

ENVIRONMENTAL LAW & MANAGEMENT

SPECIAL ISSUE

UNITED KINGDOM ENVIRONMENTAL LAW ASSOCIATION UKELA CONFERENCE PAPERS 2016

From global to local: how international environmental law affects UK practice in energy, infrastructure, nature conservation and habitats, planning, regulation and litigation

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United Kingdom Environmental Law Association

UKELA Conference 2016

In association with the University of Sussex,
Jubilee Lecture Theatre, School of Business Management
& Economics, Brighton,
1–3 July 2016

From global to local: how international environmental law affects UK practice in energy, infrastructure, nature conservation and habitats, planning, regulation and litigation

Foreword

President, patrons, ladies and gentlemen, could I extend a very warm welcome to everyone to UKELA's 29th Annual Conference. The theme is how international environmental law affects all sectors of UK environmental practice.

My immediate thanks go to the conference organising team, led by one of my vice chairs, Ben Stansfield, supported by Linda Farrow, other staff members and Origin Events.

I prepared this address before the events of 23 June 2016. I can tell you that, within a few hours of the referendum result being announced, your executive director and staff and my vice chairs and I were in discussions about the implications for UKELA and for the UK's environmental laws. I will return in just a few moments to let you know our approach to Brexit, arguably one of the most significant constitutional developments in our country since the Bill of Rights was passed in 1689.

Let us first consider the theme for our conference and why the UK Environmental Law Association is having a conference about international environmental law at all: why are we emphatically not sticking to our UK knitting?

Why have an international conference?

It is a perfectly valid question. It has been put to me by a couple of our members. By this time tomorrow we will have all the answers. Our international and UK speakers will spell out, very clearly, why we all need to keep up-to-date with international developments. They will explore aspects of public international law relating to the environment. We may discuss how a comparative law approach helps us find new and better ways to regulate environmental perils by learning from other countries.

We are, of course, exploring this dimension for many reasons. The problems environmental law exists to defeat are hydra-headed and, yes, they are often of a global nature. Let me just share just two reasons for this international conference.

- First, clients with an eye on the long term need to know what is coming – and how emerging environmental liabilities will impact business operations. What could be more significant than, for example, the international commitments arising from COP 21 in Paris just months ago in December 2015? The professional adviser who can see beyond the short term, who can identify and explain the trends, will be very highly valued by the 'C' suite: the CEO, the CFO and the CSO or chief sustainability officer.
- Secondly, whilst we may not always be aware of it, other countries around the world have looked to the UK – the fifth wealthiest country in the world – as a leader in environmental and especially climate regulation. I would argue that this position brings with it the moral responsibility to help those in need. UKELA, I am proud to say, is starting to help environmental law associations in a number of countries that are struggling to cope with their severe environmental challenges.

About Brexit

Now, let's turn to Brexit. This has been in UKELA's sights for a long time. We have published papers from our Working Parties on Brexit, organised seminars and an all-day conference on the subject. We have a dedicated Brexit page on the website, which has attracted considerable interest from members.

Editorial note:

Since the conference in July 2015 the editors and some authors have added information about recent developments where relevant to the original texts. Footnotes have also been inserted to provide general references.

In the run up to the referendum UKELA's Council adopted a position of neutrality for very compelling reasons. We are a charity, not a lobbying group. Our influence is based on our independence and expertise.

Neutrality does not mean disengagement or apathy. We have responsibilities to raise awareness about environmental law. One of our aims is to advance the education of the public about environmental laws. This applies whatever the weather; in stable and unstable times.

With this in mind, I wrote to the leaders of the Remain and Leave campaigns before the vote to ask them to explain their positions in relation to environmental law and protection. I did receive a response from Britain Stronger in Europe which is on the website, but I did not receive a response from the Leave campaign.

On 30 May 2016, UKELA's Council was invited to revisit its neutral position by the Nature Conservation Working Party (NCWP) and to put out a public statement saying that Brexit would be damaging to the environment. I welcomed this intervention. It confirms that we have an active and interested membership and reflects the value we place on inclusion and open dialogue in UKELA.

We reconsidered the matter very carefully, but declined to change our stance. My letter to the NCWP, which is on the website, states that:

As an organisation that relies on evidence to inform its work, we must also acknowledge that it is possible that an EU Exit, depending on the exit option adopted, may present opportunities to maintain our legal frameworks largely as they are and/or to enhance them. In the event of an exit vote, I believe Trustees would want to be active in suggesting how different routes can be employed to secure the best of what we have now and identify opportunities for further improvement.

We are a membership organisation and we are a charity. We will listen very carefully to our membership, to our trustees and patrons, before deciding on how best to respond to the challenges, uncertainties and opportunities associated with Brexit. This weekend's Annual Conference provides us with a timely opportunity to take soundings as to UKELA's next steps.

Clearly, there is a possibility that our framework of EU-derived environmental laws will be subject to root and branch review by policy-makers in England, Scotland, Northern Ireland and Wales. That would be a very demanding exercise for government to bear. If it arises, I am sure that UKELA will have an invaluable contribution to make as an independent and expert association of environmental lawyers and professionals. Indeed, it is hard to think of any other organisation better placed than we are to input to this process at what may be a time of national need.

There are a number of choices open to us and in respect of which I am already receiving suggestions from members. We could be proactive and set up a task force to start to look at key areas of EU-derived law and develop an objective evidence base for their retention or, indeed – where we perceive shortcomings – amendment. We could be active and make it known to policy-makers that we are available to provide independent expertise so as to 'secure the best of what we have now and identify opportunities for further improvement'. We could be cautious: we could keep a watching brief on the developing scene.

So, a moment of reckoning may be coming and we have to be prepared for it. We may wish, or need, to make UKELA's most important contribution to environmental law to date. I am confident that we will meet our responsibilities.

In the beginning

And now, let's take the long view of UKELA and the importance of engaging beyond our borders. International considerations have always been part of UKELA's genetic make-up. Our founders were far-sighted when they set up our association, back in 1987.

I recently met up with my good friend Professor Richard Macrory. Richard brought along a copy of the very first edition of UKELA's environmental law journal from February 1987. And there, on the back page, I was delighted to see a long list of environmental law associations from around the world – the US, Canada, France, West Germany, India, Greece, Mexico, the Netherlands, Russia and Spain – all sending UKELA their hearty good wishes.

To quote from Richard's own address as our first chairman back in 1987:

... events this year have demonstrated vividly that many environmental issues have a real and tangible international dimension – Chernobyl, the Sandoz Rhine pollution incident and the continuing debate on acid rain. Improved international co-operation and law-making will be the order of the day.

If any incident shows that pollution does not respect borders, it is Chernobyl. One of only two category seven nuclear incidents (the other being Fukushima) Chernobyl exposed billions of people to elevated levels of radioactive contamination, with impacts on the Welsh mountains and the Scottish Highlands.

So, there it was: the germ of the international idea, right at the start of our journey, almost 30 years ago.

UKELA's international strategy

What then is UKELA doing about the international dimension in 2016? We published our new four year strategic plan earlier this year, which was entitled 'Better environmental law through measured ambition'. International issues feature more prominently than ever before. I would encourage you to read it. It is not my plan or Linda Farrow's plan. It is *your* plan. It is a living document that you can contribute to. The plan is now a standing item on all UKELA Council meeting agendas so that we can check how well we are doing.

In relation to international matters our plan says:

- We will attract an 'increasing number of international members' as we continue to spread our wings
- We will use our Annual Conference in Brighton to 'embed and nurture international partnerships'
- We will 'interact with international bodies to share knowledge, foster cooperation and enhance networking in key jurisdictions relevant to members' working lives'

Given the outcome of the referendum we will be revisiting the plan to determine whether any of our priorities need to change.

International initiatives in 2016

2016 has been a busy year for international activities; in many ways it has marked the start of our engagement with specific countries. We have met official overseas delegations over the past six months from South Korea and Brazil. We will be meeting a Turkish delegation shortly. We are reaching out to Sierra Leone and other countries in Africa where some of our members – Richard Honey, Fiona Darroch and Helen Bowdren of Dentons – have strong connections.

If we just take South Korea as an example of what UKELA can achieve, we were approached by the Foreign Office to see if we could meet members of the South Korean 'People for Earth Forum'. We agreed and lined up ten meetings for the delegation that visited London in February. They were enormously grateful to us. In April, Stephen Tromans was in Seoul; he kindly met up with members of the Forum and this has helped to cement relations even further.

Kumsil Kang, executive director of the Forum – a former judge and justice minister for South Korea – has sent us the following message:

Dear Friends participating in the Annual Conference,

It was in February when we had the chance to visit London and meet you for the first time. We are very pleased that there has been much interaction between the two organisations and hope to learn more from you since the UK seems to have quite a proactive stance in climate change issues. We admire your efforts including the Annual Conference that you are holding and hope to contribute to the common goal and agendas that have now become cross-border issues.

