changing political platforms or disempowering bureaucratic habits. Governments can then become more resilient when the stakes in long-term sustainability are embedded in a diverse range of social actors and institutions.

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4.3 The Aldinga Arts Ecovillage

Karen Bubna-Litic[312]

Abstract

This case study examines the governance issues in an ecovillage in South Australia. People in the community wanted to work in a flat and equitable structure. What is the best governance structure to accommodate this? The community also wanted to exhibit best practices in terms of environmental sustainability including development of an active triple bottom line, appropriate housing for different levels of income, the empowerment of all members of the community, and active engagement with the broader community. This presented many challenges and there have been varied levels of success in each of these areas. However, successes have resulted from the commitment of the community to people-oriented governance. This case study evaluates the responses to various sustainability challenges posed by this intentional community and identifies some of the success factors to be applied for governance for sustainability.

4.3.1 Introduction

'Ecovillages can be likened to yoghurt culture: small, dense and rich concentrations of activity whose aim is to transform the nature of that which surrounds them'.

Jonothan Dawson, *Ecovillages*[313]

Ecovillages remain peripheral to the mainstream debate on sustainability. They are often seen as 'nice' for others but not practical. The world's push towards growth and globalisation is in direct contrast to the ecovillage philosophy of voluntary simplicity and greater self-reliance. And yet, globalisation, with its reliance on agricultural produce being transported thousands of kilometers, may be withering due to increases in fuel prices and the recognition of the impacts of climate change, including the decline in food supply, decreasing availability of water, and loss of soil fertility. A more sustainable society will need to be locally based and decentralised and people will need to become more knowledgeable about their bioregion. This was some of the thinking behind the original concept of the Aldinga Arts Ecovillage (AAEV), whose founders believed in the power of working together to improve the social and environmental aspects of our Australian suburban lifestyle.

AAEV is a sustainable housing development located in Aldinga, a coastal village in the southern suburban fringe of Adelaide, South Australia. It is an intentional community based on the principles of permaculture with a focus on the arts and the environment. The philosophy of the Village community is based on 'three pillars' – social systems, economic systems, and bio/environmental systems – with a vision of 'Caring for the Earth; caring for people; living creatively –

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313 Dawson, J, *Ecovillages: New Frontiers for Sustainability*, (Green Books: Devon, 2006).

together'[314]. AAEV is built on 33 hectares and when completed will accommodate 168 residences, including 24 low-income community residences, and 10 commercial sites on 17 hectares, with the remaining 16 hectares being an organic farm. The farm includes a treatment plant that recycles waste water for irrigation, lagoons, tree buffers, wood lots, community plots for individuals, and lease arrangements for organic food crops, all developed on permaculture principles. Additional open space allows for village commons and community gardens and orchards. All of the road reserves are planted with food-bearing trees. The first house was completed in 2003 and at present there are approximately 40 completed dwellings.

The community prides itself on aiming for a governance structure that empowers all members of the community and this reflects a worldwide increase in the participatory nature of governance, with a UN Development Programme (UNDP) study showing that for the first time a majority of the world's people live in democratic regimes.[315] Having an arts focus has allowed the community to run arts workshops and an arts ecomarket. The community has also established the village green preservation society, which creates a non-threatening community in music. The nature of the village is that people want to work in a flat structure because of what they see as issues of equity. However, working in this way can have its disadvantages. It can result in lowest-common-denominator decisions and people may be reluctant to take responsibility. For example, after a successful run of arts markets during 2005-2006, no markets were held in 2007. There has been a similar slowing in the progress of the farm and with a printed newsletter distributed in public places around Aldinga.

How do you bring things forward? Is there a need for a structure or can it be done organically? How do you work with the resistance that inevitably comes up? What sort of leadership / governance model is best suited to the aims of the ecovillage? Are formal positions of leadership needed? Is the community fearful? Is there a fear of success or fear of disintegration of community? This case study will explore some of these questions.

4.3.2 Description

History and background

For all of the advantages that an ecovillage can offer in terms of living in a sustainable community, many aspiring ecovillages never get off the ground because of difficulties such as identifying and building a core group, finding the land, working with planning authorities, raising investment capital, setting up a suitable legal structure, putting up buildings, agreeing on decision-making structures, making and distributing income, and working with conflict.

Before looking at the outcomes and successes of this ongoing project, I will describe the background in terms of the above factors. The history of the ecovillage informs much of the existing governance structures. In the early to mid-

314 www.aaev.net

315 UN Development Programme (UNDP), *Human Development Report 2002: Deepening Democracy in a Fragmented World* (Oxford University Press: New York, 2002).

1990's, a group of artists, interested in art and nature and a permaculture group, were independently looking for land to set up a community. The artists joined with energy architect John Maitland, who was interested in developing a community around environmental design, but their focus was more on a vibrant arts community. At the same time, permaculturalist Steve Poole's co-housing development fell through when the new government withdrew funding. He had been setting it up as a co-operative but the co-operatives legislation in South Australia didn't allow for private equity funding and so when government funding was withdrawn, he was looking for a new permaculture project. It wasn't until the introduction of the Community Titles Act of 1996 (South Australia) that a suitable legal vehicle was found under which the vision for the ecovillage could be implemented. This Act provides for the division of land into lots and common property and for the administration of the land by the owners of the lots. In the late 1990's the South Australian state government, through its Land Management Corporation (LMC), gave the group an option on the land it now holds. In 2001, the group was told by council that its option was about to expire and under the Community Titles Act of 1996, the community could not be the developer. Therefore, a development company was formed with five shareholder/ directors. Later, it was joined by Lou de Leeuw, an accountant, who set up a structure to raise money to buy the land and raise the investment capital. Once the group showed its ability to develop the land, the development application and subdivision plan was approved. Up to that point, the council did not think that its dream could be translated into reality. Bringing in a professional, who could set up a viable financial structure and liaise with the authorities, was essential in getting the grant of land. The current directors of the development company are John, Steve, and Lou. In line with the aspirations of the founding group, the company has been treated as a not-for-profit organisation whereby any surplus funds are put towards community resources.

Under the Community Titles Act of 1996, the community had to develop a community scheme and by-laws. A three-day workshop was held to design the village and the by-laws. The community at the time comprised 20 families. The by-laws cover such things as development of lots, ecologically sustainable development, animals, supply of water and sewerage treatment, and the electronic communication system. The Community Corporation[316] can enforce the by-laws and the development contract and a person who fails to comply with the by-laws is guilty of an offence, which carries a maximum penalty of $500. The philosophy of the village is that this penalty is not to be used as a threat of enforcement. Rather a philosophy of consensus – coupled with active encouragement and education – should be enough to get people to comply.

The collective vision of AAEV is 'Caring for the Earth; caring for people, and working creatively – together'. The village salutes the indigenous philosophy of 'people belonging to the land' in contrast to the European philosophy that land belongs to people; it recognises that traditional philosophy offers valuable

316 'Community corporation' means a corporation established when a plan of community division is deposited in the Lands Titles Registration Office; s3 www.austlii.edu.au/au/legis/sa/consol_act/cta1996224/ AAEV is a community corporation registered under the Community Titles Act of South Australia 1996. See www.aaev.net/management/index.html

teachings towards a more sustainable way to live in community. The founding members of the development company, all of whom owned land in the village, had the following objectives in setting up the ecovillage: they wanted to achieve an active triple-bottom-line development, a community developed on permaculture principles, appropriate housing for different levels of income, the empowerment of all members of the community, and active engagement with the broader community. Community by-laws were developed to reflect these objectives.[317]

Legal and governance structures

Under the Community Titles Act of 1996, a community corporation must be established. The owners of the lots are members of the corporation. There are three statutory appointments under the Act – a presiding officer, treasurer, and secretary. The Act provides for the establishment of a management committee but otherwise provides for no other governance structures. It provides for unanimous resolutions for amendment of the community plan and for a whole range of activities concerning common property. These provisions have caused AAEV some concern whereby decisions have been delayed for lack of a unanimous vote. The governance committee is currently looking at a way of amending the law so as not to require unanimous decisions. All other decision making in the village is by consensus.

The governance structure of AAEV includes a management committee and eight other committees each with a coordinator. The committees are the natural environment, building development, services, arts and culture, farm, community development, communications, and governance. The management committee comprises the three statutory members and one representative of each of the other committees. Each committee has autonomy in budget spending on any project up to a certain value, over which the project needs approval by the management committee.

Sustainability challenges

A number of key sustainability challenges are raised by this case study. The most crucial is determining the governance structures that will engage and empower all members of the community. Communicating with friends and family is easy but

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317 The general philosophy of the village was incorporated into Part 2 of the by-laws, which read,

4. The most responsible way we can deal with the built environment is to acknowledge Nature as the driver of our decision-making, not the sufferer therefrom.
5. The theme of an organic edible landscape in conjunction with local indigenous species is to be developed using permaculture techniques.
6. Harmonious relationships between the residents, created in freedom and with mutual respect, will not only benefit all living things within the boundaries of the community parcel, but will also radiate out into wider and wider circles of the environment and the external community.
7. Subject to other legitimate constraints, preservation of nature and protection of the more vulnerable requires priority of movement on the common property, paths and roads to be accorded firstly to native animals, then non-native animals, then children, then other pedestrians, then non-motorized wheeled vehicles and finally motor vehicles.
8. The aim for decision-making and conflict resolution will always be based on consensus among the owners and occupiers of lots within the community parcel.

some people are not good at communicating at the group level. Those who don't participate seem to fall into two categories: (1) those who are quiet by nature and are just happy to listen, and (2) those who are quiet because they are shy and don't feel comfortable expressing themselves in a group context because they fear what may happen when they speak out. Remaining silent may lead to passive / aggressive behaviour, which is a real challenge because herein lies the greatest potential for conflict. AAEV has recently introduced a system of red and green cards at general meetings to try to deal with this challenge. This method is discussed later in the case study.

Another challenge, one that goes to the heart of maintaining AAEV as an ecologically sustainable community, is enforcement of the by-laws. The by-laws set out the philosophy, values and rules that govern AAEV. Compliance with the by-laws is the main way to ensure that the village maintains ecological sustainability and the management committee has the role of enforcement. In the past, the management committee has been reluctant to enforce the by-laws for fear of creating conflict. But many villagers are dissatisfied with the lack of enforcement and the unwillingness of the committee to tackle the big issues. In January 2008, the management committee gave its first enforcement notice, which relates to breaches of the by-laws in relation to dogs and cats. It gave a three-month amnesty before further action will be taken. This is an ongoing challenge exacerbated when property changes hands and the sellers don't bring the by-laws to the attention of prospective buyers.

Dealing with conflict and its connection to community empowerment is a further challenge. If decision making is by consensus, how does one resolve disagreements? With consensus, people can abstain rather than disagree. Although this will not result in a unanimous decision, it is regarded as a consensus decision. Conflicts range from small neighbourhood disputes to ones involving the whole community. There is no formal structure to resolve conflicts and most are resolved between the parties. However, some fester and this has resulted in people no longer wanting to participate in governance for fear of verbal or written abuse from others. The Community Titles legislation requirement that decisions amending the community plan need to be unanimous resulted in the situation in which one person delayed a decision, which caused a large financial loss to AAEV. Although this would have been avoided if the decision could have been made by a special majority, a consent-based rather than consensus-based decision-making process[318] may also have resolved the conflict more easily. Consent-based decision making is part of a new governance model, which the governance committee is currently considering.

It is well recognised that a smaller ecological footprint will be achieved if we could travel less and work closer to where we live. It follows that one of the environmental challenges for AAEV is to have more economic development so people can work, live, and create in or around the village. One of the objectives of the current directors was for AAEV to be an active triple-bottom-line development. The environmental and social aspects are well documented as viable aspirations. However, some members are not interested in increasing economic activity. But in

[318] See discussion on sociocracy in section 3.

order to achieve a smaller ecological footprint, there needs to be a revisiting of these possibilities. The plan for the farm includes an environmental education centre with the potential for village employment, and there are plenty of business opportunities consistent with the values of AAEV, such as food production, massage, visual arts, performing arts, and markets to name just a few.

If AAEV is going to be an example to planning authorities of how communities can be sustainable and self-governing, it is important that it does not become an elite suburb for the affluent and the elderly. This challenge becomes especially difficult as building costs increase. Many suburban communities have a mixed demographic because people moved there years ago. In many cases, if they had to buy in today, they couldn't afford it and some suburbs would become *de facto* 'elite suburbs'. AAEV needed a range of housing options to achieve a mixed demographic. How this was accomplished is further discussed in Section 3.

The final challenge is how to make AAEV more externally engaged. The management committee is given the role of engaging with members of the external community. Currently there are no members of either local government, business groups, or resident groups involved in any of the governance structures of AAEV. Individual members of AAEV engage through schools, mother's groups, and church groups. They engage through local shops, the market in Willunga, and other local events. Many have friends who live locally. How does the external community perceive the ecovillage? In response to this question, the answers were mainly positive and many in the external community were interested to learn more. Some saw it as a fantastic project and wondered why the government didn't pick it up. Many local people didn't realise AAEV is a suburb that they can visit; some thought it had too many rules; and some viewed it with curiosity as a hippie commune or an exclusive suburb.

4.3.3 Evaluation

The challenges described earlier deal with conflict, choosing governance structures that empower all members of the community, creating a place of local employment, more fully engaging with the external community, and ensuring a mixed demographic in the village. There have been successes in all of these areas in both outcomes and processes. Despite these challenges, which are substantial, AAEV feels like a community that is achieving its vision of Caring for the Earth, caring for people, and working creatively – together. It has created a safe environment in which to live and there is a real feeling of support and harmony in the village.

What are factors that have led to this state? One important factor has been the willingness of the community to keep whole-community empowerment constantly in their vision and in their minds. The fact that empowerment is a commonly held aspiration allows for its success in the face of many challenges. Perhaps because the community often expresses this value it remains in the forefront of its consciousness. This value was widely expressed in response to surveys in 2004 and 2008. For example, the strategic planning process for 2005-2008 conducted a preliminary survey of community members in 2004 and asked the following questions:

1. What is your vision for our community?
2. What do you think are the three to five most important values of our community?
3. What are the three to five most important positive features of our forming community that we should seek to build and protect?
4. What do you see as the three to five most serious things that could go wrong in our community that we must guard against?
5. What do you see as the three to five most exciting opportunities that could make our community a 'success' – a positive example to other communities?
6. What do you consider the most critical five areas for the investment of our levy funds in the next one to three years?

This aspiration of community empowerment is also expressed through the inclusiveness of the community in activities, such as meetings, conflict resolution processes, and village activities like market days and the Sustainable House day. The website[319] and the opportunity it gives for everyone to communicate is another example.

The staging of an event at the Adelaide Fringe Festival, called 'A Day at the Green', a six-hour musical performance at the village amphitheatre, showed the strength of an ecovillage model; in two three-hour working bees, the community set up pathways, signs, lights, stalls, and food preparation that ensured a successful event. The spirit of the ecovillagers showed that 'at the scale of an ecovillage, the strength of one person or family meets the strength of others who, working together, can create something that was not possible before.'[320]

It is one thing to aspire to whole-community empowerment and there are illustrations of people coming together to achieve outcomes. However, that is different from a system of whole-community involvement. Consensus decision making has been the model for AAEV, but in a large community of 168 lots it is difficult for everyone to be satisfied. For some time, there has been some dissatisfaction with the existing governance structure. Conflict has been resolved in an ad hoc manner. Some people have nearly left the community because of the level of conflict and some people have stopped participating in community governance because of past conflicts. To deal with these issues, the governance committee has become active after being dormant for some time. The newly formed governance committee has been charged with researching and advising on a way forward. It is exploring 'sociocracy' as a new form of governance.[321] Sociocracy vests the power to rule in the 'socios', that is, in people who regularly interact with one another and have a common aim. Each member of the 'socios' is believed to have a voice that cannot be ignored in the managing of the

319 www.aaev.net

320 Elgin, D, 'Ecovillages: Seeds. of Sustainable Societies' forward in Walker, L, *Ecovillage of Ithaca,* (New Society Publishers: New York, 2005).

321 www.aaev.net/management/governance/gc_documents/files/Self-Organisation.pdf

organisation.[322] This would seem to be a natural fit with AAEV, but what advantages does it offer over the current consensus-based decision making system? Consensus decision making focuses on reaching agreement. When agreement is the aim of a forum, people may feel that if they do not agree, they will be made to feel that their values are not in accord with those of other members of the community and they will be viewed as anti-community. This is likely to lead to disharmony and possibly conflict. Sociocracy uses consent at the heart of its decision-making, but instead of asking for agreement it asks for a paramount[323] and reasoned[324] objection, which tries to find people's limits and tolerances. Understanding people's limits and tolerances, instead of just pushing them towards agreement, could minimise conflict. The other three ground rules of sociocracy are circles, double linking, and elections. Circles, the primary governance units, are semi-autonomous and self-organising groups. Each circle or committee has its own aim and performs the three functions of directing, operating, and obtaining feedback. The circles at the ecovillage could be organised by activities, which is how they are currently organised, or by neighbourhood groups, or a combination of both**.** Circles are connected by a double link consisting of a functional leader elected by the next higher circle and a representative elected by the circle, both of whom participate fully in both circles so there is an equal exchange between groups. The higher circle includes members of the external community. Persons are elected exclusively by consent after open discussion. This also applies to the three elected statutory positions. The top circle, currently the management committee, could comprise the three elected statutory positions, the two elected members of each of the other committees (the double linking), and any other people from the external community invited because of their special expertise in areas vital to the community. This could include representatives from government and/or business. The actual structure of the circles is a work in progress.

While the governance committee is investigating alternative governance structures, the community has not remained static. As in any situation, the loudest voices get heard the most and with consensus decision making, in trying to reach that all-important agreement, those with a different opinion may never get heard. In recent general meetings, a new technique has been introduced. People are given a red card and a green card and when it is time to vote, the chair asks people to indicate if they are ready to vote. If they are, they produce a green card and if not, they produce a red card. When a red card is produced, the chair asks that person what more they need in order to be ready to make a decision, and the chair deals with that request and then repeats the process. This process has two advantages. First, it cuts those who are ready to vote out of the discussion. These people are often the most vocal and may continue to discuss the same issues. Second, it allows people who may not feel comfortable voicing their opinion in a large arena to have a 'one on one' conversation with the chair. Those I have asked about this process have expressed that it worked very well.

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322 www.sociocracy.biz

323 Meaning serious enough to stop that person supporting the aims of the group.

324 Meaning that their objections were expressed clearly enough that the rest of the group could understand and resolve them.

Another challenge has been getting a critical mass living in the village so as to have a vibrant community with a mixed demographic. A two-year covenant on building would have resolved this, but the downside may have been that only those with available funds would have bought into the village, which may have turned it into an 'elite suburb'. The original land could never have been bought if such a covenant was in place. One perceived threat to AAEV is that it could become a retirement village for baby boomers. One of its successes has been achieving a mixed demographic in terms of ages, backgrounds, education, and work practices. A mixed community with the common aims of creating an ecologically sustainable, caring, and creative community allows for a high level of tolerance and understanding even in situations of conflict. How has this mixed demographic been achieved? The community plan allows for differing sizes of blocks of land and it contains large amounts of common land so people can build a small house, thus keeping costs down. Although AAEV has not been based on a co-housing model, there is an argument that those still waiting to build on their land should try to build at the same time. This would keep costs down and be more socially conclusive. Stage 3 of the ecovillage has seen 15 terraces being built as well as a block of 24 low-cost housing units, all adhering to eco-design principles. By letting go of their individualistic tendencies, these owners have achieved a lower cost, become more socially inclusive, and made a smaller ecological footprint.[325]

There is considerable interest in AAEV. Now that the village has been around for four years and is reaching a critical mass, there will be more opportunity for engagement with other resident associations and the local traders association. The local library at Aldinga has an expanded ecology section due to interest from the village. In 2003, Onkaparinga Council hosted a meeting of the CEOs of all local governments in Australia and they were brought in for a tour of the village. Although the local council is supportive of the village, it is not actively promoting similar subdivisions. It does not provide any services to the village, which allows AAEV to manage the common areas in a way that would be impossible under local government restrictions. Schools often visit the village. For example, in 2002, Golden Grove High School invited a representative of the village to speak to its gifted and talented students. As a result, students came and helped with the first planting in the village. They now come every year and this visit has been incorporated into their curriculum. AAEV won the Nature Foundation South Australia Good Business Environment 2004/05 Infrastructure and Services Award and one of its houses won an architecture design award.

The elements of sustainability oriented governance include empowerment, engagement, communication, openness, and transparency. These elements are echoed in the design of the community plan and the physical design of the buildings. The community plan is structured around 'neighbourhoods' of 10 – 15 dwellings. There are no through roads, though one can walk around the village. There is a large amount of common land with orchards and meeting places. The houses all have a northerly aspect with no fences allowed. These designs

[325] Dawson, J. *Ecovillages: New Frontiers for Sustainability*, (Green Books: Devon, 2006), p. 83.

encourage people to relax about the need for privacy and results in many informal meetings and chats with other members of the village.

AAEV has a strong value base as represented in its vision, 'Caring for the Earth, caring for people, and working creatively – together'. Its governance structure tries to ensure fair process. Its decision making has been by consensus to ensure common ownership of decisions. It is currently investigating even better forms of decision making that will ensure transparency, openness, and accountability. A strategic planning process needs to be completed. One was started in 2004 but never completed as it was found to be too large a job for one person in a voluntary capacity. It may need a paid leader with related expertise from the community. The challenge of providing employment within the village is ongoing.

4.3.4 Conclusion

AAEV seems to generally adhere to the 'seven golden rules' of sustainability oriented governance, governance that is: participatory, consensus oriented, transparent, responsive, equitable, and inclusive. The main learning has been about how to deal with conflict in a consensus decision-making process.

There are still challenges. Research for this case study has shown that there is a continuing need to build capacity amongst both current and potential members of AAEV in the legislative framework that governs the community including the by-laws. There could be greater external engagement with government and business and the model of sociocracy will encourage this contact over time. Continuing to educate the external community remains an important part of AAEV's activities, especially with the proposed environmental education centre. In action, AAEV is striving for a community that can provide for more of its own needs including work, creativity, food, energy, water, and community. The challenge of developing economic activity within the village so as to minimise the community's ecological footprint is one that AAEV will soon be able to embark on as more people move into the village. What AAEV has achieved in terms of people-oriented governance will enable it to meet these further challenges in a participatory, transparent, equitable, and inclusive way.

4.4 Earthlife Africa versus the Pebble Bed Modular Reactor: A Battle for Governance for Sustainability and Informed Decision Making in South Africa

Willemien du Plessis[326]

Abstract

Governance for sustainability includes issues pertaining to openness in decision making and right of access to information for both government and the people. Earthlife Africa in South Africa is a non-governmental organisation (NGO) that has fought the battle for governance for sustainability. Its court battles to obtain information about the pebble bed modular reactor from Eskom, a public company, is a study in how players react to the right of access to information and public participation. The courts in South Africa were initially reluctant to make a decision and followed a legalistic approach. They did not comment on the possible impacts of nuclear energy. Eventually Earthlife Africa managed to obtain an order from the Supreme Court of Appeal to have access to information. In other matters the courts are more outspoken regarding the role of the courts and government in the protection of the environment. In this case study it is argued that a partnership role should be introduced in which civil society, government, and private industry ensure that the environment is protected. Governance for sustainability should rest on four pillars, the environment, social, and economic considerations that are imbedded within governance (the fourth pillar), not only by government but also by civil society.

4.4.1 Introduction

South Africa's main energy supply is coal. The impacts of coal-generated energy on the environment and humans are well known. South Africa is experiencing economic growth, resulting in an energy crisis in which energy supply exceeds demand. The government is investigating alternative forms of energy including renewable and nuclear energy. In the interim, South Africa experiences load-shedding, in which the energy supply to homes, industry, and mines is cut off resulting in severe economic losses. This practise has resulted in an outcry from both the public and private sectors for new energy resources – not necessarily to preserve ecological integrity or prevent global warming, but rather to ensure that a sustainable economy and lifestyle are perpetuated. Although earlier post-apartheid energy policy documents emphasised the need to protect the environment for future generations, a recent publication on fuel strategy included a statement that 'development could not be sacrificed on the altar of the environment'.[327] A superficial reference was made to long-term planning to prevent global warming. The Department of Minerals and Energy seems to be moving away from its mandate to protect the environment in terms of section 24 of the Constitution of

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[327] www.dme.gov.za/pdfs/energy/Energy_Master_Plan_Appr.pdf. Energy Security Master Plan Liquid Fuels, p. 31.

the Republic of South Africa, 1996,[328] but other players, such as the courts, the Department of Environmental Affairs and Tourism (DEAT) and non-governmental organisations (NGOs) have come to the fore as fierce protectors of the environment.

Eskom, South Africa's electricity provider, is currently investigating the development and generation of energy by a pebble bed modular reactor (PBMR). As nuclear energy and its potential environmental and health risks are well known, the first environmental impact assessment process in South Africa, which commenced in 2000, was met with fierce criticism and opposing views. The electricity crisis, however, ironically trivialised this debate, not as to whether the PMBR should be introduced, but as to when and how it should be introduced.

Earthlife Africa, a NGO that opposed the PBMR, was involved in several court cases against Eskom by exercising its right of access to information to meaningfully participate in environmental decision-making processes. The South African Constitution and environmental legislation provide for public participation and a right of access to information. The Constitution and environmental legislation aim to empower civil society to partake meaningfully in discussions on the environment and even in the introduction of new laws. The government's implementation of public participation processes is sometimes criticised and challenged in the courts. It is not always possible for government alone to enforce the rights in the Constitution or legislation. Section 24 of the Constitution places an obligation on everyone in South Africa to ensure that the environment is not harmful to one's health or well-being. This right can only be realised in partnership with players outside government. Public participation and the right of access to information can be seen as tools to assist members of the public to meaningfully participate and enforce their environmental rights and to give effect to the idea of management by outsiders.[329] Earthlife Africa's battle to obtain information on the PBMR is an illustration of civil society's struggle to ensure governance for sustainability.

4.4.2 Description

The first court case was instituted by Earthlife Africa's Cape Town Branch. This branch was established by environmental and social activists in Cape Town 'to campaign against environmental injustices in the Cape Town area and to participate in environmental decision-making processes with a view to promoting and lobbying for good governance and informed and sustainable decision-making … and to promote ecologically sound alternatives such as renewable energy'.[330]

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328 Section 24 states that: 'Everyone has the right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development'.

329 Du Plessis, W. and Nel, J. 'An evaluation of NEMA based on a generic framework for environmental framework legislation' *South African Journal of Environmental Law and Policy*, Vol. 10, No. 1, 2001, pp. 1-37.

330 *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd* Case no 04/27514 (C) (15 December 2005) para. [2] and [4].

The NGO is known for lobbying against nuclear energy and for its research on the environmental and safety risks of nuclear energy.[331] Eskom wanted to construct a demonstration PBMR at Koeberg, an existing nuclear power station in the Cape Town area, and conducted an environmental impact assessment (EIA) process in this regard. Earthlife Africa was of the opinion that the EIA process was not conducted properly.[332] It applied for information from Eskom under the Promotion of Access to Information Act 2 of 2000 (PAIA).[333] Some information was released, other information requests were refused.[334] Eskom's defence was based on the grounds of refusal contained in the PAIA that relate to the mandatory protection of commercial information of a third party, the economic interests and financial welfare of the Republic and commercial activities of public bodies as well as the operation of public bodies. The court relied on the evidence of an expert (called by Eskom)[335] to determine whether the information could be released because, as the court stated, 'the question as to whether certain information or a particular document is to be classified under one of the statutory exemptions, whether as a trade secret or any other basis, might well involve expert and specialised knowledge which the court does not possess'.[336] After hearing expert evidence, the court held that because the project was still in the development phase, the information requested 'constitutes confidential information and trade secrets which are protected from disclosure'.[337] The court did not comment on the possible negative impacts of the PBMR. Earthlife Africa sought leave to appeal which was denied.[338]

In 2007[339] Earthlife Africa approached the Supreme Court of Appeal for leave to appeal against the decision of the High Court. It was also requested that the court decide whether the information should be released or that records be put before the court to decide on their disclosure. The court stated that because the information was of a highly technical nature, it would not be able to judge which information could be released and which could not. The judges relied on section 19*bis* of the Supreme Court Act 59 of 1959 to appoint a referee. It ordered that Earthlife Africa and Eskom each propose a technical and a legal expert to peruse the materials and to make a recommendation as to what information could be released. Earthlife Africa and Eskom must then agree on one technical and one

331 Ibid., para. [13].

332 Ibid., para. [14].

333 The right of access to information may be enforced both against government and private institutions – section 32 of the Constitution. Eskom is regarded as a public body as it exercises a function in terms of legislation as a public company – see also para. [33].

334 Op cit, supra note 330, para. [16] and [44]. Access to minutes of the board, plan and business plans concerning the PBMR, records relating to financing of the PBMR and technical reports were refused. The documents were also not severed as is allowed for in PAIA as according to Eskom the remainder of the legislation could mislead the reader.

335 Earthlife Africa relied on the affidavit of a person that the court did not regard as an expert – para. [59].

336 Op cit., supra note 330, para. [56].

337 Op cit., supra note 330, para. [72].

338 *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd* (2006) 2 All SA 632 (W).

339 *Earthlife Africa (Cape Town Branch) v Eskom Holdings Ltd* (SCA) (2007) Case number 426/2006 Date heard: 6 September 2007).

legal expert, who must peruse all the documents and make a decision on what if anything should be released. If there is a dispute between the two experts, the proposal of the technical expert would be accepted on technical issues and those of the legal expert on legal issues. If the parties cannot agree, the issue would be referred to one of two retired judges for their decision. The parties were asked to submit the expert reports to the original judge of the High Court from which they appealed, who would then order the release of the documents accordingly. At the time of this writing, the parties have not yet approached the High Court and no order has been made. Before the decision of the Supreme Court of Appeal, but after an extensive public participation process, the Director-General of DEAT considered the EIA application and granted Eskom an authorisation to construct a demonstration PBMR. Earthlife Africa opposed this decision. It argued that the Director-General based his decision on additional material that was not available during the public participation process.[340] Earthlife Africa and the Legal Resources Centre asked to make further submissions based on this information, which was refused.[341] Earthlife Africa then applied to the High Court for a review of the environmental authorisation based on the Promotion of Administrative Justice Act 3 of 2000. The court stated that it needed to consider the case because:[342]

> The present application concerns the very sensitive and controversial issue of nuclear power, which potentially affects the safety and environmental rights of vast numbers of people. In the result, Eskom's application for the construction of a PBMR has generated considerable local and national interest.

The court also stated that the *audi alteram partem*[343] rule applies, even in the stages before a final decision is reached, to prevent procedural unfairness.[344] The court set aside the authorisation and indicated that Earthlife Africa be granted the opportunity to submit written comments on the information that was not introduced during the public participation process.[345] The court held that the process 'up to and including the submission by Eskom's consultants of their final environmental impact report was fair but that the decision of the Director-General was procedurally unfair.[346] The court again felt that it was not necessary to address the possible risks of nuclear wastes and stated that these issues were to be addressed by the National Nuclear Regulator:[347]

> In view of the public interest generated by this matter, it needs to be emphasised that our decision does not express any opinion as to the merits or demerits of the proposed PBMR, in particular, nor of nuclear power in general. These were not matters that we were called upon to consider.

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340 *Earthlife Africa (CT) v DG: Department of Environmental Affairs and Tourism* (2005) 3 SA 156 (C).

341 162F-163G.

342 165H-166A.

343 The right to be heard.

344 167D.

345 173H-175C.

346 177D-E.

347 177F and 178B.

If these court decisions are compared, it seems that the following two approaches can be deduced: (a) where a final decision was made (for example issuing a record of decision in the EIA process), the court did not hesitate to order the release of information to enable the parties to meaningfully participate in discussions; (b) where the project or project documentation pertains to documentation on which a final decision has not been reached or that may contain commercially confidential information, the court followed a more cautious approach. However, the Supreme Court of Appeal, despite following a cautious approach, still created a mechanism to ensure that at least some of the information is released.

In 2008, the government announced its intention to erect more nuclear power stations and to proceed with the introduction of the PBMR. Earthlife Africa indicated that it was going to take government to court for considering the introduction of nuclear energy without consulting the general public. In its 'White Paper on Energy of 1998', the government stated that it would not introduce nuclear power without consulting the general public.

In a decision relating to petrol filling stations the High Court again reiterated the importance of public participation, freedom of expression, and the role that NGOs play to protect the ecology:[348]

> All things begin equal, Ms. Barlow and the Association bear a standard that any vibrant democratic society would be glad to have raised in its midst. Their interest and motivation is selfless, being to contribute to environmental protection in the common good. None of them stands to gain material personal profit. Their *modus operandi* is entirely peaceful. It is mobilised within a self-funding voluntary association. It is geared towards public participation, information gathering and exchange, discussion and the production of community-based mandates. Its accompanying public discourse and media coverage have been fair, with participants and readers alike being represented in a balanced way with viewpoints of all sides. In my view, conduct of that sort earns the support of our Constitution. In this context it should be borne in mind that the Constitution does not only afford a shield to be resorted to passively and defensively. It also provides a sword, which groups like the Association can and should draw to empower their initiatives and interests.

In its three-year court struggle, Earthlife Africa achieved its objective to receive and comment on information as well as to meaningfully participate in matters pertaining to nuclear energy. It used the 'sword' provided by the Constitution and it continues using it. However, it could not convince the courts to comment negatively on nuclear energy. The courts steered clear of such comments by taking a neutral stance.

The Constitutional Court was, however, more outspoken regarding the protection of the environment in a case in which there was opposition to a petrol filling station:[349]

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348 *Petro Props (Pty) Ltd v Barlow and Another* (2006) (5) SA 160 (WLD) 183H-184B.

349 *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and Others (2007) 10 BCLR 1059 (CC) paras. [55], [79], [102] and [104].*

> Development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction … environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development … The importance of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself. It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment it is the duty of the court to ensure that this responsibility is carried out … Courts therefore have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so.

4.4.3 Evaluation

The Earthlife Africa court battle indicates the importance of all players participating in matters pertaining to the environment – that is to ensure governance by the people for the well-being of the environment. It is not only the obligation of government to oversee the protection of the environment but it is an obligation that rests on everyone. The decision of the Constitutional Court quoted earlier stressed this obligation by stating that this generation holds the earth in trust for the next generation and that the courts and government are under an obligation to intervene if the environment may be harmed. The Constitution provides the tools that can be used.

Environmental issues may no longer be interpreted from a pure legalistic perspective. From the above discussion, it is clear that when the courts followed a pure legalistic interpretation of legislation, it was possible to find reasons why nuclear information may not be released. Where a holistic approach was followed and the rationale for the legislation and the importance of the matter before the court (in this case nuclear energy), not only locally but also nationally, were taken into consideration, the courts reached a different conclusion. It is proposed that courts should also consider the introduction of nuclear energy in light of international discussions to enhance the holistic approach.

Earthlife Africa overcame the obstacles of being prevented by government and Eskom from obtaining information by using its civil-based tools and ensuring management by outsiders by approaching the courts. When its first submissions failed, it kept fighting until the Supreme Court of Appeal came to its rescue. It managed to overturn a decision to grant an environmental authorisation because the judge understood the importance and sensitivity surrounding nuclear activities. Its activities and opposition to the PBMR became well known as the media also became involved in the discussions. However, NGOs or interested or affected parties may in the future experience opposition as the public opinion may turn against them. Continuing power failures benefit the proponents of nuclear power. When people's livelihoods, their jobs, and their comfort are threatened, they tend

to forget moral issues. The future has less importance when day-to-day survival is at stake. It is laudable that the courts, after a silence since 1994 when the democratic Constitution was introduced, have become the staunch protectors and upholders of the right to an environment that is not detrimental to one's health or well-being.

4.4.4 Conclusion

Community involvement and participation are crucial to ensure governance by the people. The environment should be protected by a partnership between government, the courts, and the community. Everyone should play a role to ensure that the environment is protected. The community must be empowered to participate in environmental discussions, community members must have access to information and the courts and be able to express their opinions freely, and NGOs must be supported in their endeavours to obtain and disseminate information. Environmental governance should be seen holistically and the impact of decisions and activities that harm the environment should not be addressed in a vacuum but within the pillars of sustainability namely environmental, social, and economic issues. A fourth pillar of sustainability should be added, namely governance. The first three pillars should be imbedded within the principles of governance, which includes not only governance by the state but also governance by the people.[350]

[350] See also Du Plessis, W. and Britz, L., 'The filling station saga: environmental or economic concerns?' *Journal of South African Law*, No. 2, 2007, p. 263.

4.5 Quarrels over a Proposed Quarry in Nova Scotia: Successful Application of Sustainability Principles in Environmental Impact Assessment but Not a Perfect Ending

David L. VanderZwaag[351], *Jason May*[352]

Abstract

In 2004, the Canadian Minister of the Environment and the Nova Scotia Minister of Environment and Labour appointed a Joint Review Panel to environmentally assess a controversial proposal by Bilcon of Nova Scotia Corporation to develop a large basalt quarry and marine terminal at Whites Point, Digby County, Nova Scotia. The subsequent Joint Review Panel Report, which recommended against the development, and the rejection of the project proposal by the provincial and Canadian governments, represent a major success story for the practical implementation of the principles of sustainable development.

However, the review process does not represent a perfect outcome. The Joint Review Panel Report provided scant justification of the legal grounds for its rejection, and missed the opportunity to ground the recommendation in the context of recent international environmental law and policy developments. The U.S. corporate interests behind Bilcon of Nova Scotia, upset by the Review Panel's recommendations and the subsequent governmental rejection of the project, filed a claim against the Canadian government for US $188 million in damages under Chapter 11 of the North American Free Trade Agreement. Canadian and Nova Scotian environmental assessment law is adequate in many respects, but it should not be considered complete or without fault. Although both federal and provincial environmental impact assessment (EIA) legislation embraces various sustainability principles in their purpose sections, Canada and Nova Scotia have yet to establish clear and substantive criteria for reaching EIA decisions, opening the door to uncertainty and continued legal challenges.

4.5.1 Introduction

On 5 November 2004, the Canadian Minister of the Environment and the Nova Scotia Minister of Environment and Labour announced the appointment of a three-member Joint Review Panel to environmentally assess a controversial proposal by project proponent Bilcon of Nova Scotia Corporation, a wholly owned subsidiary of Bilcon of Delaware,[353] to develop a large basalt quarry and marine terminal at Whites Point, Digby County, Nova Scotia.[354] Although the project promised some

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[352] Jason May is a Research Assistant, Marine & Environmental Law Institute, Dalhousie University.

[353] Bilcon of Delaware in turn is wholly owned by the principals of the Clayton group of companies in New Jersey.

[354] Joint Review Panel Report, *Environmental Assessment of the Whites Point Quarry and Marine Terminal Project* (Including *Appendix 1- Joint Panel Agreement*), (Joint Review Panel for the

benefits, such as the annual employment of 34 people at the quarry during its expected 50-year operation,[355] it fuelled public controversy and community opposition because of its scale and potential environmental and social impacts. Bilcon proposed blasting/crushing about 2 million tonnes of rock per year and shipping about 40,000 tonnes of aggregate 44 to 50 times per year to New Jersey in the United States.[356]

Many potential adverse environmental impacts were of concern. They included: increased risk of ships striking endangered North Atlantic right whales due to the larger volume of vessel traffic;[357] possible transport of invasive marine species from the United States to Canada via ballast water (particularly parasitic lobster disease occurring in United States waters but not in Canadian);[358] and various potential impacts from noise associated with blasting and crushing rock. Other possible impacts were disruption of the migratory behavior of the endangered Inner Bay of Fundy Atlantic salmon;[359] alteration of marine mammal feeding and socialising behaviors;[360] and alteration of the movements and distribution of crustaceans, such as lobsters and snow crabs.[361]

Various potential social and cultural effects also fuelled community opposition. Fishers feared displacement from the marine terminal area and potential destruction of gear from shipping movements.[362] Those in the tourism industry worried about the area's loss of its image as a pristine and peaceful environmental sanctuary and about the adverse effects on eco-tourism such as whale watching and kayaking.[363] Aboriginal resource users had concerns over adverse impact on traditional uses such as hunting, fishing, and berry picking.[364] Many residents lamented the possible reduction in the high quality of rural life and opposed an industrial-lifestyle model in favour of small local businesses.[365] The Digby Neck area had attracted many retirees and summer residents intent on maintaining the area's natural beauty and peaceful environment.[366] Loss of property values in the vicinity of the quarry and negative effects on drilled and dug wells were other 'spark points'.[367]

Whites Point Quarry and Marine Terminal Project: Ottawa. 2007) available at www.gov.ns.ca/nse/ea/whitespointquarry.asp (accessed 15 May 2008).

355 Ibid., p. 10.

356 Ibid., p. 1.

357 Ibid., p. 9.

358 Ibid.

359 Ibid.

360 Ibid.

361 Ibid., p. 66.

362 Ibid., p. 76.

363 Ibid., p. 77.

364 Ibid.,. p. 67.

365 Ibid., p. 99.

366 Ibid., p. 72.

367 Ibid., pp. 74, 78.

The Joint Review Panel Report of October 2007[368] and the subsequent rejection of the project proposal by the provincial[369] and Canadian governments[370] represent a major success story for the practical implementation of the principles of sustainable development.[371] The following section summarises the Review Panel's strong reliance on sustainability principles, such as precaution and public participation, in reaching its recommendation for rejection of the proposed project.

The final section offers three cautions about the success story. The Review Panel paid scant attention to justifying the legal grounds for its rejection recommendation. The Panel missed the opportunity to link its principled approach to international environmental law and policy developments. The investors behind Bilcon of Nova Scotia, incensed over the alleged discrimination against an American corporation and its investment commitments, has filed a claim against the Canadian government for US $188 million in damages[372] under Chapter 11 of the North American Free Trade Agreement.[373]

4.5.2 Description: Success story – putting sustainability principles into practice

The Review Panel, admitting to a somewhat unconventional approach, decided to evaluate the proponent's project proposal and EIA documentation in light of an 'adequacy analysis' framework through two lenses. The first lens was used to look at the project through five key principles:

- Public Involvement – Environmental assessment requires the meaningful participation of community members.
- Traditional Community Knowledge – Local people provide valuable knowledge to complement scientific studies provided by consultants and other experts.

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368 Supra note 354.

369 Nova Scotia Department of Environment and Labour, Office of the Minister, 'Re: Whites Point Quarry and Marine Terminal' (20 November 2007) available at: www.gov.ns.ca/nse/ea/whitespointquarry.asp (accessed 15 May 2008).

370 Fisheries and Oceans Canada, Standing Committee Reports and Government Responses, 'The Government of Canada's Response to the Environmental Assessment Report of the Joint Review Panel on the Whites Point Quarry and Marine Terminal Project (The Project)', available at: www.dfo-mpo.gc.ca/communic/reports/quarry/gr-quarry_e.htm (accessed 15 May 2008).

371 On the role and importance of principles, see: Nicolas de Saldeleer, *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press: Oxford, 2002); Sumudu A. Atapattu, *Emerging Principles of International Environmental Law* (Transnational Publishers: Ardsley Park, New York, 2006).