According to the UNFCCC Paris Agreement last December, South Korea has decided to join the efforts to reduce the emissions of greenhouse gas. However, in reality South Korea's environment policies have been moving backwards in recent years. To demonstrate, we came 173rd out of 180 countries in the Environmental Performance Index and are ranked first among OECD countries in the increase of greenhouse gas emissions.

Anyone on the street will tell you that the air quality in Korea is getting noticeably worse as we wrestle with health threats from increasing fine dust plaguing our air. However, despite all this, construction of coal-based power plants is still on the increase and Korean society is deeply concerned about these backward moves.

We are at a time when the roles of lawyers have become more important than ever. With the 'Centre for Climate Change Law' as our hub, the People for Earth Forum will continue to discuss and devise new ideas and measures to help solve current and impending environmental issues.

We hope to meet you in person again soon, and in the meantime, please know that your support and friendship gives us great strength in our endeavours.

What members can do to help

To paraphrase a great leader from half a century ago, ask not what UKELA can do for you, but what you can do to support UKELA's international goals. You can get involved.

I am looking for five international ambassadors to deliver our international plans. All you need is enthusiasm to make friends with fellow environmental lawyers and professionals in other parts of the world. They need help to develop their country's environmental laws. The help may take the form of friendship and support, training and capacity building. We will be developing action plans so that a handful of countries can learn from UKELA, and that we can learn from them.

Closing

I want to close this introduction on a personal note. As a young boy growing up on the edge of the Peak District National Park, little did I know where life would take me. My brother, sister and I were all on free school meals at the local primary school. I was 15 years old before anyone used the word 'university' in conversation.

To be chairing UKELA all these years later is far beyond anything I could have imagined. And yet, when I think about the time I spent as a boy roaming the hills and moors of Derbyshire, building an unbreakable connection with the natural environment, it sometimes seems as though it was meant to be. It is that connection with the great outdoors and the wild places forged back then which first drove my interest in environmental law and, from that, my long-standing membership of this fantastic association.

So, I am most grateful to my good friend Richard Kimblin QC for asking last spring if I was interested in becoming UKELA's next chair. It is an honour to serve UKELA, to build on Richard's work and to prepare UKELA for the next stage. To look beyond our borders. To spread our wings and always to aim high.

I do hope that you enjoy this international conference and that you will find time to share your thoughts – in person or by email – about UKELA's post-Brexit position.

Stephen Sykes* *Chair, UK Environmental Law Association***

www.ukela.org

1 July 2016

* Chair, the Ashfield Group of Companies and Visiting Fellow, Birkbeck College's School of Entrepreneurship.

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Principal speakers at the UKELA Annual Conference 1–3 July 2016

Terry A'Hearn is Chief Executive Officer at SEPA. He has over 20 years' experience in the environment profession, having held senior roles in Melbourne with the Environment Protection Authority in the Australian state of Victoria, in London with the global consulting firm WSP and, most recently, in Belfast as Chief Executive of the Northern Ireland Environment Agency before he joined SEPA. In all this work, Terry has strongly focused on bringing environmental and economic aims together; supporting business and social innovation and getting tougher with the worst environmental performers. Terry is a Senior Associate at the Cambridge Programme for Sustainability Leadership, a member of the Advisory Board of the Global Footprint Network and a Fellow of the UK Institute of Directors.

Pamela E Barker has practised environmental law for more than 25 years. She is a member of the law firm Lewis Rice LLC in St Louis, Missouri. Prior to joining Lewis Rice LLC, Pam served as Chief Environmental and Regulatory Counsel at Appvion Incorporated, a specialty paper manufacturer in Appleton, Wisconsin. Pam currently serves as the Chair of the American Bar Association Section of Environment, Energy and Resources and is a Fellow of the American Bar Foundation, an honorary organisation of lawyers, judges and legal scholars whose careers have demonstrated outstanding dedication to the welfare of their communities and to the highest principles of the legal profession. Pam is a frequent lecturer on environmental issues at events sponsored by the American Bar Association, State Bar of Wisconsin and the National Brownfields Conference sponsored by the US Environmental Protection Agency. Pam received her law degree from the University of Wisconsin–Madison and her BA from Beloit College, Wisconsin.

Christine Covington is a Partner at Corrs Chambers Westgarth, Sydney and is independently recognised as one of the best planning, environmental and property lawyers in Australia, having played pivotal roles in significant projects from Sydney to Beijing.

Throughout her distinguished career, Christine's mix of planning, environment and property skills have provided her clients with a unique perspective on property development, planning and environmental compliance. Christine has experienced first hand the legislative development and growing impact of environmental issues on business. She is a key advisor to some of Australia's largest land and property developers including Challenger, McDonald's, Stockland, Woolworths and various government agencies and departments.

Externally, Christine is Chair of City West Housing, an agency that provides affordable secure housing, and sits on the Boards of the NSW Environment Protection Agency and of the Barangaroo Delivery Authority which manages Sydney's waterfront development at Barangaroo and is recognised as one of the world's most ambitious urban renewal projects.

Nicholas Dunlop is Secretary General at Climate Parliament and has designed and managed a series of successful international initiatives on peace and environmental issues. Among other results, he has:

- Established the New York based network of legislators Parliamentarians for Global Action (PGA).
- Organised the Six Nation Peace Initiative, which brought together the Presidents and Prime Ministers of Argentina, Greece, India, Mexico, Sweden and Tanzania, with support from Pope John Paul II, to help end the US–Soviet nuclear arms race.
- Launched the EarthAction Network at the Earth Summit in 1992, linking 2000 citizen groups in 160 countries together with several hundred Members of Parliament, serving as its joint Executive Director until 2001.
- Persuaded the US Senate, through an EarthAction campaign, to ratify the UN Convention on Desertification.
- Organised an awareness-raising campaign on climate change in the year 2000 with actor Leonardo DiCaprio and other celebrities.
- Established the Climate Parliament, a global network of legislators working on climate change and renewable energy. The Climate Parliament has mobilised more than US\$1 billion in additional public support for renewable energy in developing countries.

Nicholas Dunlop was a co-recipient of the first Indira Gandhi Prize for Peace and Development, awarded by the President of India. He is a citizen of New Zealand, South Africa and Ireland.

Nicholas Gard is a Managing Scientist in Exponent's Ecological & Biological Sciences practice, located in Bellevue, WA. He is an ecotoxicologist with more than 25 years of experience in wildlife ecology, toxicology, natural resource damage assessment (NRDA), and ecological risk assessment. Dr Gard has worked on approximately 15 major NRDA cases throughout the USA. He has assessed injuries to natural resources from substances such as PCBs, dioxins, mercury, metals, PAHs, and petroleum, and applied equivalency analysis techniques to evaluate and scale restoration alternatives. Currently, he is also providing technical support to an industry group on issues related to the implementation of the Environmental Liability Directive in the EU.

In addition to NRDA experience, Dr Gard also has extensive expertise conducting ecological risk assessments, environmental impact assessments and habitat evaluations in a variety of estuarine, terrestrial and wetland ecosystems both in the United States and internationally, entailing evaluation of environmental effects for a number of industrial activities including agro-chemical operations, manufacturing facilities, mines, pulp and paper mills, refineries, smelters and pipelines. Dr Gard holds a PhD in Environmental Toxicology from Clemson University, an MSc (Wildlife Ecology) from McGill University and a BSc (Wildlife Biology) from University of Guelph.

Heather Hamilton is a fisheries lawyer in the Biodiversity Team at ClientEarth, a public interest environmental law organisation. Her work focuses on the implementation of the Common Fisheries Policy, as well as its interaction with EU environmental legislation such as the Birds and Habitats Directives and the Marine Strategy Framework Directive. Prior to joining ClientEarth, Heather was a solicitor at Richard Buxton Environmental and Public Law, working on judicial review and nuisance cases. She qualified as a solicitor in England and Wales in 2013 and holds a degree in law from the University of Oxford (MA Oxon). In 2010 Heather completed a Masters in Environmental Law and Policy at University College London, during which she completed a dissertation looking at the UK Marine and Coastal Access Act 2009. She also organises events as part of the Young UKELA team.

Peter Harvey is a lawyer at Thomson Reuters (Practical Law). Before joining Practical Law in 2007, Peter was an environmental lawyer in private practice for many years. He has extensive experience of advising commercial, public sector and institutional clients (FTSE 100 companies, local authorities, government departments and agencies) including on litigation in the civil and criminal courts. Peter has a Masters in Environmental Law and, before qualifying as a solicitor, he worked for a local authority planning department. He is a co-founder and trustee of a leading community energy organisation, as well as a convenor of the UKELA Waste Working Party.

Stephen Hockman is a Barrister at 6 Pump Court, London with a broad environmental, health and safety, and planning practice. His practice encompasses making and resisting public law challenges to environmental decisions, appearing for claimants and defendants in environmental cases in the common law courts, for example nuisance, and prosecuting and defending in major pollution cases. He has conducted environmental cases as far afield as Hong Kong and the British Virgin Islands.

In addition to his client work, Stephen has held a number of international posts including Chairman of the International Court for the Environment (ICE) Coalition where he has campaigned for the establishment of an International Environmental Court. He is also an Advisory Council Member of the Advocates for International Development and a trustee of ClientEarth.

Jonathan Kahn is a Senior Partner in the Toronto Office of Blake, Cassels & Graydon LLP and a leading Canadian environmental lawyer. For over 25 years he has provided representation and advice in a broad spectrum of environmental law and related forms of regulatory law. He represents clients on the purchase, sale, and remediation of contaminated properties; management of natural resources; transportation, handling and disposal of hazardous substances; environmental permitting; air, water and waste regulation and other environmental matters. Jonathan's wide-ranging expertise also includes representing accused corporations in significant environmental prosecutions; acting for proponents in major mining, renewable energy and infrastructure projects and providing environmental law advice on significant transactions, across a broad range of industries.

Jonathan is Secretary of the American Bar Association's Section of Environment, Energy and Resources Law, the first

non-American to serve on that organisation's Executive Committee. He became a member of that Section's Governing Council in 2012 after serving as Chair of several substantive committees. In 2011 he was the first non-American to chair the American Bar Association's Annual Conference on Environmental Law. Jonathan is a past chair of the National Environment, Energy and Resources Law Section of the Canadian Bar Association and of the Environmental Law Section of the Ontario Bar Association. Jonathan has also authored several environmental publications.

James Maurici is a Barrister at Landmark Chambers, London and was called to the Bar of England & Wales in 1996. He was appointed Queen's Counsel in 2013. He practises in planning, environmental law and public law. His practice regularly encompasses EU and international law. He was a member of the Attorney General's London Panels of Junior Counsel to the Crown from 1999 to 2013. James has appeared in numerous cases before the Court of Justice of the European Union (formerly the European Court of Justice) and the General Court (formerly the Court of First Instance) and has appeared a number of times before the UNECE Aarhus Compliance Committee in Geneva. James' environmental law practice is wide-ranging, covering matters such as access to environmental information, air quality, contaminated land, habitats and species protection, statutory and common law nuisance, waste and all aspects of environment impact assessment, strategic environmental assessment and environmental permitting.

James has particular expertise on climate change issues, including emissions trading. He has also been involved in a number of cases concerning marine environmental issues. He regularly advises and is involved in cases concerning access to environmental information. His recent cases include Case C-71/14 *East Sussex County Council v Information Commissioner* [2014] QB 521. He is acting for the Department of Transport in relation to the response to the Airports Commission final report.

James has been on the Council of UKELA for eight years. He is also currently on the Executive Committee of UKELA.

Geoff Raby is Co-Chair of Corrs Chambers Westgarth China Business Group and was Australia's Ambassador to China from 2007 to 2011. Following completion of his ambassadorial term, after 27 years in the public service – mostly with the Department of Foreign Affairs and Trade (DFAT) – he resigned to establish his Beijing-based business advisory company: Geoff Raby & Associates Ltd. He also holds a number of non-executive, independent director positions with ASX-listed companies, including Fortescue Metal Group (FMG), OceanaGold, Yancoal, and iSentia. In China, Dr Raby serves as Co-Chair of Corrs Chambers Westgarth's China practice. Dr Raby is a member of numerous boards, including: the not-for-profit Advance Global Advisory Board, University of Sydney's China Studies Centre, RMIT University Australian APEC Study Centre and the National Gallery of Victoria Foundation. In recognition of his contributions to advancing relations between Australia and China, Dr Raby was made Friendship Ambassador to Shandong Province and an honorary citizen of Chengdu City.

Dr Raby was Deputy Secretary in the Department of Foreign Affairs and Trade (DFAT) from 2002 to 2006. He has held a number of senior positions in DFAT including First Assistant Secretary, International Organisations and Legal

Division (2001 to 2002), Ambassador and Permanent Representative to the World Trade Organization, Geneva (1998 to 2001), First Assistant Secretary, Trade Negotiations Division (1995 to 1998), and APEC Ambassador from November 2002 to December 2004. He was head of the Trade Policy Issues Division in the OECD, Paris from 1993 to 1995. He is a member of the Australian Institute of Company Directors and the Asia Society. He holds an honours degree in Economics, a Masters in Economics and a PhD from La Trobe University.

Stephen Sykes is Chair of UKELA and Chairman of Ashfield Solutions Group. He started his career as a solicitor but has worked in business for many years. He has co-founded and chaired ventures in the environmental data, insurance and consulting sectors. He is Chair of the Ashfield Solutions Group of companies. He is a Visiting Fellow at Birkbeck College's School of Entrepreneurship. Stephen was awarded honorary membership of UKELA in 2014.

Nigel Topping is the CEO of We Mean Business, a coalition of organisations working on climate change with thousands of the world's most influential businesses and investors. He serves on the Energy Transitions Commission and on the board of the Grantham Institute. Previously, Nigel was Executive Director of CDP (formerly the Carbon Disclosure Project). Nigel has 18 years of experience in the private sector, consulting for and running manufacturing businesses. He holds a BA in Mathematics from Cambridge University and an MSc in Holistic Science from Schumacher College.

Stephen Tromans is a Barrister at 39 Essex Chambers, London and is no stranger to UKELA conferences. In fact, he organised the first one at Durham in 1987. He specialises in environmental law, practising at 39 Essex Chambers. He has also been an academic at Cambridge, and a solicitor at Simmons & Simmons. He tries to maintain an interest in all aspects of environmental law, though this becomes more difficult with increasing age. Nuclear law is a particular interest and the subject of one of his textbooks. He also has an interest in international investment arbitration and for some years has taught on the faculty of the Singapore International Arbitration Academy at the National University of Singapore. He is the first and only President of the Recyclists, which he deems a huge honour. He is seeking to develop a second career as a landscape artist.

Catherine Weller is Head of the Biodiversity Programme at ClientEarth, a public interest environmental law organisation. She qualified as a solicitor in 2008 and joined ClientEarth in 2011, where she has worked on a number of projects. For the last two years she has been focusing on various aspects of the implementation of the EU Habitats and Birds Directives, especially in the UK marine environment. Catherine has also closely followed the European Commission's fitness check process which could lead to a revision of these directives. Most recently she has been involved in the legal complaint to the Commission to prevent intensive logging in the Białowieża Forest, a Natura 2000 site in Poland. Prior to joining ClientEarth Catherine was an associate in the environmental law team at Allen & Overy in London.

Summary of the address given by Terry A'Hearn at the UKELA Conference gala dinner

Held at the Brighton Pavilion, 3 July 2016

Terry A'Hearn, the Chief Executive of the Scottish Environment Protection Agency (SEPA), addressed attendees at the conference dinner.

Terry noted how prescient the conference theme of international environmental law, 'From Global to Local' had turned out to be, given the Brexit vote a week before the conference began.

In the midst of the great uncertainty sparked by this historic referendum decision, Terry noted that it was values of decency, politeness, humility, openness to newcomers and an international focus that had encouraged him to migrate in 2010 from his home country of Australia.

He argued that, whatever view UKELA members and others have of the referendum decision and its implications for the UK, these fundamental values are ones that need to be harnessed by the global community to tackle the unprecedented environmental challenges that must be confronted in the 21st century.

Terry cited analysis which shows that, if everyone in the world lived as people in the UK do, we would need three planets to support us. No analysis is needed to reveal that we have only one planet to use.

What does this mean for environmental management in the 21st century?

Terry focused his remarks on the role of environmental regulation. He argued that the scale of environmental improvement is so large – reducing resource use from three planets down to one, decarbonising our economy etc – that we need a step change in the way we use environmental regulation.

In the past, the key success factor for a regulatory agency has been to get all regulated businesses meeting compliance standards. However, Terry argued that success in the 21st century will be doing this as a minimum and then helping as many regulated businesses as possible to go well beyond compliance standards.

He noted that the only reason for a business to go beyond what the law requires is if it generates increased profits. Terry argued that regulators needed to understand this and harness it powerfully.

Terry cited the Prosperity Agreements developed with Linden Foods and Lafarge when he was Chief Executive of the Northern Ireland Environment Agency, which were designed to do just this. Both Prosperity Agreements helped these businesses drive environmental improvements that enhanced their business outcomes.