372 Notice of Intent, *Bilcon of Delaware v. Government of Canada* (2008), (Notice of Intent to Submit a Claim to Arbitration Under Section B of Chapter 11 of the North American Free Trade Agreement, issued 05 February 2008 and served to the Office of the Deputy Attorney General of Canada) at 7, available at: www.international.gc.ca/trade-agreements-accords-commerciaux/disp-iff/clayton_archive.aspx?lang=en (accessed 15 May 2008).

373 *North American Free Trade Agreement Between the Government of Canada, the Government of Mexico and the Government of the United States,* 17 December 1992, Can. T.S. 1994 No. 2, 32 I.L.M. 289 (entered into force 1 January 1994) [NAFTA].

- Ecosystem Approach – A strong foundation of scientific information is fundamental to the assessment of potential environmental effects that may affect ecosystem health and viability.
- Sustainable Development – Sustainable development suggests that communities make decisions about the use and commitment of resources while respecting the rights of future generations and other communities to social, economic and environmental health.
- Precautionary Principle – Where there are threats of serious or irreversible damage, the precautionary principle suggests that uncertainty does not reduce the need to try to prevent environmental degradation.[374]

The second evaluative lens was the policy and legislative context. The Panel sifted through various policy and planning documents as well as many pieces of federal and provincial legislation for further guidance regarding the values and principles that should inform decisions about development projects.[375] For example, a regional development authority, the Western Valley Development Authority, had issued a document entitled *Building Tomorrow – Vision 2000: Multi-year Community Action Plan for Annapolis and Digby Counties,* which set out various community goals including preservation of the region's biological diversity and ecological heritage and promotion of cultural heritage and tourism attractions.[376] Regarding legislative guidance, the Panel noted the fundamental purposes set out in the *Canadian Environmental Assessment Act*,[377] such as application of a precautionary approach,[378] promotion of sustainable development[379] and encouragement of public participation.[380]

The Panel's Report, submitted to the federal and provincial ministers in October 2007, was very critical of the proposed project and the proponent's environmental impact statement (EIS) in light of the five guiding sustainability principles. The Panel concluded that the proponent had not lived up to the 'spirit' of the public participation principle by not effectively working with project opponents to find mutually agreeable solutions to identified problems.[381] The Panel found inadequate efforts to include traditional community knowledge in the assessment process, especially the lack of consultation with or input by local fishers worried about losing access to fishing sites and potential negative effects

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374 Supra note 354, p. 3.

375 Ibid., p. 94.

376 Ibid*.,* p. 119.

377 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37.

378 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s. 4(1)(a) states that a purpose of the *Act* is to, 'ensure that projects are considered in a careful and precautionary manner […] in order to ensure that such projects do not cause significant adverse environmental effects'.

379 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s.4(1)(b) states that a purpose of the *Act* is to, 'encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy'.

380 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, s.4(1)(d) states that a purpose of the *Act* is to, 'ensure that there be opportunities for timely and meaningful public participation throughout the environmental assessment process'.

381 Supra note 354, p. 88.

on the quantity and quality of harvested marine organisms.[382] The Panel criticised the proponent's EIS for not taking the ecosystem approach seriously and largely ignoring the interconnections among the terrestrial, marine, and human environments.[383] The Panel also found the EIS feeble in addressing sustainable development. The EIS did not address the question of whether the project would deliver long-term improvements to sustainability.[384] The Panel was especially critical of the proponent's flawed conception of the precautionary principle, which the proponent equated with adaptive management (learning through trial and error).[385] In the Panel's view, the precautionary principle requires that the onus of proof rest with the proponent to show the proposed project will not lead to serious or irreversible environmental damage.[386]

The Panel further critiqued the project for not fitting within the core values reflected in various policy documents and legislative provisions.[387] Community values were characterised as showing little support for an industrial-lifestyle model and favouring traditional lifestyles and quality of life.[388]

Although the Panel's main recommendation was for the project proposal to be rejected,[389] which both levels of government subsequently followed,[390] it made other recommendations, including that Nova Scotia develop and implement a comprehensive coastal zone management policy or plan to clarify what kinds of uses should be permitted[391] and that Nova Scotia develop and implement more effective mechanisms for facilitating consultations between quarry proponents and local governments and communities.[392]

4.5.3 Evaluation: Not a perfect ending

Although the Whites Point Quarry EIA process may be deemed a success story in putting sustainability principles into practice, the process should not be considered as having a 'fairy tale' ending. The Joint Review Panel Report gave scant justification for the legal grounds for its recommendations[393] and in particular

382 Ibid., p. 89.

383 Ibid., p. 90.

384 Ibid., p. 91.

385 Ibid., p. 92.

386 Ibid.

387 Ibid., p. 99.

388 Ibid.

389 Ibid., p. 103.

390 Supra notes 369 and 370.

391 Supra note 354, p. 104. The Nova Scotia Government has subsequently committed to developing a Sustainable Coastal Development Strategy. See 'Nova Scotia Government Business Plan 2008-2009', available at: www.gov.ns.ca/finance/site-finance/media/finance/GovBusPlan.pdf (accessed 15 May 2008).

392 Supra note 354, p. 105.

393 The limited legal discussion was largely confined to Appendix 4 (Policy and Legislative Context) of the report. For the view that the Panel, by making 'core values' and sustainability stand alone considerations, was not consistent with existing environmental assessment legislation, see Densted, S., Jamieson, J. and Keen, M., *Joint Review Panels Exceed Mandate With Use of*

missed the opportunity to link its analytical framework to recent international environmental law and policy developments. The U.S. corporate interests behind Bilcon of Nova Scotia, upset by the Review Panel's recommendations and subsequent governmental rejection of the project, have chosen to pursue a US $188 million damage claim against the Government of Canada under Chapter 11 of the North American Free Trade Agreement.[394]

Scant attention to justifying the legal grounds for the rejection

The 'adequacy analysis' framework adopted by the panel for the evaluation of the proposal was strongly supported by sustainability principles, while concomitantly being informed by pertinent legislation, regulations, and policy. However, despite a detailed focus on sustainability, the Panel's report failed to provide a concrete linkage between this principled approach and Canadian and provincial environmental assessment legislation and regulations. Aside from a cursory reference to relevant laws and regulations within Appendix 4,[395] the Panel largely missed the opportunity to link sustainability principles contained within the *Canadian Environmental Assessment Act* and the Nova Scotia *Environment Act*[396] to its decision.

In respect of a project assessment, the *Canadian Environmental Assessment Act* has broadened the definition of 'environmental effect' to include changes to (among other things) 'health and socio-economic conditions' and 'physical and cultural heritage', insofar as such changes are linked to changes in the natural environment.[397] Although this federal legislation puts limits on how principles and social considerations might be considered by requiring a connection to environmental change, it nonetheless provides a tangible connection in law between sustainability principles and environmental assessment.

In a similar fashion, the Nova Scotia *Environmental Assessment Regulations*[398] have defined an 'environmental effect' as including, 'any effect on socio-economic conditions, on environmental health, physical and cultural heritage or on any structure, site or thing including those of historical, archaeological, paleontological or architectural significance'.[399] This wording provides a firm basis in law to justify the inclusion of social, economic, and community-based concerns within the assessment of the Whites Point Quarry proposal.

The purpose sections of the *Canadian Environmental Assessment Act* and the Nova Scotia *Environment Act* provide those conducting environmental assessments with guidance towards the inclusion of sustainability principles in assessment procedures. Section 4 of the *Canadian Environmental Assessment Act*

Sustainability Framework (20 February 2008), available at: www.osler.com/resources.aspx?id=14376 (accessed 15 May 2008).

394 Supra note 372, p. 7.

395 Supra note 354, p. 125.

396 *Environment Act*, S.N.S. 1994-95, c.1.

397 *Canadian Environmental Assessment Act*, S.C. 1992, c. 37, ss.2(1)(a), (b)(i)-(iv).

398 *Environmental Assessment Regulations*, N.S.Reg. 44/2003.

399 *Environmental Assessment Regulations*, N.S.Reg. 44/2003, s.2(l)(i).

sets out key principles including precaution, sustainable development, and public participation.[400] Likewise, Section 2 of Nova Scotia's *Environment Act* also encourages application of various principles including the principle of ecological value, the precautionary principle, pollution prevention, integration of environmental and economic issues, and polluter pays.[401]

Despite these characteristics of the federal and provincial statutes, some within the legal community feel that the Panel exceeded its mandate (at least in part) by basing its decision on core social values independent of adverse environmental impacts.[402] These critics have argued that the expanded role of sustainable development in environmental assessment is inconsistent with and unsupported by existing environmental assessment legislation.[403] By not addressing the legal grounds for its recommendation in a detailed manner, the Panel missed an opportunity to address this argument and to advance the understanding of how sustainability principles may be currently applied within Canadian and Nova Scotian environmental assessments.

Missed opportunity to link with recent international environmental law and policy developments

A somewhat disappointing dimension of the Joint Review Panel Report was the limited reference to the international environmental law and policy context supportive of a principled approach to EIA.[404] Although the Panel noted the importance of international agreements relevant to environments and communities potentially affected by the project,[405] the Panel specifically referred only to the North American Free Trade Agreement and noted the rights afforded to foreign investors are not absolute but subject to governmental responsibilities to protect the environment and human health.[406]

Two key international guidance documents were brought to the Panel's attention, which might have further supported the principled approach adopted,[407] but no reference to these documents was made. The 'Guidelines for Applying the Precautionary Principle to Biodiversity Conservation and Natural Resource

400 See supra notes 378-380.

401 *Environment Act*, S.N.S. 1994-95, c.1, s.2.

402 Supra note 393.

403 Ibid.

404 The Panel merely questioned in a general way whether the quarry and associated marine terminal would be consistent with the spirit and concepts advanced at the Earth Summit in Rio in 1992. Supra note 354, p. 27.

405 Ibid., p. 119.

406 Ibid., p. 128.

407 Professor VanderZwaag highlighted the relevance of the guidance documents through written and oral presentations to the Joint Review Panel. For the written presentation see: *Comments by David L. VanderZwaag, Professor of Law and Canada Research Chair in Ocean Law and Governance, Marine and Environmental Law Institute, Dalhousie Law School*, June 26, 2007, available at: www.ceaa.gc.ca/010/0001/0001/0023/001/WP-1785-024.pdf (accessed 15 May 2008).

Management',[408] approved by the World Conservation Union (IUCN) Council in May 2007, suggest that where uncertainties exist about environmental threats, values and cultural perceptions of risk must play a role.[409] The Guidelines further suggest that the precautionary principle may sometimes require strict prohibition of activities, particularly where potential damage is likely to be immediately irreversible (such as the spread of an invasive species) and where particularly vulnerable species or ecosystems are concerned.[410]

The 'Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on, or which Are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities', endorsed in 2004 by the Conference of the Parties to the Convention on Biological Diversity[411] and meant to be used in conjunction with the 'Voluntary Guidelines on Biodiversity-inclusive Environmental Impact Assessment',[412] support a broad consideration of social and cultural impacts of proposed activities in impact assessment processes. For example, taking account of value systems of indigenous and local communities is urged[413] and weighing the effects of a project on social cohesion is advocated.[414]

The Chapter 11 NAFTA challenge

A Chapter 11 NAFTA challenge is unique because it permits an investor to launch a unilateral claim against a foreign (NAFTA signatory) government, thus allowing foreign corporations to engage host governments directly in binding international arbitration over complaints.[415] This is a departure from customary international law in which the complaints of investors are normally asserted by their own governments on their behalf.[416] Chapter 11 was originally included in NAFTA as a mechanism for protecting foreign direct investment from expropriation by host governments and to encourage cross-border investment among NAFTA member states through the protections it offers.[417]

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408 Developed jointly by Fauna & Flora International, IUCN-The World Conservation Union, ResourceAfrica and TRAFFIC. Available at: www.pprinciple.net/ (accessed 15 May 2008).

409 Ibid. Guideline 4.

410 Ibid. Guideline 12.

411 See Decision VII/16, Annex. Available at: www.cbd.int/decisions/cop-07.shtml?m=COP-07 (accessed 15 May 2008).

412 See Decision VIII/28. Available at: www.cbd.int/decisions/cop-08.shtml?m=cop-08 (accessed 15 May 2008).

413 Akwé: Kon Guidelines, *supra* note 411 para. 49.

414 Ibid. para. 51.

415 Capling, A. and Nossal, K.R. 'Blowback: Investor-State Dispute Mechanisms in International Trade Agreements', 2006 *Governance: An International Journal of Policy, Administration, and Institutions*, Vol.19, No.2, 151 at 152.

416 Meltz, R. 'Foreign-Investor Protection and the Environment: A NAFTA Chapter 11 Update', 2004 *Environmental Law Reporter*, Vol.34, No.11, 10941 at 10945.

417 Supra note 415, p. 153.

However, despite its initial intent, the dispute resolution mechanism within Chapter 11 has increasingly been used by aggrieved foreign corporations as a vehicle to recoup losses arising from environmental regulations imposed by host nations.[418] This unforeseen use of Chapter 11 has sparked particular unease within the environmental community.[419] Specifically, they have expressed concern that the filing of claims by foreign investors may cause a 'regulatory chill' on host governments who hesitate to adopt environmental laws and policies for fear of being litigated against.[420]

Subsequent to the release of the Report by the Joint Review Panel, and the decision by the federal and provincial ministers to disallow the proposed quarry and marine terminal at Whites Point, the U.S. corporate interests behind Bilcon of Nova Scotia initiated an action under NAFTA Chapter 11, claiming damages in excess of US $188 million.[421] Within the Notice of Intent, the investors claimed that Canada violated the provisions of Chapter 11; specifically Articles 1102, 1103, and 1105.[422] Essentially, the investors are claiming that the regulatory measures taken by the governments of Canada and Nova Scotia were executed in a way that was 'discriminatory, arbitrary and unfair', and not in compliance with the international law obligations that Canada holds under NAFTA.[423] The investors claim that these actions resulted in their receiving a treatment less favorable than that which is accorded to domestic corporations and investments.[424] More specifically (and amongst other claims), the investors claim that the environmental review of the proposed development was biased, politically motivated, and that it took an unreasonable length of time.[425] The claim also takes aim at the Joint Review Panel, alleging that the Panel exceeded and abused its mandate by incorporating elements into its analytical framework that are not established as accepted components of environmental reviews,[426] and that the Panel recommendations were based 'on factors that were unprecedented and undisclosed to the investors.'[427]

When Chapter 11 arbitrations are decided in favour of an investor, the Tribunal has authority to order that damages be paid to the investor in compensation for its losses or that restitution of property (with an option to pay

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418 The unintended use of Chapter 11 as a protection against environmental regulations has been attributed by some to the broadly defined key terms (such as 'expropriation' and 'fair and equitable treatment') within the document, leading to an expansive application of its provisions. See Chiu, C. 'Chapter 11 and the Environment', 2003 *Environmental Policy and Law*, Vol. 33, No. 2, p. 71.

419 Gaines, S.E. 'Environmental policy implications of investor-state arbitration under NAFTA Chapter 11, 2007 *International Environmental Agreements*, Vol.7, No. 171, p. 197.

420 Supra note 415. p. 156.

421 Supra note 372, p. 7.

422 Ibid., p. 3.

423 Ibid.

424 Ibid.

425 Ibid., p. 4.

426 Ibid., p. 5.

427 Ibid.

damages in lieu of restitution of property) be provided.[428] However, there are limitations to the relief that can come from a Chapter 11 decision. A Tribunal does not possess the authority to issue injunctive relief, nor can it make recommendations to the respondent state to alter laws or policies that it finds are in violation of NAFTA.[429] Furthermore, the dispute resolution mechanism under Chapter 11 only allows for a national government to be named as a respondent. In cases like the Whites Point Quarry dispute where there is another political entity (the Nova Scotia provincial government) involved, any obligation to pay an award in damages would nonetheless fall on the Canadian government as a NAFTA signatory.[430] It is beyond the purview of NAFTA to determine whether the respondent state should seek reimbursement from the provincial government.[431] Instead, issues such as these are destined to become matters of future domestic litigation.

Although Chapter 11 may have been forged with the intent of defending investors from discrimination and unjust measures, it has been shown to be a capable offensive tool for direct foreign investors wishing to be compensated for the effects of domestic environmental laws and policies.[432] In addition, NAFTA categorizes the nature of all disputes between the state and the investor as commercial and very little allowance is made for public interest within commercial arbitration settings.[433] However, many of the environmental issues arbitrated under Chapter 11 are more regulatory than commercial in nature and involve widespread public interest.[434] Critics have argued that such an allowance is causing a shift in authority from the state to the investor, resulting in a tangible loss of sovereignty by the host nation.[435]

Whether a fuller legal grounding of the rejection recommendation by the Joint Review Panel and a more detailed discussion of how international environmental law and policy developments support a broad basis for weighing social and cultural values in EIA would have helped ward off a Chapter 11 action seems doubtful. Although the reasons for the action in the Notice of Intent make specific reference to an EIA procedure that was perceived to be 'fundamentally flawed' by the investors,[436] it also makes reference to actions that are not directly related to the EIA, including a claim that provincial policy statements asserting the value of the mining industry in Nova Scotia led to a 'legitimate expectation' that the

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428 Supra note 416, p. 10946.

429 Heindl, J.A. 'Toward a History of NAFTA's Chapter 11', 2006 *Berkeley Journal of International Law*, Vol.24, Issue 2, 672 at 675.

430 Supra note 416, p. 10946.

431 Ibid.

432 Supra note 418, p. 74.

433 McBride, S. 'Reconfiguring Sovereignty: NAFTA Chapter 11 Dispute Settlement Procedures and the Issue of Public-Private Authority', 2006 *Canadian Journal of Political Science*, Vol.39, No.4, p. 770-771.

434 Ibid., p. 771.

435 Jones, R.C. 'NAFTA Chapter 11 Investor-to-State Dispute Resolution: A Shield to Be Embraced or a Sword to Be Feared?', 2002 *Brigham Young University Law Review*, Issue 2, 527 p. 542.

436 Supra note 372, p. 5.

investors' business would be welcome in the province.[437] It would seem that the investors have cast the net wide on the bases for their claim.

4.5.4 Conclusion

The contested Whites Point Quarry proposal in Nova Scotia stands as a sustainable development success story. The Joint Review Panel applied five of the key sustainability principles, including precaution and the ecosystem approach, and took seriously local social and cultural values in recommending rejection of the project.

The EIA review process does not represent a perfect story. The Joint Review Panel missed the opportunity to fully justify the legal grounds for its conclusions and to firmly ground its rejection recommendation within the context of international environmental law and policy developments. The distraught U.S. corporate interests behind Bilcon of Nova Scotia are pursuing a Chapter 11 challenge against the Canadian government for US $188 million in damages.

Canadian and Nova Scotian environmental assessment law should not be considered in a state of nirvana. Although both federal and provincial EIA legislation embrace various sustainability principles in purpose sections,[438] Canada and Nova Scotia have yet to fully embrace the Akwé: Kon Guidelines and have yet to establish clear and substantive criteria for reaching decisions in environmental impact assessment.[439] Perhaps the Chapter 11 challenge will be a wake-up call for further legislative reforms.

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437 Ibid. p. 6.

438 Supra notes 378-380 and 401.

439 On the need for clear criteria, see: George, C. 'Testing for Sustainable Development Through Environmental Assessment', 1999 *Environmental Impact Assessment Review*, Vol.19, 175; Gibson, R.B. 'Favoring the Higher Test: Contribution to Sustainability as the Central Criterion for Reviews and Decisions under the *Canadian Environmental Assessment Act*', 2000 *Journal of Environmental Law and Practice*, Vol.10, Issue 1, 39; VanderZwaag, D.L., 'On the Road to Kingdom Come' in VanderZwaag, D.L. and Lamson, C. (eds.), *The Challenge of Arctic Shipping: Science, Environmental Assessment, and Human Values* (McGill-Queen's University Press, Montreal and Kingston, 1990) p. 237. For a discussion on EA process reform, and the importance of harmonizing the criteria for final decision-making among multiple EA jurisdictions, see: Doelle, M., *The Federal Environmental Assessment Process: A Guide and Critique* (LexisNexis Canada Inc.: Markham, Ontario, 2008).

4.6 The WaiWai Protected Area – Our Land: Our Life

Melinda Janki, Cemci Sose[440]

Abstract

The WaiWai, one of Guyana's indigenous Amerindian peoples, live in a remote area of Guyana. In the space of five years they have moved from being the least known and least understood of Guyana's tribes to being Guyana's largest landowners and the first (and only) creators and managers of an Amerindian protected area in Guyana. In doing so they overcame problems in the national legal system and interference from non-governmental organisations.

4.6.1 Introduction

The WaiWai live in southern Guyana, as far from Georgetown, the capital, as is possible within the boundaries of the country. Long regarded as Guyana's least 'developed' and least-known tribe, they are highly esteemed for constructing Georgetown's spectacular Umana Yana, a traditional WaiWai building of wood and leaves built in 1972 in preparation for the Non-Aligned Foreign Ministers Conference. Ever since, the building has been regularly used for national celebrations and official functions.

In 2003, the WaiWai owned no land and the future of this small remote community of 200 persons seemed insecure and uncertain. According to World Bank data, Guyana is one of the poorest countries in South America. For revenue, Guyana is heavily dependent on the exploitation of its natural resources – agriculture, mining, forestry. and the trade in wildlife – all of which have a damaging impact on biological diversity, the maintenance of ecological processes, and the sustained flow of environmental goods and services. Conversely, the State has an obligation to secure investment, reduce unemployment, and ultimately achieve a higher standard of living for all of its citizens. Consequently, there was a real risk that at any time the State might decide to open up the southern forests of the WaiWai in the interests of 'national development'.

But, in less than five years the WaiWai became Guyana's largest landowners controlling a territory of 2,300 square miles and creating and managing Guyana's first and only Amerindian protected area. The WaiWai have remained true to their values. They have designed their protected area to preserve biodiversity, to preserve their traditions and way of life, and to provide for community and family development. Through their extraordinary achievement, the WaiWai are a powerful contemporary and inspirational example of governance for sustainability.

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4.6.2 Description

The key sustainability challenge for the WaiWai was to ensure forever the protection of the land they occupied, used, and regarded as theirs. The WaiWai faced two enormous obstacles to their vision of governance for sustainability. The first was to obtain ownership of the land and the second was to ensure its protection. In 2003 the economic, legal, and political environment seemed to offer nothing but obstacles to sustainability.

Under Guyana's legal system all land that is not held by a title document legally belongs to the State. An Amerindian community, which does not have a legal title issued by the State, is regarded under Guyana's laws as occupying and using State lands. In 1976, the *Amerindian Act (Cap 29:01*) recognised various areas occupied and used by Amerindian communities as Amerindian land. More communities were granted land in 1991. President Desmond Hoyte then issued formal titles to all 74 communities. The titles were an important step forward, but without an official map it was very difficult for Amerindian communities to prove their boundaries. Across Guyana, Amerindian communities suffered the deleterious effects of illegal encroachment and exploitation of their resources by miners and others.

The WaiWai land issue was first addressed formally in 1969 by the Amerindian Lands Commission. This Commission was set up by the newly independent Government to examine Amerindian land claims and recommend lands that should be titled to Amerindians. It recommended that the southern portion of Guyana should be set aside as a district for the WaiWai. This area had been identified by Robert Schomburgk, in 1840 as being occupied by the 'Woy Woy' (WaiWai) and was marked accordingly on his sketch map of British Guiana.[441] The WaiWai land was clearly separated by rivers and natural boundaries from the Atorad, Taruma,[442] and Wapishana lands further to the north.

However the Amerindian Lands Commission did not recommend a land title for the WaiWai because of the 'mobility and recent movements of the people'.[443] In 1949 when the Unevangelised Field Mission was established at Kanashen, the WaiWai population in Guyana was registered at 46 people. When the mission was set up, Brazilian WaiWai moved to Guyana along with what the Commission called 'allied tribes' – the Katawina and Cikiyana. The population at the time of the Amerindian Lands Commission Report in 1969 was estimated at about 700, but it was unclear what the future population was likely to be. In 1976 The WaiWai area was established as Kanashen District under the *Amerindian Act* with the State retaining ownership. In 1992 Minister Vibert de Souza, Guyana's first Minister of Amerindian Affairs, assured the WaiWai that the Kanashen land was theirs and the Government would not interfere with them or grant the land to anyone else. The Government honoured his words, but the WaiWai were in a weak legal position and

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441 Robert Schomburgk*, A Description of British Guiana*, 1840, Frank Cass & Co. Ltd: London, reprinted 1970.

442 The Atorad and Taruma are no longer officially recorded in Guyana and their traditional lands have been taken over by the Wapishana.

443 Report of the Amerindian Lands Commission, August 1969 Paragraph 290.

vulnerable to a future change in Government or policy. National law contained no formal procedure by which the WaiWai could apply to have their ownership of Kanashen recognised by the Government. The WaiWai were therefore dependent on the Government if they were to obtain title to their land.

At the national level the political relationship between Amerindian communities and the Government was less than cordial, and at times it was tense and adversarial. Amerindian communities complained that the Government was failing to deal with their land claims. The Government's attempts to demarcate the existing land titles, as requested by the Amerindian leaders in 1995, was held up as the result of a campaign against demarcation by the Amerindian Peoples Association, a local non-governmental organisation (NGO) based in Georgetown.[444] There were suggestions from outside the community that the WaiWai should file a land claim and force the Government to grant title. However the Guyana justice system is slow – a land claim filed in 1998 by Amerindian communities in the Upper Mazaruni was still before the court in 2008.

The WaiWai preferred a non-confrontational approach choosing instead to work through the democratically elected leaders of their community and the Office of the President. In a respectful and dignified letter, Paul Chekema, *Kayaritomo* (chief), wrote to the Government requesting title to Kanashen. The WaiWai discussed their land claim with the new Minister of Amerindian Affairs, Minister Carolyn Rodrigues. On 10 February 2004, acting upon the advice of the Minister and with the support of the Cabinet, President Bharrat Jagdeo issued a formal land grant to the WaiWai community for the entire area they had claimed. The WaiWai title was granted 'absolutely and forever'. Most importantly it was collective – the land was granted 'for and on behalf of the Community' to the people themselves – not to an NGO or a trust or any individuals. As a form of collective private property that title is constitutionally protected against a taking by the State.

Kanashen consists of mostly natural boundaries and preparations were underway in 2008 for the demarcation of the land boundary by the Guyana Lands and Surveys Commission in partnership with the WaiWai. The WaiWai had got their land title and achieved their first objective.

The WaiWai community could now practise their traditional way of life secure from the threat that the Government could use the land for other purposes, but they could not stop others from trespassing and taking resources from their territory. There were fears of incursions from Brazilian miners. The WaiWai rules regarding wise use of their land were binding on members of the community as a matter of custom and tradition, but the WaiWai had no power to enforce those rules against outsiders.

The WaiWai had long expressed a desire that their land should be recognised as a protected area thereby giving it legally recognised and enforceable conservation status. Since 1996, the Government had been proposing to set up a national protected areas system with funding from the Global Environmental

[444] Amerindian Communities subsequently agreed to demarcation and in the space of three years the amount of Amerindian owned land doubled as these claims were settled amicably with the Government.

Facility (GEF). In February 2004, shortly after receiving their title, the WaiWai wrote to the Government asking it to proceed with the process leading up to establishing a protected area in Kanashen. In December 2004, the WaiWai signed a Memorandum of Cooperation with Conservation International, an NGO, and the Government. Conservation International agreed to provide technical support to help the WaiWai set up their own protected area. The Government confirmed they had no objection to the WaiWai protected area being recognised as part of the national system. But it was not to be. The Amerindian Peoples Association in Georgetown and the Forest Peoples Programme in the United Kingdom objected to protected areas and opposed the Government of Guyana/GEF project. In 2006, after ten years of missions from the World Bank, the implementing agency for GEF, the project was dropped. In the absence of a protected areas system there was no legal mechanism the WaiWai could use to ensure the protection of their land. The WaiWai would have to find another way.

That opportunity arose in the context of new national legislation. There had long been a national consensus that the old *Amerindian Act* (Cap 29:01) was outdated, patronising, and based on a paternalistic notion of Amerindians as children of the forest who were not able to make proper decisions. In March 2006, after extensive national consultations, the Government passed a new *Amerindian Act*, which demolished the previous regime and replaced it with collective governance. The *Amerindian Act 2006* gave Amerindian communities sweeping powers over their lands. The elected Amerindian Councils now had the power to make rules for the management, use, preservation, and protection of their lands and resources including rules to restrict hunting, fishing, trapping, poisoning of rivers and creeks, and the burning of forests and savannahs. Once the rules had been published in the *Gazette*, they would be legally binding on everybody within Amerindian lands. Violators could be fined by the community and if they failed to submit to the jurisdiction of the community or to pay the fine, the State could enforce the penalty with an additional fine or imprisonment.

In effect the WaiWai already had a protected area. Their traditional rules provided for protection of certain areas and wise use of their resources. The *Amerindian Act 2006* gave them a way to enforce this *de facto* protected area, but they faced a new problem. Law making is a difficult process and the WaiWai rules would have to comply with the Constitution and with national legislation. The WaiWai community decided to seek legal advice. This was a difficult step. There had never been a lawyer in Kanashen. For many Amerindian communities national law seemed like an alien system imposed from outside: restrictive, confusing, and contrary to the Amerindian way of identifying and solving problems together. The WaiWai consulted trusted advisers and in March 2007 selected the first-named author as their legal adviser. Within a month, the first meeting took place in Kanashen. The community members compiled all the rules that applied within their village and decided which of these rules visitors would have to obey. They developed new rules specifically to cope with threats from outsiders. Based on instructions from the WaiWai, draft legal rules were prepared, discussed, and agreed with the community. The draft rules were then left with the community to reflect on, in their own time, before making a final decision.

At the request of the community, the second legal meeting took place in July 2007 in Kanashen. The community reaffirmed their decision to create a protected area. They requested that the rules go a step further and set out the community's determination on how their land should be zoned. There followed another week of in-depth discussions on existing land use, the community's vision for the future, and the need to ensure the right balance between protection and use of resources. The boundaries of each zone were set by the community leaders along with details of the kind of use that would be allowed. Two vast stretches of land in the west were set aside as a strict nature reserve and a wilderness area respectively. Following instructions from the WaiWai a mapping expert from Conservation International prepared a digital map of Kanashen showing the zones. On 25 July, at a community general meeting, called specifically for this purpose, the leaders presented and explained the zoning and the different uses of each area. Once more the leaders presented and explained each rule. When the community was ready, the matter was put to a vote and agreed unanimously. The resolution was formally recorded in the recitals to the rules:

> Whereas
>
> … in a resolution made on 25th July 2007, the Amerindian Village of Kanashen has approved the creation of a protected area over their Village lands comprising Kanashen and have resolved to manage their lands as a community owned conservation area …

Kayaritomo Sose was authorised to present the rules to the Minister of Amerindian Affairs and request that she gazette them. The presentation of the rules and the map took place a few days later in the Minister's office in Georgetown. The Minister approved the rules without delay and in September 2007 they were published in the *Gazette*. On 26 September, in Kanashen, in the presence of Minister Rodrigues, WaiWai visitors from Brazil, and Trios from Surinam, the WaiWai protected area was formally launched as the WaiWai Community Owned Conservation Area. The WaiWai had achieved their second objective and in doing so had created Guyana's first Amerindian owned protected area.

4.6.3 Evaluation

The WaiWai experience is a story of hope and success based on the WaiWai vision. In a 2007 telephone interview[445] *Kayaritomo* Sose confirmed, 'We want to protect our land for our way of life and also for our future generations'. Long before inter-generational equity became fashionable in national and international discourse, it was a way of life for the WaiWai.

The WaiWai protected area in Kanashen is a living example of governance for sustainability. The WaiWai seek to maintain their traditional relationship with the land through the protected area. The land is not a commodity to be exploited or sold. The community sets limits on what may be taken from the land and rivers, regulates the numbers and type of fish that may be caught, and sets hunting seasons for animals. Kanashen is a community of life not just people. A

[445] Conducted by MSNBC at the Latin American Parks Congress in Bariloche, Argentina in September 2007. www.msnbc.msn.com/id/21148934/

fundamental principle is that everything taken from the land must be used, nothing is to be wasted. If one person has more than he can use, it is shared not sold. The relationship is ecological not material. The WaiWai control who may enter their territory and visitors are not allowed to take anything from the land. While the community undoubtedly have the ability to manage their lands, the creation of a protected area offers a way for the WaiWai to formalise and increase their knowledge and to gain income through conserving their lands. They intend that their children, not outsiders, will be the scientists, managers, and other skilled personnel who run the formal protected area. They have used a grant from the Office of the President to establish their office. They have a record keeper, conservation rangers, and a management team, all women and men of the community.

The WaiWai Community Owned Conservation Area is based on a strong sense of national and global responsibility. The headwaters of Guyana's largest river, the Essequibo, are in Kanashen, effectively making the WaiWai protectors of the country's largest source of fresh water. In their Memorandum of Cooperation the community referred to their aim of 'conserving the locally, nationally, internationally and globally important ecosystems and biodiversity'.

Many societies are now struggling to come to terms with the damage they have been inflicting on global environmental systems and processes. In contrast the WaiWai have a well-developed sense of the relationship between personal and planetary well-being and human health, an essential element of governance for sustainability.

The WaiWai were able to overcome all the obstacles and achieve their aims by retaining control at all stages of the process. They dealt directly with the Government rather than working through NGOs or other intermediaries. The Memorandum of Cooperation of 2004 made it clear that neither Conservation International nor the Government acquired any legal rights or decision-making power in respect of Kanashen. Their roles were to support the decisions made by the community. Those decisions were strong and legitimate because of the WaiWai's system of governance, which differs from that of other Amerindian Communities. In addition to the *Kayaritomo* and elected Village Council, there is a second layer of decision makers that includes women, elders, resource users, and conservation rangers. This group takes part in all major discussions. Once the Village Council and this wider group have agreed what should be done, they hold a Village meeting at which the recommendation is presented and explained to the community. No action is taken unless the community agrees. All steps taken by the WaiWai leaders were in reality steps taken by the community – governance by the people rather than mere public consultation and participation.

A related factor was the legitimacy of the decisions and actions of the Government. The Government clearly had the legal power to act as it did but its legitimacy was demonstrated by the level of Amerindian involvement in the political and legal structure. Both Ministers of Amerindian Affairs involved in this issue were themselves Amerindian. The *Amerindian Act 2006* which provided the legal basis for the WaiWai protected area was developed after three years of consultations

with Amerindian communities – a process designed by the Government with Amerindian leaders and Amerindian NGOs. The recommendations from the Amerindian communities formed the basis of the law. When the draft law was sent for review to a Parliamentary Select Committee, three out of the seven Members of Parliament on this Select Committee were Amerindian. Even the terms of reference for the revision of the old *Amerindian Act* had been set by an Amerindian Member of Parliament, Matheson Williams, in a resolution to the National Assembly that was passed unanimously by Government and Opposition.

The process also demonstrates the importance of taking the necessary time to allow the legitimate institutions of a democratically elected government to work effectively. The WaiWai were non-confrontational, patient, and responsible. The *Kayaritomo*, the elected head of the WaiWai, wrote to the elected national government and the relationship between the Government and the WaiWai was based on mutual respect. Ultimately success depends on the individuals involved and it was the integrity of the WaiWai community, the President, the Minister of Amerindian Affairs, and other Government officials that made the WaiWai Community Owned Conservation Area possible. This success was achieved despite interference from non-elected NGOs such as the Amerindian Peoples Association and the Forest Peoples Programme claiming to speak on behalf of Amerindians in Guyana. Even before the WaiWai got their land, the Amerindian Peoples Association had condemned the Government for trying to establish a protected area in southern Guyana and had implied that the WaiWai did not understand the issues.[446]

One lesson that can be learned is to respect community decisions. In 2004 the WaiWai were advised not to accept their land title because it did not transfer to them ownership of minerals. The WaiWai have demonstrated that they are more than capable of making decisions for themselves and do not need anyone else to speak for them. Today the WaiWai have banned all mining on their lands and are able to enforce that ban because the *Amerindian Act 2006* gives Amerindian communities a veto over mining. And although they do not own the minerals, the WaiWai are able, should they choose, to carry out traditional mining in Kanashen without first seeking permission from the State.

Another significant factor is that the WaiWai sought legal, scientific and management advice from experts before taking a decision, thereby ensuring that their decisions were well informed. They chose carefully whom they would work with and consulted people they trusted, but ultimately each decision belonged to the community. They also focussed on problem solving. At a time when NGOs and other communities were engaged in confronting the Government, the WaiWai found solutions within the political and legal framework.

The Convention on Biological Diversity requires a State (subject to its national legislation), to respect, preserve, and maintain knowledge, innovations, and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity. Consequently communities are dependent on the State for recognition of their

446 www.wrm.org.uy/countries/Guyana/areas.html

traditions and knowledge. The Kanashen Community Owned Conservation Area turns this way of thinking on its head. The protected area is based on WaiWai knowledge, competence, and control. The State has no power to interfere with the WaiWai way of life. On the contrary the State has given up control to the community. The result is that a vast area of Guyana is now conserved for future generations.

In doing this the WaiWai have remained true to the vision of Elka, their former chief who, 40 years ago, dreamed of a future in which the southern forests would be protected from plunder and forever be a home for his people.

4.6.4 Conclusion

It is always difficult to look at what happens in one country and seek to apply it elsewhere. This case study demonstrates the importance of accountability, legitimacy, and integrity and of community control. The creation of the Community Owned Conservation Area in Kanashen offers at least one major point for reflection. Between them the WaiWai and the Government have put in place a new paradigm. In a world that is dominated by markets and the commoditisation of everything whether material such as land, or abstract such as knowledge, the WaiWai land cannot be sold or mortgaged. As the Inter-American Court of Human Rights confirmed:

> For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.[447]

The WaiWai are fully able to do this. The *Amerindian Act 2006* recognises the spiritual relationship and cultural attachment which Amerindians have with their land and makes Amerindian land inalienable. Instead of seeking revenue from mining, forestry, and other damaging exploitation, the WaiWai intend to earn income by protecting their land. This approach has support from President Jagdeo who has repeatedly said that Guyana is willing to conserve its forests to mitigate climate change, but must receive economic benefits for doing so.[448] In congratulating the WaiWai on their Community Owned Conservation Area, President Jagdeo linked their success to the global issue of climate change, pointing out that the WaiWai voice needs to be taken seriously.

As Major-General (ret) Joe Singh, an honoured friend of the WaiWai for over forty years, stated at the official launch of the protected area in Georgetown,

> The WaiWai will prove to all that they are worthy stewards of the environment and its ecosytems.[449]

His words captured the national consensus.

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447 The Mayagna (Sumo) Awas Tingni Community V Nicaragua, Judgement of 31 August 2001, Inter-Am. Ct. H.R., (Ser.C) No.79 (2001).

448 www.op.gov.gy/speeches/CFMM2007.html

449 www.guyanachronicle.com/ARCHIVES/archieve%2028-10-07.html#Anchor----------38457

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4.7 Balancing Sustainability Considerations through Public Participation in South Africa: A Critical Reflection on Legislative Entitlements and the Role of the Judiciary

Louis J. Kotzé[450]

Abstract

Economic development is important for any developing country. In South Africa, the mining sector contributes significantly to economic development. However, its adverse effects on the environment are well known and long-term uncontrolled mining can have a devastating effect on the environment and consequently the livelihoods of people. If one seeks to ensure a holistic consideration of all sustainability considerations in environmental governance efforts, the decision to approve mining operations should not lie solely with government. Such an approach is contrary to the spirit of environmental governance which, to be sustainable, should embrace a multi-stakeholder approach in which the public is given the opportunity to influence government decisions that may negatively affect their environmental rights and interests. This case study investigates a landmark environmental decision by the South African Supreme Court of Appeal that illustrates how proper public participation can help ensure governance for sustainability in a developing country.

4.7.1 Introduction

South Africa has made great strides in its efforts to establish a modern and comprehensive body of environmental laws since the inception of the new democratic order in 1994. In an effort to break from the past governance approach, which was characterised by exclusion, elitism, and blatant discrimination, many of South Africa's new democratic laws focus on achieving greater transparency, public inclusion in the broader governance effort, promotion of equality and justice, and upliftment of the previously disadvantaged and formerly excluded sectors of society. This is also true for environmental governance in the country. Environmental governance has yet to be properly defined in a way that makes theoretical sense and is acceptable to everyone in a social, environmental, and economic context. This case study proposes that environmental governance be allowed a wide and all-encompassing definition given its ultimate goal of ensuring an economically, socially, and perhaps above all, environmentally sustainable, future for all. One attempt to define environmental governance is to say that it postulates:

> A management process executed by institutions and individuals in the public and private sector to holistically regulate human activities and the effects of human activities on the total environment (including all environmental media, and biological, chemical, aesthetic and socio-economic processes and

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conditions) at international, regional, national and local levels; by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law, so as to promote the common present and future interests human-beings hold in the environment.[451]

One thing that clearly emerges from this definition is the definitive role the public can play in actively participating in decision making (an element of governance) that might affect their economic, social, and environmental interests. This vital role of participating, engaging, and including the public in environmental governance is reiterated by South Africa's primary environmental framework legislation, the *National Environmental Management Act* 107 of 1998 (NEMA). The Act provides that:

> The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation, and participation by vulnerable and disadvantaged persons must be ensured.[452]

Various provisions in the *Constitution of the Republic of South Africa*, 1996 (Constitution) and NEMA have specifically been promulgated to facilitate greater public participation. Similarly, provisions on public participation can also be found in a plethora of environmental sectoral acts. A recent court decision vividly illustrates the role that public participation can play in influencing governmental decision making, where these legislative entitlements are properly utilised by the public and applied by the courts to promote and protect environmental interests in a constitutional democracy. In the Supreme Court of Appeal (SCA) decision, *Director: Mineral Development, Gauteng Region and another v Save the Vaal Environment and others* 1999 2 SA 709 (SCA) (Save the Vaal), a concerned public environmental interest group, by challenging a government decision to approve a mining operation on the grounds of administrative justice and environmental rights entitlements, successfully lobbied to halt this development.

Mining is arguably the mainstay of South Africa's economy and one can imagine that a developing country, under certain circumstances, would give preference to economic development over environmental protection. The reason for this is simple: the proceeds from mining would fill the state coffers and economically empower the previously disadvantaged and the poor. Mines are, however, responsible for major damage to the environment and human health as well as other social problems. Damage from mining is a global concern and not only confined to South Africa. The situation in South Africa is, however, particularly severe, since the activities of mining companies and related industries were not always adequately regulated by legislation in the pre-constitutional and environmental dispensation.[453] There are various reasons for this, most of which

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451 Kotzé, L.J. 'Environmental Governance Perspectives on Compliance and Enforcement in South Africa' in Paterson, A. R. and Kotzé, L.J. *An Environmental Law Perspective on Compliance and Enforcement in South Africa* (Juta Law Publishers: Cape Town, 2008).