Terry argued that, with this mindset, a regulatory agency can use its access to senior people in regulated businesses as the main regulatory asset to create value for society. After all, it is the senior people in a business who make the most important business decisions – what types of goods and services to produce, how they will be produced, how supply chains will be arranged, and so on.

These are where the big environmental opportunities now lie. It is also where the biggest opportunities lie for the intersection of environmental and financial gain. This must be the focus of our future efforts.

Terry noted that SEPA would pursue a stronger and more ambitious approach to regulating. He said that the Scottish Parliament's visionary 2014 Regulatory Reform Act gave SEPA the platform to launch a new approach to environmental regulation.

This will involve initiatives such as sector plans for regulated businesses, streamlined licences and permits, sustainable growth agreements, enforcement undertakings and a range of other new enforcement mechanisms.

Terry finished by encouraging all UKELA members with an interest in Scotland to watch for the roll-out of these initiatives and to help SEPA and regulated business to make the most of them, as well as holding SEPA to account for using its new powers to best effect.

Who needs fossil fuels? Legislators accelerating the global energy transition

Nicholas Dunlop *Secretary General, Climate Parliament and Keynote Speaker of the Conference**

According to estimates by the UK Met Office, by taking into account the carbon cycle feedbacks that reinforce and accelerate climate change, if we stay on the path we are on now – which is the heavy fossil fuel pathway – by the 2050s we might reach three degrees above pre-industrial levels and by the 2070s maybe four degrees. We are currently one degree above these levels.

Feedback loops

It is important to note that all the UN models that UN policymakers and governments globally rely on for their climate change policies do not include the really dangerous feedback loops that are in many cases already being triggered. For example, in the three weeks before the Paris climate summit, there were wild fires raging in the Indonesian rain forests because of extreme weather. In those three weeks, the fires emitted as much carbon dioxide as the United States of America, or as much as Germany emits over a whole year.¹ That is a feedback loop: extreme weather causes forests to burn, and climate change speeds up. Another example is the release of plumes of methane gas coming up from the Arctic Ocean seabed that scientists are starting to see now.² The concern is if, as it thaws, we release the methane currently trapped in the Arctic seabed and under lakes and ponds under the Arctic tundra, global warming will considerably increase. Methane is a much more powerful greenhouse gas, even though it does not last for centuries like carbon dioxide does. As such, these next few years see the danger of triggering so many of these tipping points.

Probably the most famous feedback loop is the reflection of solar radiation back into space by the ice cap when it was exposed to the summer sun. By 2007, that reflective ice cap was half gone and the dark water was absorbing the solar radiation. That is one reason why the Arctic is warming so fast. And this year, we will once again hit a new record of ice loss in the Arctic Ocean as, like last year, this year is likely to be the record warmest year recorded. Similarly, on the subject of ice loss at the poles, we also

have to consider the tipping points, one of the main ones being the rise of sea levels. The Totten glacier for example has been in the scientific news recently with new studies emerging raising concerns over the warming Southern Ocean, which is eating away at its foundations and which will gradually destabilise it.³ Some scientists are saying it is now inevitable that the Totten glacier is going to be retreating: it drains an area of ice almost the size of Texas and, as it melts, even if it only retreats a couple of hundred kilometres, that could lead to a sea level rise in the order of three metres around the world. This is why people such as James Hansen are saying that it is quite possible that, even by the middle of this century, we will have seen metres of sea level rise.⁴ It could go much faster than the half to one metre that the UN Scientific Panel talks of in its conservative way.⁵

An ice-free planet?

The last time there was no ice on the planet, the sea was 70 metres higher than it is today. We will not get back to that for quite some time because it takes a long time for the ice to melt. But looking back at the geological history of the planet, the last time there was a really hot moment was 55 million years ago, when the levels of carbon dioxide in the atmosphere were high. As the concentration of carbon dioxide came down, it hit 450 parts per million, about 35 million years ago, and at that point glaciation began to form at the poles. Until that point there was no ice on the planet to speak of. This year is the first year that carbon dioxide levels are not going to dip below 400 parts per million,⁶ and we are seeing levels rising at more than three parts per million per year. You don't have to be a mathematical genius to work out that in about 20 years we are going to reach 450 parts per million. And at that point we may be committed to leaving an ice-free planet for our children or grandchildren generations hence. However, there is no need to go even that far ahead to see some extraordinary numbers. One NASA study looked at

* This article is a summary of the keynote presentation given by the author at the 2016 edition of the UKELA conference and was written before the outcome of the 58th United States presidential elections was known.

1 'Indonesia's fire outbreaks producing more daily emissions than entire US economy' *World Resources Institute* (16 October 2015) www.wri.org/blog/2015/10/indonesia%E2%80%99s-fire-outbreaks-producing-more-daily-emissions-entire-us-economy.

2 'Arctic methane emissions "greater" than previous estimates' *Climate Change News* (6 June 2016) www.climatechangenews.com/2016/01/06/arctic-methane-emissions-greater-than-previous-estimates.

3 'Antarctic's massive Totten Glacier nearing "tipping point" in global warming warn scientists' *International Business Times* (20 May 2016) www.climatechangenews.com/2016/01/06/arctic-methane-emissions-greater-than-previous-estimates.

4 James Hansen et al 'Ice melt, sea level rise and superstorms: evidence from paleoclimate data, climate modelling, and modern observations that 2°C global warming could be dangerous' (2016) 16(6) *Atmospheric Chemistry and Physics* 3761–3812.

5 Intergovernmental Panel on Climate Change www.ipcc.ch.

6 'Globally averaged CO₂ levels reach 400 parts per million in 2015' *World Meteorological Organization* (24 October 2016) <http://public.wmo.int/en/media/press-release/globally-averaged-co2-levels-reach-400-parts-million-2015>.

what the sea level was the last time the planet was three degrees hotter than today: they found it was about 25 metres higher.⁷

New Zealand has said to the people of Tuvalu, one of the many nations and cultures that will be destroyed in the coming years by this process, that they will be welcome when the time comes. But who is going to say to 100 million Bangladeshis that they are welcome when they lose their delta country, which is indefensible from sea level rise? They must retreat. Where are they to go? Nobody has a plan. Even now climate change is not exactly that much fun: typhoon Haiyan, the strongest typhoon ever to make landfall, devastated the Philippines, extreme droughts have afflicted green fields in parts of California, and the list goes on. What we are risking as we look ahead is much more than that: the last time the planet was really hot there were rain forests and crocodiles at the poles. On land and at sea it was mostly desert because it was simply too hot for anything to grow. That is the future we are risking. The question we need to ask ourselves is: why do we need to take this completely unnecessary risk?

Looking ahead: carbon budgets, fossil fuels and clean energy

Carbon budgets

The scientific panel IPCC is talking in terms of a carbon budget, although many British and other scientists question whether we even have a carbon budget left. If we accept the IPCC's conservative figures, it may be as low as 550 gigatonnes of carbon dioxide if we want to have a reasonable chance of holding the planet's temperature below two degrees. Our current emissions are somewhere in the order of 37 gigatonnes a year. Again, you don't have to be a mathematical genius to work out that in about 15 years at our current emissions rate the carbon budget will be used up.

The really big challenge, however, is fossil fuels because they generate more than two thirds of the greenhouse gases. There will always be some emissions from land use change or from agriculture, but we must remove carbon dioxide and other greenhouse gases completely out of the energy system. In a carbon budget, there should be no room for any use of fossil fuels a couple of decades from now. We not only have to use green energy to produce the electricity that we use now for all the purposes to which we put electricity, we also have to generate enough electricity to run our transport system with electric vehicles, and enough electricity to heat our homes with clean electricity, rather than with gas boilers.

The speed and scale at which we have to respond to these challenges is much greater than almost any government is currently even imagining. Following Paris, there seems to be a consensus that, in fact, the solution is quite simple: global emissions of carbon dioxide and other

greenhouse gases should peak in this decade and then, to remain under a two degree increase in temperature, they will need to reduce by about 5 per cent each year, or reduce faster to remain under one and a half degrees, the new target from Paris.

Clean energy

The good news is that there is plenty of clean energy that we can use to achieve these targets. There is no shortage of energy at all: we have onshore wind, offshore wind and even floating wind turbines, and can balance the fluctuations of wind and sun with our existing hydroelectric dams.

Despite this, there are two problems with renewable energy. The first is that the sun comes and goes each day, and the second is that the winds move around. We must develop ways of delivering a totally reliable supply of cheap green energy. One part of the answer is energy storage, eg pump storage. The system is simple: when there is a surplus of energy in the system, water is pumped uphill and when you need that electricity, you reverse the turbine and let the water run downhill again.