452 S 2(4)(f).

453 The pre-constitutional era includes the period prior to 1993, that is. before the enactment of the *Constitution of the Republic of South Africa* 200 of 1993. South Africa had little or no law to

are political in nature, including, amongst others, that the South African economy has been dependent on revenue generated by mines during times of political and economic isolation from the world. The consequences of unchecked and poorly regulated mining activities will be with South Africans for some time to come, and, if not properly overseen now and in the future, will exacerbate the already devastating effects on the environment.[454]

This case study investigates the role that public participation played in influencing authorisation for a proposed mining development in one of South Africa's most sensitive environments. In doing so, it critically reflects on the effectiveness of public participation as an element of the broader environmental governance effort by analysing the Supreme Court of Appeal decision of Save the Vaal.

4.7.2 Description

Sasol Mining Ltd. is one of South Africa's largest gas and petroleum companies. The company held mineral rights in an area near the Vaal River,[455] which is well-known for its environmentally sensitive characteristics. In May 1996, Sasol Mining sought governmental authorisation to commence open-cast coal mining in the area. Sasol Mining approached the Director of Mineral Development Gauteng (Director)[456] for authorisation in the form of a section 9 mining licence in terms of the *Minerals Act* 50 of 1991.

Save the Vaal Environment (Save) is an unincorporated environmental association comprising concerned members owning property and residing along the Vaal River. Although unincorporated, it has a written constitution that lists its objectives as, *inter alia*, 'assisting its members to protect and maintain the environmental integrity of the Vaal River and its environs for current and future generations.'[457] Save was united in its opposition to the development and exploitation of the coal reserves by open-cast mining in the area in question. Its concerns were primarily environmental:[458] the Rietspruit Wetland would be destroyed;[459] fauna and flora would be threatened (amongst these 254 bird

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regulate environmental issues during this period. It was only after the promulgation of the 1996 Constitution that the bulk of South Africa's environmental laws were established. See further, 'White Paper on a Minerals and Mining Policy for South Africa' in *Government Gazette* 19344 of 20 October 1998. Chapter 4 of the White Paper particularly highlights the relationship between mining and the environment. See also Mabiletsa, M. and Du Plessis, W. 'Impact of Environmental Legislation on Mining in South Africa' 2001 *South African Journal of Environmental Law and Policy* pp. 185-215.

454 See, for example, Feris, L.A. 'The Asbestos Crisis: The Need for Strict Liability for Environmental Damage' 1999 *Acta Juridica* pp. 287-302, for a discussion on the effects of asbestos mining in South Africa.

455 This river also supplies, *inter alia*, the greater Gauteng area, South Africa's economic centre, with water for domestic and industrial use.

456 A provincial government sphere.

457 714B-714C.

458 714D.

459 Save contended that the wetland: covers approximately 1,000 hectares. The wetland in its present state annually filters and purifies naturally in excess of 2 million cubic metres of improved quality water into the Vaal Barrage. This large volume of water makes a valuable contribution to

species, 44 endemic animal species, and 33 species of reptiles and amphibians); pollution caused by noise, light, dust and waste would adversely affect the 'spiritual, aesthetic and therapeutic qualities associated with this area'; water quality would be affected; and property values would decrease.[460]

The present appeal raises the question of whether interested parties (Save), wishing to oppose an application by the holder of mineral rights for a mining licence (Sasol Mining), are entitled to raise environmental objections and be heard by the Director. In other words, does a concerned group have the right to be heard by the relevant competent authority responsible for evaluating and issuing a mining licence; the consequences of which may very well affect the group's environmental rights and interests?

The issue revolved around the administrative law principle of *audi alteram partem*. This principle is derived from the South African common law (specifically the rules of natural justice) and, plainly put, means that everyone has a right to be heard where his or her interests could be affected by an administrative or government decision.[461] The *audi* principle can therefore be employed to facilitate effective public participation by raising objections to administrative government decisions which may affect environmental rights and interests, certainly in those instances where concerned citizens have *not* been given the opportunity to raise objections to administrative decisions earlier in the process.

Initially, the Director refused Save a hearing to air its objections, and the mining licence was subsequently issued. The Court *a quo* (High Court of first instance in South Africa) found that Save in fact had a right to be heard. The Director appealed *in casu* against this decision of the High Court. The remainder of this section reflects on those parts of the Court's decision that dealt with the *audi* principle.

Save argued that the *audi* principle should have been applied by the Director. They contended that:

> The rule comes into operation whenever a statute empowers a public official or body to do an act or give a decision prejudicially affecting a person in his or her liberty or property or existing *rights* or *interests*, or whenever such a person has a legitimate expectation of a hearing, unless the statute expressly or by necessary implication indicates the contrary, or unless there are

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water quality in the Vaal Barrage. It is alleged that the wetland will be at least partially destroyed by the envisaged open-cast mining. It is further alleged that the eventual replacement of the overburden after the mine has been worked out would not restore the wetland because the upper layer of hydric soil will have been replaced by undifferentiated soils without water storage capabilities. The affected wetland will thus be permanently destroyed. Furthermore, removal of the overburden to reach the coal seams will result in natural seepage water making contact with iron pyrites in the exposed coal seams. This will create weak sulfuric acid solutions and leaching of acid water into the Vaal Barrage is likely.

Par 714G-714J.

460 714F-715F.

461 See for a detailed discussion on the application the principle, Pretorius, D.M. 'The Outsider and Natural Justice: A Re-examination of the Scope of Application of the Audi Alteram Partem Principle' *THRHR* Vol. 63 .pp. 93-110.

> exceptional circumstances which would justify a court in not giving effect to it.[462]

The substantive rights or interests Save relied on were the environmental right enshrined in section 24 of the Constitution. This right states that:

> Everyone has the right
>
> (a) to an environment that is not harmful to their health or well-being; and
>
> (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
>
> (i) prevent pollution and ecological degradation;
>
> (ii) promote conservation; and
>
> (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

The Director argued that the *audi* principle was expressly excluded by section 9 of the *Minerals Act* 50 of 1991 because the section was formulated in peremptory terms. Section 9 states that Director *shall* issue the license *if* he is satisfied, *inter alia*:

> (a) with the manner in which and scale on which the applicant intends to mine the mineral concerned optimally under such mining authorisation;
>
> (b) with the manner in which such applicant intends to rehabilitate disturbances of the surface which may be caused by his mining operations;
>
> (c) that such applicant has the ability and can make the necessary provision to mine such mineral optimally and to rehabilitate such disturbances of the surface.

The Court found that some of the matters in section 9 involved environmental issues, for example, an enquiry into how the applicant (in this instance Sasol) intends to rehabilitate disturbance to the surfaces which may be caused by the mining operations. It added that:

> This provision requires the Director to enquire into the nature and extent of the terrain which would be violated by the relevant mining operations, the effect of such violation and how the terrain could and should be rehabilitated. *In casu*, he would have to take into account the alleged likelihood of damage to the Rietspruit wetland and the question if, and to what extent, the wetland could be rehabilitated. *These are environmental matters about which the respondents have legitimate concerns*.[463]

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462 716C-716E. Emphasis added.

463 717E-717F. Emphasis added.

The Court accordingly found that the Director would therefore have to give Save an opportunity to be heard at the stage of considering the license application.

The Director further argued that the 'mere issuing of a mining licence … in terms of s[ection] 9 of the Act can have no tangible, physical effect on the environment. For this reason no rights are infringed and there is no case for a hearing'.[464] The Court found this argument to be flawed since:

> The granting of the s[ection] 9 licence opens the door to the licensee and sets in motion a chain of events which can, and in the ordinary course of events might well, lead to the commencement of mining operations. It is settled law that a mere preliminary decision can have serious consequences in particular cases … which may have grave results. In such a case the *audi* rule applies to the consideration of the preliminary decision.

The Court came to the conclusion that the *audi* principle applies when application for a mining licence is made to the Director, and that Save therefore had a right to object and air its concerns and objections to the development by way of a hearing. The Court also indicated that the hearing need not be a formal one. Concerned citizens could merely be notified of the application and be given an opportunity to raise their environmental objections and concerns.[465] In what is perhaps its most profound finding, especially as far as protection of environmental rights and interests in South Africa is concerned, the Court stated that:

> …the application of the [*audi*] rule is indicated by virtue of the enormous damage mining can do to the environment and ecological systems. What has to be ensured when application is made for the issuing of a mining licence is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs (the criterion proposed in the *Brundtland Report*) ... Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.[466]

The appeal was accordingly dismissed with costs and at the time of writing, in the absence of a valid mining license, Sasol has not commenced mining operations in the area.

4.7.3 Evaluation

The anomaly presented in Save the Vaal illustrates the sometimes difficult decisions government and the courts have to make to balance sustainability considerations in a developing country. Kidd[467] notes that public participation, certainly from the mining sector point of view, may seem an unnecessary and

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464 717J-718A.

465 719A.

466 719B-719D.

467 Kidd, M. 'Vaal Environment Saved?' *SAJELP* Vol. 6, 1999, pp. 152-153.

costly burden on developers. Such an approach, according to the author, is incorrect. The issue at stake is not 'to curtail the opportunities of interested parties to make representation at important stages of the development process, but rather to ensure that the methods of allowing the public a chance to be heard are appropriate in the circumstances'.[468] Moreover, the Supreme Court of Appeal decision does not mean that mining should be prohibited in all circumstances where the environment may be threatened. The discretion to issue a mining license still lies with the relevant competent authority, but now and in future, the authority has to consider *all* elements of sustainability. The judgment in Save the Vaal therefore stresses the 'how' element of environmental governance rather than the 'what' element by obliging government to reform its 'administrative' decision-making processes to include comprehensive consideration of all sustainability elements. One of the most effective ways this can be achieved is to force government to consider public environmental concerns.

The approach of the Court in Save the Vaal also suggests that if decision making concerning authorisation of proposed developments is entirely left to government without adequate public participation, one could easily end up with a situation in which only the economic component of sustainability is promoted without due regard to the social and environmental considerations necessary to sustain life on Earth. Concerned members of the South African public have a constitutional environmental right which protects environmental interests.[469] They should, in all administrative decisions that might affect the environment, be given the appropriate opportunity to raise any objections concerning these rights and interests. Conversely, government must take note of these constitutional entitlements and must further ensure that administrative decision making does not under any circumstances infringe rights and interests flowing from these entitlements. What clearly emerges is the significant role environmental rights can play to protect sustainability interests, if these rights are properly enforced by means of, *inter alia*, administrative law remedies such as the *audi alteram partem* principle. Rights in themselves are of little value if not properly enforced. Public participation through the *audi* rule accordingly can provide a fairly simplified and effective mechanism to protect and enforce environmental rights.

It is also evident that legal and administrative (environmental governance) processes must change to conform to the principles of sustainability. If government from its own accord does not make this paradigm shift, the public now has a comprehensive 'arsenal' of mechanisms by which government could be 'forced, kicking and screaming if needs be, into to new "ideological climate"'.[470] What clearly transpires from Save the Vaal, is that public participation can be used effectively in public endeavours to force government to consider all sustainability issues throughout the entire environmental governance sequence.

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468 Kidd, M. 'Vaal Environment Saved?' *SAJELP* Vol. 6, 1999, p. 153.

469 Kotzé, L.J. 'The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection' *RECIEL* Vol. 16 No. 3, 2007 pp. 298-311.

470 Kidd, M. 'Vaal Environment Saved?' *SAJELP* Vol. 6, 1999, p. 154.

4.7.4 Conclusion

Decisions affecting sustainable livelihoods are complex, mainly because of the complexities arising from the sustainability concept itself. The content, parameters, and dimensions of environmental governance also are wrought with uncertainties and complexities. What is clear is that sustainability should be the ultimate ideal or objective of environmental governance. It is also clear that environmental governance postulates a multi-stakeholder approach in which public inputs in decision making are crucial to keep governance decisions on a sustainable path.

Governance for sustainability will remain a pipe dream if administrative or governance decisions that may negatively impact on the environment are not transparent, inclusive, and representative of the views of all people living in a particular environment. Legislative entitlements that protect environmental rights and interests, should be relied on by a vigilant public by means of public participation processes to ensure an equitable consideration of all sustainability dimensions in all environmental governance processes. Moreover, the public should be encouraged to actively partake in environmental governance and to rely on all possibly available legal entitlements and mechanisms at its disposal to ensure a sustainable future.

Surely there are many and varied means available to a concerned public that wishes to protect its environmental rights and interests. The *audi* rule, certainly in South Africa's case, is not the only mechanism available to induce, encourage, and further facilitate active public participation. Constitutional, environmental framework, and sectoral legislation provisions all aim to give effect to public participation. However, as one of the tools to facilitate broad-based public participation, the right to be heard, especially when applied to environmental governance as illustrated in the present case, makes it incumbent on government to reinvent environmental governance processes so as to better conform to the generally accepted principles of sustainability. It goes without saying that public involvement in environmental decision making is crucial to ensure that government adequately recognises public environmental concerns, which often revolve around maintaining an acceptable environment that is not harmful to health and well being.

4.8 It Takes a Village to Save the Polar Bear

Christina E. MacLeod[471]

Abstract

The Newfoundland and Labrador Government set forth to strengthen the sustainable management of the Davis Strait subspecies of polar bear and ended up creating an inclusive document that combined local, indigenous, and scientific knowledge. The Management Plan puts into action a structure that includes ecological, social, and economic considerations and in a way that engages governments and departments as well as local communities and individuals.

4.8.1 Introduction

Policymakers, activists, and academics have developed important concepts such as 'sustainable management', 'future generations', and the 'precautionary principle' to help direct society toward a better balance with nature. However, concepts alone will not create a world that is in sync with nature. To live in balance we need a game plan that incorporates these concepts and allows us to know and understand the interests at stake.

The *5 Year Management Plan (2006-2011) for the Polar Bear/Nanuk* (Ursus maritimus) *in Newfoundland and Labrador* is an attempt to make the concept of sustainable management into a realisable goal of sustainably managing polar bears that inhabit Labrador.[472] While using management plans for species preservation is relatively new, the Newfoundland and Labrador Management Plan goes even further than most plans by including not only scientific and local knowledge, but also the traditional knowledge of Nain elders on the polar bear's habitat, climate change, human encounters, and traditional hunting.[473] This inclusive approach creates a report focused on sustainable management that is accessible to the public through pictures, stories, and scientific data.

4.8.2 Description

The polar bear faces threats from oil exploration, climate change, persistent organic pollutants (POPs), and increased human encounters[474] that endanger the

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471 Christina MacLeod is a member of the IUCN Commission on Environmental Law. She lives in Prince Edward Island, Canada. Email: christina_macleod@hotmail.com

472 Brazil, J. and Goudie, J. *A 5 Year Management Plan (2006-2011) for the Polar Bear/Nanuk* (Ursus maritimus) *in Newfoundland and Labrador* (Wildlife Division, Department of Environment and Conservation, Government of Newfoundland and Labrador and the Department of Lands and Natural Resources, Nunatsiavut Government, 2006).

473 'Under the federal *Species at Risk Act*, a management plan must include measures for the conservation of the species that the Minister of Environment considers appropriate for species of special concern. Especially, a management plan is a plan to redirect the course of decline of the species to prevent it from becoming endangered or threatened by addressing and mitigating the main threats that it faces'. David Suzuki Foundation *Canada's Polar Bear: Falling Through the Cracks?* November 2007, www.davidsuzuki.org/files/SWAG/DSF-Polar-Bear.pdf, pp.11. (accessed 19 February 2008)

474 '[T]he polar bear's hunting platform – sea ice – is melting at an unprecedented rate due to global warming. Without this sea ice, the future of all polar bears in Canada is uncertain'; Persistent

very survival of the great white bear. Because of these increasing threats and because studies highlight the species' slow reproductive rate,[475] Newfoundland and Labrador has declared the polar bear 'vulnerable' under the provincial *Endangered Species Act*.

The Newfoundland and Labrador Management Plan's objective is 'to ensure the long term health and viability of the species in Newfoundland and Labrador'.[476] Other management plans that address polar bears in Canada are solely about hunting but the Newfoundland and Labrador Management Plan recognised the impacts of climate change and other influences on the sustainable management of the polar bear.[477] Addressing just one aspect that is threatening a species is not going to result in effective and efficient management and is contradictory to the concept of sustainable management.

The objective of a management plan is not simply to determine the population of a species and then set hunt quotas, but to understand the interests of stakeholders, whether they be economic, cultural, conservational or spiritual. The exact number of polar bears in the Davis Strait sub-population was unknown at the time of this writing and is one of the 'knowledge gaps' clearly detailed in the management plan,[478] one of many such gaps that reveal the need for more scientific, local, and traditional research and understanding.

Reports and documents usually become dated, and often irrelevant, soon after publication. The Newfoundland and Labrador Management Plan (2006 – 2011) acknowledges that to be sustainable it must be a 'living document' that will be re-evaluated and revised before the end of the period as new information becomes available.[479] Priorities and plans may be adapted when new scientific, local, or traditional knowledge on the population of Davis Strait polar bears becomes available.

4.8.3 Evaluation

Overlapping jurisdictions

Duplication of efforts and policies is common when departments, jurisdictions, and organisations fail to have open discussions about their concerns and efforts. Because Polar Bears, like most animals, are not aware of provincial, federal and regional borders there is a 'need to insure there is inter-jurisdictional cooperation

organic pollutants (POPs) are being discovered in the flesh and organs of polar bears. POPs include pesticides and industrial chemicals such as PBDEs (toxic flame retardants), PCBs (used in plastics and dioxins (used in pulp and paper bleaching and a combustion by-product) in Suzuki Foundation Report, p.1; also see IUCN Polar Bear Specialist Group, www.pbsg.npolar.no/ [accessed on 18 February 2008].

475 *Endangered Species Act,* S.N.L. 2001, c. E-10.1.

476 Newfoundland and Labrador Management Plan, p. ii.

477 Personal Communication with Rachel Plotkin, Biodiversity Policy Analyst for the David Suzuki Foundation, 5 March 2008.

478 Newfoundland and Labrador Management Plan, p.16.

479 Newfoundland and Labrador Management Plan, p. vi.

when it comes to conserving the Davis Strait polar bear sub-population'.[480] As shown in Map. 1, the Davis Strait sub-population migrates through Newfoundland and Labrador, the Labrador Inuit Settlement Area (the northern part of Newfoundland and Labrador), Quebec, Greenland, and Nunavut.[481] If each of these jurisdictions were to embark on autonomous management plans, they would likely provide ineffective and limited sustainable management of the Davis Strait population of polar bears.[482]

Developing isolated management plans for any of the jurisdictions (federal, provincial, or aboriginal) with patchwork legislation and public messaging creates the prospect of gaps that may do more harm than good. Increasingly, with greater acknowledgement of the value of local involvement and knowledge, policies, and assessments are employing cooperative management schemes and collaborative efforts to be inclusive of all stakeholders.

Leading by example

In November 2007, the David Suzuki Foundation produced a report, *Canada's Polar Bear: Falling Through the Cracks?* to provide direction for provinces, territories, and the federal government to deal with management of polar bear populations as there are complicated jurisdiction concerns.[483] The Suzuki Foundation acknowledges that 'Newfoundland and Labrador is the only province that has written a management plan for the species, which was co-created by the Nunatsiavut government',[484] and recommends that '[e]very province and territory where the polar bear is found must develop and implement a polar bear management plan to mitigate threats and plan adaptation measures'.[485]

The Newfoundland and Labrador Management Plan did an excellent job, not only in identifying the stakeholders but also in creating a framework for meaningful cooperation and collaboration. In its final recommendation, the Suzuki Foundation report reiterates the cooperative efforts used in this management plan and notes that 'the federal government should exert leadership in managing the larger ecosystems in which federal protected areas exist, by encouraging co-management arrangements with shared jurisdiction and cooperative decision making between federal/provincial/territorial governments, aboriginal peoples and local communities'.[486]

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480 Newfoundland and Labrador Management Plan, p. v.

481 The data analyzed by the Newfoundland and Labrador Management Plan 'suggest that weekly movements can be in the thousands of kilometres while an activity area can be tens of thousands of square kilometres'. Newfoundland and Labrador Management Plan, p. 4.

482 Minutes of the 14th Working Meeting of the IUCN/SSC PBSG, Seattle, 20-24, June, 2005, pp. 35, 36.

483 Suzuki Foundation Report.

484 Mclean, E., 'Protecting polar bears; People are seeing more of the majestic white bear in Labrador, but scientists say the species may still be in danger', *The Telegram,* 2 March 2008, p. A1.

485 Suzuki Foundation Report, p. 20.

486 Suzuki Foundation Report, p.11.

Diverging Interests of Stakeholders

The recent campaign by climate change activists to use the polar bear as the icon of the potential effects of climate change is an example of an effort in which discussions with all stakeholders did not take place. 'While Canadian polar bears roam the Arctic oblivious to the international politics swirling around them, Inuit are bracing for another blow to our traditional pursuits and local economy. It comes in the form of a distant political jurisdiction – the United States Fish and Wildlife Service – listing the polar bear as "threatened"'.[487] While many climate change activists saw that move as a step towards recognition of the dangers of climate change and possibly more protection for the polar bear, they gave little regard for the thousands of years the Inuit communities have interacted with the polar bear. By isolating the Inuit Community from the process lessens the effectiveness of sustainable management. Obviously, the Inuit community has an important role in the sustainable management of the polar bear.

Saving Nanuk together

The Newfoundland and Labrador Management Plan acknowledged the Inuit's connection to the polar bear by including *Nanuk,* the Inuit name for the polar bear, beside the scientific reference name, *Ursus maritimus* in its title.[488] The Davis Strait sub-population, like many polar bear populations, is closely connected to the culture and tradition of the people who co-inhabit their frozen land and sea. 'Polar bear' is the western name for majestic white bear but throughout its range in the far north the polar bear is *Nanuk, Pihoqahiak* (the ever-wandering one), *isbjørn* (the ice bear), *Tornassuk* (master of the helping spirits)*, biely medved* (white bear), *gyp* (grandfather), and *qoi* (stepfather).[489] Acknowledging indigenous names and concepts is an important part of connecting the plan to the desires of indigenous communities that inhabit the same land as the species.

Canada recognizes this connection to the polar bear as a mythological creature and as a part of their traditional hunting rights through numerous Inuit land claim agreements.[490] Currently, the Inuit have exclusive rights to harvest six polar bears annually along the Labrador coast.[491] Not including Inuit traditional knowledge and rights in the management plan, and subsequently, excluding representatives from the Nunatsiavut Government, would have left a large gap in the management of the polar bear and negated the province's legislated responsibility to co-manage wildlife with the Nunatsiavut Government. The innovation of the Management Plan under the lens of sustainable governance is that it acknowledges all stakeholders and threats, and places value on different

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487 Simon, M. 'Polar Bear Politics', *Above & Beyond,* March/April 2008, p.61.

488 Newfoundland and Labrador Management Plan.

489 Newfoundland and Labrador Management Plan, p. 1.

490 See Labrador Inuit Land Claim Agreement Act, S.N.L. 2004, c.L-3.1.

491 12.3.6 of Labrador Inuit Land Claims Agreement 'Inuit have the exclusive right to Harvest, throughout the Labrador Inuit Settlement Area, the Total Allowable Harvest of polar bears established by the Province or in or for Newfoundland and Labrador'. Labrador Inuit Land Claim Agreement Act, S.N.L. 2004, c.L-3.1.

sources of knowledge to manage the Davis Strait polar bear in an inclusive manner. [492]

Inclusive knowledge

The Newfoundland and Labrador Management Plan takes extra efforts to be inclusive to all stakeholders including the public. Often policy makers and scientists write plans, reports, and legislation in a language that is hard for those outside their field to understand. However, the stories, pictures, maps, and plain language in this plan make it accessible and interesting to the public, which also has a role to play in the sustainable management scheme.

The plain language is useful because the Management Plan's 'target audiences' are coastal communities, eco-tourism companies, national parks staff, resource management employees, and companies working in areas frequented by polar bears.[493] The effort to write in accessible and interesting language assists in fulfilling the objectives of the management plan in education and stewardship and should strengthen commitment to the concepts presented in the report. Management plans increase their adoptability when they are available in all languages employed by the stakeholders including indigenous.

The creation of a sustainable management plan

As outlined earlier, the Management Plan has established new ground by addressing species management with regard to breadth, stakeholders, flexibility, and inclusiveness. It recognizes that neither scientists in a centralized government with little connection to the local communities nor local communities without adequate resources can sustainably manage a species. It takes a village.

The success of the Management Plan as an example of sustainable management of the Davis Strait polar bear population is that it is a 'living document'. It encapsulates current scientific, local, and indigenous knowledge about the polar bear along the Labrador coast. It also establishes who is responsible and accountable if the Management Plan's objectives are left unanswered throughout the five years.

Newfoundland and Labrador was required to create a management plan. However, it was not required to create a document that is accessible to the public and of the breadth that it covered.[494] The Management Plan recognized early that 'successful conservation and management of polar bears is dependent on the cooperation and in many instances collaboration of various governments,

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492 '[T]he goals, objectives and management recommendations identified in the plan are based on available scientific, local and aboriginal knowledge and are the subject to modifications resulting from new finding and revised objectives' in Newfoundland and Labrador Management Plan, p. ii.

493 Newfoundland and Labrador Management Plan, p. 18.

494 'The *Endangered Species Act* requires release of a recovery plan within one year of designation for endangered species and two years for threatened species'. *Endangered Species Act,* S.N.L. 2001, c.E-10.1, ss. 14(2); A management plan must be prepared within three years for vulnerable species. Recovery plans are required for critical habitat 'where appropriate' *Endangered Species Act,* S.N.L. 2001, c.E-10.1, s. 23(b).

responsible management agencies and others with a stake or legitimate interest in polar bear conservation'.[495]

The Newfoundland and Labrador Management Plan could be strengthened if more jurisdictions such as the Canadian Federal Government, Quebec, Nunavut, and Greenland sign on. While the Management Plan framers went out of their way to include local, indigenous, and provincial representatives and knowledge, they did not include all stakeholders who have an interest in the polar bear or the polar bear's habitat, which overlaps multiple countries, provinces, and governments.

The Newfoundland and Labrador Management Plan implements the precautionary principle, not in the traditional sense of protecting all land and stopping all economic, cultural, or spiritual practises in relationship to the species, but in the recognition that these discussions will continue. This approach to the precautionary principle was highlighted in the plan where it states that '**prior to putting in place a habitat protection strategy such important areas have to be identified and mapped'** (bold in original text). Thus the Plan cautions against simply protecting more habitat area recognises that the threats are diverse and complicated. Approaching the precautionary principle in this manner is aligned with the concept of sustainable management.

A notable limitation of the Newfoundland and Labrador Management Plan as an example of sustainable management is its lack of an evaluation structure.[496] If the Plan were to adopt concrete targets, it could further enhance the accountability and effectiveness of the report. Setting targets is a way of tracking successes and overcoming weaknesses to continue towards sustainable management for each partner and government involved.

4.8.4 Conclusion

Biological conservation has been hampered by fragmented mandates and divisions between scientists, policy makers, businesses, and communities. Often this fragmentation creates duplication and conflicting strategies even within the same level of government. In bringing all stakeholders to the drafting table, as the polar bear management team did, policy and implementation can be more effective and more efficient.

The Suzuki Foundation recognizes the effectiveness of the Newfoundland and Labrador Management Plan as a 'potential legislative tool available to governments, management plans are likely the most appropriate means for developing effective mitigation and adaptation measures to address the threats facing polar bears'.[497] The Suzuki report recommends that other jurisdictions follow Newfoundland and Labrador in their management of the polar bear but cautions that provincial or indigenous nation's management plans might be limited due to jurisdictional issues and might create a patchwork of legislation and policy.

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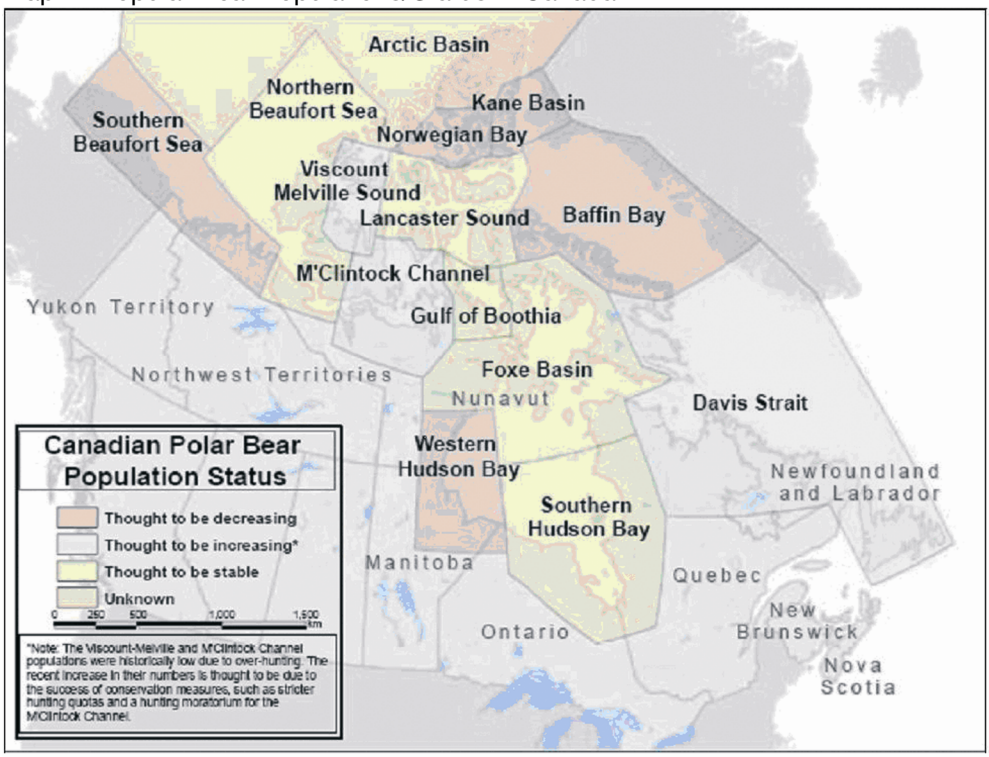
495 Newfoundland and Labrador Management Plan p. 19.

496 Personal communication with Rachel Plotkin 5 March 2008.

497 Suzuki Foundation Report p. 19.

The Management Plan is a tremendous first step in the sustainable management of the polar bear, but implementing it is the only way to see the full impact of the sustainable goals and objectives.[498] The Management Plan is significant to the development of governance for sustainability because if we are to move toward sustainability we need to challenge our current simplistic western constructs. We need to acknowledge and recognize that not all process occurs in solitary at one moment in time and that it takes a village to create sustainability.

Map. 1: Popular Bear Populations/Status in Canada



Source: Minutes of the 14th Working Meeting of the IUCN/SSC PBSG, Seattle, 20-24, June, 2005.

498 Personal communication with Rachel Plotkin 5 March 2008.

4.9 Brightening the Covenant Chain: The Onondaga Land Rights Action and Neighbors of the Onondaga Nation

Jack Manno,[499] *Chief Irving Powless Jr. (Chawhdayguywhawdoes)*[500]

Abstract

In 2005 The Onondaga Nation, one of the six nations of the *Haudenosaunee* (Iroquois) Confederacy, filed a lawsuit in U.S. federal court alleging that New York State violated federal law when it attempted to take title to the aboriginal homeland of the Onondaga people who had never legally ceded it. The Onondaga have used their land rights action to focus attention on cases of environmental destruction throughout the disputed territory and have reached out to assure the local community that they do not plan to dispossess anyone of their property. A local organization, the Neighbors of Onondaga Nation (NOON) formed several years earlier to support the Onondaga Nation, began supporting their legal action and educating the local community concerning the history and culture of the indigenous people of central New York. NOON sponsored several educational events, including a year-long educational series. This case study examines the *Haudenosaunee's* foundational event and its 'constitution', the Great Law of Peace. The Iroquois Confederacy was established in ceremonies on the shore of Onondaga Lake, now one of the most chemically contaminated water bodies in North America. The Onondaga land rights action has linked the healing of the environment with the healing of the relationship between the peoples that share the Onondaga's aboriginal homeland. This has made it possible, through the educational series, 'Onondaga Land Rights and Our Common Future', to examine the Great Law of peace as a model for governance for sustainability. This case study also discusses how *Haudenosaunee* tradition and worldview may have influenced progressive social movements in central New York state, especially the nineteenth century movements for the abolition of slavery and for women's rights and how it is again influencing how people of central New York imagine the possibilities for peace and social justice. The metaphor used to describe the peace treaties between the *Haudenosaunee* and their neighbors throughout history is the

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500 A leader *Dayhawtgawdoes* of the Beaver Clan of the Onondaga Nation for more than 40 years. He is a teacher, frequently speaking at colleges and universities and public events raising awareness about the history of the treaties between Native Nations and the U.S. government and their associated rights and responsibilities. He has been instrumental in obtaining the return of wampum belts and other historic and sacred objects. His writing has appeared in the *University of Buffalo Law Review* and *New York Folklore* and in Jemison, G. Peter and Schein, Anna M., *Treaty of Canadaigua: 200 Years of Treaty Relations between the Iroquois Confederacy and the United States,* (Clear Light, Santa Fe,2000).

'Silver Covenant Chain', a covenant of friendship, mutual assistance, and respect. Occasionally, throughout history, the silver needs to be polished and brightened. The Onondaga see the land rights action as an invitation to renew the covenant between our peoples.

4.9.1 Introduction

In the heartland of what is now New York State a remarkable collaboration has been underway between Native Americans of the Onondaga Nation and NOON (Neighbors of the Onondaga Nation) a group of local citizens organized as Onondaga allies and affiliated with the Syracuse Peace Council, a local peace and social justice organization. In 2005 the Onondaga Nation filed a legal complaint in U.S. federal court asking the court to rule that New York State violated federal law in a series of land deals commencing in the late eighteenth century thus those transactions are void and title to the land rightfully belongs to the Onondaga Nation. The lawsuit names not only the State of New York but also several large chemical, mining, and energy corporations that the Onondaga hold responsible for the degradation and chemical contamination of the land and waters in the aboriginal territory. In presenting the case to the court and to the people of central New York, the Nation and its lawyers have expressed their intentions to begin a healing of the ancestral land and waters and of the relationships between all the people who now share this place. The Onondaga Nation has especially reached out to local communities throughout the region that have been affected by pollution and destruction of natural resources. The Nation assured the community that although it is asking that aboriginal title to the land in question be acknowledged, it is not seeking to repossess land that others presently occupy. 'We know what it is like to be evicted', Sid Hill, the *Tadodaho* or spiritual leader of the Onondaga and a spokesman of the *Haudenosaunee* ('People of the Longhouse'), said in reassuring the local community. In words unusual for a legal complaint, the Onondaga land rights action begins, 'The Onondaga People wish to bring about a healing between themselves and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time. The Nation and its people have a unique spiritual, cultural, and historic relationship with the land, which is embodied in, the Great Law of Peace (*Gayanashagowa*). This relationship goes far beyond federal and state legal concepts of ownership, possession or legal rights. The people are one with the land, and consider themselves stewards of it. It is the duty of the Nation's leaders to work for a healing of this land, to protect it, and to pass it on to future generations. The Onondaga Nation brings this action on behalf of its people in the hope that it may hasten the process of reconciliation and bring lasting justice, peace, and respect among all who inhabit the area'.[501]

The *Onondagega*, the 'People of the Hills' have lived in the region south and east of Lake Ontario, in the high hills and wide valleys carved by the advancing and retreating glaciers, since, as it is expressed, 'the dawn of time'. Many still live on a fragment of the aboriginal homeland whose sovereignty is today mostly, if at times

[501] Onondaga Nation (2005), *Onondaga Nation vs. State of New York, Civil Action 05-CV-314 (LEK/DRH)*, available at: www.onondaganation.org/land/briefs.html

tenuously, recognized and honored by local, state, and federal officials. They continue to maintain traditions, stories, ecological perspectives, and the traditional form of governance. Onondaga chiefs and clan mothers have often spoken on behalf of indigenous people globally and frequently warned the world about the threat of accelerating global ecological change and what it means to people whose culture is tightly bound to the ecology of their homelands. The Onondaga are referred to as the 'fire keepers'. Their territory lies in the middle of *Haudenosaunee* country, which is thought of as a large longhouse, a home in which the nations live together as family and the Onondaga tend the central fire, the symbol of governance. Thus it is to Onondaga that the leaders of the other nations come to meet in the Grand Council (legislature). To the east of the Onondaga land are the Oneida and Mohawk Nations, to the west, the Cayuga and Seneca (the Tuscarora, removed from the their homeland in North Carolina in the eighteenth century sought refuge with the *Haudenosaunee* and were welcomed as the sixth nation). The six nations comprise the *Haudenosaunee* known mostly to non-natives by the name given them by the French, the Iroquois Confederacy.

Oral tradition tells of the arrival of a messenger, a Huron man known as the Peacemaker whose message was eventually taken up by the leaders of the five original nations and ended a long period of violence and strife among the nations. The Peacemaker brought the leaders of the nations together on the shores of Onondaga Lake nearly a thousand years ago and established perhaps the world's first participatory democracy, with a delicate balance of responsibilities among branches of government and between women and men. The Great Law of Peace serves as the Constitution that sets forth guidance for governing, establishes the rights and responsibilities of individuals, nations, and clans and sets rules for emigration, adoption into the community or nation, the role of spiritual leaders, and the powerful role of women who had the responsibility to nominate, hold in office, and, if necessary, remove the chiefs. Under the Law, 'every human being who is a member of a family, clan, and nation has certain responsibilities and rights. Everyone has a responsibility to help protect and to preserve the Earth, our Mother, for the benefit of her children seven generations to come. Everyone has the right to come and to go, free to live in harmony with the laws of nature, free to enjoy liberty, to live in a natural way, as long as one continues to give thanks for all land and life'.[502] The tragic irony is that in the twentieth century Onondaga Lake became one of if not *the* most chemically polluted lakes in North America. Near the lake and in the Tully Valley to the south several salt springs were an economical source of salt for the new United States, especially after the building of the Erie Canal. Wealth from salt built the city of Syracuse. It also became a source of a number of industrial processes whose wastes were dumped into the small lake (4.6 square miles) already reeling from the wastewater of the burgeoning city. Between 1956 and 1970 Allied Chemical Corporation dumped an estimated 165,000 pounds of mercury into the lake. Today the entire bottom is designated a hazardous waste site under U.S. Superfund laws. While a great deal of work is underway by the responsible parties to clean up the lake, the Onondaga consider the plan

[502] Swamp, Chief Jake and Schaaf, G. *The U.S. Constitution and the Great Law of Peace* (CIAC Press: Santa Fe NM, 2004) p. 66.

inadequate and insist that, as the stewards of the lake, they must have a meaningful say in decisions about clean-up.

The Onondaga Nation produced a video to present the land rights case to the public titled *Brighten the Chain* (available at www.onondaganation.org/). It referred to a series of Covenant Chain Treaties, the first between the Dutch settlers and the *Haudenosaunee* in the early 1500s. This treaty set out the relationship between the two societies as one of friendship, respect, and mutual assistance. It was envisioned as a chain made of silver because silver maintains its strength. But it could and would be tarnished and on occasion would need to be taken out and polished and brightened. The Onondaga see the land rights action as part of this brightening process.

In the official website of the *Haudenosaunee*, the values derived from the Great Law are described as:

- Thinking collectively, considering the future generations;
- Consensus in decision making, considering all points of view;
- Sharing of the labor and benefits of that labor;
- Duty to family, clan, nation, confederacy and Creation;
- Strong sense of self-worth without being egotistic;
- People must learn to be very observant of the surroundings;
- Everyone is equal and is a full partner in the society, no matter what their age;
- The ability to listen is as important as the ability to speak; and
- Everyone has a special gift or talent that can be used to benefit the larger community.

Many people involved in NOON admire these values and appreciate the culture and community that considers them foundational. One aspect of *Haudenosaunee* culture that had a profound impact on NOON and many others is the requirement that every ceremony or meeting begins and ends with the Thanksgiving Address. Each part of the community of life is acknowledged and appreciated for carrying out its duties and following its 'original instructions from the Creator'. The address begins by thanking the people who have come together. We are reminded of our duty to live in balance and harmony with nature. The Earth is greeted and thanked for the way she provides for us. The waters, the fish, the wild and domesticated plants, and the medicinal herbs are all noted and offered thanks. The animals, the trees, and birds follow. The winds of the four directions, the thunders, the sun and moon, the stars, the great teachers and leaders who continue to guide the people, and finally the Creator are thanked. After each acknowledgement the speaker asks the people gathered to bring their minds together as one to give greetings and thanks. Before closing, the speaker apologizes for leaving anything out and asks the listeners to add whatever may have been forgotten and then encourages each individual to send such greetings and thanks in his or her own way. To take the time in this way before and after each meeting effectively reminds everyone of our essential dependence on and deep connection with the entire community of life,

and it expresses a belief that all beings, including humans, have their duties under natural law. Our duty is to pay attention to the detailed workings of the life processes around us and to give thanks, a task that pleases the Creator and keeps the people healthy and humble.

The Thanksgiving Address, like so much else in *Haudenosaunee* culture, has its origins in the Great Law of Peace. When the leaders of the five nations gathered with the Peacemaker, they buried their weapons of war in a hole dug beneath a tall white pine tree near the shore. From there a powerful stream washed them away. The roots of the Tree of Peace spread out in the four directions throughout the world, holding out a promise that any and all nations could follow those roots and decide to live beneath the shade of the Tree of Peace and eventually join the *Haudenosaunee* Confederacy or perhaps another version of a United Nations. The Great Law of Peace conceivably presents a model of global governance based on human rights, thanksgiving, and responsibility for the Earth and future generations. The story of the Onondaga Nation's decision to frame their land rights action in the context of the Great Law and NOON's decision to back them and to educate the public about the Onondaga's land rights action, is particularly pertinent for this project.

4.9.2 Description

NOON has been involved in many educational and support activities including maintaining an information booth at local community events, often several in a single week; writing educational pieces on Onondaga history and culture, maintaining a website (www.peacecouncil.net/NOON) and advocating for the Onondaga land rights action. At many events, NOON asks people to sign a statement of support for the Onondaga land rights action that reads:

As residents of New York State we support the land rights action filed by the Onondaga Nation against the State of New York on March 11, 2005.

- We understand that no individual will be sued and that there is no action requested against any individual property owners. Our homes are not in jeopardy.
- We thank the Onondagas for their efforts to protect and heal the water, land and air, which we all share, from the devastating effects of industrial pollution of the environment.
- We share these environmental concerns, and pledge our support for a just resolution to this legal action. It is our intention to contribute to making right the historic wrongs done to the Onondaga people.
- We are hopeful that the outcome of this process will be a safer and healthier environment for all of us, for our children and the generations to follow.

In this case study we focus on a year long education series at a major local theater titled 'Onondaga Land Rights and Our Common Future' co-sponsored by NOON, Syracuse University, the State University of New York College of Environmental Science and Forestry (SUNY ESF), and several other local organisations. The series provided an open public accounting of New York history, examined the

specifics of the legal case, and introduced non-natives to the region's rich and active indigenous culture. More than 20 community organizations and university departments contributed to the series. Each event attracted hundreds of native and non-native students, activists, community leaders, and professors, and became a scene of cross-cultural reconciliation that covered extensively by the media. The series also included a day-long teach-in involving nearly 1,000 students and community members and ended with a celebration in which hundreds of Native and non-Native students, faculty, and community members learned *Haudenosaunee* social dances, snaking their way in intricate patterns around the Syracuse University gymnasium to the songs and drums of the Onondaga Nation Singers. Many of the events paired Native and non-Native speakers in conversation on stage followed by audience questions and discussion.

Among the highlights were:

- The opening evening when two prominent Onondaga leaders, *Tadodaho* Sid Hill and Clan Mother Audrey Shenanadoah of the Eel Clan, conversed with each other and spoke to the audience about Onondaga history, culture and spirituality. The theater was full with more than 300 people.
- A program, 'Visionary Women: The *Haudenosaunee* and the U.S. Women's Rights Movement', in which a prominent historian of the U.S. women's rights movement, Sally Roesch Wagner, discussed evidence suggesting that several prominent leaders of the U.S. women's suffrage movement 'were inspired to imagine the possibility of a more equal society'. 'That inspiration', Wagner claimed, 'came from contemporary women, who in fact lived very different lives from theirs, the women of the *…Haudenosaunee*'. She quoted writings of Elizabeth Cady Stanton, who marveled that the women 'were the great power among the clan', and 'the original nomination of the chiefs also always rested with the women'. The clan mother had the authority to nominate, hold in office, and remove the representative of her clan, Stanton explained. (Wagner 2005) Jeanne Shenandoah, of the Onondaga Eel Clan, spoke of the political, social, and cultural role of women in *Haudenosaunee* society. In conversation that held the audience spellbound, the two women imagined the impact this example must have had on nineteenth century American women, who had been taught that women were created by God to be subordinate to men and who could not participate in political life, could not own their own property, and were subject for life to the authority of father and husband.
- The discussion between a Native elder and one of the authors of this article, Chief Irving Powless Jr., and a university-based historian, Robert Venables, titled, 'The Onondaga Nation Encounters European Settlers'. The two friends, who had worked together for nearly thirty years, described their collaboration. Chief Powless would dispute the standard written history, citing the oral tradition that had been passed down over many generations about the early encounters with the 'newcomers'. Professor Venables would revisit the historic written evidence only to discover that the Chief's oral history could be verified even when it contradicted conventional scholarship on New York-*Haudenosaunee* relations.

- Over two consecutive evenings the story of the land and waters of Onondaga were told. Traditional Onondaga environmental knowledge and resource management practices had shaped and sustained a land of rich soils and abundant game and fish. Later, the industrialization of salt led to the environmental catastrophe that Onondaga Lake became. The following night featured local environmental scientists and organizers, Onondaga leaders, and the Nation's environmental counsel discussing a shared vision of a clean and healthy lake.

There were many other events.

DVD's are available at www.peacecouncil.net/NOON/commonfuture/dvd.html

4.9.3 Evaluation

The common theme and outcome of the educational series was an understanding that the system of governance embodied in the Great Law of Peace and the culture and lives of the Onondaga People have had a profound impact on our region even if that impact has seldom been acknowledged. The Onondaga land rights action has created an opportunity to brighten the Covenant Chain of friendship between the Onondaga and its neighbors. Many ideas and new programs have flourished following the series.

- Following the adoption by the UN General Assembly of the UN Declaration of the Rights of Indigenous Peoples, a local publisher, the Syracuse Cultural Workers, printed a commemorative poster designed in collaboration with Onondaga artists containing the words of the Declaration (www.syracuse culturalworkers.com). Several Onondaga and other *Haudenosaunee* leaders have played a significant role for more than 30 years in efforts to pass the historic Declaration.
- Over the past two years, NOON, Syracuse University Department of Religion, and the Onondaga Nation have begun a tradition of holding ' Roots of Peacemaking' gathering and ceremony at Onondaga Lake on the UN International Day of Peace (rootsofpeacemaking.syr.edu/).
- A group of local business people, public officials, and NOON activists are exploring the possibility of having the city and county cede a part of the Onondaga Lake shore back to the Onondaga Nation. The land around Onondaga Lake is largely undeveloped and in public ownership, a legacy of its severe pollution. But as the clean-up continues and water quality improves the lakefront will become a place of great potential.
- Among the ideas that have been floated by Onondaga Nation leaders and their allies is for a *Haudenosaunee* Environmental and Cultural Center on the shore of Onondaga Lake to commemorate the Great Law of Peace, celebrate the cultural heritage that has endured, and undertake environmental research

and education from the perspective of both traditional environmental knowledge and western environmental science.[503]

As of this writing, the Onondaga land rights action remains in federal court awaiting action. The State of New York asked the judge to dismiss the case on the grounds that 1) it will be disruptive to the local community and, 2) the Onondaga have waited too long to challenge the actions of the state. The efforts of NOON have shown that the case has been anything but disruptive. It has been, as it was intended to be, tremendously healing. It has been, in essence, a kind of truth and reconciliation commission, with a focus on how to shape the future to reflect the values and perhaps even the governance of the Great Law of Peace. The state's second assertion, that the Onondagas waited too long to go to court is wrong on several counts. First, Indian nations were only allowed to file land claims in U.S. federal court beginning in the 1970s. And the evidence filed in court briefs by several historians demonstrate that the Onondaga frequently sought redress over the past two centuries by doing what the treaties required – taking their concerns directly to Washington, nation to nation, rather than entering an alien court system. How the judge views these arguments remains to be seen.

4.9.4 Conclusion

It has long been acknowledged that central New York has long been unusually active in producing and sustaining social change and reform movements, especially in the ninteenth century. Anti-slavery, women's rights, and religious freedom movements all flourished in this area. Their leaders included Elizabeth Cady Stanton, Frederick Douglas, Susan B. Anthony, Harriet Tubman, William Henry Seward, Matilda Joslyn Gage and others. There is a growing and fascinating body of evidence that widespread and daily encounters between *Haudenosaunee* people and the surrounding community must have given early Americans pause to think about their own cultural practices. The *Haudenosaunee* world, as troubled as it was in the century following the devastating Sullivan-Clinton campaign to destroy it (sullivanclinton.com/), was still a community where women had authority and dignity, dressed in comfortable, loose clothing (during the era of corsets for white women), acknowledged the Earth as Mother, and made decisions based on consensus. This must have suggested the idea that bondage and legal disempowerment need not be inevitable. It suggested that another world was possible.[504] As we face the threat of multiple environmental catastrophes and as we imagine new forms of governance, the Onondaga land rights action and the response of Neighbors of the Onondaga Nation suggests that the Great Law of Peace might indeed serve as a model of governance for sustainability. Benjamin Franklin, Thomas Jefferson and other eighteenth century leaders of the movement for American independence from the British empire, were familiar with *Haudenosaunee* governance. They considered the advice of Iroquois leaders and

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503 Haudenosaunee Environmental Task Force *Haudenosaunee Environmental Restoration: An Indigenous Strategy for Human Sustainability* Occasional Paper # 1, (Indigenous Development International: Cambridge, 1995).

504 Roesch Wagner, S.y Sisters in Spirit: The Haudenosaunee (Iroquois) Influence on Woman's Rights (Native Voices Press: Summertown, TN, 2001).

may have adopted some of the ideas of the Great Law of Peace into the early drafts of what would become the U.S. Constitution.[505] As we grow closer to the need for a new Constitution for global governance, the roots of the white pine on Onondaga Lake are reaching out to the corners of the world, offering a route home to one of world's first democracies. If and when the American founders were influenced by the Great Law of Peace, they left out essential components, most especially the requirements to build into laws and decisions a perspective of gratitude to the entire community of life and a responsibility to protect it for the benefit of the children seven generations to come.

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[505] Johansen, B. E. Debating Democracy: Native American Legacy of Freedom (Clear Light Publishers: Santa Fe NM, 1998). Swamp, Chief Jake and Schaaf, G. The U.S. Constitution and the Great Law of Peace (CIAC Press: Santa Fe NM, 2004).

4.10 Rediscovering and Revitalizing the Great Lakes Governance

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Abstract

The Great Lakes Water Quality Agreement between Canada and the United States is a model of international cooperation to protect shared water resources. It contains a covenantal component committing the parties to restore and maintain the chemical, physical, and biological integrity of waters of the Great Lakes Basin ecosystem and a commitment to adopt an ecosystem approach. Presently the Great Lakes Water Quality Agreement is under its once-every-six-years formal review called for by the Agreement, which provides an opportunity to revisit its successes and failings, and to imagine new forms and scope of environmental governance for the Great Lakes. This case study summarizes the early history of Great Lakes, their pollution, and their emerging bi-national governance. It explores the promises of the early years of the Great Lakes Water Quality Agreement, the growing gap between promise and results, and the current effort to reform and revitalize Great Lakes governance through the review of the Agreement. A consensus is emerging that proposes new models of governance with improved public participation, reformed coordination among the agencies that comprise the Great Lakes regime, the articulation of a strong vision or covenant, inclusion of First Nations/Tribes, and recognition of the special status and associated treaty obligations of both Canada and the United States to effectively include Native perspectives and indigenous knowledge into Great Lakes institutions.

4.10.1 Introduction

Seen from space, the Great Lakes appear as sparkling jewels strung across the center of North America. The Great Lakes ecosystem is one of the great natural wonders of the world. It is hard to overstate its importance. Nearly one-fifth of the planet's surface fresh water is stored in and flows through the lakes. One out of every three Canadians and one of every ten United States residents takes her or his drinking water from the Great Lakes. This case study explores the Canada-U.S. Great Lakes Water Quality Agreement (Agreement), the potential it has demonstrated to be a model of Governance for Sustainability, its successes and shortcomings in living up to that potential, and the current efforts to reform and revitalize Great Lakes governance institutions, in particular the 2006-2007 review and possible revision of the Agreement by 2010. The Agreement first signed by President Nixon and Prime Minister Trudeau in 1972, renewed and revised in 1978, and amended in 1987, has been a major milestone in the history of international environmental governance. It is founded on explicit ecological principles and with a stated purpose to 'restore and maintain the chemical, physical, and biological

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integrity of the waters of the Great Lakes Basin Ecosystem'. It committed the U.S. and Canadian governments to achieving the 'virtual elimination' of persistent toxic substances by ending all such discharges into the lakes.

The Great Lakes Water Quality Agreement was negotiated pursuant to the 1909 Boundary Waters Treaty between the United States and British Canada that had created the International Joint Commission (IJC) to help resolve problems including pollution that was causing injury to health or property crossing the bi-national boarder, The IJC and the institutions added to it in 1972 by the Water Quality Agreement were based on the principle of bi-nationalism (two countries collaborating on achieving a set of shared goals) rather than bi-lateralism (two countries negotiating with each other in an attempt to balance interests and protect each others rights). Participants from both countries serve not as representatives of their nations' or agencies' interests but rather in their personal and profession capacity directed towards the welfare of the ecosystem and the people in it. The IJC and its several expert boards are populated equally by Canadians and Americans. The Agreement sets water quality goals and objectives, but the means to achieve them are left to the environmental laws and regulatory agencies of each country. A complex system of shared governance grew around the IJC involving environmental bureaucrats, government and university-based environmental scientists, professional environmental advocates, business and industry representatives, and interested citizens that by the 1980s could be described as a viable bi-national community. Considerable progress was achieved in reducing pollution discharges into the lakes and thus reducing the levels of priority toxic substances, educating the public, maintaining a flourishing recreational fishing industry, and making it desirable for millions of people around the lakes to once again enjoy the beaches and beautiful sunsets. And yet in December 2005 many of the leading Great Lakes scientists released a stark warning that the lakes were nearing a 'tipping point' beyond which lay the likelihood of irreversible ecosystem damage unless urgent action was taken to relieve symptoms of extreme stress from a combination of sources that included toxic contamination, invasive species, nutrient loading, shoreline and upland land use changes and hydrological modifications.[508]

How did this apparently contradictory situation come to be and how are initiatives exploring options to reform Great Lakes governance so that it can again serve the purpose of Governance for Sustainability? Although a once-every-six-years review is required under the Agreement, no reviews have been completed since 1987. A 2006 decision to review the agreement with the thought of possible revision or re-negotiation has presented the opportunity to revisit the Agreement, examine its successes and failings, and imagine new forms and scope of environmental governance for the Great Lakes. This case study provides the background of the authors' project, funded by the Joyce Foundation, to explore prospects for renewed and revitalized Great Lakes/St. Lawrence River governance.

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[508] Bails, J. et al, 2005 'Prescription for Great Lakes Ecosystem Protection and Restoration: Avoiding the Tippping Point of Irreversible Changes' www.healthylakes.org/news-events/ 2006/05/07/ report-prescription-for-great-lakes-ecosystem-protection-and-restoration [March 2008].

4.10.2 Background

For at least 6,000 years[509] Native communities in the Great Lakes region shaped the landscape with fire to improve conditions for game, built weirs in streams and refined fish-spearing and capture techniques, and developed a highly productive agriculture based on the ecological and nutritional synergies of the varieties of corn, beans and squash that Native horticulturalists had refined over millennia. They traveled by canoe along the lakes and tributaries and trade flourished among the many Native nations within and beyond the Great Lakes basin. At times Native peoples warred for control over resources and at times they developed complex confederations with participatory governance systems, some of which inspired later settlers with an example of cooperation and participatory democracy, an inspiration that in part leads directly to this publication with its impulse to expand governance to include the entire Community of Life.

The arrival of European explorers and missionaries was a catastrophe for the Native peoples throughout the Americas. Diseases for which aboriginal people had no immunity spread rapidly, decimating by some estimates up to 90 percent of the original population and unraveling the web of ecological relationships that had sustained Native nations and their governance. Early arrangements between Europeans and Native peoples included the incorporation of Native trappers and hunters into global commercial networks that served Europe's growing demand for furs, feathers, timber, and other natural resources. By the seventeenth century, following a century of contact, Native agriculture and resource management had greatly diminished. When large-scale European settlement began in the east, it was easy (and politically convenient) for Europeans to see and describe the landscape as a 'wilderness', a God-given opportunity to tame and exploit its vast resources. The era of expansion was characterised at first by the struggle between the French economic strategy of resource extraction and export via Great Lakes transport routes and the British strategy of large-scale settlement of the fertile valleys, a conflict the British eventually won. The Native strategy of shifting agriculture and landscape management for seasonal abundance became increasingly difficult to maintain. The French-British wars were followed by revolt of the British colonies in America. In both conflicts, Native people were caught in the middle, their communities and nations divided as to the best strategies for survival. Conflict in the Great Lakes region finally ended after the War of 1812 with the lakes and connecting channels becoming part of the vast boundary between British Canada and the United States. Some Native nations were removed and resettled, others were scattered, and some held on to ever-diminishing territory where they continued to assert their sovereignty (See the Onondaga Land Rights case study in this volume). With peace came a growing economy built on lumber, wheat, iron ore, and other natural resources. New industries depended on water power and increasingly steam engines with wood boilers. Beset by settled agriculture, construction, and wood-burning engines, the forests disappeared. The Great Lakes, the vast freshwater seas, began to show the effects of booming cities with inadequate sanitation, industrial pollution, and ravaged watersheds. Meanwhile

[509] Many Native people of the region assert that their peoples have lived sustainably within the community of life since 'the dawn of time'.

dams and canals re-engineered water flow raising tensions on both sides of the border between British Canada and the United States from coast to coast. It was under these conditions that a major innovation in international cooperation in water management, the International Joint Commission, came into being with the signing of the Boundary Waters Treaty in 1909. The Boundary Waters Treaty provided the principles and mechanisms to help resolve disputes and to prevent future ones, primarily those concerning water quantity and water quality along the boundary between Canada and the United States.

4.10.3 Description

Great Lakes Water Quality Agreement 1972

By the late 1960s the degradation of the Great Lakes was obvious by sight and smell. Routine algal blooms choked the oxygen out of the central basin of Lake Erie. Populations of non-native prey fish, alewife primarily, exploded from the dramatic decline in large predator fish due to overfishing and bio-concentrated dioxin pollution, and washed ashore in rotting wind throws. The Cuyahoga River caught fire. The resulting public outcry led to political pressure for environmental action. Research conducted by IJC- affiliated scientists validated phosphorus as responsible for severe nutrient problems. New environmental legislation was passed in both the United States and Canada, new environmental agencies were created, and the 1972 Great Lakes Water Quality Agreement was signed.

The Agreement focused on reducing the flow of nutrients, primarily phosphorous. The Agreement gave momentum to upgrading sewage treatment throughout the basin, eliminating phosphorus-based household detergents, and setting up elaborate systems for monitoring and controlling what was coming out of the thousands of industrial and municipal outflow pipes. The governments also recognized that controlling deliberate discharges, so-called 'point sources', would never be enough to protect water quality and they asked the IJC to investigate the broader and more politically difficult problem of pollution that resulted from activities on the land such as farming and urban development that produced run-off of nutrients or 'non-point' pollution.

PLUARG

The IJC created an 'expert group' known as, the Pollution from Land Use Activities Reference Group (PLUARG). PLUARG undertook a large bi-national study involving more than 200 scientists and other experts. It quickly understood that if the problems of pollution from run-off and poor land-use activities were to be effectively addressed, it had to go beyond science and engineering to tackle the technology and policies that encouraged poor land-use practices. It also had to move from its investigations from the lake upstream to the watershed including the rivers and small streams affected by forest practices, mining, urban development, and suburban sprawl. A watershed and ecosystem approach was needed. Doing this would require broad public support and, for the first time, the IJC invited and encouraged public participation at a series of public hearings around the basin, which became at the same time a massive effort to educate the public on the causes and solutions to the Great Lakes water quality crisis. Participants and

observers credit PLUARG for stimulating the emergence of a bi-national Great Lakes community, the beginnings of a constituency for Great Lakes clean-up, and the political will to make the politically difficult and expensive changes that environmental protection would require.[510] Thus as early as 1972 the essential components needed for Governance for Sustainability were identified as active public participation, ecosystem-based management, multi-jurisdictional collaboration, and a shared sense of responsibility for stewardship by the people and their leaders. What was and is necessary is an understanding that one's actions, even when they may appear to be local and isolated, occur within and affect a broader set of ecological relationships known as the Great Lakes ecosystem. While many people who had been involved in PLUARG reported it to be a ground-breaking success, they also reported discouragement when the U.S. and Canadian governments ignored most of the recommendations in the final report.[511]

4.10.4 Great Lakes Water Quality Agreement 1978

The 1972 Agreement required that the governments undertake a comprehensive review of the Agreement's 'operation and effectiveness' after the first five years. Monitoring showed that phosphorus levels were in rapid decline. At the same time concern was growing about chemical pollution, particularly after the highly charged events of Love Canal, N.Y. near the Niagara River highlighted how chemical wastes from the huge expansion of industrial production in the 1950s and 1960s had been recklessly dumped in waterways and buried in landfills and were steadily making their way into the tributaries and lakes and turning up in the flesh of fish, fish-eating birds, and mammals. The 1972 Agreement had given a boost to Great Lakes science and information about contaminant levels in fish and fish-eating birds and mammals was filling scientific journals and eventually the popular press. Many of these compounds were being identified as carcinogens, neurotoxins, and other chemicals that damaged the reproductive and the chemical messaging systems of fish, mammals, and potentially humans. The momentum from early successes of the Agreement and the steady revelations of new and eve- more-complex-pollution issues in the lakes, quickly led to a major revision of the Agreement. The 1978 revisions added several features most relevant to Governance for Sustainability. The United States and Canada made far-reaching commitments to an 'ecosystem approach' to management based on the philosophy of zero discharge of persistent, bio-accumulative toxic substances. The purpose of the Agreement was changed from protecting and restoring 'water quality in the Great Lakes System' to restoring and maintaining 'the chemical,

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510 International Joint Commission 1980 'International Joint Commission Reference Group on Great Lakes Pollution from Land Use Activities 1979'. Manno, J. 'Advocacy and Diplomacy: NGOs and the Great Lakes Water Quality Agreement' In Princen, T. and Finger, M. (eds.) *Environmental NGOs in World Politics: Linking the Local and the Global* (Routledge: New York and London, 1994). Moore, S. 2004. 'The Secrets Behind PLUARG'. Workgroup on Implementation, Great Lakes Commission, Great Lakes Nonpoint Source Pollution from Land Use Workshop: A Post-PLUARG Review. Ann Arbor, MI [November 8-9, 2004] available at www.glc.org/postpluarg/

511 Moore, S. 2004. 'The Secrets Behind PLUARG'. Workgroup on Implementation, Great Lakes Commission, Great Lakes Nonpoint Source Pollution from Land Use Workshop: A Post-PLUARG Review. Ann Arbor, MI. www.glc.org/postpluarg/ [November 8-9, 2004].

physical and biological integrity of the Great Lakes Basin Ecosystem', an expansion of scope that created the potential for a new kind of environmental governance, one that would require increased collaboration, public participation, and shared responsibility.

Following the signing of the revised Agreement in 1978, Great Lakes governance began a period of increased activity. Members of the IJC's Water Quality Board, however, were frustrated by lack of progress in cleaning of up specific geographic locations. New information on atmospheric and sediment sources of contaminants to the Great Lakes food web and human health were emerging. The 1985-1986 review of the Agreement, resulted in amendments to the 1978 protocol in 1987. Local clean-up plans, known as 'remedial action plans', for 42 of the most heavily polluted areas were being drawn up by partnerships of local, state/provincial' and federal environmental officials; citizen activists; and local professionals. Multi-jurisdictional collaborations were drawing up lakewide management plans to achieve the Agreement's objectives in each lake. Environmental coalitions and advocacy groups were mobilizing supporters to get involved in IJC institutions culminating with more than 2,000 people registering for the IJC's biennial meeting in Windsor, Ontario in 1993. The institutional infrastructure was in place and in many ways thriving, Great Lakes issues were being widely covered in the region's press, and the U.S. Congress amended the Clean Water Act for the purpose of:

> achiev[ing] the goals embodied in the Great Lakes Water Quality Agreement … by funding of state grants for pollution control in the Great Lakes Area, and improved accountability for implementation of such agreement.[512]

Presumably this amendment was intended to provide more clout in U.S. federal law for commitments made in an otherwise non-binding agreement with Canada. Canada similarly spurred implementation through a formal agreement between the federal government and the province of Ontario clarifying roles and responsibility for Great Lakes programs through routine renewals of collaborative commitments under the Canada-Ontario Agreement Respecting the Great Lakes Basin Ecosystem, first signed in 1971.

However by the early 1990s the Great Lakes institutions were mired in controversy and inaction over how to address the significantly more complicated, and to some more urgent, policy challenge posed by a steady flow of new evidence linking a broad range of wildlife health effects with increasingly similar human heath effects to exposure to toxic chemicals in the Great Lakes environment. The most significant chemicals were PCBs, dioxin, and other chlorinated organic compounds either directly produced by or the by-products of industry and agriculture. Theo Colborn, a scientist at the World Wildlife Fund pulled together threads of evidence from both wildlife and human health studies and made a compelling case that the accumulating data showed a chemical disruption of endocrine functioning, the body's chemical messaging system, that was eroding the vitality, and in some cases the viability, of exposed organisms. This degradation of the health of whole populations was just as, and perhaps more,

[512] U.S. Clean Water Act, Section 118 a, 2.

important than any cause-effect linkages between any specific exposure and individual illness. It was the very definition of a decline in biological integrity. Yet despite the apparent potential for a new kind of shared environmental governance compatible with this project's notion of Governance for Sustainability, shortly after an apex of activity related to the Agreement, Great Lakes governance seemed to enter a steep decline in activity and effectiveness. What happened?

4.10.5 Evaluation

A number of explanations can be offered as to why Great Lakes governance, shortly after what had appeared to be a period of incredible energy and government commitment, experienced a decline in activity and effectiveness. These include in no particular order:

- **Ideological change.** Beginning in 1981 with the presidency of Ronald Reagan and premiership of Brian Mulroney, political sentiment in both countries took a decidedly conservative turn, at times hostile to the core premise of federal activism in environmental protection. In addition both leaders appointed commissioners with little Great Lakes knowledge or experience and left Commission positions unfilled for long periods. The Reagan administration began what would become the politicization of appointments of commissioners. It also disbanded the Great Lakes Basin Commission that had been a source of funding for many of the studies that had uncovered the sources of and suggested solutions for Great Lakes pollution.[513]
- **Matching actions to the scale of the problems.** Although there is still a need for governance at the ecosystem scale, many advocates and policy makers came to recognize that persistent organic pollutants (POP) were a global problem that required a global response. Greenpeace's Great Lakes office closed and the organization's leadership turned its attention to the international effort to conclude a POPs treaty. Similarly, the appropriate scale for the hands-on work of restoring the Great Lakes ecosystem is at the local level where thousands of 'Friends of" organizations, local conservancies, beach stewards, and so on, represent a substantial and knowledgeable constituency actively engaged in clean-up and maintenance.
- **Shift from IJC to BEC.** In hopes of improving accountability, the 1987 amendments to the Agreement shifted the assessment of progress and ecosystem response to management actions from the IJC to a new institution, the Binational Executive Committee (BEC), through which the U.S. and Canadian governments were to coordinate their implementation activities. Lee Botts and Paul Muldoon in their study of the history of the Agreement report that the agencies represented in BEC are unlikely to engage in self-evaluation, since observers report a shift from a 'mutual search for solutions' frame of mind that formerly existed in the WQB [IJC Water Quality Board] to that of 'negotiation on the common position to be presented to the IJC in the BEC.[514]

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513 Botts, L. and Muldoon, P. 'Evolution of the Great Lakes Water Quality Agreement'(Michigan State University Press: East Lansing, MI, 2005), p. 75.

514 Ibid., p. 103.

- **SOLEC.** From the beginning of the Agreement, the IJC biennial meetings had been the place where the Great Lakes community came together to discuss progress or lack thereof in achieving Agreement objectives. With the creation of the BEC, the governments focused instead on a biennial State of the Great Lakes Ecosystem Conference (SOLEC) that reported on a suite of indicators only loosely if at all designed to report on the specific commitments in the Agreement. The Conference's reluctance to link its data to the effectiveness of specific policies turned off many activists who decided not to participate.
- **Government downsizing and retreat from environmental programs.** Throughout the 1990s, spending for environmental monitoring, surveillance, remediation, and prevention was severely cut. Environment Canada's 'program review' shrank investments in Great Lakes programs. The conservative administration in Ontario in the early 1990 cut the Ontario Ministry of Environment funding by roughly 40 percent and invoked even deeper cuts to the Ontario Ministry of Natural Resources. Several of the Great Lakes states were facing financial hardship and the U.S. EPA reduced funding for Great Lakes programs to the state agencies. The capacity for achieving the purpose of the agreement was crippled.
- **Unclear definitions of the ecosystem approach.** Even though the Agreement's adoption of the ecosystem approach to management was clearly meant to promote an awareness of the ecological processes that determine water quality and a recognition that pollution in the open waters were directly related to activities on the land and throughout the ecosystem, the approach was often interpreted in ways that shifted attention away from the achievement of water-quality objectives.[515] For example, at times industry representatives would argue that the ecosystem approach meant that issues of habitat restoration and exotic species were more important than the presence of persistent toxic chemicals. With the emergence of SOLEC, water quality became one of several sets of indicators reflecting the state of the lakes along with land use, habitat, fisheries and so on.
- **Failure to update and keep relevant.** While article X of the Agreement calls for a comprehensive review and possible revision every six years, more than two decades have passed between the last comprehensive review and opportunity to negotiate changes and the 2006 – 2007 review and possible renegotiation. During that time many government officials and nearly all Great Lakes activists believed that reopening the agreement would risk allowing conservative regimes in each country to retreat from its most far-reaching commitments and statements of purpose and principles. Others argued that the Agreement already contained adequate measures to regularly update it and keep it relevant but the governments had failed to use those mechanisms.
- **Activist IJC** – The IJC, like all institutions created by intergovernmental agreement, is sometimes caught between its responsibility to serve the governments that created it and its need to develop its own public

[515] Gilbertson, M. 'Living with Great Lakes Chemicals: Complementary Strategies and Cross-Paradigm Reconciliation' 2000 Ecosystem Health Vol.6, No.1, pp. 24-38.

constituency that can create the political will necessary to act on its recommendations. From PLUARG on, the IJC, whether by choice or because of the nature of the institutions the Agreement had created, has actively helped build a bi-national constituency for action on the Great Lakes. Environmental activists began to look to the IJC to make far-reaching recommendations. One such recommendation, that the governments should 'develop timetables to sunset the use of chlorine and chlorine-containing compounds as industrial feedstock'[516] prompted strong opposition from the chemical industry and ridicule from many career bureaucrats who believed the recommendation could not be considered politically serious. The reaction was a setback for those who believed that the regulatory processes in both countries, based as they were on a chemical-by-chemical, innocent-until-proven-guilty risk assessments had clearly failed to protect the lakes. Half of the 362 synthetically produced chemical compounds found in the Great Lakes at the time of the sun-setting recommendation were chlorinated organics.[517]

Given this history of high expectations and more modest achievements, the Great Lakes community now faces an important opportunity to revitalize or redesign Great Lakes governance. The U.S.-Canada Binational Executive Committee has completed its review of the Agreement (available at binational.net/ glwqa_2007 _e.html) and the two governments may or may not decide to revise the existing Agreement or re-negotiate a new one. At the time of this writing, no decisions have been made. The current period of uncertainty offers a real opportunity to revitalize Great Lakes governance.

Several workshops and expert analyses undertaken by scholars, activists, and the IJC have recommended changes in the Great Lakes governance system.[518] Although they differ in a number of details, they converge on a number of features that would help build a governance framework around a set of clear responsibilities with means for concerned citizens to hold governments accountable. These include:

- Mechanisms for representation of First Nations and Native communities on the IJC at both the level of Commissioner and in Advisory Board membership;
- Regular reporting on progress in achieving the objectives of the Agreement

516 International Joint Commission 'Sixth Biennial Report Under the Great Lakes Water Quality Agreement of 1978' 1992.

517 DePinto, J. and Manno, J, 'Proposed Chlorine Sun setting in the Great Lakes Basin: Policy Implications for New York State' Monograph 11 *Donald Rennie Monograph Series* (Great Lakes Program: State University of New York at Buffalo, 1997).

518 IJC special report to the Governments of Canada and the Unites States, 'Advice to Governments on the Review of the Great Lakes Water Quality Agreement', August 2006; Krantzberg, Manno, J., and de Boer , report on an Expert Workshop on Great Lakes St. Lawrence River Governance, 2007; Botts, L., and Muldoon, Wingspread Conference on the Great Lakes. Water Quality Agreement 2006; Agreement Review Committee, 'Report to the Binational Executive Committee on the Review of the Great Lakes Water Quality Agreement 2007'; Workshop on the Great Lakes Water Quality Agreement Governance and Institutions for the Agreement Review Committee, 2007; Council of Great Lakes Industries, 'Building a Sustainable Great Lakes Water Quality Agreement', 2007; Canadian Environmental Law Association, 'The Future of the Great Lakes Water Quality Agreement: The ENGO Perspective', 2007.

with indicators directly related to specific commitments;

- Independent third-party review of science reported by the Agencies for the purpose of tracking progress under the Agreement;
- Provisions for citizen petition for redress for harms to the environment;
- Direct reporting by the IJC to Congress and Parliament, in addition to the current practices of reporting the U.S. State Department and the Canadian Departments of Foreign Affairs and International Trade;
- Regular updating of key provisions, ecosystem objectives, and priority pollutants;
- Methods for sub-national governments to share responsibility for the implementation of the Agreement; and
- A renewed commitment to bi-nationalism through the mutual search for solutions.

4.10.6 Conclusion

Now in its fourth decade, the Great Lakes Water Quality Agreement has continued to serve as a kind of covenant between the people of this vast region and the freshwater ecosystem that defines it. Even the fact that the Agreement has disappointed many is a testament to the ambitious ecological commitments at its heart. In its early years, actions growing out of the Agreement led to significant improvements in water quality, greatly expanded scientific understanding of freshwater ecosystems, and created a dynamic bi-national system of ecologically based governance with strong elements of public participation and an emerging sense of mission based on protecting and restoring the integrity of the Great Lakes Basin ecosystem. It is not surprising that such a far-reaching commitment to pollution prevention, virtual elimination, and ecological responsibility would falter as it came up against the limitations of the environmental governance that dominated in both countries. The early successes in improving the most noticeable near-shore pollution led to a period of complacency and ultimately inaction in preventing the continued degradation of the ecosystem. Revisiting and perhaps revising the Agreement now creates the opportunity to highlight specific examples of where the current governance system has failed to deliver on the promises written into the Agreement and to bolster Great Lakes governance with new institutional mechanisms designed to overcome the obstacles to full implementation. Currently funding, regulation, and policy making in general are disconnected from the needs of the Agreement. Realignment of the instruments in both countries to achieve the purpose of the Agreement will require political will but can result in a strengthened regime of accountability. Improvements among the many institutions and levels of government involved in the Agreement could generate leadership with the following capabilities:

- Ability to articulate a shared vision;
- Set goals and priorities;
- Re-establish moral authority;

- Undertake bi-national strategic planning;
- Mobilise responsibility and action; and
- Manage conflict and enable effective representation.

The people responsible for evaluating the current state of the Great Lakes Water Quality Agreement would do well to remember the ecological and political context within which the agreement was originally negotiated as well as considering its current challenges. We have learned many important lessons from the Agreement's successes as well as its failures. With the changing ecological dynamics triggered by climate change we now face a period of heightened uncertainty and vulnerability. The future of the Great Lakes depends on governance that mobilizes the commitment, intelligence, and skills of all those who live and work in the Great Lakes. The first Great Lakes Water Quality Agreement achieved considerable success. It's now time to take the next step.

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4.11 Actualising Sustainability in the United Kingdom – Recent Developments in Devolved and Local Government

Karen Morrow[519]

Abstract

This case study will examine the most recent approaches to integrating the values of sustainable development into governance structures in the United Kingdom. It will briefly examine recent examples of the contrasting approaches adopted toward this end at national, devolved, and local levels of government, with particular emphasis on the role played by legislative developments in this regard. The rationale for taking sustainability from the sphere of policy and placing it in the realm of legal obligation in the context of parts of the United Kingdom's devolved and local government structures and the efficacy of so doing will be considered.

The case study reflects on the role of key statutory provisions in this area in integrating the policy priority of sustainability into more practical aspects of governance. To this end, after briefly examining the status of sustainability in the context of central government, the case study will focus primarily on the law relating to sustainable development and well-being (the latter being considered as an example of a governance for sustainable development (GSD) based approach) in Wales. Brief consideration is given to provision in Scotland and Northern Ireland. Well-being powers will also be considered as they apply to local government in England and Wales. The case study focuses on key recent statutory provisions, including:

- The Government of Wales Act c.32 of 2006 which contains a 'sustainability duty'[520] and a new 'power to promote well-being';[521] and
- The well-being provisions of the Sustainable Communities Act c.23 of 2007.

The scope, content and context of the relevant statutory provisions will be compared and contrasted and the relationship between them will be examined. The case study will endeavour to draw out general lessons from the U.K. experience in promoting progress in the integration of sustainability into governance, in particular considering the contribution made by adopting sustainability obligations into statutory form, including the ability of law to foster an institutional culture that promotes GSD.

4.11.1 Introduction

Perhaps the greatest challenge that arises in respect to sustainable development is taking an often problematic and contested concept from the realm of debatable principle and translating it into something that is a viable proposition for practical

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520 S79 Government of Wales Act 2006.

521 S60 GoWA 2006.

application. One of the key vehicles for achieving this is the shift from the often largely rhetorical concept of sustainable development into a more concrete set of practices pertaining to governance for sustainable development (GSD). It would appear that the concept of governance for sustainable development in the United Kingdom is, at least in some respects, in a state of fairly rapid expansion. Recent significant developments in this area involving devolved and local government appear to be exhibiting a shift in the application of sustainable development from the sphere of pure policy into a range of more concrete mechanisms for GSD. The reasons for these developments are undoubtedly many and complex, but at the very least they seem to offer examples of innovative approaches to realising aspects of GSD while clarifying and highlighting its status and attempting to improve institutional functionality in this area in terms of both policy and practice.

Law can arguably play a significant role in facilitating this change and, at the same time, can highlight the importance of sustainability in a very tangible way. This study will briefly contrast the relatively narrow and arguably increasingly dated approaches to sustainable development that apply at a central government level to the more innovative strategies employing law to promote GSD that are emerging in respect of devolved and local government in the United Kingdom.

4.11.2 Description

Sustainable development and central government

Within central government, general policy responsibility for a relatively limited (and increasingly outmoded) Concept of sustainable development at Cabinet level in the United Kingdom remains primarily, though not exclusively, grounded in policy rather than law. Responsibility in this area is complex and fragmented, with specific coverage for sustainable development declared as falling within the responsibilities of the Department for Communities and Local Government, the Department for Business, Enterprise and Regulatory Reform, the Department for Environment, Food and Rural Affairs, the Department of Health, the Department for International Development, and the Department for Work and Pensions.[522]

When law is employed, either statutory duties or powers may be invoked. An example of the former is the obligation imposed on ministers by the Environment Act (EA) 1995 c.25[523] to issue guidance to the Environment Agency in discharging its functions, which include its role with respect to sustainable development (see below). More typical however is the grant of statutory powers to ministers with respect to promoting specific aspects of sustainable development, as for example those exercisable by the Secretary of State for international development under s1 of the International Development Act 2002 c.1 with respect to the provision of development assistance, including that aimed at furthering sustainable development outside the United Kingdom.

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522 www.cabinetoffice.gov.uk/upload/assets/www.cabinetoffice.gov.uk/ministerial_responsibilities/lmr_nov07.pdf

523 S4(2) Environment Act 1995.

In operational terms, statutory duties are more commonly employed with respect to public bodies and sustainable development, as for example with the (albeit qualified with reference to resource constraints) provisions relating to the principle aim of the Environment Agency under the EA 1995[524] in 'discharging its functions so to protect or enhance the environment, taken as a whole' to make a 'contribution' towards 'attaining the objective of achieving sustainable development'. Powers are also occasionally employed in this area, as for example in The Renewable Transport Fuel Obligations Order of 2007,[525] under which the Office of Renewable Fuels Agency may request that transport fuel suppliers provide information in a variety of areas including sustainable development.

While these developments are certainly interesting and indicate at least willingness in principle to attempt to engage with the sustainability agenda, they are in many respects rather limited, employing as they do the broad but still contested terminology of sustainable development with little or no further refinement. More recent thinking appears to espouse a more closely defined and far-reaching approach to sustainability through the development of GSD in order to achieve meaningful progress in this area. As indicated earlier, it is in devolved and local government in the United Kingdom that the most interesting developments are currently underway and the remainder of this paper will discuss some examples. The former administrations granted (differing) statutory powers to govern Scotland, Northern Ireland, and Wales respectively. Under the devolution settlement the Westminster government remains sovereign, retains power to legislate on UK matters and the state remains unitary, rather than constituting a federation.

Devolution – Wales, a unique case

Although there have arguably been developments that may be characterised as pursuing a variety of GSD pathways in each of the U.K. devolved administrations, they have, despite the publication of a new U.K. framework in 2005,[526] thus far been neither consistent nor coherent.

It is in Wales that the best established and arguably most convincing work has been done. There a number of potential reasons for this, but most significant is the particular nature of the Welsh devolution settlement, which made early statutory provision for sustainable development, necessitating innovation and engagement in GSD with the remit of the Welsh Assembly Government (WAG) and at the same time fostering a culture of sustainability in the remit of the WAG. The main outcomes of adopting a broad approach to the sustainability agenda in Wales will now be considered.

524 S4(1) EA 1995.

525 Art 13(4) The Renewable Transport Fuel Obligations Order of 2007 (SI 2007 No. 3072).

526 'One Future, Different Paths', available at www.sustainable-development.gov.uk/publications/pdf/SD%20 Framework.pdf (accessed 7 March 2008).

Legislation

The devolution of legislative power and governance to the constituent nations of the United Kingdom has been termed 'asymmetric'[527] and under the initial devolution settlement provided by the *Government of Wales Act* 1998 c.38 (GoWA 1998) the Welsh Assembly was more akin to a local government body, albeit with expanded competences, than a true devolved 'legislature'. Although its status in this regard has subsequently evolved significantly and is enhanced to a considerable degree by the *Government of Wales Act* 2006 c.32 (GoWA 2006), its powers in regard to law-making remain of a different order to those enjoyed by the Scottish Parliament and the Northern Ireland Assembly.[528]

The remit of the Welsh Assembly, in contrast to those of the other devolved institutions, is placed under a specific statutory obligation to pursue sustainable development. This duty was initially contained in the GoWA 1998[529] and can now be found in the GoWA 2006[530] which, under subsection (1), places the Welsh Ministers under a duty to consult[531] and then make and publish[532] a sustainable development scheme (SDS) detailing how they propose to 'promote sustainable development' in carrying out their functions. Further obligations relate to review of the SDS and to the annual publication of a report on its implementation.[533] This obligation ensures that, in practical terms, sustainability is looked at through a wider GSD lens and integrated into WAG policy-testing, operational-planning, and expenditure-review processes.[534]

The GoWA 2006 potentially supplements the sustainability duty through the introduction, of a new power,[535] at a Wales-wide level, to promote 'well-being'. A narrower version of the 'well-being power' (described in more detail later in this article) had previously been applied to local government in the Local Government Act 2000 c.22 (LGA), and while this has subsequently been extended in the Sustainable Communities Act 2007, its new form is arguably still less ambitious that that applied under the GoWA 2006. The GoWA 2006 provides that the Welsh Ministers are authorised to '… do anything which they consider appropriate' to 'promote or improve one or more of the economic, social and environmental well-being of Wales.'[536] It also enables initiatives to be undertaken that will have

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527 See, for example Himsworth, C.M.G. 'Devolution and its Constitutional Asymmetries', *Modern Law Review* Vol.70., No.1., 2007, pp. 31-58.

528 In terms of its role and competence, the Northern Ireland Assembly is in fact very similar to the Scottish Parliament, its rather misleading nomenclature is due to the fact that designation 'parliament' would have been politically sensitive given the controversial operation of the Northern Ireland Parliament between 1921 and 1972.

529 S121 GoWA 1998.

530 S79 GoWA 2006.

531 S79(3) requires consultation of those the Welsh Ministers 'consider appropriate'.

532 Under s79(4) GoWA 2006 the publication obligation extends to revisions.

533 S79(6) GoWA 2006.

534 www.sustainable-development.gov.uk/publications/pdf/SD%20Framework.pdf, supra note 526, p. 4.