Solar

Rooftop solar is expanding fast and there is an important role for community solar and community wind – although we should be wary of using too much farmland for solar power as the agricultural land is needed for food production. Instead, we can expand in deserts and drylands with either large-scale photovoltaic installation or solar thermal power, which uses mirrors to concentrate the sun's heat to boil water and drive a steam turbine, or those that use mirrors to concentrate the heat on molten salt, which holds the heat to generate power after sunset. The other advantage is that the vast majority of the human race lives within transmission distance of deserts.

Another source of energy is the molten salt: the heat from the mirrors is stored by moving liquid salt between a cold tank and a hot tank, and again this power station can generate for hours after dark. But there is an even more important key to making the supply of clean energy reliable, cheap and unlimited, and that is continental scale grids. We have to be building long distance clean energy 'highways', as some people call them, to harness renewable energy over a wide area; even if it is cloudy or not windy, there will be access to energy from a location where it is sunny or windy.

The technology that enables us to do this is high-voltage direct current transmission. In the UK, we are connected, through underwater high-voltage direct current (HVDC), to France, Ireland and the Netherlands. Another HVDC, the Nemo link, is under construction to Belgium. There are also plans for the construction of a link to Norway and another to France. There is even a discussion of building a link to Iceland to bring in Icelandic geothermal power; and there will be plenty of legal work to be done as we put these continental scale supergrids in place.

One country that does not worry about legal niceties and going ahead with its plans is China, which is building an

⁷ 'NASA study finds world warmth edging ancient levels' NASA (25 September 2006) www.nasa.gov/vision/earth/environment/world_warmth.html.

ultra-high voltage supergrid, in no small part in order to be able to accelerate the transition to renewable energy in China. Moreover, China is interested in running transmission cables to trade renewable energy between China and Europe. Anecdotally, I said to the chief engineer of the Chinese grid: 'if you are going to do that, why don't you run some of those cables through the desert, connecting the Gobi to the Thar desert in India to the Arabian desert and the northern Sahara, and then to Europe?' In fact, the International Renewable Energy Agency, which sits on that route in Abu Dhabi, calculated that such a route would provide solar power without storage, providing solar power 22 hours out of a 24 hour cycle. In one of those wonderful moments you get in China, where anything seems possible, the chief engineer of the Chinese grid said to me: 'This is no problem, there are no technical obstacles, we can do this'.

A similar regional supergrid in Europe and the Mediterranean would enable us to put together the big clean energy resources in our region, sourcing solar power from the Mediterranean, wind along the west coast of Europe and Morocco, and hydropower in the Alps and the Scandinavian mountains.

Wind

As mentioned above, wind has to be harnessed over a wide area, and offshore winds are going to be the big resource. The key to success, then, is to have a northern seas wind supergrid. This has been agreed in principle among all the countries of the Baltic, the Irish and the North Sea. This means that, as weather fronts move across northern Europe, the wind is always blowing somewhere, and you go from having an intermittent energy resource to a fairly stable energy resource. But wind also needs big continental scale grids because the strong wind locations are quite limited. Having said this, the UK and Ireland have terrific wind power, as do all the North Sea countries, Patagonia, the Southern Cone of South America, Australia and New Zealand, northern Siberia, eastern Canada, and so on. It follows that to provide cheap, reliable wind power, the suppliers should be linking these wind hotspots, to create a so-called 'global energy internet'. In the same way as with the information internet, the smallest owner of a solar panel on their roof, or the largest owner of a desert solar power station needs to be able to do the same. This has already happened with Europe's supergrid; the problem is that it was built for the wrong industry. There are gas pipelines and a few oil pipelines. In fact, every regional organisation around the world has agreed in principle that they want to link up their national grids into a regional grid, partly for renewable energy.

Political leadership

To implement these systems properly, to reach our GHG emissions reduction targets and to ensure that lobbyists do not unnecessarily slow these processes down, we need political leadership. There have been some very interesting examples of political leadership in the last few months such

as Narendra Modi and François Hollande who, at the Paris climate summit, jointly launched the international solar alliance that now includes 121 countries.⁸ The aim is to mobilise US\$1 trillion between now and 2030 to deploy a terawatt (a trillion watts – circa the generating capacity of the United States) of solar power in the next 14 to 15 years. Another example is in September 2015 when at the UN General Assembly, Xi Jinping, the President of China, proposed 'discussions on a global energy network to facilitate efforts to meet global power demand with clean or green alternatives'.⁹ This is a proposal for a set of regional supergrids of the kind described above, which would enable each region to share its best renewable energy resources and what the State Grid Corporation of China (the world's biggest grid operator) is calling an inter-continental backbone grid that will allow energy trading between regions. The Chinese are saying that, if this is achieved by 2050, 80 per cent of our energy could be sourced from renewable energy. Having said this, hardly any government has responded to this proposal, and the only ones that have done did so because of the pressure organisations such as Climate Parliament have been putting on them. This gives you an idea of the state of climate politics around the world. So, whilst China is the world's biggest polluter, it is also the world leader in renewable energy and has an investment capability that neither Europe nor the United States has.

A proactive way forward

There is a role for legislators and lawyers, who are two very closely allied professions. Climate Parliament is a network of national and some state legislators, who are concerned about climate change, working on accelerating the shift to renewable energy. For example, the Indian Climate Parliament group was very successful in negotiating more than double the renewable energy budget in the Indian national government budget, up to 1 per cent of the overall budget. Similarly, the European Parliament group mounted a real campaign in the European Parliament to protect €3 billion in the seven year trillion euro EU budget for cross-border electricity connections. This was met with much resistance from oil company lobbies, who see cross-border energy interconnections as falling within their prerogative.

Another initiative Climate Parliament is working on is creating the green grid alliance, which will be a group of 20 developing countries, with possibly five northern partners working with the group. This leadership group will work towards speeding up the process of creating the new grids from the continental scale grids, right down to village microgrids. The model will bring together legislators interested in this project and will support them in generating ideas and political will for these major new initiatives. To

8 'India and France launch international solar energy alliance at COP 21' UNFCCC Newsroom (30 November 2015) <http://newsroom.unfccc.int/clean-energy/international-solar-energy-alliance-launched-at-cop21/>.

9 'All economies should build on a sound global eco-environment, and green, low-carbon circular sustainable development should be pursued' <https://gadebate.un.org/en/70/china>.

date, countries that have expressed their interest in participating include Bangladesh, China, India and Mongolia; in the Arab world, Jordan, Morocco and Tunisia; in sub-Saharan Africa, Ethiopia and Senegal; in Latin America, Chile, Costa Rica and Peru; and two island states, the Dominican Republic and Samoa.

There is a precedent for a network of legislators pulling together a group of governments to do something new and interesting. One of the aims is to get the countries working together to produce new innovative financial mechanisms to redirect a fraction of the trillion dollars in the global bond market (more money than in all the share markets of the world combined). Another aspect to

focus on is creating a model contract that could attract investors to build mini-grids for the 1.2 billion people who are currently without even a light bulb in their home, who need to leapfrog to renewable energy. Most of them live in villages that are rich in solar and often have wind or small hydro potential.

To conclude, 25 years of climate negotiations have shown that the human race is not very good at negotiations on a big global problem such as global warming, but what we are very good at is building things. If we could build any of the seven wonders of the world, thousands of years ago, building a new energy system for planet Earth really shouldn't be too difficult.

Natural resource damage assessment: lessons for the EU

Nicholas Gard *Managing Scientist, Ecological and Biological Sciences Practice, Exponent, USA*

Introduction

This article analyses some aspects of natural resource damage assessment (NRDA) in the United States. It will give a brief overview of NRDA and touch on some of the key technical issues dealt with in these cases. Highlights from several projects will then be presented to illustrate what an NRDA case involves. Finally, the author will talk about the relevance of lessons learned in NRDA to the EU's Environmental Liability Directive (ELD).

Natural resource damage assessment in the United States

Site clean-up and remediation occur at a hazardous waste site or following an oil spill to remove contaminants and reduce risks to the public and the environment. This process helps return the site back to the pre-existing condition before the contamination occurred. However, even after remediation is complete, there remain services provided by that site that were lost or impaired in the interim. An NRDA is the process designed to address those lost services by providing similar services in compensation. An NRDA involves a number of complex technical issues and I am going to talk about a few of those issues. The basic premise of an NRDA, however, is that it is intended to make the public whole for service losses that have happened owing to a release of a hazardous substance or an oil spill.

By the 1970s, laws existed in the US to prevent pollution releases to the environment, although there was inadequate legislation for mandating responsibility for clean-up of a contaminated site by those parties responsible for the contamination. In the 1970s and 1980s there were a number of high profile waste cases, such as Love Canal in New York and Times Beach in Missouri, which raised public attention to the need for clean-up of such sites. Therefore, in 1980, in part due to incidents like these, the US enacted the Comprehensive Environmental Response, Compensation, and Liability Act, or CERCLA. This is commonly referred to as the Superfund Act. The Superfund Act serves, in part, as a mechanism to compel potentially responsible parties (PRPs) to clean up sites where they have contributed to the deposition of hazardous wastes.