535 S60 GoWA 2006.

536 S60(1) GoWA 2006.

impacts beyond Wales if they fulfill these objects. The power is wide reaching, extending to making arrangements or agreements, cooperating, facilitating, coordinating, exercising functions on behalf of another, and providing staff, goods, services or accommodation.[537] However the well-being power is not necessarily an unqualified boon to the development of GSD. Although GoWA 2006 well-being power draws heavily on the language of sustainable development, it explicitly separates the elements of sustainability rather than taking an integrated approach, which is a potential cause for concern. Problems in this regard are likely to be avoided however if, as seems necessary given the wording of the respective provisions of the GoWA, the section relating to the well-being power is read in conjunction with that imposing the sustainability duty. In this light the GSD potential of the well-being power is arguably fairly strong in a Welsh context. In respect of developing GSD, then Wales has the potential to act as a 'legal laboratory'[538] allowing the application of a cutting edge approach in a new context. It would not be the first time in U.K. history that a devolved administration has provided the opportunity for experimental policy developments.

Policy

Given its legislative pedigree, sustainable development has played a comparatively prominent role in the development of the broader WAG policy agenda and a suite of documents relating to sustainability it has adopted. The general policy priorities of the WAG are laid out in the 2003 document, *Wales: A Better Country – The Strategic Agenda of the Welsh Assembly Government*[539] which, in accordance with the GoWA 1998,[540] makes frequent reference to sustainable development. Arguably, the most significant coverage for sustainability in this context lies in its adoption as a basis for impact assessment of substantive policies.[541]

The key sustainability-specific policy context is found on *Starting to Live Differently: The Sustainable Development Scheme and Action Plan of the National Assembly of Wales*[542] (the SDS). The SDS advocates the mainstreaming of sustainable development in all matters concerning the Assembly[543] and its own and related activities. In addition, the SDS mandates engagement with the sustainability agenda in the United Kingdom Europe and beyond.[544] The working definition of sustainable development adopted in the SDS is:

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537 S60(4) GoWA 2006.

538 See, for example, with specific reference to Wales, 'UK Politics: Devolution plans don't go far enough' at news.bbc.co.uk/1/hi/uk_politics/265504.stm (accessed 1 February 1999) and, more generally, McCrudden, C. 'Northern Ireland, the Belfast Agreement, and the British Constitution' in Jowell, J. and Oliver, D. (eds.) *The Changing Constitution* 5th edition (Oxford University Press: Oxford, 2004).

539 At www.elwa.ac.uk/doc_bin/SkillsObservatory/Learning%20Country.pdf (accessed 21 February 2008).

540 S121 GoWA 1998

541 Ibid., p. 13.

542 Supra note 527.

543 Para 1.3.

544 Para 1.5. and Section 5D.

> … development that meets the needs of the present without compromising the ability of future generations to meet their own needs. By this we mean the needs of all human life, within the carrying capacity of supporting ecosystems, without compromising the ability of future generations to meet their own social, economic, environmental and cultural needs.[545]

The SDS commits the Assembly to employing a range of tools to pursue sustainable development, including: harnessing scientific knowledge in decision making, cost-benefit and risk analysis, respect for environmental limits, the precautionary principle, the polluter pays principle indicators,[546] and monitoring.[547] The broad approach advocated in the SDS fits well with GSD thinking. Interestingly and somewhat unusually in a Western legal context, in Wales environmental concerns have not provided the prime impetus for developing the sustainability agenda. In fact Wales did not initially have a separate environment policy, opting instead to tackle these issues within the SDS until the adoption in 2006 of the *Environment Strategy for Wales*[548] (ESW). The ESW sets strategic direction for environmental policy for the next 20 years and is accompanied by an Action Plan (outlining concrete commitments) and Policy Map (providing details of the ESW's integration with existing policies).

In addition to these initiatives, WAG has made serious attempts to integrate sustainability into a plethora of other policy documents in pursuit of its statutory duty. For example, the 2004 document, *People, Places, Futures: The Wales Spatial Plan*[549] (WSP) sets a broad strategic agenda for land-use planning for the next 20 years and emphasises the role of sustainability in this regard. In a less obviously 'environmental' context, the Department for Education, Lifelong Learning and Skills (DELLS) has recently published *Sustainable Development and Global Citizenship – A Strategy for Action*'[550] taking a contextual look at GSD issues.

Culture

It would appear that the WAG, far from adopting GSD approaches as the result of an unwelcome imposed obligation born of statutory necessity, has actively embraced them, developing a positive institutional culture in this regard. The iterative[551] nature of the GoWA 2006 sustainability duty[552] serves to enhance this process. The WAG has made considerable efforts to pursue GSD approaches by

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545 Available at www.wales.gov.uk/topics/sustainabledevelopment/publications/startlivedifferently/?lang=en, Para 2.1, (accessed 21 February 2008).

546 Para 5.6.

547 Para 5.7.

548 Available at www.new.wales.gov.uk/topics/environmentcountryside/epq/Envstratforwales/about_the_strategy/?lang=en, (accessed 21 February 2008).

549 Available at www.walesresilience.org/about/strategy/spatial/sppublications/walesspatial?lang=en, (accessed 21 February 2008).

550 Published on 19 September 2006 at www.esd-wales.org.uk/english/ESDreports/pdf/ AP_E.pdf. (accessed 28 February 2008).

551 The review process, as mandated by statute, is currently underway once again – see www.new.wales.gov.uk/publications/accessinfo/decisionreport/dreconomics/economicsdrs2007/1956144/?lang=en (accessed 28 February 2008).

552 S79 GoWA 2006.

adopting a sustainability agenda simultaneously on a number of different levels. For example, the agenda has been promoted by WAG in its external relations as emblematic of its pride and identity in viewing Wales as a 'global citizen'.[553] To follow through in practical terms WAG has adopted an outward looking agenda in GSD, as evidenced by its role in co-founding the NRG4SD – the Network of Regional Governments for Sustainable Development[554] network for regions and sustainable development at the 2002 World Summit on Sustainable Development and its involvement in its subsequent activities.

In terms of its internal affairs, the WAG adopts an ongoing consultative stakeholder-based approach to carrying out its functions[555] and promotes the adoption of GSD values and structures across its remit. Sustainability also plays a prominent role in, 'One Wales: A Progressive Agenda for the Government of Wales' the document laying out the agreed policy of the current Welsh Labour Party and the Plaid Cymru (Welsh nationalist) governing coalition[556] and thus its status as an accepted an assimilated WAG priority seems assured at present.

As a result of developments in law and policy and the growth of an institutional culture supportive of sustainability and pursued by GSD, in part due to the early rooting of sustainability in the Assembly's remit and the subsequent accumulation of experience and expertise in this area, sustainable development retains a unique and valuable position in devolved governance in Wales.

Scotland and Northern Ireland

Developments in Scotland and Northern Ireland have been somewhat more sporadic than in Wales. Sustainability is notable by its absence in the Scotland Act 1998 c.46 and the Northern Ireland Acts 1998 c.47 and 2000 c.1. Although there have been some developments relating to governance and sustainability in Scotland and Northern Ireland, they have been less systematic than those adopted in Wales. For example, the Local Government in Scotland Act 2003 (ASP 1) (LGSA)[557] introduce a 'power to advance well-being' for local authorities. This power, although broadly enough framed to encapsulate GSD, is not specifically tied to sustainability-based values. In Northern Ireland, conversely, the Northern Ireland (Miscellaneous Provisions) Act (NIMPA) 2006 c.33[558] applies a new duty to '… act in the way … best calculated to contribute to the achievement of sustain-

553 new.wales.gov.uk/about/strategy/strategypublications/sustainabledevelopmentactionplan/leadershipanddelivery/walesaglobalcitizen?lang=en (accessed 20 Feruary 2008).

554 At www.nrg4sd.net/pags/AP/Ap_inicio/index.asp?cod=50A1CE86-A8A4-44F6-842A-04B63BBDF33A (accessed 20 February 2008).

555 See, for example, the Welsh Assembly Government Stakeholder Survey 2006 at www.new.wales.gov.uk/docrepos/40382/40382313/293077/1266940/stakeholder_survey_FINALEng1.pdf?lang=en (accessed 20 February 2008).

556 At new.wales.gov.uk/strategy/strategies/onewales/onewalese.pdf?lang=en (accessed 27 June 2007).

557 S20 Local Government in Scotland Act 2003.

558 S25 Northern Ireland (Miscellaneous Provisions) Act 2006.

able development …'[559] on Northern Ireland public authorities, including the Northern Ireland departments and local government.[560]

Local Government

Local government in the United Kingdom has engaged (to be fair, with varying degrees of enthusiasm) the sustainability agenda since the adoption of Local Agenda 21 at the UN Conference on Environment and Development in 1992. At the same time, successive U.K. administrations have sought to reform local governance in an oftentimes bewildering plethora of initiatives. Most germane are the changes introduced by the Local Government Act 2000 c.22, founded on proposals contained in the White Paper, *Modern Local Government: In Touch with the People*.[561] These changes were aimed at the broad (and extremely demanding) task of overhauling local governance to restore confidence in thoroughly beleaguered institutions. Contained amidst much higher profile developments, such as provision for elected mayors, was the introduction of a 'well-being power'.[562] This empowered local authorities to act for the 'promotion or improvement' of one or more of the 'economic … social … environmental' well-being of their areas, to which end it mandated the adoption of 'community strategies'.[563] The well-being power was aimed at developing more responsive and community-specific local approaches to governance, and it greatly increased the latitude available to local authorities to act in this regard. The provision had, on its face, considerable potential to foster the adoption of a distinctive and innovative approach to the development and furtherance of GSD in a local context, espousing as it did aspects of the three core values underpinning the sustainability paradigm. However, it would be fair to say that the nascent potential of the wellbeing provision in the LGA 2000 was stifled by the legislative context in which it found itself. HHouse of Commons Select Committee on Transport, Local Government and the Regions, concluded in its review of the LGA that[564] the well-being power had been little used,[565] and was effectively being smothered by complex statutory and institutional contexts.[566] The local government well-being power also proved a slow starter in the Welsh context, a fact recognised by WAG, which has attempted to engage with limited progress in promoting the GSD agenda under the LGA 2000 beginning with adopting a formal compact with the Welsh Local Government Association to promote 'sustainable development principles' and offer guidance on

559 S25(1) NIMPA 2006.

560 S25(2) NIMPA 2006.

561 CM 4014, July 1998, available at www.communities.gov.uk/documents/localgovernment/pdf/144890

562 S2 Local Government Act 2000.

563 S4 LGA 2000.

564 In its 14th Report, Session 2001-2002,'How the Local Government Act 2000 is working', available at www.publications.parliament.uk/pa/cm200102/cmselect/cmtlgr/602/60203.htm

565 Ibid., Para 10.

566 Op cit, Para 11.

the well-being power. [567] Once again, the statutory sustainability agenda proved a significant factor in promoting active engagement with GSD.

In response to the teething troubles alluded to earlier, the Sustainable Communities Act (SCA) 2007 overhauls the well-being provisions as initially contained in the Local Government Act 2000, and places them into their own discrete statutory context, a move that may help to improve or at least highlight their status. The explicit rationale for extending the well-being powers of local government is to allow local authorities greater freedom of action in their areas.[568] The SCA empowers local authorities in England and Wales,[569] assisted by the Secretary of State,[570] to contribute to promoting the 'sustainability of local communities' through 'encouraging the improvement of the economic, social or environmental well-being' of their areas.[571] An interesting additional clarification is made in this definition of well-being in a social context as including 'participation in civic and political activity'.[572] The Act requires the Secretary of State to invite local authorities to make proposals[573] that would, taking into account[574] the factors outlined in the Schedule to the Act (local issues relating to a wide range of topics, including: food supply, jobs, energy, social exclusion, health, planning, and waste), in their view contribute to promoting the sustainability of local communities. Successful proposals will be approved as action plans,[575] which will be subject to review and reporting obligations. Under the SCA, new 'sustainable community strategies' are to be instituted,[576] replacing the 'community strategies' that had been introduced under the LGA 2000. Taken as a whole, the SCA appears to underline the potential GSD credentials of the well-being power, though having said this, it must be noted that, even in their current form, the well-being provisions relating to local government are not underpinned by a statutory sustainability commitment in the same way as those exercised by the Welsh Assembly and, as a result, are less directly and thoroughly linked to developing the GSD agenda.

4.11.3 Evaluation

Recent progress in forwarding the sustainability agenda in the United Kingdom, notably through the adoption of GSD, has been mixed, featuring elements of both success and failure. This is to be expected in the development of a potentially revolutionary approach to governance from concept to reality. The fact that U.K. approaches recognise the important contribution to sustainability that can be

567 Available at www.new.wales.gov.uk/about/strategy/strategypublications/sustainabledevelopmentactionplan/leadershipanddelivery/deliveringwithlocalgovernment?lang=en

568 Explanatory Notes for the Sustainable Communities Bill at www.publications.parliament.uk/pa/cm199900/cmbills/087/en/00087x—htm

569 S1(1) Sustainable Communities Act 2007.

570 S1(4) SCA 2007.

571 S1(2) SCA 2007.

572 S1(3) SCA 2007.

573 S2(1) SCA 2007.

574 S2(4) SCA 2007.

575 S4 SCA 2007.

576 S7 SCA 2007.

made by appropriate institutional arrangements is encouraging. Regional and local governments potentially have a hugely significant role to play in mediating between the global (and even national) dimensions of sustainability and its realisation at community and individual levels. Finding a workable mix of provisions for GSD within a multi-level governmental paradigm is surely a worthy, if challenging, objective.

One of the most positive elements of the U.K. experience lies in the fact that it is relatively dynamic; law and policy transformation refashioning sustainable development into GSD, particularly at devolved and local government levels, is developing rapidly and responsively. In this context it is significant that well-being concepts, after problematic beginnings, are not being abandoned but refined. However, if well-being provisions are to serve as viable tools for GSD, then the content of such provisions and their law and policy contexts will prove decisive. Although enumerating the elements of sustainability separately as in the GoWA 2006, the NIMPA 2006 and the SCA 2007 may be potentially problematic, failing to allude to them at all, as in the LGSA 2003, will undoubtedly weaken the potential of such powers to contribute to GSD. Adding a statutory underpinning in the form of a more general sustainability duty, as in the GoWA 2006, to support and direct the application of well-being powers provides an important additional dimension, giving symbolic significance and enhanced status to sustainability in agenda setting. The use of statutory provisions in this area is also of huge practical significance as it mandates the emergence of sustainability from the realm of pure policy into practice. In Wales, the statutory context has ensured, at least at the level of the devolved administration that GSD has become part of the institutional *status quo* and the subject of more conscious and consistent development than has been seen elsewhere in the United Kingdom. For example, there have been serious attempts to integrate sustainability considerations across the range of WAG functions and there seems to be a real sense of commitment to and ownership of the sustainability duty both as a tool for internal governance and as a stimulus to reach out and exchange ideas, as for example through the NRG4SD initiative and work with local authorities.

In Wales the statutory regime has arguably also fostered the development of a distinctive agenda, with a clear regional character and values emerging from the process, often exhibiting creative approaches, not least in respect to according a significant role to cultural dimensions of GSD**.** Giving particular credence to such elements as recognising and underpinning distinctive features of Welsh society (notably the Welsh language, but also in the particular importance accorded to concepts such as community) is a broader feature of the approach of the Welsh Assembly and its government across the range of its activities. In this context WAG has provided added value by placing a distinctively Welsh stamp on GSD**.** The Welsh approach arguably demonstrates transformational thinking about governance in this area, converting what at first glance may appear to be a rather barren and legalistic issue into something altogether more viable that is shaped to fit Welsh priorities. The SCA provisions too potentially have a great deal to offer in terms of some aspects of GSD by promoting governance that is closer and more responsive to local people and their priorities. It may well be that with the discrete

statutory coverage and the more distinct profile it offers for the well-being duty, the SCA approach can foster innovative approaches in this area.

4.11.4 Conclusion

Experience in Wales suggests that, in line with emerging understanding of the need to give institutional and legal cognisance to sustainability in order to take it from paper to practice, it is desirable to underpin GSD developments with the imposition of a statutory sustainability duty. This ensures that questions of principle are kept in focus while at the same time moving beyond them to tackle practicalities. In Wales, the s79 sustainability duty has created both an impetus for the development of GSD and fostered a positive proselytising culture towards its development within the WAG. The GOWA well-being power,[577] thus grounded, has considerable potential to deliver in practical terms by concretising the sustainability agenda, but other similar provisions may prove less stable, lacking the firm foundation provided by the statutory context in question. A statutory underpinning serves to enhance the status of sustainability and focus attention on how the agenda can be most effectively pursued. The lessons that can be learnt from the implementation of the sustainability duty in Wales and further developments of the well-being power supported by this are potentially valuable and worthy of close examination. Best practices may be drawn from the Welsh case that may be suitable for wider dispersal. In the United Kingdom, taking such an approach is potentially applicable to local government and other devolved administrations and it may also have considerable potential to be extrapolated to the national level and even possibly even be exported for consideration internationally. This would fit with the fact that, at the very least, the statutory context prevailing in Wales has ensured that sustainability has an almost totemic significance for the WAG, playing a key role in its institutional identity and laying a viable foundation for it to actualise GSD. As things stand, it has ensured that Wales, for a small country, has big ambitions for developing its role as a 'global citizen' promoting the sustainability agenda.

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4.12 The Experience of Porto Alegre's Participatory Budget

Ricardo Libel Waldman[578]

Abstract

The participatory budget, first adopted in Porto Alegre, Brasil, in 1989, is an informal consultation procedure in which the city government hears proposals from citizens on issues such as sanitation, housing, pavement, education, social assistance, health, public transportation and traffic, leisure areas, sports and leisure, public lighting, economic development, youth, culture and waste management. Public officials provide technical information to city residents who are divided into groups by region and by issues. Delegates are elected to vote on priorities, which are graded from one to four. The city government has no legal obligation to accept the priorities voted by residents, although the city's organic law requires popular participation in the allocation of the executive budgetary resources.

The aim of this paper is to discuss the role of participatory budgeting in approaching social and ecological justice issues. The participatory budget has important features that point to sustainable governance, such as the ethical commitment to justice and the perception that general participation will not be able to solve all justice questions alone, and thus should be limited, not only by individual and social rights, but also by environmental data.

The great challenge for Porto Alegre is how to ensure genuine and growing participation when the municipal government is required to set limits and when complex information is mostly held by the government and is unavailable to citizens. In addition, this process should undergo statutory regulation so that its misuse is reduced. In this case, participation will increase, but the problems mentioned above may dampen citizens' enthusiasm and decrease their awareness of relevant information.

4.12.1 Introduction

The participatory budget in Porto Alegre, capital of the State of Rio Grande do Sul, Brazil, is an example of governance that can actually contribute to the solution of social and ecological justice issues. Its history began in 1989, when it was implemented by the Workers Party in the city to effectively include historically disenfranchised groups in the political debate.

There were other participatory budget experiences before, such as the one in Pelotas, a city in the same Brazilian state of Rio Grande do Sul, but Porto Alegre was the first major city to adopt the process, and its endurance and results have drawn worldwide attention. From fewer than 1,000 participants in its first year, the

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procedure involved more than 20,000 people by 2000 that directly participated in deciding where the city government will invest its money. In 2008, 10,079 people have officially participated. More than 100 cities in Brazil have adopted it with different degrees of success.

The government of the State Rio Grande do Sul extended participatory budgeting to the decision about State's budget, when the Workers Party was in office from 1998 to 2002. The procedure was highly criticized; the opposition won the next election, and the program was discontinued.

In the past two years, participatory budgeting in Porto Alegre has been conducted by a government controlled by another political party, which cannot be classified as left wing although it calls itself socialist. The participatory budget ensured that several areas of the city, mostly those inhabited by poor people and usually forgotten by municipal governments, had their demands heard and their quality of life improved. This is a major step towards governance that can effectively deal with social justice and, at some level, ecological justice. Therefore, this case study will discuss the role of participatory budgeting in approaching social and ecological justice issues.

4.12.2 Main features of the procedure

Participatory budget is an informal consultation procedure as there is no statutory obligation of the city government to accept the priorities selected by participants, although the city's organic law requires the participation of residents in the allocation of the executive budgetary resources. The government hears citizens' proposals on issues previously selected by the administration, such as sanitation, housing, pavement, education, social assistance, health, public transportation and traffic, leisure areas, sports and leisure, public lighting, economic development, youth, culture, and waste management. Proposals are voted, organized, selected according to technical criteria, and then sent to the Legislative Council as part of the official executive budget for approval.

The procedure works through cycles from March to January. Starting in 1994, changes in the Internal Regiment (the set of rules that governs the participatory procedure) for the next term have been voted at the end of each cycle. Residents are divided into 17 groups by regions, where regional assemblies are conducted. Since 1994, six other issue-oriented assemblies have been conducted yearly to discuss issues that affect the whole city. Technical information is provided by assigned public officials.

The main governing bodies of the participatory budget are:

1. Participatory Budget's Council: It coordinates the budgeting procedure and supervises the implementation of the participatory budget decisions by the government, according to relevant budget statutes.[579] It defines its own bylaws. It is composed of councilors elected in the regional and

[579] In Brazil, there are three types of budget statutes: one plans the State's inversions in the period of five years; another defines budgeting criteria for the next year (for instance, what proportion of State revenue will be spent by each branch of governmental power; and the last establishes the specific revenue and expenditure for the next year.

issue-oriented assemblies, members nominated by associations, and non-voting members appointed by the municipal government. Its members are appointed every July by the Municipal Assembly*.

2. Regional Assemblies: Starting in 2008, there are 17 regions; each region holds an Assembly, which is a meeting of residents of that region. The Assembly elects priorities among the issues previously selected by the city government, the region's representatives (councilors) in the Participatory Budget Council, and the delegates (one for each ten participants). Delegates have several functions, mostly related to organizing procedures in the region. The delegates are chosen among representatives of associations and other entities according to the proportion of their participation in the assembly. The number of delegates of a given association is proportional to the number of members present at the Regional Assembly. The Assembly also presents specific demands, such as paving of a given street.
3. Delegates' forums: Meetings of delegates from a given region or assigned to discuss a given issue.
4. Issue-Oriented Assemblies: Meeting of citizens to discuss and plan issues for the whole city rather than according to regional priorities. Created in 1994, they have the same functions as the Regional Assemblies.
5. Municipal Assembly: Meeting of all citizens. It appoints the members of the Participatory Budget Council. It is where the final order of priorities and demands (based on criteria that will be explained later in this paper) is presented to the population.

Priorities are voted and graded from one to four. Delegates are elected to determine the order of the priorities according to the following criteria: a) each priority receives a grade value, from one to four; b) all priority grades are added, and the three priorities with the highest grades are then distributed to regions; and c) this distribution depends on general and technical criteria, which are voted by the Participatory Budget Council. The influence of the local government plays a major role in determining this criterion.[580]

The Participatory Budget Council votes the executive budget bill that will be sent to the municipal legislative council, and follows up its execution. This is the same procedure followed for all executive budgetary bills. Therefore, the process involves citizens, community leaderships, and government officials, and goes beyond writing a budgetary bill to include the follow-up of implementation after approval by the legislative council. From 1990 to date, 1,211 demands related to all participatory budget issues and areas have been approved and fully implemented. The city's Secretary for the Environment was responsible for the implementation of 241 of these demands, mostly conservation issues and creation of parks. Additional ecological justice demands were met, such as the 24 demands

[580] Sobottika, E., 'Orçamento participativo: conciliando direitos sociais de cidadania e legitimidade do governo'. In *Civitas*, Porto Alegre, Vol. 4, No. 1, Jan.-Jun., 2004, p. 9.

related to the revitalization of the Guaíba Lake, whose official name is Guaíba River. These results are promising considering the number of repressed demands that may be easily seen as more urgent by citizens, such as daycare and health centers.

As a result of this process, the poorer areas of the city have received more public housing, pavement, and services. This is explained by the fact that several sectors of society, mostly those represented by (poor) community leaders that participated in the political struggles for democracy and rights before the Constitution of 1988 was passed, used this new political space to press for their demands. The city government, especially in the early days of participatory budgeting, tried to promote the participation of representatives from social movements and neighborhood associations.[581] At any rate, most participants are poor people.[582]

4.12.3 Evaluation

The participatory budget is ethically oriented, and this ethical orientation is not only formal. Its purpose is not only to ensure that all participate under equal conditions, but it is also material since the three general criteria to distribute money are selected by the people: a) lack of services or infrastructure (weight = 4), b) population (weight = 2); and c) the priorities chosen by the region (weight = 5). The purpose of the criteria is to help poor people to improve their quality of life. The lack of services and infrastructure is an objective criterion whose weight is greater than that of the 'population' criterion and similar to that assigned to strict majority criteria, such as the priorities chosen by the region. It should be noted that, although the majority criterion is an important standard, some goals of the procedure are previously determined and are not subject to the will of the majority.

Moreover, members of the Participatory Budget Council must have previously been delegates, which is a relevant ethical feature. Council members should have experience. This is a merit criterion, which suggests that besides being popular, representative councilors should have some specific knowledge based on experience and constructed in courses attended when they were delegates.

Another important feature, related to the merit criterion, is that the participatory budget is based on reality. There are technical criteria that objectively determine whether a given priority is feasible or desirable according to facts and laws. For instance, a proposal to regulate real estate property rights is unacceptable if it refers to an area of risk for its inhabitants or the environment, and a proposal to create popular daycare centers depends on the availability of land that belongs to the demanding organization or the city. The government also analyzes the technical viability of the demands.

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581 Sobottka, E., 'Orçamento participativo: conciliando direitos sociais de cidadania e legitimidade do governo'. In *Civitas*, Porto Alegre, Vol. 4, No. 1, Jan.-Jun., 2004, p. 9.

582 Verle and Brunet *apud* Sobottka, E. 'Orçamento participativo: conciliando direitos sociais de cidadania e legitimidade do governo'. In *Civitas*, Porto Alegre, Vol. 4, No. 1, Jan.-Jun., 2004, p. 10.

The participatory budget is informal, the government does not have to implement it, and participation is not mandatory. These features favor the misuse of participation: because not everyone is required to participate, it is easy to organize a group of people to participate in favor of some interests. Such groups may participate in decision making when those opposed to the interests under discussion are not represented because they are not informed that an assembly is going to be held or are unaware of its importance. Such a feature favors those who are organized, but makes it more difficult to include those who are not yet part of 'organized civil society'. Also, it leaves room for a certain type of blackmail every election: if the opposition wins, popular participation will be discontinued!

The procedure is not error proof and leaves room for contradictions between free democratic debate and distortions of the procedure through undue government influence, mainly because of the differences in level of information and availability of infrastructure between citizens and the state.

Informality also makes it more difficult to maintain stability of rules and to hold those who decide – a small part of the population with no legal mandate – accountable for their decisions. Such characteristics are central to the rule of law, which, in turn, is crucial for sustainability.

The participatory budget is reason for hope because it is a form of governance in which the people and the government can work together for social justice and can use information and education for ecological justice. People are increasingly aware of the importance of protecting the environment and of the fact that such protection sets limits to what human beings may want for themselves. The main virtue of participatory budgeting is that, while democratic, it accepts more or less objective criteria to guide democratic decisions. Therefore, fairer decisions, not only in terms of equal participation, but also in terms of its results, may be made.

For clarity purposes, it is worth listing four sustainability-friendly features of the participatory budge.

1) *The need for environmental protection is part of political deliberations, and some criteria in the procedure are about legal and non-legal limitations of deliberation.*

A deliberation that disrespects environmental law, for instance, or that is unsustainable because it will raise pollution levels or the production of hazardous wastes should be dismissed. There are channels to do thisin the participatory budget procedures, but there is no guarantee that the right choice will be made.

The crucial aspect, however, is that the system ensures that scientific information will somehow limit democratic decisions to the extent that sustainability, like civil and fundamental rights, is essential to democracy. Democracy should be protected from itself, because it is not an end in itself, but a means for human beings to live the good life, which is, among other things, a life of respect and integration with nature.

2) *Sustainable governance must be conceived at a global level, but state and local governments should have autonomy to determine global sustainable governance.*

The Brazilian federal system places environmental issues under the common power of federal, state and local governments. Local autonomy cannot mean indifference to global issues, but global policies should allow room for people to adjust these policies to their actual conditions.

3) *Informed participation is essential.*

Participants who are well-informed and well-educated, both technically and ethically, are essential for a sustainable government. The success of governance at all levels depends on the public debate about the definition of the common good. The Participatory Budget Internal Regiment makes provisions for the formation and information of people who are more directly involved with the procedure (counselors and delegates).

4) *A participatory decision-making process ensures common ownership of decisions.*

Everyone who takes part in the procedure may think of the results as his or her decision. Objective criteria also ensure that the procedure is consensus oriented, as people can easily see if a region actually has less of a given service or infrastructure that was recommended in participatory budgeting.

4.12.4 Conclusion

Some important features of the participatory budget point to aspects of sustainable governance that should not be ignored: the ethical commitment to justice and the perception that the popular will alone cannot solve all justice questions and should, therefore, be limited not only by individual and social rights, but also by environmental data.

The great challenge for Porto Alegre is how to ensure genuine and growing participation when the municipal government is required to set limits and when complex information, which citizens in general do not have, is mostly held by the government. Related to these issues is the need for statutory regulation of the process so that the misuse of the participatory space and its possible negative effects on participation are reduced. Participation will increase, but the problems mentioned above may dampen citizens' enthusiasm and decrease their awareness of relevant information.

For sustainable governance in general, the questions raised by Porto Alegre's case are similar: 1) how can we ensure effective democratic governance that, at the same time, incorporates values that do not depend on human points of view, although the human point of view is the only one through which we can see the world? And 2) who is going to be responsible for safeguarding these values?

4.13 Land Use Regulation versus Property Rights: What Oregon's Recent Battles Could Mean for Sustainable Governance

Melissa Powers[583]

Abstract

Governance for sustainability requires a monumental shift in the way societies currently operate and structure themselves. If implemented as currently envisioned, governance for sustainability would no longer place localized economic interests above the needs of other communities, other life forms, and the world at large. Thus it would be perceived by many as a direct threat to private property rights and personal economic interests. If governance for sustainability is to succeed, citizens must have assurances that sustainable governance and economic prosperity go hand-in-hand. The State of Oregon's recent experiences with its comprehensive land use laws could serve as a cautionary tale for advocates of governance for sustainability.

4.13.1 Introduction

In 1973, the State of Oregon, located in the Pacific Northwest region of the United States, adopted a comprehensive land-use planning law that placed strict restrictions on development outside designated urban growth areas.[584] Oregon adopted the law to abate concerns that unchecked urban sprawl would degrade both agricultural production and pristine natural areas.[585] Oregon's land use regulations quickly earned the praise of many for their success in preventing suburban sprawl and preserving prime agricultural land and open spaces.

Others, however, regarded Oregon's laws as heavy-handed, inflexible, and possibly unconstitutional controls that impeded economic development and unduly restricted landowners' rights.[586] The opponents' claims initially appeared to fall on deaf ears, as voters repeatedly rejected ballot initiatives to overturn Oregon's land-use laws.[587] However, in 2004, voters passed Measure 37, a ballot initiative that required local governments to either compensate landowners for economic losses caused by land use regulations or else waive the offending land-

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584 1973 Or. Laws 80 (codified as OR. REV. STAT. § 197 (2005)).

585 See Blumm, M. C. and Grafe E. 'Enacting Libertarian Property: Oregon's Measure 37 and Its Implications' 2007 *Denv. U. L. Rev*. Vol. 85, No. 2, pp. 279, 286.

586 Hunnicutt, D. J. 'Oregon Land-Use Regulation and Ballot Measure 37: Newton's Third Law at Work' 2006, *Envtl. L.* Vol. 36, No. 1, pp. 33-34.

587 See Blumm and Grafe (supra note 585) pp. 296-97; *see also* 'Oregon Repeals Land Use Planning Coordination Statutes' Ballot Measure 10 (1976), availabale at www.bluebook.state.or.us/state/elections/elections19.htm (accessed 23 April 2008); 'Ends State's Land Use Planning Powers in Oregon, Retains Local Planning' Ballot Measure 6 (1982) available at bluebook.state.or.us/state/elections/elections20.htm (accessed 23 April 2008).

use laws.[588] Within three years of the passage of Measure 37, property owners had filed more than 7,000 claims seeking compensation for or waivers from land-use laws on more than 750,000 acres of land.[589] Oregon governments waived regulations for all but a few of the claims.[590] Oregon's land-use planning system appeared to be on the brink of collapse.

In 2007, as the ramifications of Measure 37 became clear, Oregon voters passed Measure 49,[591] which promised to clarify and correct some of the most problematic provisions of Measure 37. Many land-use planning advocates have hailed Measure 49 as restoring Oregon's land-use regulations.[592] The voters' support for the measure, moreover, suggests that Oregonians continue to value the role governments play in directing and controlling development.[593]

However, some commentators believe Measure 49 maintains a flawed compensation scheme based on incorrect assumptions. Measure 49 is premised on the unfounded belief that government must compensate landowners for any losses they incur as a result of prospective government regulation.[594] Measure 49 will thus unreasonably restrict governments from enacting future regulations designed to preserve biodiversity, protect agricultural and forest lands, prevent urban sprawl, or respond to climate change.[595]

Any conflict between land-use planning and private property interests could significantly undermine any initiative to govern for sustainability. At its heart, the concept of sustainable governance assumes private property owners will recognize the benefits they enjoy as a result of comprehensive and far-sighted government planning. However, the Oregon experience suggests that private property owners often focus only on the direct economic costs they may incur if a

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588 'Oregon Governments Must Pay Owners or Forego Enforcement When Certain Land Use Restrictions Reduce Property Value' Ch. 197 Ballot Measure 37 (2007) (codified at OR. REV. STAT. § 197.352 (2005)) (hereinafter Measure 37).

589 Blumm and Grafe (supra note 585) 358; Sheila A. Martin et al., 'What is Driving Measure 37 Claims in Oregon?' (Institute of Portland Metropolitan Studies: Portland State University, 2007) available at www.pdx.edu/media/i/m/ims_M37/April07UAAppt.pdf (accessed 23 April 2008).

590 Blumm and Grafe (supra note 585) 359; Preusch, M., 'Prineville Offers Measure 37 Pay' *Oregonian* (Portland, OR, 26 October 2006) p. A1 (reporting that governments had waived land-use regulations in all cases except one, where the government offered the land owner compensation).

591 H.B. 3540, 74th Leg., Reg. Sess. (Or. 2007), available at www.leg.state.or.us/07reg/ measpdf /hb3500.dir.pdf accessed 23 April 2008 (hereinafter Measure 49).

592 Yes on 49, 'Oregonians Support Measure 49, Maintain Protections on Forests and Farmland' (7 November 2007) available at www.yeson49.com (accessed 23 April 2008).

593 Sightline Institute, 2007, 'Two Years of Measure 37: Oregon's Property Wrongs' available at www.sightline.org/research/sprawl/res_pubs/property-fairness/measure-37-report/two-years-m37-report (accessed 23 April 2008).

594 Echeverria, J. D. 'Analysis of Oregon House Bill Measure 3540/ Measure 49' (Georgetown Envtl. L. & Pol'y Institute: Washington D.C., 17 July 2007), p. 7.

595 Sullivan, E. J., 'Year Zero: The Aftermath of Measure 37' *Urb. Law* Vol. 38, 2006, pp. 266-267 (explaining that Measure 37 will result in 'legislative sclerosis' because governments will be unwilling to enact regulations that could expose the governments to compensation claims); Echeverria (supra note 594) p. 2 (predicting that Measure 49 will continue to 'discourage adoption of new regulations needed to protect the public welfare').

given development project cannot proceed as planned. For sustainable governance to succeed, governments must dispel the myth that property ownership rights necessarily clash with or are undermined by comprehensive governmental efforts to promote sustainability.

4.13.2 Description: The battle over Oregon's land-use laws

Oregon's land-use planning laws emerged in the 1960s and 1970s in response to local concerns regarding unchecked growth and as part of an 'emerging national interest in land-use planning'.[596] Senate Bill 100, passed in 1973, established the system by which Oregon's land-use decision- making process would proceed.[597] Of foremost importance are a series of 'goals' that limit urban growth and mandate protection of agricultural and forest lands.[598] Adherence to these goals has prevented widespread suburban sprawl and maintained a robust agricultural economy in the state.[599] However, these goals also spurred opposition from property rights advocates who oppose development restrictions.[600] These opponents never succeeded in their efforts to directly overturn Oregon's land-use laws.[601] They did, however, convince Oregon voters to adopt Measure 37, which affords private property owners extraordinary rights to compensation for any economic losses resulting from a land-use regulation. While Oregon voters later withdrew support for many of its aspects, Measure 37 will have lasting effects on Oregon's land-use laws.

The land-use goals

Oregon's land-use laws require adherence to 19 land-use goals, which are divided into four broad categories related to the planning process, conservation, development, and coastal resources.[602] The most restrictive, and thus contentious, goals are Goals 3, 4, and 14, which collectively limit most growth within urban areas and substantially restrict development of agricultural and forest lands.[603]

Goal 14 directs each local government to establish urban growth boundaries 'to provide for an orderly and efficient transition from rural to urban land use'.[604] The urban growth boundary establishes the allowable extent of urban development.[605] Land within the urban growth boundary may be developed for

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596 Blumm and Grafe (supra note 585) p. 286.

597 1973 Or. Laws 80 (codified as amended at OR. REV. STAT. s 197 (2005)).

598 1973 Or. Laws 80, s 11 (codified as amended at OR. REV. STAT. § 197.250 (2005)); see also Or. Admin. R. 660-015-000 (2006).)

599 See Brook, D., 'How the West Was Lost' *Legal Affairs* March/April 2005, pp. 44-48.

600 See Hunnicutt (supra note 586).

601 Blumm and Grafe (supra note 585) pp. 296-299.

602 See Or. Admin. R. 660-015-000 (2006); see also Blumm and Grafe (supra note 585) p. 290.

603 See Blumm and Grafe (supra note 585) p.291; Hunnicutt (supra note 586) p. 28.

604 Goal 14, Statewide Planning Goals, Oregon Department of Land Conservation & Development available at www.oregon.gov/LCD/goals.html (accessed 23 April 2008).

605 Blumm and Grafe (supra note 585) p. 291.

urban uses, while lands beyond the urban growth boundary generally cannot.[606] Local governments must establish and, where necessary, revise their urban growth boundaries to accommodate the anticipated residential, industrial, commercial, and recreational needs of their communities, consistent with a '20-year population forecast'.[607] Thus, where urban populations are expected to increase, local governments may expand their urban growth boundaries.

Lands outside of the urban growth boundary are considered rural. Local governments have classified at least 95 percent of these rural lands as either agricultural or forest lands under Goals 3 and 4,[608] which establish restrictions on development of such lands.

Goal 3, for agricultural lands, includes land outside urban-growth boundaries that exhibits certain soil characteristics appropriate for farming, 'other land' suitable for farming, and adjacent or nearby lands necessary to permit farm practices.[609] In its current incarnation, Goal 3 establishes stringent development standards for agricultural lands designated as 'high-value farmland'.[610] Among other limitations, Goal 3 restricts the construction of dwellings on high-value farmlands unless the land generates at least $80,000 in annual farm income from the parcel over a limited time period.[611] The purpose of this restriction is to prevent speculators from purchasing productive agricultural properties and converting them into residential estates or subdivisions. Goal 3 also restricts development on other types of farmland that do not qualify as 'high value', but the restrictions are far less onerous. In addition, Goal 3 allows at least 48 types of non-farm uses, including schools, parks, churches, and wineries, on certain agricultural lands.[612] Thus, while Goal 3 imposes stringent restrictions on certain ‘high-value” farmlands, it nonetheless allows limited development of other agricultural lands.

Goal 4, for forest lands, includes lands suitable for commercial forest uses, 'other forested land that maintains soil, air, water and fish and wildlife resources', and adjacent or nearby lands necessary to permit forest practices.[613] Goal 4 allows limited residential and commercial development on designated forest lands, but it restricts property owners from subdividing or building multi-family housing developments on forest lands.[614]

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606 Ibid.

607 Goal 14 (supra note 604).

608 Hunnicutt (supra note 586) p. 3.

609 Goal 3, Statewide Planning Goals, Oregon Dep’t of Land Conservation & Dev., available at www.oregon.gov/LCD/goals.html (accessed 23 April 2008).

610 Ibid. Goal 3 has undergone several revisions since 1983. Blumm and Grafe (supra note 585) p. 294, n.77. Oregon’s land use regulatory agency added the 'high-value farmland' provisions in 1992 to increase conservation of prime commercial farmland. Department of Land Conservation and Development, *Analysis and Recommendations of the Results and Conclusions of the Farm and Forest Research Project* (1991) 1.

611 Goal 3 (supra note 609).

612 Ibid.; see also Blumm and Grafe (supra note 585) pp. 293-294.

613 Goal 4, Statewide Planning Goals, Oregon Dep’t of Land Conservation & Dev., available at www.oregon.gov/LCD/goals.html (accessed 23 April 2008).

614 Ibid.

The Oregon Legislature and the agencies charged with administering Oregon's land use laws have amended these goals many times since 1973.[615] By and large, these amendments sought to lessen the restrictions on development while preserving, to the extent possible, Oregon's agricultural and forested lands.[616] These amendments did little, however, to stifle the growing opposition to Oregon's land use system.

The property rights initiatives

Land-use planning opponents initially launched direct challenges to Oregon's land-use laws through citizen initiatives seeking to rescind the laws. Three separate measures brought between 1976 and 1982 all failed,[617] and Oregon's land-use system appeared safe from direct challenge. In the late 1990s, however, land-use planning opponents launched a new strategy of using indirect means to restrict land use planning.[618] When one moderate initiative met with success,[619] the land use opponents turned to 'takings' laws to launch a broadside attack on Oregon's land use system.

The first citizen initiative proposed to amend the Oregon Constitution by requiring local governments to compensate private property owners whenever a land-use decision would reduce the economic value of the property.[620] The ballot measure passed by a margin of 54 percent to 46 percent;[621] however, the Oregon Supreme Court invalidated the measure in 2002, after finding that the text of the ballot initiative did not satisfy state constitutional requirements.[622]

Undeterred, property rights advocates advanced another ballot initiative, Measure 37, that required local governments to either compensate property owners whenever land-use regulations diminished the economic value of private property or else waive the offending land use regulation.[623] This more sweeping initiative passed with approximately 60 percent of the vote[624] and it ultimately survived court challenges.[625]

Measure 37 directed local governments to either pay compensation for or

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615 See generally Blumm and Grafe (supra note 585) pp. 285-296 and accompanying notes.

616 Ibid.

617 See (supra note 587).

618 Blumm and Grafe (supra note 585) p. 298 and accompanying notes.

619 This law required the state to notify by mail landowners of all proposed changes to land-use laws or regulations. 'Expands Notice to Landowners Regarding Changes to Oregon Land Use Laws' Ballot Measure 56 (1998) (codified as OR. REV. STAT. s 215.503 (1999)).

620 'Amends Oregon Constitution: Requires Payment to Landowner if Government Regulation Reduces Property Value' Ballot Measure 7 (2000) available at www.sos.state.or.us/elections/nov72000/nov72000.htm (accessed 23 April 2008).

621 'Unofficial County Results on Measure 7 as of November 14, 2000' (2000) available at www.orcities.org/Portals/17/A-Z/m7ns022.pdf (accessed 23 April 2008).

622 *League of Or. Cities v. State*, 56 P.3d 892, 896 (Or. 2002) (Oregon Supreme Court).

623 Measure 37 (supra note 588) s 1.

624 Hunnicutt (supra note 586) p. 41.

625 *MacPherson v. Dep't of Admin. Serv.*, 130 P.3d 308 (Or. 2006) (Oregon Supreme Court).

waive any land use regulation that 'restricts the use of private real property …. and has the effect of reducing the fair market value of the property'.[626] It applied to any resolution enacted or enforced against a property owner after the property owner – or his or her ancestors – acquired the property.[627] Measure 37 thus operated retroactively. Measure 37 also applied to any prospective land-use regulations;[628] landowners could receive compensation under Measure 37 even if they had no previous intention of using the property in a way prohibited by newly enacted or applied land-use regulations.[629]

Measure 37 exempted certain regulations from the compensation or waiver requirement. These exemptions applied to regulations 1) restricting 'activities commonly and historically recognized as public nuisances under common law'; 2) enacted to protect public health and safety; 3) required to comply with federal law; 4) related to bans or restrictions on pornography and nude dancing; and 5) enacted before the current landowner or her ancestor acquired the land.[630] While some commentators believed the exemptions would severely restrict the number of successful Measure 37 claims,[631] they did not seem to have such an effect.

Measure 37 sent Oregon's land-use regulations into a tailspin. Between the initiative's passage in November 2004 and December 2007, property owners had filed more than 7,000 claims with the state, seeking nearly $20 billion in compensation for alleged economic losses resulting from application of Oregon's land-use laws.[632] Time and again, local governments faced the 'choice' of either retaining their land use goals, but paying heavily for the decision, or waiving the laws designed to protect the nature of their communities and the landscape. In reality, though, the governments had no choice, as their budgets did not include sufficient funds to compensate landowners for the claims.[633] In all but a few circumstances, governments agreed to waive the applicable regulations.[634]

Citizens who may not have understood the expansive scope of the waiver provisions suddenly found their neighbours proposing large-scale subdivisions or commercial developments in place of their agricultural fields or forests.[635] As large

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626 Measure 37 (supra note 588) s 1.

627 Ibid; *see also* Blumm and Grafe (supra note 585) pp. 308-310.

628 Measure 37 (supra note 588) s 1.

629 Ibid.

630 Ibid s (3).

631 See Jeannie Lee, 'Tying Up Loose Ends: Resolving Ambiguity in Ballot Measure 37's Public Health and Safety Exemption' 2008 *Envtl. L*., Vol. 38, No. 1, p. 209.

632 Dep't of Land Conservation and Dev., 'Measure 37, Summaries of Claims' www.oregon.gov/LCD/MEASURE37/summaries_of_claims.shtml#Summaries_of_Claims_Filed_in_the_State (accessed 23 April 2008).

633 Blumm and Grafe (supra note 585) p.323.

634 See (supra note 590).

635 See Blumm and Grafe (supra note 585) pp. 358-359 and accompanying notes (noting that more than 60 percent of the Measure 37 claims filed as of April 2007 came from owners of forest and farm lands and 33 percent of those claims sought subdivision of lands into four or more home sites).

timber companies filed claims seeking to subdivide their property,[636] citizens learned that Measure 37 would undermine Oregon's land- use system. By 2007, many voters expressed an interest in overturning or modifying Measure 37.[637]

The legislature's response: Measure 49

Many observers had hoped the Oregon legislature would use the 2007 legislative session to repeal or limit Measure 37.[638] In the end, though, Oregon's legislators made only moderate alterations to Measure 37.[639] They referred the larger amendments to the voters by placing on the Oregon ballot yet another measure – Measure 49 – which promised to reform many troubling aspects of Measure 37.[640] Specifically, among other reforms, Measure 49 limited compensation rights to regulations enacted after the date of acquisition by the current owners and not the ancestors.[641] In addition, Measure 49 allowed claims only for laws 'restrict[ing] the residential uses' of property owners, and thus prohibited claims for laws restricting commercial or industrial uses.[642] Finally, to thwart construction of subdivisions, Measure 49 limited the number of dwellings a claimant may build.[643]

At the same time, Measure 49 retained Measure 37's broad compensation and waiver provisions for any new regulation that would result in lost property values.[644] Measure 49 thus requires local governments to compensate landowners for any reduction in fair market value of the property or to waive any new regulation 'to the extent necessary to offset' the reduction.[645] Measure 49 further limits the ability of governments to adopt new regulations by narrowing the exemptions for health and safety and compliance with federal law – which would otherwise exempt a government from compensating a landowner for lost property values – on agricultural and forest lands.[646] Thus, while Measure 49 likely restored a significant portion of the land use regulatory system that has existed in Oregon since 1973, it also constrained the ability of governments to adopt future land use controls and regulations.

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636 Ibid. 359 n. 455 (citing reports of timber companies filing Measure 37 claims covering thousands of acres and seeking millions of dollars in compensation).

637 Ibid. 359 n. 458.

638 Ibid. 360 n. 459; *see also* Oppenheimer, L., 'Public Demands Land-Use Clarity' *Oregonian* Portland, OR, 23 February 2007, p. A1.

639 H.B. 3546, 74th Leg., Reg. Sess. s 2(2)(a) (Or. 2007) www.leg.state.or.us/07reg/measpdf/hb3500.dir/hb3546.b.pdf (accessed 23 April, 2008).

640 Measure 49 (n 9).

641 Ibid. s 4(3).

642 Ibid. ss 4(1), 12(1)(b).

643 Ibid. ss 6, 7, 9(1)-(2).

644 Ibid. ss 12(1)(b), (4).

645 Ibid. ss 12(4)(b), (5)(b).

646 Ibid. ss 4(4)(b)-(c).

4.13.3 Evaluation: Oregon's land-use experience and its implications for governance for sustainability

Oregon's recent experiences with Measures 37 and 49 provide hints of the hurdles proponents of governance for sustainability must surmount as they try to turn the concept into reality. Although Oregon's land-use laws are by no means as expansive or innovative as governance for sustainability proposes to be, they nonetheless could serve as a useful starting point for anticipating how the public might react to governmental planning aimed at achieving long-term sustainability. The majority of Oregonians had expressed continued support for Oregon's land-use system, even while supporting Measure 37. It may be that voters did not understand the impacts of Measure 37. It may also be that voters believed the claims that Oregon's land-use laws had decimated property values. Or perhaps some voters anticipated that they would personally benefit from filing their own Measure 37 claims. Whatever the reasons underlying the passage of Measure 37, it seems clear that Oregon's land-use proponents failed to make an economic case against Measure 37. It was only after Oregon voters experienced the impacts of Measure 37 that they seemed ready to limit property rights in favour of the common good.

By the time Oregonians had the chance to vote on Measure 49, they had three years' experience with Measure 37, during which time local governments waived land-use regulations in all but a few cases.[647] Once voters understood the overall impacts of Measure 37's broad waiver provisions, they appeared to better appreciate the benefits that Oregon's longstanding land use laws.[648] Oregonians' continued support of Oregon's land-use laws suggests that, even in jurisdictions where citizens highly value private property rights, citizens may also support innovative governmental measures that achieve broader goals.

However, Measure 49 perpetuates a distorted balance between governmental regulation and private property interests. It allows private landowners to seek compensation when new regulations reduce farm and forest land values. It will therefore likely impede local governments and the state from enacting new laws, even though future environmental conditions – including the likely impacts from climate change – may mandate wholesale revisions to governmental planning strategies.[649] Perhaps worse, Measure 49 codifies a harmful assumption that private property owners should be entitled to compensation anytime the government's actions affect an individual's property values.[650] Until this underlying assumption is overcome, innovative governmental initiatives will face significant hurdles.

Governance for sustainability would require a monumental shift in the way societies currently operate and structure themselves. If implemented as currently envisioned, governance for sustainability would not necessarily allow short-term

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647 (supra note 590).

648 Edward J. Sullivan, 'Through a Glass Darkly: Measuring Loss Under Oregon's Measure 37' *Urb. Law*, Vol. 39, 2007, p. 563.

649 Blumm and Grafe (supra note 585) p. 365; Echeverria (supra note 594) p. 2.

650 Ibid.

economic interests of property owners to trump the broader needs of communities, other life forms, and the world at large. It would also be perceived by many as a direct threat to private-property rights and personal economic interests. If governance for sustainability is to succeed, governments and citizens must have assurances that sustainable governance and economic prosperity go hand-in-hand.

4.13.4 Conclusion: The implications for governance for sustainability

Oregon's experiences with Measures 37 and 49 raise questions about whether governance for sustainability could succeed within a system that so values private property rights. The initial passage of Measure 37 would have suggested that governance for sustainability simply could not succeed in a place such as Oregon. However, Measure 49 leaves open the possibility that, as citizens are educated about the benefits they receive through far-sighted environmental planning, they will embrace broader initiatives that benefit far more than any single parcel of property. For this possibility to become a reality, however, any advocate of governance for sustainability will need to convince private property owners of not just the moral, but also the economic, benefits they will derive from sustainable governance.

4.14 *Grenelle de l'environnement*: Is France making up for lost time?

Ricardo Stanziola Vieira[651], *Julien Bétaille*[652]

Abstract

Grenelle de l'environnement[653] was a broad negotiation process that took place between French national and local authorities and civil society (nongovernmental organisations (NGOs), trade unions, and employers) in the second half of 2007. Following the May 2007 presidential elections in France, the new French president Nicolas Sarkozy decided to organize a set of negotiation sessions regarding environmental laws [654] in order to develop a five-year action plan on environmental policies. The process was conducted in three phases. First, during the summer 2007, six working groups met to exchange ideas and bring specific recommendations to improve the present situation (phase 1). The reports produced were then used as a basis for a consultation process with the public and members of the French Parliament (phase 2) held in September/October. Finally, a last set of negotiations were to take place in Paris at the end of October 2008 to finalize the action plan. This action plan includes almost all environmental protection sectors (climate, biodiversity, water, agriculture, and governance) and is now being implemented (phase 3). The fact that *Grenelle* took place is positive, but effective changes remain to be seen. Indeed, up to now, the action plan seems to emphasize only the need to adapt to environmental disorders. In terms of governance, NGOs have been widely associated with the process and some NGOs have criticised implementation phase.

4.14.1 Introduction

Grenelle de l'environnement has been a negotiation process that brought together the French government and civil society; it culminated in October 2007.[655]

The first phase took place in July and August of 2007. Work was divided among six working groups of 30 to 35 people each. Each group was further

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653 For further information about '*Grenelle* de l'environnement', see Julien Betaille, '*Grenelle* de l'environnement, la France comble son retard ?', *Revue européenne de droit de l'environnement (Francophone European Review of Environmental Law)*, No. 4, 2007, p. 437.

654 Nicolas Sarkozy had the worst mark when the Alliance pour la Planète assessed the candidate's program (www.lalliance.fr).

655 The *Grenelle* negotiations process took place 24 and 25 October 2008 in Paris, where a final negotiation between the various actors took place at that time. However, in this case study, the most interesting element is the various phases of *Grenelle* as a process.

divided into five groups (representing different social sectors: state, local authorities, NGOs, trade unions, and companies)[656] and was working on specific themes.[657] A president and vice-president were appointed to each by the State. The groups met four to six times during the summer of 2007 to conduct an important reflexion process and made several proposals. Each group produced a final report that included the main environmental protection sectors (climate, biodiversity, water, agriculture, and governance). From a legal point of view, the fifth working group called To Build an Ecological Democracy: Institutions and Governance, is the one we emphasize in this case study.

The second phase took place in September and early October of 2007. Designed to be a democratic and participative phase, it was devoted to public consultation (via Internet, meetings, and debates at the French Parliament). A final roundtable of negotiation between the five parties took place on 24 October.

The third phase consists of the implementation of the decisions taken in the *Grenelle.* It can be divided in two steps: 1) the organisation of working sessions to develop decrees and laws, and 2) their legal adoption by the Parliament, which was expected to happen in July 2008.

4.14.2 Description

Le *Grenelle de l'environment* highlighted problems such as the need to 1) deal with ecological crisis at the national level, taking into account that related decisions will influence the action of the French government at the international level; 2) be an example of governance for all the actors dialoguing and working together toward a common goal; and 3) effectively apply environmental governance and demonstrate that only a democratic and participative process can respond to environmental issues.

Parties involved and their interests

Five parties were directly involved: NGOs, trade unions, employers, local authorities, and the national State. They where chosen for being actors in the civil society as well as for being closely related to environmental protection to different extents. It has been called 'Dialogue of Five'.

Main issues and objectives

The negotiation process aimed at dealing with the existing ecological crisis and making up for lost time compared with actions taken by countries.

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656 The vice president of Group 5 (Governance) was Michel Prieur, Deputy Chair of the IUCN Commission on Environmental Law.

657 Group 1, 'Fighting against climatic changes and controlling energy requests'; group 2, 'Preserving biodiversity and natural resources'; group 3, 'Implementing a healthy environment'; group 4, 'Adopting sustainable production and consumption standards'; group 5, 'Building an ecological democracy'; group 6, 'Promoting development standards that favour employment and competitiveness'. To take into account and face the complexity of emerging tensions, two 'inter group' (joint committee) workshops regarding generically modified organisms and waste were spontaneously created.

The French government has long wished to gather French society around environmental protection and sustainable development issues. That is what led the previously mentioned actors to consider working together towards building a large program addressing the French environmental policy for the next five years of the presidential mandate.

While formal governance structures – such as the State, nongovernmental organisations (NGOs), local governments, trade unions, and companies representatives (such as the *Mouvement des Entreprises de France* – French Business Confederation) were directly involved in the negotiations process, other informal structures also played a key role.[658] For instance, some NGOs formally involved in the *Grenelle* process decided to organize a civil mobilization in parallel. As well, the '*Contre Grenelle de l'environnement,*'[659] a group of NGOs and individuals who did not take part in the official *Grenelle*, adopted a more critical perspective regarding certain issues, such as Genetically Modified Organisms and nuclear energy.

Background

Initially, the word '*Grenelle*' was associated with the social negotiations that followed the great Manifestations of May 1968, in France.[660] To stress the idea of reproducing the concept and applying it to environmental issues, the word '*Grenelle*' was re-used.

The president decided to organize this new *Grenelle* and the Ministry of Ecology took the initiative to create six working groups, each one dedicated to a subject that had attracted the five parties. Historically, this was the first time that the five parties worked together to find common solutions to the ecological crisis. It is relevant to mention that the NGO collective was divided into three parties: *France Nature Environnement* (FNE), the *Fondation Nicolas Hulot* (FNH)[661] and *Alliance pour la planète*[662] (Friends of the Earth, Greenpeace, and WWF).

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658 Some NGOs have informally taken actions outside of the *Grenelle* negotiations framework. For example, the *Alliance pour la Planète* made an evaluation of each candidate's environmental program.

659 *Pour repolitiser l'écologie* – Contre *Grenelle* de l'environnement. (Paragon, Lyon, 2007).

660 The name '*Grenelle*' comes from the name of the agreements that followed the May 1968 Crisis in which there was a series of student protests and a general strike under the De Gaulle government in France. Many saw the events as an opportunity to shake up the 'old society' and traditional morality, focusing especially on the education system and employment. The original *Grenelle* agreement brought together three parties: the trade unions, employers, and government. The term *Grenelle* is used to emphasize the importance of considering ecological issues. At the moment, such issues are largely recognized, as illustrated by the Nobel Peace Prize given to Albert Gore and the Intergovernmental Panel on Climate Change (IPCC) on 12 October, 2007.

661 See: Hulot, N. *Pour un Pacte Écologique,* (Calmann - Levy, Paris, 2006/2007). For Hulot, the environmental crisis involves a larger responsibility for developed countries (such as France) to show an example: 'Our financial capacities and techniques enable us to show the example while building, in the European context, the ecologically viable society. What are we waiting for? Let's show the example!' p. 35.

662 The *Alliance pour la planète* is a collective of NGOs and trade unions gathering more than 70 organizations: Greenpeace, Friends of the Earth, WWF and Confédération Française Démocratique du Travail – one of the main trade unions in France (see: www.lalliance.fr).

The outcomes

Some of the major achievements were that the stakeholders made consensual decisions in almost all the fields of environmental protection,[663] that the government will adopt and implement one or more important laws that reflect the final decisions adopted by the *Grenelle*; and that many of the fifth working group's proposals, especially those regarding governance, have been adopted. Institutional reforms, transparency of information, reforms in the public enquiries processes, definition of the criteria to determine NGOs' legitimacy, are some of the innovations that have been made at the private level of governance. Corporate Social and Environmental Responsibility has been accentuated.[664] The *Grenelle* also revealed differences of points of view among the NGOs.[665]

4.14.3 Evaluation:

In general, the project had both positive and negative (critical) aspects.

On the one hand, the *Grenelle* was a success in that it created an opportunity to exchange ideas about environmental problems faced by French society; the 'Dialogue of Five' has made possible for the first time the meeting of various key actors of the civil society; and new bi-lateral relations (e.g., NGOs and unions or NGOs and local governments) have been created and implemented.

On the other hand, many criticisms must be expressed although the results cannot be evaluated as long as the implementation phase is not finished. For instance the decisions adopted are not ambitious enough to address the complexity of the ecological crisis ; there is no evaluation of the access to justice; neither is there an objective to aim for more control of polluting industrial activities; there is no legal or governmental structural change planned, only an adaptation of the current structure. In the *Grenelle*, the concept of sustainable development is implemented as a lever of economic growth – the environmental pillar is used to serve the economic logic (it might not be a good example of 'governance for sustainability'). Indeed, the decisions taken through the *Grenelle* reflect the idea of 'investment' and, indeed, references to the concept appear in several places in the final document (e.g., references to the 'Marshall Plan', and the 'New Deal'). For instance, the document suggests major development such as construction of more high-speed railways, which is likely to threaten biodiversity. The government's purpose in implementing the *Grenelle* has been to offer opportunities for investment and economic growth. During the meetings regarding implementation (phase 3), NGOs were less present than previously and the decisions taken at this step may misrepresent the body as a whole. Finally, no budget has been dedicated to the implementation of *Grenelle de l'environnement.*

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663 See www.legrenelle-environnement.fr

664 See Corinne Lepage's recent report on environmental responsibility in general. *Mission Lepage, rapport final, 1ère phase*, Février 2008 (www.grenelle-environnement.gouv.fr).

665 For example, *France Nature Environnement* refused the idea of a moratorium on GMOs as proposed by *Alliance pour la planète* (Greenpeace, Friends of the Earth, World Wildlife Fund).

4.14.4 Conclusion

In conclusion, despite the criticisms, we must welcome the process of *Grenelle*. Its existence is already a great improvement as it is the first time that NGOs are considered real interlocutors.

The *Grenelle* consultation process has seemed to promote social acceptance of environmental law. The *Grenelle* action plan is a guide for the French government for five years to come that will allow it to better organize and structure its actions in this sector.

Finally, the decisions taken through the *Grenelle* negotiation process, rather than giving France a leadership role in the environmental legal sector, allows France to make up for lost time at the European level. *Grenelle* has not yet brought about a structural change or a turning point towards sustainable societies. Its evaluation will depend on its implementation phase. However, the first execution of *Grenelle* decisions show that passing through the parliament can reduce the scope of the decisions taken (for example, a proposed law on genetically modified organisms, that was the result of the *Grenelle* process, was denounced by NGOs).

The *Grenelle* experience is important as it presents technically clear and feasible goals.

Ultimately, if the *Grenelle* enables unquestionable progresses, the proposed measures are strongly based on the 'good governance' perspective and not so much on the 'governance for sustainability' perspective. Indeed, voluntary approaches, according to the Anglo-Saxon inspirations on this issue,[666] seem to have been privileged to the detriment of the binding regulations traditionally used in France.

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[666] See, for example: Forester, M. *Deregulation could do better,* Environmental Law and Management, October 1993, p. 126; and YEAGER, P. C. *The limits of law, the public regulation of private pollution*, (Cambridge University Press, UK,1991).

4.15 International Law and Local Normative Changes: Learning to Co-exist with Hooded Cranes in Suncheon Bay, South Korea

Rakhyun E. Kim[667]

Abstract

This case study explores how and why the South Korean city of Suncheon has been pursuing the wise use of its coastal wetland. Suncheon is a prime example of a Korean locality that has made the sustainability challenge part of its local identity. The case draws our attention to the role of intermediary actors in mediating between global and the local stakeholders and the emergence of local government as an independent actor with its own 'face' on the global stage. This in part explains how and why local normative changes are induced in the absence of a top-down coercive power of international environmental law. The case illustrates how internalisation of trans-national norms over time can have an impact on local sustainability.

Courtesy: Suncheon-si

Suncheon Bay is no longer an exclusive resource of local residents but a common heritage of the international society as a whole.[668] *– local councillor*

The protection of Suncheon Bay must be strictly enforced. This is not merely an issue of concern to local citizens and environmental NGOs for it is not too much of an exaggeration to say this is a national and global problem.[669] *– local conservationist*

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668 Jeong, D. 100th Main Conference 4th Round, Suncheon City Council (17 November 2004), p. 2.

669 Suh, G. *An Incident on the Boat Ramp*, 28 May 2007, www.sckfem.or.kr/bbs/view.php?id=menu04_01&page=11&sn1=&divpage=1&sn=off&ss=on&sc=on&select_arrange=hit&desc=desc&no=1315 (accessed 26 March 2008).

4.15.1 Introduction

On its annual migration to the breeding grounds in Alaska, a satellite-tagged Bar-tailed Godwit took off from the Firth of Thames,[670] New Zealand, and stopped over at Suncheon Bay in South Korea for refuelling.[671] Such a pan-global migratory journey is just one of countless examples that illustrate the ecological links between seemingly disconnected locations. Sustainability, which is understood as doing justice to this bird, is undeniably a global challenge. It forces us to revise the dated notion of territorial sovereignty and to take a multi-scalar governance approach that matches the scale of the problem.[672]

In talking the global sustainability challenge, one must note that most environmental changes, both positive and negative, necessarily come from the local – from actions and initiatives planned and executed by individuals in daily lives. Thus governance for sustainability should not remain an abstract concept floating on the global level but instead be brought down to earth. Hence we have the famous saying 'Think Globally, Act Locally'.

As students of governance for sustainability, however, we need to go beyond the global-local dichotomy, and 'find small interstices in global processes' and 'study placeless phenomena in a place'.[673] This case study focuses on a 'Wetland of International Importance' (known as a Ramsar site under the Ramsar Convention on Wetlands).[674] It introduces how and why Suncheon Bay (Ramsar Site No. 1594) in the Republic of Korea (Korea) enjoyed relative success in terms of sustainability compared with other places in Korea.[675] Suncheon is perhaps the best example of a Korean city that has made the sustainability challenge part of its local identity.

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670 Ramsar Site No. 459.

671 Battley, P. *Bar-tailed Godwits Arrive Back in Alaska* 12 May 2007, www.shorebirdnetwork.org/07news/070512migration.html (accessed 10 May 2008).

672 Young, O. R. *The Institutional Dimensions of Environmental Change: Fit, Interplay, and Scale* (MIT Press: Cambridge, MA, 2002). See also e.g., Osofsky, H. M. 'The Intersection of Scale, Science, and Law' In: Massachusetts v. EPA, *Oregon Review of International Law*, 2007; Osofsky, H. M. and Levit, J. K. 'The Scale of Networks? Local Climate Change Coalitions', *Chicago Journal of International Law*, 2008.

673 Merry, S. E. *Human Rights and Gender Violence: Translating International Law into Local Justice* (University of Chicago Press: Chicago, 2005), p. 44.

674 The full name of the Ramsar Convention is the 'Convention on Wetlands of International Importance Especially as Waterfowl Habitat'. There are 1,743 sites designated for the List of Wetlands of International Importance (Ramsar sites) covering the total surface area of 161,177,358 hectares in 158 Contracting Parties (as of 15 April 2008). Wetlands are broadly defined by the Convention as 'areas of marsh, fen, peatland or water, whether natural or artificial, permanent or temporary, with water that is static or flowing, fresh, brackish or salt, including areas of marine water the depth of which at low tide does not exceed six metres'. Ramsar Article 1.

The Ramsar Convention is the only multi-lateral environmental agreement specifically mandated to protect a particular type of ecosystem around the globe.

675 Ramsar Secretariat, *Ramsar Web Site Index Page Banner Photographs from the Past*, 2 July 2008, available at www.ramsar.org/archives/archives_banners4.htm (accessed 4 August 2008).

4.15.2 Description

In the past decade, Suncheon has endeavoured to transform itself from an ordinary rural city to an eco-city committed to the conservation of its estuarine ecosystems. Suncheon is a medium-size city of approximately 270,000 residents located on Korea's south coast in South Jeolla Province, which contains 40 percent of Korea's coastal wetlands.[676] In terms of local environmental law and policy, Suncheon is the first local government to legislate a *Basic Environmental Municipal Ordinance* in 1996,[677] and among the first to produce a *Local Agenda 21* in 1997.[678] After the city council successfully blocked a private proposal to reclaim part of the bay in 2001,[679] Suncheon Bay was designated as one of the first coastal Wetland Protection Areas in 2003.[680] Three years later, the bay was listed as Korea's first coastal Ramsar Wetland of International Importance.[681] It is also to be protected as a 'heritage landscape' under the *Cultural Heritage Protection Act*, and the local government is seeking to add it to the UNESCO World Heritage List.

How did this begin? The year 1993 marked the start of an organised local conservation effort to protect Suncheon Bay. A proposal for aggregate dredging of a river that runs through the city was presented to the local government.[682] At the end of a three-year battle between groups that are for and against the project, the mayor gave it a go-ahead. Shortly afterwards, a group of local environmental activists carried out the first waterbird census in Suncheon Bay and (officially) discovered a significant number of endangered species such as Hooded Cranes (vulnerable), Black-faced Spoonbills (endangered), Oriental Storks (endangered), White-naped Cranes (vulnerable), and Saunders's Gulls (vulnerable), and one of the largest concentrations in Asia of the Common Shelduck. These species indicate the diversity and the natural productivity of the bay as made explicit by the Ramsar Convention resolutions and specific waterbird-related criteria for identifying

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676 Korea has a two-tier system of local government. There are 16 upper-level local governments. The southwestern part of Korea is politically left, and there is a strong sentiment widely shared among residents that the region has been largely neglected by the central government's development plans. Most lower-level local governments are economically dependent on the central government. In Suncheon's case, only 32 percent of its budget is locally funded.

677 Legal grounds for local environmental ordinances are provided under the *Framework Act on Environmental Policy* enacted in 1990.

678 Green Suncheon 21, *The History of Green Suncheon 21*, 2007, available at www.greencity.or.kr/2007/sub_01_02.html (accessed 26 March 26 2008). As of 2004, 210 among 248 local governments have Local Agenda 21's in place and 19 are being drafted. The participation rate is 91 percent, one of the highest in the world. As the Ministry of Environment acknowledges, however, they are poorly implemented. Ministry of Environment, *The White Book on the Environment* (Ministry of Environment: Seoul , 2005), p. 463.

679 For discussions of the city council, see 71st Main Conference 2nd Round, Suncheon City Council (11 October 2001), pp. 9-10.

680 The legal basis for the Wetland Protection Areas is provided by the *Wetlands Conservation Act* of 1999, which was enacted to implement the Ramsar Convention.

681 The second coastal Ramsar wetland – Muan – is the first coastal Wetland Protection Area designated in 2000 and listed on the Ramsar List in 2008. It is also in South Jeolla Province.

682 Suh, G. 'The Status of the Suncheon Bay Wetland and a Case of Conservation', In *Wetlands Conservation Strategy Conference*, pp. 103-110 (KFEM: Seosan, 2004).

wetlands of international importance.[683] The discovery and the public presentation of these rare bird species pushed the Board of Audit and Inspection of Korea to conduct an audit in November 1996, which ultimately led to a revocation of the permit in 1998.

The wintering population of Hooded Cranes in particular attracted substantial public attention. The local government has since branded Suncheon as a place to see Hooded Cranes and marketed Suncheon Bay as a world-class natural heritage.[684] The city is now a major tourist destination attracting 1.8 million tourists a year (as of 2007). With the upcoming Ramsar Conference of Contracting Parties in 2008 and the Yeosu Expo in 2012 hosted by neighbouring cities, the timing is right to further promote Suncheon Bay as an international ecotourism destination.

Suncheon has managed to maintain a consistent increase in the number of Hooded Cranes wintering in the area from about 60 in 1996,[685] to 120 in 1999/2000,[686] to 260 in 2004/2005,[687] and to more than 300 in the most recent survey conducted in 2007/2008.[688] Some argue, however, that the maintenance and increase of the Hooded Crane population is an attribute of a combination of external factors such as artificial feeding (further discussed below); the loss of other viable wintering sites; and the warming climate allowing the birds to winter further north.[689] The lack of roosting space for Hooded Cranes at high tide has indeed been a major concern for conservationists. The land adjacent to the coastline is reclaimed rice paddies, which in itself is constantly disturbed by agricultural practices. The local government has a long-term plan to restore this river mouth area to mitigate this destructive competition and it plans to purchase and restore the privately owned land. However, the future is unclear because another plan for that site involves constructing a Suncheon Bay visitor centre for the 2012 Yeosu Expo. Also a considerable threat to the birds is present with the currently under construction Mokpo-Gwangyang Expressway cutting through

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683 In the brackets are the IUCN Red List classifications. For the status of waterbirds in Suncheon Bay, see *The White Book on the Environment* (Suncheon: Suncheon City, 2007), pp. 63-85.

684 Editorial Committee, *From Korea's Suncheon to World Suncheon*, 24 December 2007, available at www.suncheonnews.com/scnews/article/view.aspx?section=%b1%e2%c8%b9+%c6%af%c1%fd&seq=10596 (accessed 26 March 2008); Lee, Jong-gwan *Ecocity Suncheon's Brand - Suncheon Bay*, 25 January 2008, avaiilable at www.suncheon-news.com/scnews/article/view.aspx?section=%b1%e2%c8%b9+%c6%af%c1%fd&seq=10715 (accessed 26 March2008).

685 Rhim, S. and Lee, W. 'Status and Habitat Use of Cranes in the Republic of Korea During Winter' *Cranes in East Asia: Proceedings of the Symposium Held in Harbin, People's Republic of China*, 9-18 June 1998, pp. 11-15. The number varies from 59 to 80 in different sources.

686 Wild Bird Society of Japan, *The Newsletter of North East Asian Crane Site Network*, 2000, available at www.wing- wbsj.or.jp/english_hp/crane_net/CraneNews2/Crane_Newsletter_no2.html (accessed 27 March 2008).

687 Korean Federation for Environmental Movement *2004-2005 Report on Ecology of Hooded Cranes at Suncheon Bay* 20 April 2005, available at kfem.or.kr/kbbs/bbs/board.php?bo_table=envinfo&wr_ id=3937 (accessed 27 March 2008).

688 Suh, G. *New Year's Suggestions* 2 January 2008, availalbe at www.suncheon.go.kr/home/participation/netizen/netizen_01/index.jsp?sheet_id=2764 (accessed 27 March 2008). According to The Crane Network in Korea, 330 Hooded Cranes were observed in January 2008. The Crane Network in Korea, *Crane Census*, 15 February 2008, www.cafe.daum.net/cranes/BASC/149 (accessed 26 March 2008).

689 A personal communication with Nial Moores, email received on 26 May 2008.

those rice paddies.[690] In May 2007, Suncheon City Council adopted a motion recommending the central government to build that part of the expressway on a bridge to minimise the ecological harm to the shorebirds.[691] When it was turned down, Suncheon City made another formal appeal to the Korea Expressway Corporation in March 2008, urging it to either change the course of the expressway further away from Suncheon Bay or to build it on a bridge with a transparent tube-type baffle wall. This plan was again rejected because of the cost ($US75 million) and time required.[692]

For the time being, the birds are being fed artificially by Korea's Biodiversity Management Contract Scheme.[693] This scheme establishes a legal basis for paying the farmers to leave parts of their rice paddies unharvested, leave rice straws unremoved after harvests, and/or grow barley in the winter for the birds to eat.[694] Some do question, however, whether attracting a targeted bird species – Hooded Cranes – through artificial feeding is better for the species or for the local economy, which is spurred by tourists attracted by the rare birds. The local government does focus more on development of the bay as a tourism resource, than on the protection of the bay's ecological integrity for its own sake.[695] Consider that the conservation responsibility for the bay lies within the Tourism Promotion Department when there is a separate department dedicated to the environmental protection in the local government.[696]

Often an influx of tourists results in unbearable pressure on the local environment. The local authority, however, is not willing to compromise the booming tourism industry. The money that tourists bring in is the incentive that local residents have accepted for restricting industrial development commonly

690 Birds Korea, *Suncheon Bay Tidal-flats*, 12 May 2008, available at www.birdskorea.org/Our_Work/Research/NSS2008/BK-RES-NSS2008-SuncheonBay.shtml (accessed 4 August 2008).

691 Gi, D. 123rd Main Conference 2nd Round, Suncheon City Council (30 May 2007), pp. 4-5.

692 Kim, E. *The Expressway Cutting Through Suncheon Bay is All About Money After All*, 19 June 2008, available at www.jnilbo.com/read.php3?aid=1213801200264697154 (accessed 4 August 2008).

693 The scheme is set up by the Natural Environment Conservation Act enacted in 1991 – a piece of legislation that is most relevant in implementing the Convention on Biological Diversity. Article 16 of the Natural Environment Conservation Act. For more information, see *The White Book on the Environment* (Suncheon: Suncheon City, 2007), pp. 91-101.

694 Cho, J. Director of the Environmental Protection Division, 129th Committee on Culture and Economy Meeting, Suncheon City Council (28 January 2008). (97 ha in 2006, 242 ha in 2007, 300 ha in 2008.) Suncheon City, *The White Book on the Local Environment* (Suncheon: Suncheon City, 2005). See also, section 4.3.1. of the Korea's National Reports prepared for the 10th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands, p. 34.

695 Jeong, D. (city councilor), 93rd Internal Affairs Meeting (4 December 2003); Shin, H. (City Councilor), 128th Culture and Economy Committee Meeting 6th Round, Suncheon City Council (5 December 2007).

696 For the city's organisational structure, see Suncheon City, *Organisational Diagram*, 2006, available at www.suncheon.go.kr/home/about/organization/organization/index.jsp (accessed 26 March 2008). Similarly on the national scale, the development-minded Ministry of Land, Transport and Maritime Affairs (established in early 2008 by merging the Ministry of Maritime Affairs and Fisheries into the Ministry of Construction and Transportation) has almost exclusive jurisdiction over the coastal zone while the Ministry of Environment has not much say in its planning, conservation, and development.

found elsewhere in Korea. There is some room for improvement in how Suncheon Bay is managed. Many unsustainable practices seem to stem from ecological ignorance. To list but a few examples, the fluorescent uniform vests of a group called 'Suncheon Bay Protectors' and newly built white buildings along the coastline are easily detectable by the birds hence disturbs their natural ecology, and the continued commercial operation of five motor boats in the estuary for sightseeing disrupts wildlife. Simple mistakes such as these stem from the political sector lacking an understanding of the ecological functions and character of the site, and the NGO and academic communities lacking the combination of independence, experience, and influence to advise and be heard regarding ecological issues.[697]

The key sustainability challenge has been satisfying local needs while operating within the limits of the fragile local environment. In Ramsar terminology, the challenge is the wise use of Suncheon Bay so that its ecological character is maintained while both human and non-human beings that are equally dependent on ecosystem services can coexist in harmony.[698] This challenge will, of course, last long into the future. The pursuit of sustainability of Suncheon Bay is constantly challenging conventional management practices to adapt to a profoundly precautionary, integrative, and ethical governance approach. So far, it has been a learning process for the city and the residents. They have learned that the establishment of a nature reserve is not a threat to the local community; how to see things from birds' eyes; and that people are part of the wider community of life.

4.15.3 Evaluation

Suncheon is not the only place in Korea where a significant number of endangered bird species are found. What, then, was it with Suncheon that enabled better protection for its coastal environment? It was the international attention that Suncheon received in the early stage of the conservation through informal trans-national non-governmental (NGO) networks, particularly between the incipient Korean Wetland Alliance and the Japanese Wetlands Action Network, which was beginning to form at the time.[699]

When a local NGO called the Social Research Institute for the Eastern Part of South Jeolla first discovered Hooded Cranes in Suncheon Bay in 1996,[700] it invited

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697 Moores, supra note. 23.

698 For an analysis of the Ramsar Convention in the South Korean context, *see* Rakhyun E. Kim, 'National Implementation of the Ramsar Convention and the Legal Protection of Coastal Wetlands in Korea', *Birds Korea*, 2007, available at www.birdskorea.org/Our_Work/Ramsar/Downloads/Rakhyun-Kim_National-Implementation-of-Ramsar-and-Legal-Protection-of-Coastal-Wetlands.pdf (accessed 27 March 2008).

699 The Hakata Bay Citizens Alliance, as part of JAWAN (Japan Wetlands Action Network) had, from the beginning, good links with the Korean Federation for Environmental Movement through individuals such as Lee In-Sik, an environmentalist who stood at the forefront when bidding to host the Ramsar COP10 in Korea.

700 Nial Moores is now the director of a trans-national NGO based in Korea called Birds Korea.

the late Kim Sooil, a renowned ornithologist,[701] to conduct a proper survey of the site. Through his personal networks, conservationists and ornithologists in Japan such as Nial Moores (who later founded Birds Korea) were invited for monitoring and training surveyors.[702] These experts not only brought expertise and experience, but also trans-national ties with issue-specific international NGOs such as Wetlands International and BirdLife International. Subsequently, other multi-lateral partnerships such as the North East Asia Crane Site Network[703] and the International Crane Foundation[704] came to work closely with local activists in Suncheon. Also a number of locally hosted international conferences, such as the 2000 International Symposium for the Protection of Cranes in North East Asia,[705] the 2007 International Symposium on Improved Coastal Wetland Management, and the 2007 Suncheon International Crane Symposium, have provided opportunities for trans-national communication and networking.

A related factor that encouraged rapid interest in the site from international bodies is the fact that the strategic focus of discussion was on conservation of the birds of the bay rather than simply on opposition to 'bad development'. Those who were involved with the conservation of the bay in the early days strategically avoided focusing on abstracts such as 'nature' and 'environment' which is largely an unwinnable strategy in contemporary Korea, as the definition and perception of both are so subjective or poorly defined.[706] Their focus was rather more on key flagship species, emphasising slightly different species to different audiences: Hooded Cranes for the local and national audience, and Saunders's Gull (and shorebirds) and Common Shelduck to international bodies.[707]

Wetlands conservation was and still is a new development in Korea. At the national level, wetland conservation policies and practices are often horizontally transplanted from countries with experts in wetlands management, such as Germany, The Netherlands, Japan, Australia, the United Kingdom, and the United States. Local government bureaucrats go on 'study trips' overseas, and upon their

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701 George Archibald, the co-founder of the International Crane Foundation, described the loss of Kim Sooil as follows: 'Korea had lost one of its most effective voices for the environment'. George Archibald, *Reflections on Partnership*, 2007 Autumn/Winter Issue Newsletter, In *Wetland*, ed. UNDP/GEF Korea Wetland Project (UNDP/GEF Korea Wetland Project), p. 45.

702 JAWAN was perhaps more interested in Saunders's gulls, a species that WWF-Japan was surveying actively in Kyushu at the time. Suncheon was found to be hosting the biggest wintering concentration of Saunders's gulls of about 1,000 individuals.

703 Launched in March 1997 and Suncheon joined in 2004. For more information, see Wetlands International, *North East Asian Crane Site Network*, 2008, available at www.wetlands.org/articlemenu.aspx?id=4e3ece05-7866-448e-8a1f-6f38ff9cb2d0 (accessed 26 March 2008).

704 An International Crane Foundation volunteer, Fran Kaliher, spent much of the winter of 2002 at the site and in concert with Korean colleagues studied the ecology and habitat needs. of hooded cranes in the area. International Crane Foundation, *Hooded Crane*, 2006, available at www.savingcranes.org/species/hooded.cfm (accessed 26 March 2008).

705 Jointly organized by the Ministry of Environment of the Republic of Korea, the City Government of Suncheon and Wild Bird Society of Japan. The Japan Fund for Global Environment supported travel costs for international participants.

706 Moores, supra note. 689.

707 Ibid.

return, they translate what they have learned into the local context.[708] Environmental research institutions too, when requested by the local government to draft conservation plans, often adopt foreign policies and practices to suit the local conditions.

As such, the role of local actors as mediators between global and local actors is crucial.[709] Local actors are noted for their critical role in translating ideas from the global arena down and from local arenas up. However, we must be careful to understand that diffusion processes of laws are far more complex and organic,[710] and that 'law is almost never "delivered" on the ground in the pure form that treaties … would indicate'.[711] More attention should be paid, for example, to 'the ways that law actually ends up being applied (or subverted) through the discretionary acts of lower-level bureaucrats'.[712] Furthermore, what is perhaps less studied is the specific role of the city council in bringing in and applying international legal norms to the local context. It is noteworthy that in Suncheon, a number of environmentally conscious city council members, deeply committed to the conservation of the Ramsar site, have constantly questioned and challenged the conduct of local government bureaucrats. The designation of the Ramsar site has directly influenced the decision-making process in the city council. For example, the location of the proposed Children's Transport Park was challenged and it was later relocated farther from the Ramsar site.[713] A stricter control of water pollution sources was legitimised to protect the Ramsar site.[714]

The role of local NGOs has been the most deciding factor in Suncheon's success. NGOs bring in expertise, experience, and local knowledge, while maintaining formal and informal national and trans-national networks. The collaborative relationship between civil society and the local government was formalised in 2007 when an unprecedented Memorandum of Understanding was signed between the Korean Federation for Environmental Movement (central office in Seoul) and the Suncheon city government promising continued cooperation for 'the efficient conservation and sustainable use of Suncheon Bay'. At the local level, the Committee on the Ecology of Suncheon Bay has been organised to collect opinions, provide policy advice, and establish a cooperative system among various

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708 For instance, between November 2006 and October 2007, 147 public servants in the Suncheon City made 55 separate overseas visits.

709 Merry, S. E. 'Transnational Human Rights and Local Activism: Mapping the Middle', *American Anthropologist*, 2006, pp. 38-51.

710 Twining, W. 'Diffusion of Law: A Global Perspective' *Journal of Legal Pluralism* 2004: 1-45; Twining, W. 'Social Science and Diffusion of Law', *Journal of Law and Society*, 2005: 203-240; Twining, W. 'Diffusion and Globalization Discourse', *Harvard International Law Journal*, 2006, pp. 507-515.

711 Berman, P. S. 'From International Law to Law and Globalization', *Columbia Journal of Transnational Law*, 2005: 485-556, p. 498.

712 Ibid.

713 Mun, Y. (Director of Culture and Tourism), 111th Committee on Industry and Construction Meeting 2nd Round, Suncheon City Council (15 February 2006); 117th Main Conference 2nd Round, Suncheon City Council (15 November 2006).

714 Recently the *Coastal Management Act* that was enacted about the same time as the WCA provides a legal ground for sustainable development of the coastal area.

stakeholders.[715] The Committee consists of 30 members including local residents, experts, and NGO members.