Another key event in US environmental legislation history was the 1989 *Exxon Valdez* oil tanker accident in Alaska. After this spill there was a realisation that legislation was required to ensure PRPs clean up the marine environment following an oil spill. Therefore, in 1990 the US enacted the Oil Pollution Act (OPA). These two Acts,

CERCLA and OPA, are the main bases for natural resource damage (NRD) legislation in the United States. Other Federal and State statutes also apply, but these are the two key regulations that govern how and when NRDA applies.

In terms of resources addressed in an NRDA, there has been a change of focus over time. From 1980 until 2000 we saw more high-value settlements focused on heavily contaminated sediment sites, particularly river and lake sites. There were also a large number of legacy sites, including abandoned mines, shuttered industrial plants and factories and oil spills. The focus has changed somewhat since 2000, with the inclusion of groundwater contamination cases and also ongoing releases from operating industrial sites.

There has also been a shift in how NRDA's are conducted. We are seeing greater emphasis on what are termed cooperative assessments, where the natural resource trustees and the PRPs work together mutually to identify injuries, quantify damages and select restoration options. Although NRDA's can also follow a litigation track, very few cases have actually gone to trial and there is limited case law on NRD in the US. The few litigation settlements that exist are for relatively simple damage cases, such as a ship grounding on a coral reef where the extent of resource damages is not difficult to quantify. Therefore, the validity of technical and economic evaluation methods used in many cases has never been legally sanctioned. This is partially because both sides are somewhat reluctant to have their evaluation methods and assumptions scrutinised by the courts, which leads to the desire for a cooperative approach or out of court settlement. Another aspect we see more often these days is that trustees favour restoration, that is rehabilitation or creation of ecological habitats, over cash payouts which are addressed below.

There have been approximately between 300 and 350 NRD settlements to date. What is interesting is that there are only a few settlements with damages greater than US\$10 million, and most cases settle for less than US\$1 million. Of course, there are the rare incidents with very big damage claims, one of which is discussed below. It is interesting that when Defra was assessing the regulatory impact of implementing the ELD in the UK in 2008, it concluded that the magnitude of effects would be somewhat similar, with a few cases a year, most of which would be relatively small in extent, but that there would be a severe case once every five years. So in a sense, the magnitude of these damages in NRD cases parallels Defra's prediction for ELD liability in the UK.

Technicalities of conducting a damage assessment

Every site is different; every site has its own unique characteristics: chemicals, ecosystems and species etc. Despite that, there are four key technical issues that we tend to deal with at most sites.

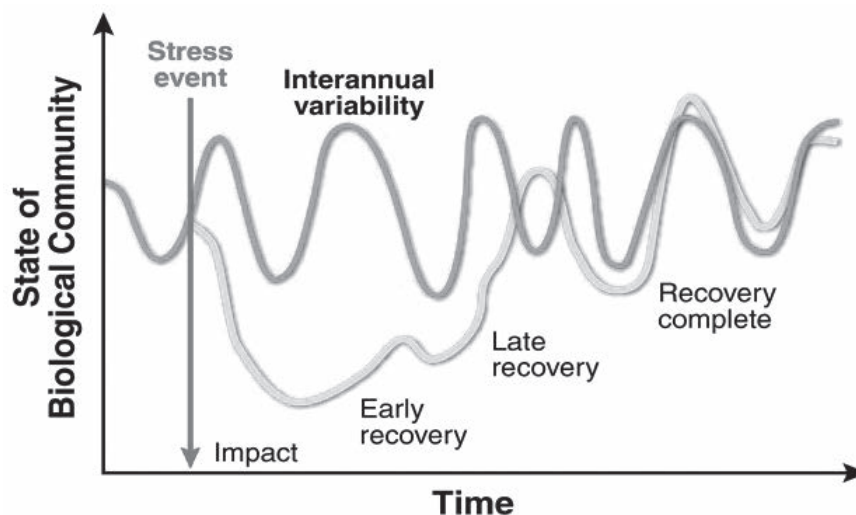
The first one is injury, which refers to some sort of adverse effect to resource services owing to a spill or a release. In terms of biota, the injury could be drastic, such as mortality, but it could also be a sublethal effect that causes that animal not to function normally, such as inability to reproduce or having a diminished lifespan. There are also injuries to human services to consider. Here, we typically look at limits on consumptive uses such as when contamination prevents use of a water body as a source of potable water; or when public health agencies place restrictions on consumption of fish or game as a consequence of chemical accumulation in edible tissue. However, human services can also be non-consumptive uses, including recreation: if people perceive there is a pollution problem they do not use a certain area for recreational purposes and go somewhere else instead. That is what we mean by injury: an ecological or human use service loss.

Baseline is also a very important issue. Baseline is the 'but for' case, the condition of the environment that existed before the release or the spill. In concept, this sounds very simple but in reality it can be extremely challenging to define baseline because often we lack good knowledge on the environmental condition of an area before an event occurs. The figure below shows another reason why defining baseline is not as easy as it sounds. The interannual variability line represents a natural cyclical baseline: think of this as depicting a species whose population abundance cycles over time. A stress event, as shown by the arrow, is imposed and that causes the population trajectory to be knocked out of its normal cyclical pattern, following instead a different path (recovery line). Gradually over time the population recovers until the point where the post-stress population pattern tracks the baseline pattern and recovery is complete.

Next is the concept of causation: there is an event or stressor – a cause, and then an effect arising from that

stressor. Like baseline, this sounds very simple in theory and, in some cases, it can be. For example, if there is a chemical spill into a lake and the next day dead fish are seen floating on the surface, it is very plausible that is a result of the spill. However, causation is not always that clear. I live in the Pacific North West of the United States and one of the big environmental issues there is that salmon stocks that migrate from rivers and streams to the Pacific Ocean are declining – quite drastically, in some cases. There are a number of contributing factors, such as disease, overfishing, habitat destruction and sewage flows. However, one current issue is the run-off of agricultural pesticides into streams and the effect that might have upon salmon survival. In a case such as this, causation due to pesticides becomes much more difficult to establish because teasing apart the effects of pesticides from those of other stressors can be very difficult. The important aspect of this is the need truly to differentiate causation from simple correlation of two separate events.

Over time there has been a fundamental change in how restoration scaling has been conducted in NRDA. The original method was a value-to-value approach, where economic methods were used to place a monetary value on lost services and this value was equated with the quantum of damages owed. The more recent trend has seen a shift to focusing on a service-to-service approach. This involves calculating the total quantity of lost ecological or human use services and determining the best approach to restore or replace services of equivalent type and quality. Two techniques are commonly used to estimate services: habitat equivalency analysis (HEA) and resource equivalency analysis (REA). These are very important concepts, not just in the US but also in the EU, and crucially in HEA and REA there is no actual calculation of monetary value of losses. Monetary valuation is based strictly on the cost of performing restoration projects required to restore lost services. Equivalency methods equate the past and future losses to a present-day value by applying a discounting factor. This is very important, especially in the US, as we have retroactive NRD which typically goes back to 1980. With discounting, losses that happened far in the past become much greater in present-day value than an equivalent level of loss that occurred more recently. Discounting



also applies to restoration activities, so the sooner restoration starts after an incident, the less is needed as gains are discounted less heavily than for a restoration project that does not happen until long after the event has passed.

A graphical example of an HEA is shown below. The horizontal line is the baseline level of services over time. An incident occurs that causes the level of service to drop below baseline and remain there until natural recovery and/or remediation return services to the baseline condition. However, there is a discounted interim service loss which requires compensation (demonstrated by the lighter shaded curve on the graph). A restoration project is conducted to restore or replace lost services, and that project generates a discounted level of service over its functional lifetime (demonstrated by the darker shaded curve on the graph). In the end, after the discounting function is applied, the level of service lost due to an incident equals the level of service gained from the restoration. It is a simple concept in theory. It is much more challenging actually to apply it but this is the theoretical underpinning of equivalency methods: a complete offset of services lost.

Case studies

I will briefly present a couple of case studies for projects I have worked on to give you a flavour of how we conduct an NRD in the US. The first NRD is in Massena, New York, and the PRPs were two aluminium smelters and an automobile powertrain manufacturing plant. The sites lie along the St Lawrence River, which is the border between the US and Canada. Unlike the ELD – which applies trans-boundary to all EU Member States – NRD in the US only applies within US territory, so there were some issues to delineate contamination in Canada that originated from the facilities but was not considered part of the damage calculations.