With Suncheon Bay labelled a 'Wetland of International Importance', the locals have come to recognise that what was a local issue has now become an international legal concern. Although the Ramsar Convention itself does not create a set of enforceable laws, the question of enforceability has not been a primary concern on the local level. The Ramsar Convention is used by local environmental activists as a powerful tool to legitimise the protection of the local area, and to prompt various public and private entities to obey the *spirit* of the law. Put differently, what ordinary citizens consider to be in the interest of Suncheon has evolved since the designation, and those changes have been at least partly the product of changes in legal consciousness, which was shaped by international law.[716]

The local government of Suncheon itself attained a 'face' in the world community by emerging as an independent actor on the global stage. It is no longer invisible behind the veil of national sovereignty. The fear of shaming, especially with the Ramsar COP10 on the horizon, has been a significant factor that drove Suncheon to take utmost efforts to obey international law and conserve the bay.[717]

4.15.4 Conclusion

There is a general acknowledgement that '[l]ocal governments are increasingly becoming major actors in the emerging global legal order'.[718] This case study adds support to the argument that although 'global environmental governance is often assumed to take place at the "global" level[,] the "local" is also an important site for governing global environmental problems'.[719] Such a recognition is also reflected in the recent discussions within the IUCN to add a new category of membership for local government authorities.[720]

Although the law's deference to boundaries must decline as our appreciation of the geophysical world grows, 'geographic nexus still has a role to play'.[721]

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715 Section 2.3.3. of the Korea's National Reports prepared for the 10th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands, p. 24.

716 See generally, Berman, supra note. 711, pp. 493-497; Koh, H. H. 'Why Do Nations Obey International Law?' *The Yale Law Journal* Vol. 106, No. 8 (1997) pp. 2599-2659; Merry, S. E. 'International Law and Sociolegal Scholarship: Toward a Spatial Global Legal Pluralism' *Studies in Law, Politics, and Society* Vo. 41, 2008, pp. 149-168.

717 A visit to Suncheon Bay is on the official program for the COP10 delegates and representatives.

718 Blank, Y. 'Localism in the New Global Legal Order' *Harvard International Law Journal*, 2006: 263-281, p. 263.

719 Betsill, M. M. and Bulkeley, H. 'Cities and the Multilevel Governance of Global Climate Change' *Global Governance*, 2006, pp. 141-159.

720 IUCN CEL Mailing List email exchanges following the email titled 'Local Authorities Draft Amendment Proposal – Creating a New Category of Membership' from Armelle Guignier (12 February 2008). According to the email, the proposal is being prepared to be presented at the 2008 World Conservation Congress, Spain.

721 Stone, C. D. 'Locale and Legitimacy in International Environmental Law' *Standford Law Review*, 1996, pp. 1279-1291.

Indeed to deny the multi-rootedness of individuals within a variety of territorial and non-territorial communities will bear no positive outcome[722] because it fails to 'capture the extreme emotional ties people still feel to distinct trans-national or local communities'.[723] The challenge for governance for sustainability is to avoid the trap of utopian universalism while pursuing a shared goal of sustainability that respects the diversity and plurality inherent in human society and ecosystems.

722 Berman, P. S. 'Towards a Cosmopolitan Vision of Conflict of Laws: Redefining Governmental Interests in a Global Era' *University of Pennylvania Law Review*, 2005: 1819-1882, pp.1860-1861.

723 Ibid.

4.16 Australia's Efforts to Achieve Integrated Marine Governance

Gregory Rose[724]

Abstract

Recent Australian efforts at integrated marine management provide a case study in governance for sustainability. Sustainability requires management with a view across borders, sectors and time.

In 1998 the Australian government adopted its comprehensive Oceans Policy. An objective of the policy was to ensure ecosystem-based management in Australia's and marine realm, based upon a whole-of-government approach to integrated planning for multiple uses of marine regions. An administrative agency, the National Oceans Office, was established and made accountable to a National Oceans Ministerial Board of five ministers with responsibilities across marine resources sectors. Slow progress was made in commencing the regional planning part of the Oceans Policy and only one marine regional plan was adopted, for South Eastern Australia, in 2004. The marine regional planning process was then substantially abandoned.

Instead, a process of bioregional planning was adopted in 2005. This narrowing of the scope of the planning process, in favour of a biodiversity-focused planning approach, reflected lessons learned from the fraught experience in holistic marine regional planning. In contrast to the policy-based marine regional planning process, the bioregional planning process is supported by a legislative mandate. Again, in contrast to the Ministerial Board, bioregional planning occurs under the sole authority of the Minister for Environment. It is supported by the more muscular Department of Environment, into which the National Oceans Office has been merged.

This case study argues that lessons learned from the implementation of Australia's Oceans Policy include an appreciation of the necessity of a clear mandate, with a legislative basis, to support governance for sustainability. In addition, administrative arrangements need to utilise the capabilities and resources of existing agencies, either by delegating to them a particular responsibility for cross-sectoral liaison concerning specified subject matter, or by locating that broad responsibility for cross-sectoral liaison within a capable and well resourced administrative agency. These two elements provide the institutional foundations to give effect to the integrated planning and management process.

4.16.1 Introduction

The marine environment poses specific challenges to governance for sustainability that make it problematic for managers. There are at least three exceptional marine challenges: first, there is usually limited access to expert technical advice, due to a

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plain lack of available scientific information concerning the particular marine ecosystem to be regulated, e.g. its geomorphology, the dynamics of its currents, chemistry and temperatures, the biological relationships of endemic and migratory species, or even the prevailing patterns of human use and exploitation. Second, regulatory authority for marine ecosystems is typically fragmented geographically between jurisdictions that each controls a piece of the marine pie (horizontal fragmentation). Third, regulatory authority is also fragmented vertically between activity regulators that administer the different sectoral uses of the same space, such as for shipping and waste discharges, that have significant intensity and impact upon each other through multiple relationships (vertical fragmentation). This case study focuses upon integrating management across different sectoral uses that require that the various, sometimes competing, authorities to cooperate with each other to manage the ecosystem as a whole. For example, marine species conservation cannot be managed without addressing cross-jurisdictional migrations and habitat influences, and also addressing impacts of commercial fisheries, recreational fisheries, port management, waste discharges and ship-based marine pollution.

The Australian government responded to the challenge of integrated marine management by initiating a national consultative and negotiation process that culminated at the end of 1998, the international Year of the Oceans, with the adoption of Australia's Oceans Policy (AOP).[725] It establishes a framework for integrated ecosystem-based planning and management for all of Australia's marine jurisdictions[726] that aims to promote ecologically sustainable development of marine resources in a way that both encourages industry and protects biological diversity. Its implementation has met many obstacles that left it floundering and resulted in reconceptualisation of central implementation mechanisms.

This case study examines Australia's experience with the concept, design and implementation of the AOP and reflects back on what this might tell us about designing governance for sustainability. As Thomas Edison is famously said to have observed concerning his multiple failed attempts to construct an incandescent light bulb: 'I have not failed. I've just found 586 ways that won't work'. Similarly, the history of the AOP offers almost as many lessons relevant to marine governance for sustainability.

4.16.2 Description

Many littoral countries experience horizontally fragmented jurisdiction in their power to control marine affairs. For example, Canada and the USA divide littoral jurisdiction geographically between their federal and provincial/state governments. In the United Kingdom, jurisdiction is divided between the Kingdom and the constituent countries. In Indonesia and the Philippines, littoral jurisdiction is divided into three coastal rings of control, respectively held by the national government, regencies/provinces and local municipalities. In Australia, in 1975, the High Court

725 Senator Robert Hill *World First Plan to Safeguard Our Oceans* Media Release for the Minister of Environment and Heritage, Australia, 23 December 1998.

726 Australia's Oceans Policy (AOP) 1998, South-east Regional Marine Planning Publications p. 2, available at www.environment.gov.au/coasts/mpa/southeast/index.html (accessed April 2008).

disrupted earlier assumptions concerning the geographical division of coastal jurisdiction by holding that the Commonwealth alone, i.e. federal government, is sovereign over all coastal waters, including the seabed, as far inshore as the low water mark.[727] Following this decision, the Commonwealth and the States negotiated the Offshore Constitutional Settlement, which re-established the previously assumed jurisdictional boundaries between Commonwealth and State marine areas. In general, the States maintain responsibility for waters up to three nautical miles from the coastline, now termed the 'coastal waters'.

Australia's Oceans Policy was initially intended to embrace all marine jurisdictions, inclusive of the Commonwealth, States and the Northern Territory. However, negotiations between the governments broke down,[728] apparently because the States considered that any policy that required them to coordinate regulatory authority over their own State coastal waters would surrender again those crown controls they had won back under the Offshore Constitutional Settlement. Consequently, the AOP was adopted only by the Commonwealth government and it is not a national policy of all Australian governments. Only if Commonwealth, State and Territory coordination emerges independently through joint inter-governmental ministerial arrangements can coordinated cross-jurisdictional management of Commonwealth, State and Territory coastal waters be achieved.[729] Thus, the AOP applies only to Commonwealth waters, i.e. the maritime domain commencing from the outer edge of the coastal waters, 3 n.m. offshore, and extending outwards to the edge of the exclusive economic zone 200 n.m. offshore.

For Commonwealth waters, the AOP seeks to establish integrated marine governance. The AOP established the National Oceans Ministerial Board (NOMB), comprising the five federal Ministers responsible for environment, fisheries, industry, transport and science, as the highest mechanism within the Commonwealth Government empowered to negotiate cross-sectoral marine management cooperation.[730] The National Oceans Office (NOO) was established to act as secretariat to the NOMB.[731] NOO was designated as a small, free-standing executive agency, accountable across ministries, and was located in Hobart, Tasmania, somewhat remote from the seat of federal government in Canberra.

At the regional level, the AOP utilised 'regional marine planning' as the primary way forward to cross-sectoral cooperation. The regional marine plans were to integrate sectoral commercial interests and conservation requirements and to bind Commonwealth agencies. The regions to be planned were to be based on five large marine ecosystems, identified through a national system for Australian marine

727 The 'Seas and Submerged Lands case', *New South Wales v Commonwealth* (1975) 135 CLR 337.

728 Joanna Vince 'The South Eastern Regional Marine Plan: Implementing Australia's Oceans Policy' *Marine Policy Vol.* 30, 2006 420-430, p. 420.

729 AOP, p. 17. Geoffrey Wescott 'The development and initial implementation of Australia's "integrated and comprehensive" ocean's policy' *Ocean and Coastal Management* Vol. 14, 1999 pp. 387-398.

730 AOP, p. 15.

731 AOP, p. 16.

and coastal regionalisation that was developed in time for the adoption of the AOP in 1998.[732]

The first region designated for planning was offshore of south-eastern Australia. Following a scoping phase in 2000-2001 and an assessment phase in 2001-2002, consultations took place in 2002-2003 to negotiate the contents of the plan. That marine region is the nation's most intensely used and, if coastal waters were coordinated, would overlap the most jurisdictions (five). Its planning commenced with a series of scientific, socio-economic and legal studies intended to consolidate the regional knowledge base. It continued with a series of stakeholder consultations.

The South East Regional Marine Plan was finalised and launched in May 2004.[733] Unfortunately, the final Plan did not meet Commonwealth Government or stakeholder expectations. A major reason was its focus on governance principles rather than on prescriptions for spatial uses. The adopted plan had no statutory status or legislative footing but was entirely based in policy instruments. From a marine conservation perspective, in particular, it failed to conclude an agreed 'comprehensive, adequate and representative' system of marine protected areas as part of the originally intended package of regional measures. Nevertheless, in July 2007, three years later, 13 new marine protected areas for the South East region, comprising the largest temperate water MPA network in the world (all in Commonwealth waters) were declared under statutory authority.[734]

A new Commonwealth approach to regional marine planning, announced in October 2005,[735] indicated that the plans would henceforth have a legislative basis in the *Environment Protection and Biodiversity Conservation Act* 1999 (EPBC Act), Section 176. It provides for the adoption and effect of 'Bioregional Plans' within a Commonwealth area:

> 176(1) The Minister may prepare a bioregional plan for a bioregion that is within a Commonwealth area. In preparing the plan, the Minister must carry out public consultation on a draft of the plan in accordance with the regulations.[736]
>
> 176(2) The Minster may on behalf of the Commonwealth cooperate with a State or self-governing Territory, or any other person in the preparation of a bioregional plan for a bioregion that is not wholly within a Commonwealth area.

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732 AOP, pp. 11-13.

733 Ibid.

734 The areas were identified in May 2006 and declared in July 2007, see: Senator Ian Campbell *Australia leads world with new Marine Protected Areas* – Media Release for the Minister of Environment and Heritage 5 May 2006 and the Hon. Malcolm Turnbull *World's First Temperate Network of Marine Reserves Declared* – Media Release for the Minister of Environment and Heritage 5 July 2007.

735 Senator Ian Campbell *New focus for Australia's marine regional planning programme* - Media Release for the Minister of Environment and Heritage September 2005.

736 Regulations concerning the procedure for consultation and preparation of bioregional plans under section 176(1) have not yet been adopted.

176(3) The cooperation may include giving financial or other assistance. …

176(5) Subject to the Act, the Minister must have regard to a bioregional plan in making any decision under this Act to which the plan is relevant.

Although regional marine planning under the EPBC Act formally became a process confined to Commonwealth waters, a plan may extend into State or Northern Territory coastal waters if the latter cooperate, most likely as a result of Commonwealth financial inducements. The major significance of a bioregional plan under section 176 is that it imposes a legal obligation upon the Minister administering the EPBC Act to take the plan into account when making any decision in relation to which the plan is relevant. A failure to do so would result in the decision being open to challenge and judicial review for procedural error. The Minister has a wide range of decision-making responsibilities under the EPBC Act. These include consideration of environmental approvals, disapprovals or conditions that can be imposed on proposed developments that affect Commonwealth waters or others matters of 'national environmental significance'.[737]

As compared to marine regional plans, the section 176 bioregional plans refocus the marine planning process and outcomes on matters of environmental relevance. In particular, the bioregional plans will provide for the conservation of marine biodiversity, by means of the National Representative System of Marine Protected Areas. The contents of bioregional plans are largely anticipated in section 176, which provides that:

176(4) A bioregional plan may include provisions on all or any of the following:

(a) The components of biodiversity, their distribution and conservation status;

(b) Important economic and social values;

(c) Objectives relating to biodiversity and other values;

(d) Priorities strategies and actions to achieve the objectives;

(e) Mechanisms for community involvement in implementing the plan; and

(f) Measures for monitoring and reviewing the plan.

Thus, bioregional plans will contain three components: (1) a profile of the marine region (including key conservation values, socio-economic context and threats to ecological sustainability); (2) an integrated conservation strategy (including risk-based priority actions); and (3) reporting and review requirements.

Consequent upon the shifts from a policy to a legislative basis and from holistic to bioregional planning, two institutional changes were made in federal marine governance. The National Oceans Ministerial Board was dissolved (in May 2006), in favour of flexible federal cabinet committee consultations, and the

737 EPBC Act (Cth) Chapter 2, Part 3, Division 1.

National Oceans Office was made responsible exclusively to the Minister for the Environment, rather than being responsible to five ministers across sectors, as it was initially.

In effect, the use of EPBC bioregional plans makes regional marine plans, the central feature of the AOP, redundant. Indeed, the 2004 South East Regional Marine Plan will need to be revised in order to give it the significance of a s 176 bioregional plan. With the transformation from regional marine planning to bioregional planning, the goal of the planning process was reduced from fully whole-of-government central planning to the far more modest goals of developing a plan that the Minister for Environment must consider, and providing information products in the form of regional biodiversity profiles for consideration by other agencies with a view to their independent consideration of sustainable marine development.

4.16.3 Evaluation

In circumstances where it is desired to govern an ecosystem that stretches across geographically defined boundaries that are administered by two or more jurisdictions with substantial autonomy, incentives for cross-jurisdictional coordination are essential. These incentives include common self interests, which may be apparent from the start of the coordination process or artificially introduced in the form of incentives, such as financial grants or access to resources, or disincentives to non-coordination, such as denial of such privileges. It might have been predicted that the AOP would not successfully introduce cross-jurisdictional coordination as there was no apparent self-interest for the States and Northern Territory to coordinate with the Commonwealth or each other. Unfortunately, the Commonwealth declined to introduce incentives or disincentives that might have positively influenced State and Northern Territory perceptions of their interests in cross-jurisdictional coordination.

In relation to integrating marine governance across sectors at the Commonwealth level, the AOP has been a partial success. The quiet abandonment in 2005 of centrally and fully integrated cross-sectoral marine planning, in favour of bioregional planning, was an Australian marine governance watershed. The failure of holistic, cross-sectoral marine institutional cooperation might be attributed to the AOP's lack of requisite mechanisms for implementation, including statutory authorities and operational linkages to existing management frameworks that would provide authority, clarity and enforceability. The succeeding approach focuses more narrowly on the integration of biodiversity conservation into regional marine governance. It is supported by statutory authority and a capable government agency.

Concerning statutory authorities, it is critical that the rules are known and accepted by all the players. Sectoral agencies and governments, each with their own established stakeholders and bureaucratic resources, are players seeking to score their independent goals. Mere policy is not enough to establish respected game rules because individual government portfolios are each responsible for their own sectoral policies, often competing with equal authority with policies of other sectors and the policies of the umpire. Respected game rules provide conditions of

play more conducive to 'cross-sectoral governance', whereby mid-level governmental officials build cooperative working relationships across portfolios in order to achieve sustainable, mutually acceptable outcomes.[738] Thus, a lesson from the Australian experience is that cross-sectoral cooperation needs to be supported by clear, common recognition of the imperative of whole-of-government cooperation, such as is usually mandated through legislation. Of course, such laws and procedures need to be explicit and clear to be effective.[739] In the event of a breach or of conflicting interpretations or rules, an appeal to a judicial umpire can then correct unfair play. Laws enacted directly by Parliament also provide a greater likelihood of external legal accountability for their breach.

Concerning institutional arrangements, the Australian experience suggests that cross-sectoral coordination processes, which are in reality power games engaged in by proponents of competing interests, cannot be vested in a central institution. The effort to locate the management of cross-sectoral issues in one executive agency without a legal or an established political power base was perhaps over-ambitious for a fledgling process and its infant institution. Its attempt to integrate management was perceived as 'threatening' by some stakeholders and as encroaching on the responsibilities of some governmental institutions. Thus, planning and management for sustainable development might need to be based on dialogue and networks that operate primarily at the intermediate level of bureaucracy and should be conducted through mainstreaming within and consultations between multiple agencies. The location of responsibility for marine resources management liaison arrangements might vary with the subject matter, with various line agencies having responsibilities for different subject matters.

However, the conclusion that a centralised process and agency can never successfully perform an integrated marine governance planning or management function is premature and too simplistic. For example, where the main issues managed by a governmental agency are cross-sectoral in nature, cross-sectoral liaison responsibility might be successfully entrusted to it. This is the modus operandi of foreign affairs ministries and it is also possible for integrated marine governance because the main ocean resources issues are cross-sectoral. Thus, the difficulties that confounded centralised integrated cross-sectoral oceans management in Australia might have a range of other reasons, including a weak mandate and the lack of a well resourced agency located in Canberra.

4.16.4 Conclusion

Australia's experience with its Oceans Policy provides a case study in cross-sectoral integration of natural resources management premised on ecosystem

738 Jenny Stewart and Grant Jones *Renegotiating the Environment – The Power of Politics* (Federation Press: Sydney 2003).

739 In this respect, it is noteworthy that the 2004 Australian Conservation Foundation Marine Legislation Review examined 250 Commonwealth, State, and Territory marine-related environmental laws and regulations that apply to the conservation, fisheries, petroleum, shipping, and tourism sectors for their utilisation of IOM principles. The review found that sustainable development objectives were, on the whole, poorly articulated albeit with various degrees of cogency across marine sectoral enactments; see: *ACF Online Publications* www.acfonline.org.au/default.asp?section_id=4 (accessed April 2008).

sustainability. Australian integrated marine management eventually narrowed in scope in its transition from whole-of-government multiple-use regional marine planning to bioregional planning. The case study demonstrates some difficulties in establishing a mandate and operational mechanism for broadly conceived cross-sectoral governance for sustainability. It also provides some lessons about how to construct successful mandates and mechanisms.

The abandoned broad-scope regional marine planning process was a learning experience. It demonstrated the value of the substantial information it produced through its marine regional profiles and its linkage of marine information databases. In addition, liaison between an extended set of marine agencies generated knowledge about their respective interests and produced enduring linkages between bureaucrats across sectors that continue to facilitate cross-sectoral cooperation. Similarly, liaison with external stakeholders generated knowledge, linkages and functional consultation processes that facilitate inclusive, participatory decision-making.

The absence of a legislative mandate for broad-scope integrated marine management was problematic. If the Commonwealth were to reintroduce holistic, cross-sectoral management, the use of a statutory basis would be advantageous to set clear rules that necessitate cross-sectoral cooperation. It is significant that, under the revised bioregional planning process, the necessity for cooperation between the various Commonwealth portfolios engaged in marine activities is supported by the legislative mandate for bioregional planning that empowers the Minister for Environment to set conditions for proposed activities that would significantly impact on the environment of a Commonwealth bioregion.

Under the new bioregional planning process, management is refocused on biodiversity, such as on establishing and managing marine parks. To discharge these responsibilities, the Department of Environment has adequate institutional mechanisms and can deliver the goods, e.g. by setting conditions for proposed activities to address impacts on biodiversity. However, for fully integrated marine management, further study needs to be done to elaborate the circumstances in which cross-sectoral cooperation can better be conducted, i.e. whether by means of consultations between and mainstreaming through multiple agencies or by means of a centralised agency with whole-of-government liaison responsibilities. The Australian experience has been that the creation of a new specialised cross-sectoral liaison agency that overlaps the responsibilities of already established line agencies is fraught with risks for an adequate mandate and resources for the new agency.

Finally, it must be remarked that the elephant in the room of Australian integrated marine governance is the obstacle of cross-jurisdictional coordination. It is in the coastal waters that resources and their uses are the most intense and conflicting. The simple but main weakness of Australia's integrated marine governance remains its failure to achieve essential federal coordination across the jurisdictional boundaries Commonwealth and State waters.

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4.17 Waitutu Block and Tutae-Ka-Wetoweto Indigenous Forests

Nicola R. Wheen[740]

Abstract

All of New Zealand's remaining indigenous forests are managed for conservation purposes or are subject to a sustainable forest management regime. However, the transition from exploitation to sustainable management has not been seamless. In particular, the process has struggled to accommodate the rights and expectations of certain Maori landowners to use their land for their support and maintenance. These landowners were granted their lands by the Crown under the *South Island Landless Natives Act* (SILNA) of 1906, as either a remedy or a form of compensation for their state of landlessness. They were landless because the Crown and its agents had purchased nearly all of their lands without ensuring that the land and the resources it had promised to reserve for them were actually reserved, and despite the Crown's guarantee in the 1840s Treaty of Waitangi that Maori would retain possession and control of their lands following their cession of sovereignty to the Queen. In fact, the land granted was so remote and hostile as to be basically useless until the type of timber growing there was over harvested elsewhere thus driving up the price. Only then did forestry by clear-felling on Maori SILNA land become viable.

This case study considers the settlements that two of the indigenous landowner groups covered by SILNA were able to negotiate with the Crown. In these settlements, the Maori landowners agreed to end clear-felling on their blocks of land within the Waitutu and Tutae-Ka-Wetoweto forests in southern New Zealand. In return, they received monetary compensation for lost cutting rights. The Waitutu block is now managed by the Department of Conservation as if it were a national park, whereas the Tutae-Ka-Wetoweto blocks are managed for conservation purposes by the landowners themselves. Both settlements were implemented in law by legislation, the *Waitutu Block Settlement Act* 1997 and the *Tutae-Ka-Wetoweto Forests Act* 2001.

4.17.1 Introduction

In the first few months of 1840, more than 500 Maori chiefs signed the Treaty of Waitangi with representatives of the British Crown. They agreed to 'give absolutely to the Queen of England for ever the complete government of their land' and also the valuable right of pre-emption. The Queen in turn promised to protect all the people of New Zealand and give them the same rights and privileges as British subjects, and guaranteed to Maori 'the unqualified exercise of their chieftainship over their lands, villages and all their treasures'. [741]

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741 This is Kawharu's 'attempt at [an English] reconstruction of the literal translation' of the Maori text (Kawharu, I.H. 'Translation of Maori text' in Kawharu, I.H. (ed) *Waitangi – Maori and Pakeha Perspectives of the Treaty of Waitangi* (Oxford University Press: Auckland, 1989) p. 320. It is

Despite the Treaty, the settlement process deprived Maori of most of their land. In the South Island (*Te Waipounamu* in Maori), the Crown and its agents acquired Maori land for settlement in a series of major land purchases, each accompanied by broken promises that the Crown would reserve land and resources for local Maori. By 1891, half of Ngai Tahu (the Maori group whose domain covered most of the South Island/Te Waipounamu) were reported to have no land, and only 10 percent to have sufficient land.[742] Ngai Tahu were left with just one-thousandth of their original land holding.[743] The Iwi's landless state was officially recognised as early as 1879, but it took years of political pressure and a series of Parliamentary committees and Royal commissions before the Crown provided any actual redress.

> Then between 1893 and 1905, just over 57,513 hectares of land in 18 blocks ranging from Stewart Island (*Rakiura* to Maori) to Marlborough Sounds were allocated to 4,064 beneficiaries in grants subsequently authorised by the *South Island Landless Natives Act* 1906.[744] The Act's purpose was to authorise allocations of selected Crown land to South Island Maori affected by landlessness 'to provide for their support and maintenance'.[745] Nevertheless, in what was later described as a 'cruel hoax',[746] the grants were found to be woefully inadequate. They were smaller than had been recommended, holdings were fragmented, and most of the lands allocated were 'remote; rugged, broken and bush-covered; infertile; wet …; located long distances from railways and mostly not roaded; insufficient in size for farming and difficult for milling'. 'Capital would have been needed for development and was not made available' and '[p]erhaps most significant, the lands were far from the owning beneficiaries' traditional *kainga* or present home'.[747]

The owners of a limited number of SILNA blocks have managed to earn some profit from logging on their land; harvesting on some blocks began soon after the original land grants and continued through the 1990s. By and large, however,

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proper to prefer the Maori text for all sorts of reasons: there is only one Maori version 'and this is the one signed by all but a small minority' (Kawharu, ibid); such an approach is also consistent with the contra proferentem rule, see the Waitangi Tribunal's *Orakei Report* (1987) chapter 11.

742 McPhail, D. *Constraints and Opportunities for South Island Landless Natives Act (SILNA) 1906 Indigenous Forest Utilisation* (Paper No 3 from the research programme UoCX0004 Sustainability on Maori-owned Indigenous Forest, School of Forestry, University of Canterbury, Christchurch, 2002) p. 5.

743 The one-thousandth reference comes from 'The Ngai Tahu claim – the Treaty in practice', available at www.nzhistory.net.nz/politics/treaty/the-treaty-in-practice/ngai-tahu, (Ministry for Culture and Heritage), updated 18 Apr 2007, (accessed 28 January 2008).

744 Hereafter 'SILNA'; the Act was repealed by the *Maori Land Act* 1909.

745 This purpose 'emerges' from ss 2 and 3 of the Act, per Wild, J., in *Alan Johnston Sawmilling Ltd* v *Governor-General* (1999) 1 New Zealand Customs Cases (NZCC) 61,129, pp. 61,137.

746 This is the description given by the Waitangi Tribunal to the SILNA land grants some 85 years later. The Tribunal was established in 1975 to investigate claims of prejudice to Maori caused by Crown action that is inconsistent with the 'principles' of the Treaty of Waitangi, see *Treaty of Waitangi Act* 1975, s 6. SILNA issues in fact formed one of the ancillary aspects to the huge Ngai Tahu claim, which was reported on in Waitangi Tribunal, *Ngai Tahu Report* (1991), and which formed the basis for the Ngai Tahu settlement with the Crown (subsequently given legislative effect in the *Ngai Tahu Claims Settlement Act* 1998).

747 McPhail, supra note 742, p. 8.

forestry activities on most of the SILNA blocks were not economic for some time. Their very ruggedness and remoteness effectively protected the virgin indigenous forests at a time when two thirds of New Zealand's indigenous forests were destroyed.[748] By the 1970s, however, indigenous timber was scarce and valuable enough for more SILNA landowners to be in a position to realise a meaningful economic benefit from their land. They began clear-felling,[749] to 'devastating effect'.[750]

4.17.2 Description

As the SILNA blocks – and other forests – were logged, public opinion swung to favour conservation of all remaining indigenous forests. From the mid-1980s, the government developed a policy to conserve or sustainably manage all remaining indigenous forests. In 1986, the West Coast Accord was agreed between the government, conservation organisations, timber millers, and local authorities.[751] It protected some 215,000 hectares of indigenous forest on the west coast of the South Island/Te Waipounamu, and provided for the sustainable harvesting of other Crown-owned west coast indigenous production forests. The Accord was subsequently cancelled in 2000 when the government disallowed all logging in west coast forests and moved them into the conservation estate.[752] In 1990, in the face of an emerging international market in wood chips, the government began actively controlling exports of indigenous timber under customs legislation[753] and in 1993, a new 'Part IIIA' was inserted into the Forests Act 1949 to promote the sustainable forest management of indigenous forest land.[754] This legislation bans exports and milling of indigenous timber products that are not harvested under a sustainable forest management plan or permit.[755] Significantly, Parliament created

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748 According to the Ministry for the Environment's report *The State of New Zealand's Environment* (Ministry for the Environment. Wellington, 1997), p. 27, forest cover has been reduced from about 85 percent to about 23 percent of New Zealand's landmass since people arrived here.

749 McPhail explains the economic rationale behind the preference for clear-felling (supra note 742, p. 35).

750 *Alan Johnston Sawmilling* case, supra note 745, pp. 61,132.

751 'The Accord [was] not a legally binding document and there [were] major disputes over its interpretation' (Bellingham, M. 'Protection of Land, Plants and Animals', in Milne, C.D.A. (ed.) *Handbook of Environmental Law* (Royal Forest and Bird Protection Society. Wellington, 1992), p. 225.

752 See the Forests (West Coast Accord) Act 2000. Sawmillers who had contracts with state-owned enterprise Timberlands (the organisation that managed production in the affected forests) were badly affected by the decision, but were unable to obtain any remedy, see Wheen N. R. 'Desperate Remedies and the West Coast Sawmillers' *New Zealand Universities Law Review,* Vol. 19*,* 2001, pp. 351-365; Wheen, N.R. 'Fairness and Indigenous Forests Law in New Zealand' *Asia Pacific Journal of Environmental Law*, Vol. 7, 2002, pp. 7-24.

753 Development of the policy by the Lange-led Labour Government culminated with Cabinet's adoption of a directive for the sustainable management for all indigenous forests on 20 June 1990. These events, and the various regulatory measures taken under customs legislation to give effect to the policy, are described in *Alan Johnston Sawmilling* case, supra note 745.

754 Sustainable forest management is defined as meaning 'the management of an area of indigenous forest land in a way that maintains the ability of the forest growing on that land to continue to provide a full range of products and amenities in perpetuity while retaining the forest's natural values' (Forests Act 1949, s 2).

755 Forests Act 1949, ss 67C and 67D respectively.

two exemptions to Part IIIA: the Crown-owned west coast production forests (because they were already subject to a sustainable management regime under the West Coast Accord) and the SILNA land.[756]

The SILNA exemption was created because the land had been provided for the maintenance and economic development of the Maori owners.[757] Forestry was virtually the only activity open to landowners seeking to derive an economic benefit from the land[758] and the statutory exemption was in effect a 'Parliamentary recognition of the Crown's obligation to SILNA owners'.[759] The exemption meant that for a time the SILNA landowners were the only landowners in New Zealand able to clear-fell their indigenous forests. Some SILNA landowners continued to do so, profiting mainly from international demand for wood chips. They argued that the SILNA expressly confirmed their right to use the land to provide for their support and maintenance,[760] but the Forests Act exemption was perceived to be unfair by some other forest owners.

The main opposition to SILNA clear-felling projects, however, came from conservation organisations. Public pressure for conservation focussed especially on the Waitutu block and two of the Lords River blocks. The Waitutu block is located on the southern coast of the South Island/Te Waipounamu, within the Waitutu forest that today forms part of the Fiordland National Park and the South West New Zealand World Heritage Area. The Waitutu forest is the 'largest remaining relatively unchanged lowland forest in New Zealand'.[761] Here,

> geological uplift has led to a remarkable 'staircase in time' – a half-million-year-old flight of marine terraces chiselled by the sea out of soft mudstones. On the terraces … the forest has grown in a great patchwork quilt. The terraces are the best surviving example of a once-widespread and significant component of the New Zealand natural landscape.[762]

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756 Forests Act 1949, s 67A(1)(b)(i), repealed in 2004 (see text to follow).

757 *New Zealand Parliamentary Debates* (1993) 13940, per Hon Denis Marshall.

758 Farming was not an option (see previous text) and the land was/is almost inalienable (see the SILNA, ss 9 and 10 (now repealed)). The land now falls under *Te Ture Whenua Maori Act* 1993, s129, which provides comprehensive restrictions on the alienation of Maori land. Ownership of the SILNA block has now descended bilaterally from the original grantees to the extent that approximately 25,000 people have an interest in some 57,513 hectares of existing SILNA land. Establishing who these people are is not easy: most SILNA land has never been occupied and the owners are scattered throughout New Zealand.

759 *Alan Johnston* case, supra note 745, p. 141.

760 See Devoe, N. 'Seeing the Forest for the Trees: The Future of the SILNA Lands' (seminar presented at *He Minenga Whakatu Hua o Te Ao*, 27 August 2000, Murihiku Marae, www.otago.ac.nz/titi/hui/Main/Home.htm, (accessed 15 March 2008), quoting one of the landowners (John Sutherwood), who said: 'When they were valueless to the Crown, there was no restriction on the use of SILNA land; indeed the express intention was that they be cleared. Now that the owners could realise some benefit from these lands, the Crown proposes to take away what it gave in 1906, lands that were ours to begin with'.

761 Schmidt, S. and Swenson, K. 'Waitutu – The Ultimate Forest Protected at Last', *Forest and Bird* , No 280, May 1996, p. 27.

762 Ibid., p. 31.

The Waitutu block itself includes 'the most recent and most fertile of Waitutu's distinctive marine terraces and thus the most impressive podocarp forests'.[763] The Lords River blocks lie within the Tutae-Ka-Wetoweto forest on Stewart Island/Rakiura, the smallest of New Zealand's three major islands. Rakiura's

> outstanding values … include extensive forests and natural features which deserve 'protection in the national interest'. The island is home to a number of endangered birds and plants, and is notably free of mustelids, such as ferrets and stoats, which have devastated birdlife in mainland forests.[764]

The government made a 'generally known commitment in the early 1990s … to preserve the Waitutu Block given its boundary with the Fiordland National Park (a world heritage site)',[765] but negotiations had ground to a halt. 'To focus the Crown', the Waitutu Incorporation 'creat[ed] a specific value on their first option of harvesting' by entering into an agreement with a milling company to harvest 'substantial volumes of rimu and other timber' on their land, and began logging.[766] The government responded, and tried to reinforce its negotiating position, by letting the SILNA landowners know that it would strictly enforce new regulations blocking exports of unsustainably harvested indigenous timber against them.[767] The affected landowners simply stockpiled their clear-felled timber as conservation organisations pressed the government to save the forests. Then on 8 March 1996, the Crown and the Waitutu Incorporation reached an agreement under s 77 of the Reserves Act 1977 to halt all logging in the Waitutu Block.[768] The owners agreed that the land would be managed by the Department of Conservation as a national park. The terms of settlement were that the Waitutu Incorporation would continue to own the land, but would give up cutting rights to the forest in return for cash compensation of NZ$13.55 million.

The settlement was drawn up in a deed of covenant and implemented in the *Waitutu Block Settlement Act* 1997. This act provides that the *National Parks Act* of 1980 applies to the Waitutu block as if it was a national park, subject to the

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763 Ibid., p. 28.

764 Ell, G., 'Stewart Island/Rakiura National Park Proposal Advanced' *Forest and Bird* , No 296, May 2000, p. 7.

765 McPhail, supra note 742, p. 15.

766 Ibid., p. 15.

767 The regulations prohibited exports of indigenous timber unless it was harvested in accordance with the Forests Act's sustainable management regime, or unless the Minister gave consent. The Minister then approved conditions for routine approval: being that the timber was harvested from an area managed under an approved sustainable management permit and was surplus to domestic requirements. In the *Alan Johnston* case, supra note 745, p. 61, 141 – 61,144, Wild J. held that the government had promulgated the regulations for one or more of the purpose(s) ('remote and unconnected with the proper purposes of [the] customs and excise legislation' pursuant to which the regulations had purportedly been promulgated) of promoting sustainable management and seeking to improve its negotiating position vis a vis the landowners.

768 The Reserves Act 1977, s 77 enables the Minister of Conservation 'if satisfied that any private land … should be managed so as to preserve the natural environment, or landscape amenity, or wildlife or freshwater-life or marine-life habitat, or historical value, and that the particular purpose of purposes can be achieved without acquiring ownership of the land … may treat and agree with the owner … for a covenant to provide for the management of that land in a manner that will achieve the particular purpose or purposes of conservation'".

provisions of the deed of covenant. Specifically, it states that 'nothing in [the National Parks Act] limits or affects the rights' of the owners in clause 3 of the deed[769] (these include rights to erect accommodations, take 'traditional foods', take 'traditional vegetative material for customary medicinal use', erect smoking racks for eels, and enter the land at any time) and that the powers conferred by the National Parks Act on the Minister, Director-General or Department of Conservation must not be 'exercised in a manner that is contrary to or inconsistent with the deed of covenant'.[770] The deed itself further provides that neither party may remove indigenous plants, trees or animals from the land, and that the public is to have access to the land except for purposes consistent with the National Parks Act.[771]

Section 6 gives a right of 'first refusal' to the Crown if the Incorporation decides to sell or lease the land, and requires the Incorporation to secure the 'binding agreement of the other party to the transaction [for any sale or lease] that the other party will comply with the deed of covenant'. Upon sale or lease of the land, the National Park Act continues to apply.[772] Under ss 8 and 9, the Minister must 'consult with and have regard to the views of' the Incorporation when exercising powers under the National Parks Act, and in making conservation strategies and plans that 'affect or relate to' the land. Disputes between the parties are to go to an 'agreed party for decision' and thereafter to arbitration, and both parties are able to 'institute proceedings to enforce compliance' with the deed.[773]

Meanwhile, negotiations on other SILNA blocks stalled again, even though the landowners scored a significant victory in 1996 when one of the milling companies holding SILNA forest cutting rights successfully challenged the new customs regulations that were being used to prevent exports of unsustainably harvested indigenous timber. The regulations were held to be repugnant to the exemption of SILNA land under the Forests Act (and therefore to be contrary to the Bill of Rights 1688), and to have been made for improper purpose(s) including enhancing the Crown's position in its negotiations with the landowners.[774]

In July 1999, the government announced that it would introduce a Forests Amendment bill to remove the exemption for SILNA land from the sustainable forests management regime, and that meanwhile it was prepared to compensate SILNA owners willing to enter into a voluntary moratorium on logging. Those

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769 Section 5(2)(a); the Deed is reproduced as the Second Schedule to the Act.

770 Section 5(3).

771 Clauses 12 and 13.

772 Section 6(7).

773 Clauses 29 and 33.

774 The regulations, and the Minister's policy on implementing them, are described in note 28 above. Wild J. reasoned that in so far as the regulations applied to indigenous timber harvested from SILNA land, they effectively removed or defeated the exemption by denying unsustainably harvested timber access to the international market. Thus they offended the Bill of Rights 1688, s 1 (which 'prevent[s] the Executive … suspending the operation or benefit of laws passed by the Parliament of New Zealand') (*Alan Johnston* case, supra note 745, pp. 61,139 – 161,140). Wild J.'s improper purpose/irrelevant considerations findings are described in note 767 above.

owners prepared to join the moratorium would win priority in negotiations for conservation or sustainable management.

On 9 October 1999, negotiations with the owners of two of the Lords River blocks in Tutae-Ka-Wetoweto forest culminated with a Deed of Settlement and Deed of Covenant, again made under the Reserves Act, s 77 and again implemented in special legislation, being the Tutae-Ka-Wetoweto Forest Act 2001. Under this deed, as under the Waitutu deed, the land in the Lords River blocks was to remain in the hands of its SILNA owners, the Rakiura Maori Land Trust. This time, however, the landowners would also retain ownership of the forest 'with full rights of ownership, possession and use of the Forest'.[775] The landowners agreed to manage the land as if it were a national park in exchange for compensation of NZ$10.9 million.

Under the Tutae-Ka-Wetoweto Forests Act, Rakiura Maori must manage the forest 'in accordance' with the deed of covenant,[776] and with the terms of the management plan that Rakiura must prepare thereunder.[777] The conservation management objectives of the covenant are set out in cl 3 of the deed include preserving the natural environment, providing for public access, and for Rakiura to continue to exercise their Maori customary rights 'in respect of the indigenous vegetation and the land generally'. Clause 4 sets out some specific restrictions, responsibilities, and powers of Rakiura, including a ban on the removal of any tree, a requirement that the public be permitted to walk on the blocks free of charge, and an authorisation enabling closures of (parts of) the block for 'cultural purposes'. Clause 8 provides that if Rakiura sell or lease (any part of) the blocks, they must first obtain the agreement of any purchaser or lessee to comply with the covenant. If Rakiura fails to do so, it 'shall continue to be liable in damages for any breach … committed after it has parted with all interest in the … sections in respect [of] which such breach has occurred'. Disputes between the parties to the covenant must fall to resolution by negotiation, formal mediation and, subsequently, arbitration.[778]

Since the Tutae-Ka-Wetoweto Forests Act was enacted, the government has moved away from its policy of negotiation for compensation and, in 2001, the Environment Court held that, despite the existence of the SILNA exemption in the Forests Act effectively enabling the SILNA landowners to unsustainably harvest and mill and/or export indigenous timber, local authorities can control and constrain the removal of indigenous vegetation from SILNA land under the *Resource Management Act* 1991. The court found that the power of the local authority to make such rules under the 1991 act was not impliedly repealed *pro tanto* by the enactment of the Forests Act exemption in 1993.[779] In 2004, Parliament removed the SILNA exemption from the Forests Act, and now the only

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775 Preamble to the Tutae-Ka-Wetoweto Forest Act 2001, para (3).

776 The Deed is set out in the Second Schedule to the Act.

777 Clause 6, which also provides that the plan must implement the objectives in cl 3 and give effect to cl 4.

778 Clause 13.

779 *Minister of Conservation* v *Southland District Council*, unreported, Environment Court, Auckland, A39/2001, 29 April 2001.

option remaining for SILNA landowners seeking some remedy for lost cutting rights is to negotiate a conservation covenant under the Nature Heritage Fund. Nature Heritage Fund (the Fund is run by the Department of Conservation and is funded by Parliament) payments 'are calculated on a much lower value that the commercial value of the timber, unlike the Waitutu and Rakiura settlements'.[780]

4.17.3 Evaluation

The process of moving New Zealand's indigenous forests from exploitation to conservation or sustainable management has not been smooth sailing. In particular, there have been difficulties in ending clear-felling on SILNA land. The Waitutu and Tutae-Ka-Wetoweto settlements represent significant achievements in context. Each settlement was individually negotiated, although the latter clearly emulates and builds on the former. Each settlement was given the status of law by an Act of Parliament. Both have resulted in important indigenous forests being protected in perpetuity as national parks. Both have retained Maori land in Maori hands, although the Tutae-Ka-Wetoweto Act also retains Rakiura Maori as the managers of the land (whereas under the Waitutu settlement, the Department of Conservation manages the land) and as owners of the forest itself. This seems better to reflect their status as *kaitiaki* (guardians) and *tangata whenua* (the people who belong to this land) of the Lords River blocks.

There is some criticism of the use of the Reserves Act 1977, s 77 as the authority for the two covenants. The argument is simply that a better-tailored alternative exists in the Reserves Act, s 77A which enables the Minister to enter into a *Nga Whenua Rahui kawenata* (which translates loosely as 'our land protection coventant') with the owners of any Maori land in order to preserve and protect either its 'natural environment, landscape amenity, wildlife or freshwater-life or marine-life habitat, or historical value' or the 'spiritual and cultural values which Maori associate with the land'. It is clear, however, that this option was not used because while, like the conservation covenants under s 77, Nga Whenua Rahui kawenata can be in perpetuity, they may only be so subject to a condition that 'at agreed intervals of not less than 25 years, the parties … shall review the objectives, conditions, and continuance' of the *kawenata*.[781] The Crown wished to see the forests protected in perpetuity, but the opt-out option for *kawenata* as preferred by the landowners could actually enable a more durable settlement.[782]

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780 As expressed by the Waitangi Tribunal in its summary on the *Waimumu Trust (SILNA) Report* (2005), see the Tribunal's website at www.waitangitribunal.govt.nz/reports/summary.asp?reportid=e00a5a61-1ce0-476f-80ac-69a4911a6e2a, (accessed 5 March 2008). The *Report* considers the Waimumu Trust's claim that the 2004 amendment to the Forests Act removing the SILNA exemption was a breach of the principles of the Treaty of Waitangi. The Tribunal found breaches in the government's approach to SILNA lands since the Rakiura settlement, but no real prejudice as the Trust had not yet pursued the Nature Heritage Fund option. The reason for the disparity in the value of payments is that the fund provides compensation for costs only.

781 Section 77A(1)(b).

782 At some point in the future, the compensation sums paid for lost cutting rights could seem trivial in terms of the value of the forests to the nation. Allowing for renegotiation of conditions and so on would enable a settlement to endure in the face of such changing conditions.

4.17.4 Conclusion

The grievances of the SILNA landowners are long standing, and attach to historic and further alleged breaches of the principles of the Treaty of Waitangi, as well as to the 'hoax' perpetrated by the land grants effected under the SILNA. The Waitutu Block Settlement and Tutae-Ka-Wetoweto Forest Acts are the legal embodiment of one possible response to those grievances. They represent a solid compromise between conservation interests and the rights and interests of the landowners. The only problem is that they only cover some of the forests, and only compensate some of the landowners for what they have lost in terms of their ability to support and maintain themselves in the transition from exploitation to conservation and sustainable management of indigenous forests in New Zealand.

4.18 Hector's and Maui's Dolphins

Nicola R. Wheen[783]

Abstract

Hector's dolphin, *Cephalorhynchus hectori*, and its sub-species, Maui's dolphin, *Cephalorhynchus hectori maui*, is New Zealand's only endemic cetacean. It is also recognised domestically as threatened, and internationally as endangered or critically endangered. The main human-induced threat to Hector's and Maui's dolphins is set netting, followed by trawling. Although New Zealand's *Marine Mammals Protection Act* 1978 begins by banning all unauthorised takings of marine mammals in New Zealand waters, it goes on to provide a defence for incidental or accidental takings (known as by-catch) that are recorded and reported. Basically, by-catch is lawful, unless it breaches an especially introduced measure, such as a ban on a particularly harmful fishing method or maximum allowable level of fishing-related mortality. Only the Minister of Fisheries acting alone, or the Minister of Conservation acting with the consent or concurrence of the Minister of Fisheries, may introduce these measures. Measures are almost never required, but may be made if necessary.

Despite the vulnerable state of Hector's and Maui's dolphins and New Zealand's apparent international commitment to biodiversity conservation, only two such measures have been introduced to reduce the fishing-related mortality of these dolphins. Both of these measures (seasonal restrictions on fishing activities that apply within the Banks Peninsula Marine Mammals Sanctuary, and netting bans on the northwest coast of the North Island) were hard won. So far, they have proved insufficient to arrest decline in the relevant dolphin populations. To date, no nationally comprehensive measures have been implemented, and no scientifically based maximum level of allowable by-catch has been set. This case study considers deficiencies in New Zealand's legal regime relating to by-catch, and suggests that these deficiencies are to blame for allowing successive Fisheries Ministers to avoid introducing stricter and more comprehensive measures to protect Hector's and Maui's dolphins.

4.18.1 Introduction

This case study focuses on the plight of New Zealand's Hector's and Maui's dolphins (*Cephalorhynchus hectori* and *Cephalorhynchus hectori maui*). Hector's dolphin and its sub-species Maui's dolphin or *popoto* are members of the *Cephalorhynchus* genus, a group of coastal dolphins generally found in geographically distinct locations. They are 'small, generally playful, blunt-nosed dolphins'.[784]

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[784] All information and quotes in this paragraph containing general information on *Cephalorhyncus* are from Wikipedia, see en.wikipedia.org/wiki (accessed 22 March 2008).

Hector's cousin, Commerson's dolphin (*Cephalorhynchus commersonii*) is found around the southern tip of South America and the Falkland Islands, and near the Kerguelen Islands in the southern Indian Ocean. 'The proximity of the dolphin to the shore makes accidental killing in gillnets a common occurrence'. Another cousin, the Chilean dolphin (*Cephalorhynchus eutropia*) is endemic to the coast of Chile. It is 'perhaps one of the least studied of all cetaceans' and its population 'is not known with certainty. There may be as many as a few thousand individuals, although at least one researcher … has suggested that the population may be much lower'. The species suffered from widespread hunting up until the early 1980s; 'nowadays a few individuals are lost each year in fishing equipment. It is possible … that these losses are causing an irreversible decline of the species, but this is not known with certainty'. Sightings of the third cousin, Heaviside's Dolphin (*Cephalorhynchus heavisidii*) 'are not uncommon off the Skeleton Coast of Namibia'. Again, however, these dolphins 'have not been systematically studied by scientists' and 'no estimates of abundance exist'. Commerson's, Chilean and Heaviside's dolphins are all listed as data deficient on the International Union for the Conservation of Nature's *Red List of Threatened Species*.

New Zealand has an unusually high proportion of endemic species,[785] but *Cephalorhynchus hectori* is New Zealand's only endemic cetacean. It is the world's smallest dolphin, and Maui's dolphins are the world's rarest dolphins. With an estimated population of around just 100 individuals, Maui's dolphins are listed on the IUCN's *Red List* as 'critically endangered'. Their range is confined to small areas close to shore on the west coast of the North Island of New Zealand. The total number of South Island Hector's dolphins is larger, but still reaches only an estimated 7,300 individuals. These individuals group into at least three geographically and genetically distinct populations and, like their North Island counterparts, display a high degree of site fidelity. South Island Hector's dolphins are listed as 'endangered' on the IUCN *Red List.*[786]

The coastal distribution of Hector's and Maui's dolphins, combined with a low overall maximum population growth rate (due to a short life-span of about 20 years; a low reproduction rate, which sees females calf just once every two to three years; and a relatively late age of sexual maturity) means 'that Hector's dolphin can be threatened by low levels of human-induced mortality'.[787] The New Zealand Ministry of Fisheries and Department of Conservation's recently released *Hector's and Maui's Dolphin Threat Management Plan – Draft for Public Consultation* identifies a range of human-induced threats to Hector's and Maui's dolphins. The first two threats listed are set netting, which is described as 'the

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785 This is largely attributable to New Zealand's isolated evolution, see *New Zealand Biodiversity Strategy* (Government Printer: Wellington, 2000).

786 This information is drawn from: Dawson, S. et al.'The North Island Hector's Dolphin is Vulnerable to Extinction', *Marine Mammal Science,* Vol 17, 2001, pp. 366-371; Slooten, E. and Dawson S. 'Hector's Dolphin *Cephalorhynchus hectori*' in S. H. Ridgeway and R. Harrison (eds.) *Handbook of Marine Mammals, Vol. 5 Delphinidae and Phocoenidae* (Academic Press: London, 1992); Slooten, E. and Lad, F. 'Population Biology and Conservation of Hector's Dolphin' *Canadian Journal of Zoology*, Vol. 69, 1991, pp. 1701-1708; and *Hector's and Maui's Dolphin Draft Threat Management Plan – Draft for Public Consultation* (Ministry of Fisheries and Department of Conservation, Wellington, 2007), pp. 17-18. The IUCN Red List is available at www.redlist.org

787 *Hector's and Maui's Dolphin Draft Threat Management Plan*, supra note 786, p. 21.

greatest known cause of human-induced Hector's dolphin mortalities',[788] and trawling, of which it is noted that 'since 1921, there have been 19 reported dolphin mortalities definitely attributable to trawling (around 9 percent of incidents with a known cause of death)'.[789] Reducing the human-induced risks to Hector's and Maui's dolphins, however, involves an acknowledged cost to both commercial and recreational coastal fisheries.

4.18.2 Description

The relevant law

Marine mammals are, at first glance, protected throughout New Zealand waters by the *Marine Mammals Protection Act* 1978.[790] This protection is, however, subject to significant qualification. In particular, 'accidental' or 'incidental' takings of marine mammals are excused as long as they are recorded and reported in accordance with the Act.[791] By-catch of marine mammals (and other marine wildlife[792]) is prima facie lawful. Additional controls on fishing activities to protect marine mammals may, however, be made by the Minister of Conservation under the 1978 Act or by the Minister of Fisheries under the Fisheries Act 1996.

The *Marine Mammals Protection Act* authorises the Minister of Conservation to establish marine mammal sanctuaries.[793] The Minister requires the consent of

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788 In a recent article, Associate Professor Slooten of the University of Otago's Department of Zoology and Hector's dolphin research scientist is said to have ranked 'set nets, closely followed by trawling, as the number one threat to Hector's dolphins. She rates pollution and then tourism as a distant third and fourth in terms of risk'" (Bain, H. 'Dolphins in Danger' *Forest and Bird,* No. 323, 2007, p. 19.

789 *Hector's and Maui's Dolphin Draft Threat Management*, supra note 786, p 23. See also Martien, K. K. et al.'A Sensitivity Analysis to guide research and management for Hector's Dolphin' *Biological Conservation*, Vol 90, 1999, pp. 183-191; Baird, S.J. and Bradford, E. *Estimation of the total bycatch of Hector's dolphins (*Cephalorhynchus hectori*) from the inshore trawl and setnet fisheries off the east coast of the South Island in the 1997-98 fishing year*, Conservation Services Levy Report CSL99/3024 (Department of Conservation: Wellington, 1999); Dawson, S. M. 'Incidental catch of Hector's dolphins in inshore gillnets' *Marine Mammal Science*, Vol 7, 1991, pp. 283-295; Slooten, E. and Lad, F. 'Population Biology and Conservation of Hector's Dolphin', supra note 786, p. 1701; Slooten, E. and Dawson, S. 'Studies on Hector's Dolphin *Cephalorhynchus hectori:* a Progress report', *Rep. Int. Whaling Comm. Special Issue No. 9,* 1988, pp. 325-338; Dawson, S. et al. 'The North Island Hector's Dolphin is Vulnerable to Extinction', supra note 786; Suisted, R. and Neale, D. *Department of Conservation Marine Mammal Action Plan for 2005-2010* (Department of Conservation: Wellington, 2004), p. 20. Note further that Hector's and Maui's dolphins are not the only marine species adversely affected by fishing activities: see the *New Zealand Biodiversity Strategy*, supra note 785, p. 57 observes that '[f]isheries bycatch … remains a problem for some species, such as Hector's dolphin, New Zealand sea lion, and albatross'.

790 The Marine Mammals Protection Act is administered by the Minister of Conservation (s 6 and First Schedule) and operates around a general rule that bans 'takings' of marine mammals (s 4). 'Take' is widely defined as including killing, harassing, and disturbing marine mammals (s 2). Unless expressly permitted by the Minister, taking a marine mammal is an offence (ss 4, 5 and 9).

791 Section 26(4); the recording and reporting requirements are prescribed in s 16.

792 Non-mammalian marine animals and marine birds fall under the Wildlife Act 1953. The by-catch scheme for these animals and birds is the same as that for marine mammals as described in this case study.

793 Section 22. Sanctuaries are one form of protected marine area that may be set aside in New Zealand waters, another being marine reserves under the *Marine Reserves Act* 1977. There is one

other Ministers who have control over resources included in the sanctuary. Within sanctuaries, fishing activities such as set netting can be restricted. This Act also authorises the Minister, from time to time, to make population management plans for threatened or 'other' species of marine mammal.[794] These plans can include: assessments of the status of the species, of any 'known fisheries interaction with the species' and of the risk posed by fishing-related mortality; a 'maximum allowable level of fishing-related mortality' (MALFiRMs) for the species;[795] and recommendations to the Minister of Fisheries on measures to mitigate fishing-related mortality of the species. MALFiRMs may be set for a species throughout New Zealand fisheries waters as a whole and must be at a level that allows the species to achieve non-threatened status 'as soon as practicable, and in any event within a period not exceeding 20 years'.[796] For 'geographically or genetically distinct' populations of threatened species, an additional area-based MALFiRM may be set at a level that 'neither cause[s] a net reduction in the size of the population nor seriously threaten[s] the reproductive capacity of the species'.[797] A detailed procedure, involving the preparation and public notification of a draft and the consideration of submissions, is prescribed for the formulation of plans, which are approved by the Minister of Conservation subject to the concurrence of the Minister of Fisheries.

If a population management plan has been made for a by-catch species, the *Fisheries Act* 1996 requires the Minister of Fisheries to 'take all reasonable steps to ensure that [any MALFiRM] set by the relevant … plan is not exceeded' and also authorises the Minister to take measures as necessary to further avoid, remedy or mitigate the adverse effects of fishing-related mortality on the protected species.[798] The Minister of Fisheries can also take measures as necessary to avoid, remedy or mitigate the adverse effects of fishing-related mortality on a protected species if no population management plan has been made, but must first consult the Minister of

existing marine mammals sanctuary, see text to follow. Just 0.3 percent of New Zealand's total marine environment is protected in marine reserves (see the Department of Conservation website, www.doc.govt.nz [accessed 14 February 2008]). The *Marine Reserves Act* emphasises scientific values, and reserves are not overtly about protecting marine mammals. As with sanctuaries, the Minister of Fisheries must concur to the establishment of a marine reserve *(Marine Reserves Act*, s 5).

794 Section 3E. 'Threatened' species are those that have been declared to be such by the Minister of Conservation under s 2(3).

795 Usually and hereinafter referred to as a 'MALFiRM'. The Act defines 'fishing-related mortality' as 'the accidental death or incidental death of any marine mammal in the course of fishing'. The words 'in the course of' exclude impacts such as competition with fishers for food in the form of the target species (see *Squid Fishery Management Company Ltd* v *Minister of Fisheries*, unreported, Court of Appeal of New Zealand, 13 July 2004, CA39/04, para 7).

796 Section 3F(a).

797 Sections 3E(g) and 3G.

798 Section 15(1). Note that only such measures as are 'necessary' for the purposes specified can be made under s 15(1) and (2). In *Squid Fishery Management Company Ltd*, supra note 795, para 79, the Court held that 'implicit' in this wording was a requirement that the Minister clearly identify the extent to, or point at, which utilisation of squid resources threatened the sustainability of the by-catch species (New Zealand sea lion, or *rapoka,* in that case).

Conservation.[799] In this case, the measures may include a 'limit on fishing-related mortality' (FRML).[800]

In taking these steps, the Minister of Fisheries is bound by the purpose of the Fisheries Act, being to 'provide for the utilisation of fisheries resources while ensuring sustainability',[801] and is required to take its principles into account. These principles include: 'associated or dependent species should be maintained above a level that ensures their long-term viability; 'biological diversity of the aquatic environment should be maintained'; 'decisions should be based on the best available information'; and 'the absence of, or any uncertainty in, any information should not be used as a reason for … failing to take any measure to achieve the purpose of this Act'.[802] The Minister's task has been described in general terms as being to 'balance utilisation objectives and conservation values'. However, a precautionary approach that 'largely resolve[s] uncertainties against utilisation and in favour of conservation' is open to the Minister when dealing with by-catch of a threatened species.[803] This approach contrasts with the approach of the Minister of Conservation under *the Marine Mammals Protection Act*. This Minister's primary focus is the preservation and protection of natural resources held or managed by the Crown for conservation purposes, nevertheless there is nothing in the conservation legislation that explicitly and expressly mandates a precautionary approach.[804]

Steps taken to protect Hector's and Maui's dolphins

Hector's dolphins were declared by the Minister of Conservation to be 'threatened' marine mammals in 1999. Eleven years earlier, a marine mammals sanctuary for Hector's dolphins was established around Banks Peninsula on the east coast of the South Island. Seasonal netting restrictions apply within the sanctuary. But the sanctuary was difficult to establish.[805] Experienced conservation biologists argue that its boundaries are too restrictive and point to data indicating that the Banks Peninsula dolphin population continues slowly to decline.

In 2003, amateur and commercial set netting was banned from Maunganui Bluff to Pariokariwa Point on the northwest coast of the North Island to protect Maui's dolphins. Again, the restrictions were difficult to achieve (the process

799 Section 15(2).

800 Note the different terminology: under the Marine Mammals Protection Act, the limits are called 'MALFiRMs' but under the Fisheries Act, they are known as 'FRMLs'.

801 Section 8(1). 'Utilisation' is defined as meaning 'conserving, using, enhancing, and developing fisheries resources to enable people to provide for their social, economic, and cultural wellbeing' and 'ensuring sustainability' is defined as 'maintaining the potential or fisheries resource to meet the reasonably foreseeable needs. of future generations; and [a]voiding, remedying, or mitigating any adverse effect of fishing on the aquatic environment' (s 8(2)).

802 Sections 9 and 10.

803 Both quotes are from *Squid Fishery Management Company Ltd*, supra note 795, para 77.

804 The focus on conservation (defined in s 2 as preservation and protection) derives from s 6 of the Conservation Act 1987.

805 See Dawson, S.M. and Slooten, E. 'Conservation of Hector's Dolphins: The case and process which led to the establishment of the Banks Peninsula Marine Mammals Sanctuary' *Aquatic Conservation: Marine and Freshwater Ecosystems*, Vol . 3, 1993, pp. 2007-2021.

included a judicial review of the Minister's decision[806]) and are arguably inadequate in that they do not extend sufficiently far south and exclude harbours even though dolphins have been seen and caught there.

Towards the end of 2007, the Ministers of Fisheries and Conservation released a draft threat management plan for public consultation. This plan has no statutory status; it is just a discussion paper but contains some options for managing the threats to Hector's and Maui's dolphins in the future. The Minister of Fisheries' proposals involve various combinations of netting restrictions and voluntary measures, but no bans and no FRML. The Minister of Conservation suggests extending the sanctuary at Banks Peninsula and also establishing four new sanctuaries. However, the Minister's proposals do not involve making a population management plan, or installing a MALFiRM.

4.18.3 Evaluation

New Zealand values biodiversity protection. It is a party to most multi-lateral international environmental agreements that have animal conservation as their goal(s), including the *Convention on Biological Diversity* 1992. New Zealand is also party to the various international environmental agreements that promote sustainable utilisation of fisheries resources and conservation of associated or dependent species, including the *Convention on the Conservation of Antarctic Marine Living Resources* 1980, the *United Nations Convention on the Law of the Sea* 1982, and the *Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific* 1989.

New Zealand also has comprehensive domestic legislation that mandates sustainable utilisation of fisheries resources (this includes avoiding, remedying, or mitigating the adverse effects of fishing on other marine animals) and that emplaces a near-absolute ban on takings of marine mammals. A specialist Ministry of Fisheries (whose task it is to balance utilisation objectives and conservation values) and, significantly, a specialised Department of Conservation (which has the task of managing natural resources for conservation purposes) have been established to administer this legislation. Nevertheless, numbers of key endemic species including Hector's and Maui's dolphins continue to decline. In the case of these endemic dolphins, this is partly because the law is not as conservative as it seems and because successive fisheries ministers have over-valued existing fisheries interests in their decision making.

The relevant New Zealand law suffers from four key deficiencies. First, the law is deficient because it allows by-catch unless this breaches an expressly created measure or other limit under the Fisheries Act or the Conservation Act. Compare this with, for example, the United States where the presumptions work the other way around and incidental takings of marine mammals and other endangered marine species must be positively authorised or permitted. In New Zealand, conservationists must lobby to protect marine animals liable to be taken as by-catch, even if they are classified as threatened or protected, but in the United

[806] *The Northern Inshore Fisheries Company Ltd* v *Minister of Fisheries*, unreported, High Court Wellington, 2 March 2002, per Ronald Young J.

States the burden falls on fishers to seek authorisation for by-catch involving marine mammals or other endangered marine animals.

Permitting systems, such as those in the United States, have a down side in that they can raise problems of perception and entitlement. A good New Zealand example is provided by the quota management system for commercial fisheries. Under this system, fishers are allocated what are effectively pro rata shares (individual transferable quota) in the relevant fishery, from which they generate a right to go out and take 'their' share of fish. The system is supported by a comprehensive legislative scheme. Implementation of the scheme has, however, featured challenges by fishers to reductions in catches and quota holdings on the grounds that quota are property and property rights should be protected. The Courts have always resisted these arguments, but nevertheless Wallace argues that the system's 'fairly clear recognition of the rights of quota holders' but 'less clearly defined entitlements' of '[o]ther members of the fishing sector, and those concerned with the stocks and the environment', has caused one of the quota management system's 'continuing problems': 'asymmetry of specification of rights and duties. A rights-based approach where only one set of parties has well-defined rights leads to the misconception that they are the only party with rights'.[807] Despite the strength of this argument, an approach that expressly defends all by-catch unless positive measures have been introduced to regulate or ban it seems inconsistent with a scheme that otherwise requires any takings of marine mammals to be done only with a specific permit.

Second, New Zealand by-catch law is deficient because it is almost wholly discretionary (and therefore exposes decision makers to interest-group lobbying pressures). In the United States, monitoring programmes for all marine mammal by-catch from commercial fisheries are mandatory,[808] as are take reduction plans for commercial fisheries with frequent or occasional marine mammal by-catch, and recovery and take reduction plans and monitoring plans for by-catch of any species or population that is depleted.[809] Marine animals that fit the legislative criteria in s 4(a)(1) of the *Endangered Species Act* must be designated 'threatened' or 'endangered', and recovery plans for these species must be implemented.[810] In New Zealand, the Ministers of Fisheries and Conservation retain far more discretion. Here, marine mammals may be classified as threatened, marine reserves and sanctuaries may be set aside, population management plans may be made, and these may include MALFiRMs. When a population management plan has been made, further measures to minimise the adverse effects of fishing on protected species may be set in place by the Minister of Fisheries; otherwise the Minister may take such measures as he or she considers necessary to minimise the effects of fishing-related mortality on protected species. About the only thing the Minister of Fisheries is *required* to do is take reasonable steps to ensure that

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807 Wallace, C. 'Environmental Justice and New Zealand's Fisheries Quota Management System' *NZ Journal of Environmental Law*, Vol. 3, 1999, p. 33 at 47.

808 *Marine Mammal Protection Act* of 1972 (US), s 118(d)(1).

809 *Marine Mammal Protection Act* of 1972 (US), s 118(f)(1), 118(2) and 101(a)(5)(E). Recovery plans fall under the auspices of the Endangered Species Act of 1973 (US).

810 *Endangered Species Act* (US), ss 4(a)(1) and 4(f) respectively.

any MALFiRM actually set in a population management plan is not exceeded. Considering, however, that the Minister of Fisheries' concurrence is needed for a plan (and its MALFiRM) to be approved, it is hardly onerous to then require the Minister to ensure that MALFiRM is preserved.

Third, the law is deficient in that it over-values fishing interests by placing the final decision-making power effectively in the hands of the Minister of Fisheries in all cases relating to the introduction of measures to protect by-catch species, and by setting too high a bar for the making of measures to ameliorate the adverse effects of fishing activities. Thus, the Minister of Fisheries can only make measures that are 'necessary' (not merely desirable, or even reasonably necessary) to ameliorate by-catch. The Minister of Conservation cannot act alone to prevent by-catch and protect marine mammals. He or she must obtain the consent of the Minister of Fisheries before making a sanctuary. He or she requires the concurrence of the Minister of Fisheries to make a population management plan, without which he or she cannot set a MALFiRM. The Minister of Fisheries, on the other hand, need only consult with the Minister of Conservation if he or she takes measures to ameliorate by-catch in the absence of a population management plan. In a related case concerning the issue of concurrence by the Minister of Fisheries with the Minister of Conservation's decision to establish a marine reserve at Parininihi, the Court described the requirement for concurrence as 'part of the statutory safeguard provided in the Act for commercial fishers', and determined that the Minister of Fisheries must make 'his own decision' about the impact of the proposed reserve on commercial fishing in the area.[811] Unless the Minister of Fisheries' 'own decision' favours the introduction of a measure to reduce by-catch, the measure will not be introduced no matter what the Minister of Conservation's view.

The fourth major weakness in New Zealand's law that relates to fisheries by-catch is that it contains no underlying legislative goal of zero fishing-related mortality. In the United States, whether or not the marine mammal is endangered, threatened or depleted, and whether out not the by-catch is permitted, the overall 'immediate' legislative goal is that 'the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations' should be 'reduced to insignificant levels approaching zero mortality and serious injury rate'.[812] Even if it is not attained in practice, this goal conveys the idea that by-catch should always be reduced, and that the 'correct' or desirable level of by-catch is always zero. No such message is conveyed by the New Zealand legislation.[813] If a FRML or a MALFiRM were to be set for Hector's or Maui's dolphins in New Zealand fisheries waters, fishers would have to observe it. But once by-catch was reduced so that the FRML or MALFiRM was not breached,

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811 *CRA3 Industry Assn Inc* v *Minister of Fisheries*, unreported, Court of Appeal of New Zealand, 29 March 2001, CA 124/00, paras 6, 16 and 29.

812 *Marine Mammal Protection Act* (US), s 118(a)(1). But note s 118(b)(2), which provides that 'Fisheries which maintain insignificant serious injury and mortality levels approaching zero rate shall not be required to further reduce their mortality and serious injury rates'.

813 According to The State of New Zealand's Environment Report (Ministry for the Environment and GP Publications, Wellington, 1997), the zero mortality is 'seen as an unattainable goal'. (The Report may be downloaded or viewed online at www.mfe.govt.nz/publications).

there would be no continuing incentive for fishers to further reduce by-catch in relevant fisheries to the point of zero mortality and serious injury.

4.18.4 Lessons for the future

This case study captures a pressing issue in fisheries management in New Zealand. There are successes in the story: New Zealand has a *Marine Mammals Protection Act*; it operates around a presumption of protection for marine mammals and it provides for further protective measures for by-catch species that combine and integrate with provisions in the Fisheries Act; and a sanctuary at Banks Peninsula and some netting restrictions have been put into place.[814] But, there are also abject failures: there is no population management plan, no MALFiRM or FRML has been set or proposed; the sanctuary's boundaries do not cover the full range of the Banks Peninsula Hector's dolphin population; the netting restrictions exempt harbours and are hard to enforce; and the whole process of getting anything done has been long and difficult.[815]

In the final analysis, all of these abject failures are attributable, wholly or partially, to weaknesses in the law. In essence, the relevant law is too tolerant of by-catch and over-values fishing interests. The law leaves too much discretion in the hands of the relevant Ministers, who must be persuaded by conservationists that there is a problem and that fishing restrictions should be considered. These deficiencies could be resolved by law reform that would result in more robust legislation that ensures better protection for by-catch species. Specific reforms that should be considered are: including in the legislation a general statement of principle supporting an overall goal of zero tolerance for by-catch, emplacing a legislative ban on by-catch so fishers are required to obtain permits to take by-catch species, enabling the Minister of Fisheries to take 'reasonable' (rather than only 'necessary') steps to protect by-catch species, enabling the Minister of Conservation to act after having consulted (but without the concurrence) of the Minister of Fisheries, and, finally, *requiring* the Minister of Conservation to make population management plans and introduce measures to protect by-catch species that are classified as threatened or endangered.

Law reform along these lines could enable better protection of Hector's and Maui's dolphins in the future. It would also clearly benefit other species that are adversely affected by fishing activities in New Zealand's fisheries waters, including the New Zealand Hooker's sea lion (*rapoka*) (*Phocarctos hookeri*), New Zealand fur seals (*kekeno*) (*Arctocephalus forsteri*), common dolphins (*Delphinus delphis*), bottlenose dolphins (*Tursiops truncatus*), dusky dolphins (*Lagenorhynchus obscurus*), and seabirds including albatross, petrels, penguins, shearwaters and

814 Some similar steps have also been taken viz other by-catch species in New Zealand. For example, fisheries regulations made in 1993 require tuna long-liners to use tori lines (bird-scaring devices), a marine reserve extends for 12 nautical miles around the Auckland Islands and protects species including yellow-eyed penguin (*hoiho*) (*Megadyptes antipodes*) and New Zealand/Hooker's sea lion *(rapoka*) (*Phocarctos hookeri*) from fishing activities, and a FRML for *rapoka* beyond the marine reserve has been in place since 1995/1996.

815 For example, see Dawson and Slooten, supra note 805 and Hughey, K. D. F. 'An Evaluation of a Management Saga: the Banks Peninsula Marine Mammal Sanctuary, New Zealand' *Journal of Environmental Management*, Vol 58, 2000, pp. 179-197.

gannets. Even if the law was to be reformed, it could be too late for Maui's dolphins. Something must be done for this sub-species urgently or we will be the generation that witnesses its extinction.[816] This matters not only for Maui's dolphins, but also in terms of New Zealand's general record with extinctions. New Zealand has a very high level of species endemism, but also a very high level of species extinction.[817] This country has an international responsibility to protect the endemic species that remain.

[816] Dawson, S. et al.'The North Island Hector's Dolphin is Vulnerable to Extinction', supra note 4 and 'Maui Dolphin Danger Critical' *Otago Daily Times,* 11 August 2004.

[817] According to the *New Zealand Biodiversity Strategy*, supra note 785, p. 4 'New Zealand … has one of the worst records of indigenous biodiversity loss. While biodiversity varies in natural cycles, nothing since the extinction of the dinosaurs (65 million years ago) compares with the decline in indigenous biodiversity in New Zealand over the last century … Today, about 1000 of our known animal, plant, and fungi species are considered threatened'.

4.19 The Case of Nunavut: Global Warming and Vulnerability in the Canadian Arctic

Laura Westra[818]

Abstract

Environmental conditions imposed by global warming are now in conflict with the traditional lifestyle of Arctic Peoples. In this brief case study, we consider the Inuit people of the Nunavut region in the Canadian Arctic. If their 'right to be cold' is not respected, their health and life are at grave risk, and so is their survival as a people.

4.19.1 Introduction

'The world can no longer carry on "business as usual" when the basic rights of the vulnerable are being diminished and often destroyed, due to a "disconnect" between development and environmental protection'.[819]

Much can be learnt about governance for sustainability from the climate change impacts on the Arctic region and on the Inuit people, in particular the impacts on the Nunavut region. First, all regions and peoples will not be affected equally. Many of the Earth's most vulnerable ecosystems and peoples will be disproportionately harmed. Thus the nature, the scale and scope of our climate change responses must take into account what is required to protect the most vulnerable. Second, the Inuit, like many indigenous peoples, retain a culture that is intertwined with and dependent upon the ecological systems they inhabit. Degradation of these ecological systems threatens the very foundations of their culture. Loss of cultural heritage is not only a great harm inflicted upon present and future generations of Inuit, but their loss is also our loss. Their culture is a part of the cultural heritage of *all* humanity, of which we are all guardians. Third, their knowledge of natural systems and human inter-relationships with natural systems provides an important source of alternative values and knowledge beyond the scientific and technocratic. For these reasons, the people of the Nunavut region are amongst our most precious canaries in the cage. We must ensure their continued health and well being by protecting the fragile ecological systems that are their home. To achieve this, our governance structure will have to deliver more than technological fixes and lowest-common-denominator greenhouse-gas targets and timetables, both of which perpetuate business as usual.

4.19.2 Description

While Western developed nations debate the existence of global warming and, if it exists, what to do about it, the Inuit have been plunged into its effects with no way out. In 2004, scientists conducted a comprehensive study of climate change in the

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[819] Watt-Cloutier, S. Comment on Westra, L. 2007, *Justice and the Rights of Indigenous Peoples*, Earthscan UK, back cover.

Arctic and reported that, 'the region as a whole has undergone the greatest warming on Earth in recent decades with annual temperature now averaging 2-3 degrees Celsius higher than in the 50s'.[820] Temperature changes on this scale affects the region's ice to such a degree that, 'late summer Arctic sea ice has been thinned by 40 percent in some parts, and has shrunk in the area of roughly 8 percent over the past 30 years'.[821] [822]

What are the major effects of these drastic changes? The first thing to note is that Arctic people are particularly vulnerable to these changes, as a recent study of the Nunavut region demonstrated.[823] For the purposes of that study, Ford and his collaborators took an approach to the issue based on the 'Conceptual Model of Vulnerability', as indicated by the United Nations Framework Convention on Climate Change.[824] Vulnerability is defined as a 'function of the climate conditions to which a system is exposed, its sensitivity, and its adaptive capacity'.[825] The *special* vulnerability of the Inuit arises principally because of their dependence on the land and sea for their subsistence, a condition they share with most indigenous peoples' communities. The Inuit's defining activity is the hunt. As Ford explains, '[c]onsiderable time is spent by most community members 'on the land' (a term used by Inuit to refer to any traditional activity, camping, hunting, or traveling) that takes place outside the settlement'.[826]

Several issues illustrate the vulnerability of the Inuit to the effects of global warming as they pursue their hunting and gathering activities. These issues arise either when the Inuit prepare for the hunt, or when they are already out 'on the land' (see Table 1). For example, the ability to predict weather-related dangers and to be able to adjust plans according to that knowledge is highly important. But, as Lisha Levia, a resident of Arctic Bay puts it, 'Normally, when the wind starts coming, it comes gradually, then it gets stronger later on. But today when it starts getting windy, it comes on really strong. I cannot predict the weather through looking at the clouds when I used to'.[827] Another resident, Eva Inukpuk, reports a similar experience of her 70-year-old mother, who used to live in igloos and who could accurately predict the next day's weather. She notes, 'Now, it could be anything. All her knowledge counts for nothing these days'.[828]

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820 Ford, J. 'Living is: The Change in the Arctic', *World Watch*, Sept/Oct, 2004, pp. 15-21, p. 18.

821 Ibid.

822 Kattsov, V.M., and Kallen, E., 'Future Climate Change; Modeling and Scenarios for the Arctic', in *Arctic Climate Impact Assessment Scientific Report*, 2005, pp. 99-150.

823 Ford, J., Smit, B., and Wandel, J. 'Vulnerability to Climate Change in the Arctic: A Case Study from Arctic Bay, Canada', *Global Environmental Change*, Vol.16, 2006, pp. 145-160.

824 1992 United Nations Framework Convention on Climate Change, www.unfcc.int/resource/docs/convkp/conveng.pdf (accessed 14 August 2008).

825 McCarthy, J. et al*., Climate Change 2001: Impacts, Adaptation, Vulnerability Contribution of Working Group II to the Third Assessment Report of the Intergovernmental Panel on Climate Change*, (Cambridge University Press, Cambridge UK, 2001).

826 Ford, et. al., 2006, p. 149.

827 Ford, J., 2005, p. 19.

828 Kendall, C., 'Life at the Edge of a Warming World', *The Ecologist*, Vol. 36, No.5, July/August 2006, p. 27.

As these testimonials indicate, we are witnessing more than climate change, it is – as the people in the Nunavik region describe it – 'climatic disruption'.[829] Climatic disruption includes 1) the total unpredictability of the changes caused by increased temperatures, 2) the related obsolescence of the Inuit's knowledge base, and 3) the severe impact on their cultural life.[830]

Because the Inuit are traditionally dependent on their hunting activities, their ability to predict the weather in preparing for a hunting trip is often a matter of life and death. For instance, if spring temperatures are expected they might decide to use tents rather than build igloos. However, if temperatures unexpectedly drop in the night the hunters may be at risk of freezing to death. Similarly, the arrival of freak blizzards and sudden snowmelts may prove equally fatal. If temperatures are warmer than expected, hunters may unexpectedly fall through thin ice.[831] Thus, when faced with climatic disruption, the importance of traditional knowledge is drastically diminished. Experienced hunters, formerly considered the keepers of the 'collective social memory',[832] may see their traditional knowledge fail and this, in turn, undermines gravely the very existence of their cultural integrity. In short, rising weather unpredictability forces fundamental changes in lifestyle on local inhabitants.

In most circumstances, modern technology does not guarantee mitigation of the increasingly hostile environmental conditions described. Traditional travel, for example, involved dog sleds. Animal instinct, together with the Inuit's own knowledge base, ensured safety for hunters. In comparison, use of modern snowmobiles can result in sudden plunges through thin ice hidden beneath snow.[833] The use of global positioning systems (GPS) might help preserve, at least in part, the continuity of traditional ways. However, when these human-made devices fail, as they often do, the stranded hunters are left with neither technology nor traditional knowledge to guide them to safety.[834]

The changes described above are harmful enough, but of even more concern is the social fall out that is a consequence of transformation of traditional subsistence-based societies, to 'southern' wage-based economies. Unemployment in both the Arctic Bay and the settlement of Igloolik , stands at more than 20 percent and alcoholism is a major problem. Nunavut's suicide rate, 77 deaths per 100,000 people, is one of the highest in the world, and six times higher than in the rest of Canada.[835] The inability to continue traditional practices leads to dependence on wage-based positions, hence the change to a 'dual' or 'mixed'

829 Ibid.

830 Ford et. al., 2006, p. 150.

831 Kendall, C., 2006, p. 27.

832 Ford et. al., 2006, p. 19; the 'memory' is based on the knowledge and skills passed on by elders, and it is known as Inuit *Qaujimajatuqanqit*, pronounced cow-yee-ma-ya-tu-kant-eet.

833 Ford et. al., 2006, p. 151.

834 Ford et. al., 2006, p. 155.

835 Ibid., p. 20.

economy in which both traditional living and market-based activities coexist.[836] In addition, in the 1960s, the government promoted 'fixed settlements', which further complicated traditional access to hunting areas.[837] Finally, the dependence on a 'mixed' economy implies the reduction of traditional foods and increased dependence on store-bought and fast food with the expected rise in obesity and diabetes as the result of unhealthy diets.[838]

The corollary of all these changes is not only a grave threat to the physical and mental health of the Arctic Bay Inuit, but also, increasingly, to the cultural survival of those Inuit as a people. The 'social networks' typical of these societies are seriously eroded, as Lisha Qavavang puts it, 'that's the only way we survive, by supporting one another'.[839] But the existence of a 'mixed' economy does not facilitate the re-distribution and transfer mechanisms of food sharing.[840] The difficulties encountered in the changed physical environment dissuade the present and older generations from persisting in their traditional ways, but the results have been even worse in the younger generation:

> English has replaced Inuktikut as the dominant language among younger generations, older generations think the young Inuit are not interested in learning the traditional ways, and the Euro-American social norms of youth are far removed from the traditional upbringing of older generations.[841]

In recent years, many younger people have not learned the traditional skills necessary for successful hunting. Without these skills they are unable to ensure their own safety. As a result, they are forced to depend upon on elusive monetary resources to acquire the technology and gadgets they need to survive. With only a limited number of private-sector jobs available, high unemployment is a fact of life further limiting their economic prospects.

4.19.3 Conclusion

In recent months, much has been made of efforts to have the Bush Administration list the polar bear as an endangered species. The rationale is that such a listing would require a greater acknowledgement of and response to climate change. This case study reminds us that climatic disruption threatens not only the polar bear, but also the indigenous peoples in the Arctic region. This disruption is harmful to not only their physical and mental health, but to their very culture, without which the future of their children is imperiled and the collective cultural heritage of all humanity is diminished. Protecting the Arctic will require a greater awareness of

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836 Damas, D *Arctic Migrants, Arctic Villagers*, (McGill-Queens University Press, 2002); Chabot, M., 'Economic Changes, Household Strategies, and Social Relations in Contemporary Nunavik Inuit', 2003, *Polar Record*, Vol. 39, pp. 19-34.

837 Ford et. al., 2006, p. 150.

838 Ford, p. 2005.

839 Ford et. al., 2006, p. 153.

840 Ford et. al, 2006, p. 153; Damas, D, 'Central Eskimo Systems of Food Sharing', 1972, *Ethnology* Vol.11, pp. 220-240.

841 Kral, M., 'Unikkaartui Meaning of Well-being, Sadness, Suicide, and Change in Two Inuit Communities', Final Report to the National Health Research and Development Programs, Health Canada, 2003.

the vulnerability of the Inuit peoples, and climate change responses that are commensurable with their vulnerability. To achieve this, our governance systems will need to deliver more than technological fixes and lowest-common-denominator greenhouse-gas targets and timetables. The ability of the Inuit to argue for their own survival before international fora is limited. It is therefore beholden to us to appreciate their needs and interests and accept responsibility for their continued health, well being, and dignity.

Table 1 Harvesting Activities Sensitive to Observed Changing Climatic Conditions

Activity	Time of year	Hazardous conditions	Implication of changing conditions for hazardous conditions
General hunting/travel on the sea ice	October-December	Thin ice	New areas of open water, areas of unusually thin ice, and a change in the location of leads[a] have increased the dangers of traveling on sea ice and lake ice. People have lost and damaged equipment
	October-July	Weather	More unpredictable weather and sudden weather changes have forced hunters to spend extra unplanned nights on the land. Unusual weather—rain in winter, extreme cold in spring—is dangerous because hunters are not prepared
Narwhal hunt	June-July	Ice break-up	Sudden and unanticipated wind changes causing sea ice to unexpectedly disintegrate. Incidence of hunters being stranded on drifting ice[b] and having to be rescued by helicopter
General hunting/travel by boat	July-September	Waves/stormy weather	Sudden changes in wind strength and direction, combined with stronger winds, have forced hunters to spend extra nights 'on the land' waiting for calm weather to return to the community

[a] A crevice or channel of open water created by a break in a mass of sea ice.
[b] Drift occurs when ice is broken off and blown away from ice that is attached to the land.

Source: Ford J.D. et. al., 2006, p. 150.

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