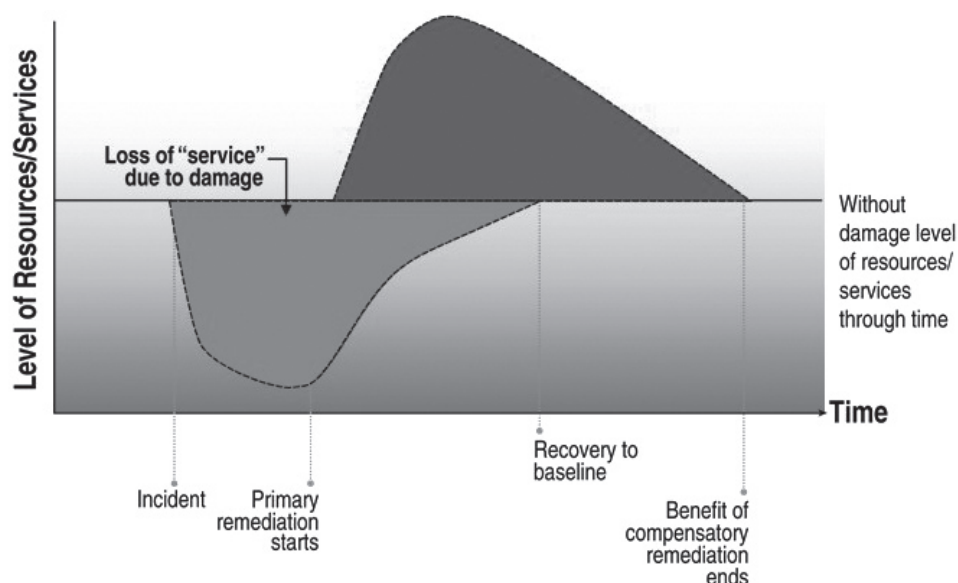
Every NRD site has natural resource trustees. These are the Federal and State agencies that represent the public. In this case, the Federal trustees were the US Fish and Wildlife Service, which is responsible for migratory birds and endangered species, and the National Oceanic

and Atmospheric Administration, which is responsible for marine resources. The New York State Department of Environmental Conservation was the trustee for human use services and non-migratory fish and wildlife. An interesting feature of NRD law is that Native American communities can be a trustee for lands they administer. In this case, the St Regis Mohawk Tribe was a trustee because its Akwasasne Reservation that was downstream had received chemicals released by the facilities.

The contaminants – in this case a mixed bag of chemicals – included PCBs, PAHs and various metals. That is not unusual and, in some cases, the list of chemicals of concern can be much greater. Services impacted included sediment contamination and injuries to birds, fish and mammals. There were human use service losses, in this case a reduction in recreational fishing opportunities owing to a fish consumption advisory that limited how many fish from the site could be consumed monthly. The third component of the injury claim was cultural losses to the Mohawk. The issue in this case was that, because of concerns about pollution on their lands, tribal members could not engage in ancient traditions such as fishing, hunting, collection of medicinal plants or harvesting of willows to make baskets.

Types of restoration projects

I turn now to the types of restoration projects that were done in compensation. There were a number of ecological projects, such as rehabilitating islands in the St Lawrence River used by nesting waterbirds, wetland and stream bank restoration and removal of a dam to allow for fish passage further up a river. Since human use losses were primarily related to lost fishing opportunities, projects were intended to enhance angler access, including installing boat ramps and canoe launches. At settlement, the total damages in this case amounted to US\$18.1 million. Of this, US\$7.3 million were for compensation of ecological losses through habitat acquisition and restoration, fish stocking and habitat improvement. Human use losses amounted to US\$1.5 million. The Mohawk cultural losses



were US\$8.4 million, and in this case the money was directed, in part, to establishment of an apprenticeship programme where the tribal elders could teach young members traditional ways of hunting and farming, along with teaching the Mohawk language as ways of ensuring their cultural traditions passed to future generations. The remainder of the total settlement, about US\$1 million, was for reimbursement of assessment costs accrued by trustees in their conduct of the NRDA.

The next case is the *Deepwater Horizon* oil spill. Exponent served as a technical consultant to BP on this case. Since our work is confidential, I cannot describe our investigations. Instead, I would like to present an overview of the trustees' approach in establishing the damage claims. The spill occurred in April 2010 and it took 87 days to cap the well head successfully. In the interim period there was a release of about 134 million gallons of oil, and oil sheen was detected over approximately 143,000 square miles of the Gulf of Mexico. A number of response actions were adopted. Dispersants were applied to degrade oil into smaller particles to allow biodegradation and some oil was burnt off or collected by skimming. Containment booms and berms were used to try to prevent oil reaching the shoreline.

The trustees claimed injury to a range of coastal, nearshore and deep water habitats and species. There were some unique aspects of this case, given the deep water location of the oil release. Because the release was sub-surface, deep sea resources were considered impacted, including fish species and deep water cold water coral communities. The challenge in evaluating these injuries was that because so little is known about the ecology of these resources it was difficult to establish the baseline condition, magnitude of injury and suitable restoration alternatives. The trustees also conducted a wide range of laboratory and field studies to support their injury claims.

Total damages in the case were US\$20.8 billion. This is by far the largest NRD settlement in US history: the *Exxon Valdez* was only about US\$10 or 11 billion. Natural resource damages were just one component of the total at US\$7.1 billion, with BP also having previously committed US\$1 billion to early restoration projects while settlement negotiations were ongoing. In addition, up to US\$700 million was set aside for use over the next 16 years to address potential future natural resource damages not known of at the time of settlement. Other major components of the settlement included a Clean Water Act (CWA) penalty of US\$5.5 billion, based on the volume of oil that was released. Finally, state and local economic claims were settled for a total up to US\$5.9 billion. I know from attending several recent meetings in Europe that the *Deepwater Horizon* incident attracted considerable attention from government officials responsible for the ELD who wondered how a damage assessment would play out if a similar event occurred in the North Sea, for instance. While it is difficult to speculate on the magnitude of the damage, it is possible to imagine in a worst-case comparable event that many of the same ecological and economic effects seen in the US could occur. If such a spill were to occur, it would be a major test of the ELD.

Looking ahead

Finally, I want to provide some brief thoughts on where I think NRD is heading in the US. We are seeing more interest in damages due to contamination of groundwater by chemicals. There have been several high profile cases related to contamination by MTBE, a gasoline additive. Another big concern regarding groundwater is contamination due to fracking; also an issue for concern in the UK as fracking projects are being considered. I am not aware of any NRD fracking cases yet in the US, but this may be a future type of claim. We are also starting to see damage claims for unconventional contaminants such as nutrients in animal waste. There has also been speculation that animal waste run-off from confined animal feed lots could be subject to NRD damages. Potentially, the same could apply to pharmaceuticals that enter water treatment systems; this could be an issue in the future. Damage claims for forest fires caused by negligence are becoming more common, especially in California. Equivalency methods such as HEA and REA have been used to quantify damages in these fires. There was one case in California that settled where the resource damages from the forest fire were about US\$25 million. I am also aware of a case in Spain where similar equivalency methods were used to value losses due to a forest fire started by a fault in an electrical transmission line.

I have discussed restoration projects undertaken to offset ecological injuries. Typically, in past cases, natural resource trustees have favoured restoration in the same area where the injury occurred and restoration of similar habitats. That can sometimes be challenging, especially in urban areas where suitable restoration opportunities may not be available. However, we are starting to see more use of what is referred to as 'out of place' or 'out of kind' restoration. To give one example, there was an NRD site in Massachusetts where there was injury to forest habitat used by small songbirds that migrate to the tropics in winter. The restoration project selected in this case was to fund coffee farmers in Latin America to grow shade-tolerant coffee crops, because this provided a useful wintering habitat for these bird species.

Concluding remarks

To conclude, I would like to focus on how the US experience with NRDA is relevant to the ELD in the EU. First, ELD regulations are modelled very closely on US regulations and experience. US consultants were hired by the EU during the development of the ELD to help craft technical guidance. The core principle on quantifying environmental damage is the use of equivalency methods such as HEA and REA, which is also written into the ELD. What this means is that the same technical issues that I have discussed in relation to the US – baseline, causation, quantifying losses, scaling remediation – will all be likely to arise in ELD cases too. I think you are also likely to see greater use of HEA and REA in other applications, such as offsetting effects to habitats and species, as required under Article 6 of the Habitats Directive.

However, there are some aspects of the ELD that are distinct from NRD practice and which I find interesting. The first one is the definition that environmental damage is considered to occur when there is a significant adverse effect on the ability of a protected species or natural habitat to maintain favourable conservation status, as compared to the baseline condition. This sets the bar for concluding injury or effect higher than under US NRD regulations. Annex I to the ELD describes some metrics by which significant adverse change can be determined, although I foresee one of the major challenges of the ELD will be in determining significance. It will need to be done on a species- or habitat-specific basis in each potential ELD case and will rely heavily on professional expert opinion, as well as subjective interpretation of the significance criteria.

One other thing to watch out for is adoption of simple measures to assign damage. For example, instead of trying to conduct evaluations to determine significant impacts on favourable conservation status, there may be the fallback of doing something as simple as applying risk screening criteria as a proxy for determining effect. That is not the intention behind the ELD. Finally, there is the potential to

use the ELD as a way of driving clean-up of hazardous waste sites. Although it was not designed to address this issue, some Member States have been using the ELD to achieve this outcome. These sites need to be addressed under other environmental legislation, not the ELD.

Retroactivity may become important in future. In the US, retroactivity for damages under NRD regulations typically goes back as far as 1980, when CERCLA was enacted. In the EU, the ELD only applies back to the time of its transposition by the EU Member States, about 2007–2008. However, in future, retroactivity may become more important, particularly in situations when there are sites with ongoing releases after the transposition date. Based on how equivalency methods discount past losses, this type of situation could lead to much more substantial damage claims in future.

What happens as the ELD matures? Hopefully, as more cases occur under the ELD and more Member States apply the ELD in everyday practice, a standard set of administrative, legal and technical best practices for conducting damage assessments will emerge. This has happened over the years in the US, and it brings a level of predictability and balance to the assessment of natural resource liabilities.

Striking the balance: international marine conservation

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Introductory remarks

The concept of conservation is difficult to define and, therefore, even more difficult to achieve in practice. A significant part of the problem derives from the well-recognised distinction between conservation for the sake of securing maximal sustainable yields of usable resources, and conservation for the less quantifiable benefits of ecology/environmental preservation as an end in itself.

The issue of the conservation of the marine environment requires us to face this dichotomy head on.

In the course of researching and preparing this paper, it very early on became strikingly clear that the laws and regimes concerning marine conservation provide a broadly typical example of international environmental law.

There are, as in other areas where international law has been engaged, interrelated international conventions and regional regimes seeking to provide a coherent and systematic approach to the recognised issues. There are tensions between industrially developed and developing nations and parties, often tensions revolving around appropriate burdens and responsibilities. There is the continuous bugbear for environmentalists of inadequate scientific data. There are conflicts between those advocating a commerce-centric, more *laissez-faire* approach, and those whose values prefer and proffer precaution.

Unsurprisingly, therefore, the prevailing theme of international marine conservation is of a consistent effort to strike the right balance between the innumerable interests at play.

It is my hope here to unpack the balance, to provide some explanations for why the scales are set in the ways they have been and to offer some thoughts on whether the current international marine conservation regime is balanced in the right, or rather, an acceptable way.

Notes on the structure of the paper

In explaining the structure which I propose to adopt for assessing the balance, it is worth reiterating that it is my assessment that the marine conservation regime echoes much of what is common in those international regimes concerning global environmental issues. The principles and hurdles present in the discourse surrounding climate change, energy and land-based conservation management are, to a greater or lesser degree, evident also in marine conservation. Those regimes have developed on the global stage in response to the fact that such issues or problems are global issues or problems. They do not recognise national boundaries, and so it is inappropriate, if not illogical, to seek to address the problems through national measures alone.

Plainly marine conservation is a truly global issue. Oceans cover around 71 per cent of the world's surface, and contain around 97 per cent of the world's water.¹ Understandably, therefore, the oceans are the habitats of a significant number of diverse organisms. The Census of Marine Life, in its first report released in 2010 following 'a decade of discovery', describes encountering 'an unanticipated riot of species',² with the number of known marine species totalling almost 250,000. The report continues, however, and comments that: '[a]fter all its work, the Census still could not reliably estimate the total number of species, the kinds of life, known and unknown, in the ocean. It could logically extrapolate to at least a million kinds of marine life that earn the rank of species, and to tens or even hundreds of millions of kinds of microbes'.³

When faced with such enormous figures, and when taking a common sense approach to them, it is hubristic to suggest that the conservation of the marine environment could be managed, or even realistically attempted, on a national scale. This submission is all the more powerful when one considers that sizeable portions of the oceans are in fact outside of national jurisdictions. As will be discussed, the furthest a particular state's sphere of influence can extend is 200 miles from the coastal baseline, and so beyond that are the 'high seas' which, 'being open to all nations, no State may validly subject any part of them to its sovereignty'.⁴

Given the vast scale of the marine environment, and being trans-territorial as well as extraterritorial in nature, it is unsurprising that the sources of concern for marine conservation are various and cannot themselves be easily categorised. Oceanic habitats are well known for being susceptible to climatic conditions and foreign intervention. To cite a useful, if perhaps clichéd example, in March 2014 *The Guardian* published an obituary for the Great Barrier Reef which suggested that the reef had been subject to 'death by a thousand cuts ... referencing a tangled web of decisions that have contributed to the reef's malaise'.⁵

With this difficulty of pinpointing clear causes of the concerns that face conservationists, I propose to adopt a loose structure for this paper, focusing in turn on the broad – although necessarily interlinked – sources of

1 US Geological Survey <http://water.usgs.gov/edu/earthwherewater.html>.

2 Census of Marine Life *First Census of Marine Life 2010: Highlights of a Decade of Discovery* (Census of Marine Life 2010) www.coml.org/press-releases/census2010/PDF/Highlights-2010-Report-Low-Res.pdf.

3 *ibid.*

4 UN Convention on the High Seas (1958) art 2.

5 Oliver Milman, Christian Bennett and Mike Bowers 'The Great Barrier Reef: an obituary' *The Guardian* (26 March 2014) www.theguardian.com/environment/ng-interactive/2014/mar/great-barrier-reef-obituary.

marine conservation problems which have attracted legislative efforts. I will first discuss the attempts to manage pollution which arises from sea-based activities; secondly, I will turn to the more problematic and less successful approaches taken to address the pollution which arises from land-based activities; thirdly, it is understandably necessary to assess the role of exploitation of marine living resources themselves, with a particular focus on fisheries and the attendant regulations; and, finally, I will give some more general comments on the impacts of climate change on marine biodiversity and conservation.

In adopting this approach, I hope to make clear the balancing which has occurred of the relevant interests at play, and also to highlight the presence of the well-recognised principles of environmental law which have sought to influence the debates.

Pollution arising from sea-based activities, principally vessels

There is some sense in starting this discussion through focusing on legislative regimes which seek to prevent, or at least manage pollution which arises from sea-based activities, principally discharges of oil and toxic substances derived from shipping vessels.

These regimes developed in response to an awareness of the problems for coastal environments and human populations caused by oil pollution of the oceans and have been comparatively successful in attaining their objectives, such that now oil pollution from ships is 'a relatively minor component of marine pollution'.⁶ These regimes provide a useful foundation for discussion insofar as the successes can be used as a measure and guide for other sources of oceanic degradation. They also, however, clearly demonstrate that the problems are rarely, if ever, simple. Whilst generally positive steps have been taken towards the prevention of oil pollution, other forms of pollution caused by shipping are still increasing: for example, CO₂ emissions from ships amount to 4.5 per cent of the global total, more than twice that of the airline industry.⁷

It is also prudent to recognise the fact that there is, unsurprisingly, an interplay between global rules and regional arrangements.

The central global measures are the 1982 United Nations Convention on the Law of the Sea (UNCLOS) and the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL). UNCLOS is particularly relevant for our purposes because it is described in its preamble as 'a legal order for the seas and oceans which will facilitate international communication, and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment'.⁸ Specifically, it enables

signatories to undertake greater administration of the waters surrounding it through expanded jurisdictional limits and the ships which are flying its flag.

The MARPOL Convention details the interrelated respective jurisdictions of states to inspect ships and enforce compliance with the pollution prevention legislation. Its annexes provide technical standards for vessels and seek to eliminate pollution from ships of various harmful substances (whether operational or accidental). One of the chief effects of the UNCLOS Convention⁹ was to establish the MARPOL rules as the international minimum standard for states seeking to reduce pollution from vessels.

As is reiterated in UNCLOS, the MARPOL Convention makes clear that the flag state is ultimately responsible for its vessels, and so is required periodically to inspect its ships and issue compliance certificates. That certificate is liable to inspection by states where the ship seeks to make port and, if non-compliance with its terms is discovered, the port state is required to prevent the ship from sailing and report the offending ship to its flag state. The flag state then reports such a breach of the 1973 Convention to the International Maritime Organization (IMO).

This somewhat limited power of the port state was significantly amplified by Article 218 of UNCLOS, under which port states have been given the authority 'where the evidence so warrants' to 'institute proceedings [against vessels within a port of that state] in respect of any discharge from that vessel' whether caused within the jurisdictional waters of the port state or not.¹⁰ Indeed, if requested, the port state may even undertake actions against a vessel in relation to discharges that have occurred and caused damage in the waters of another state.¹¹ The impact of this development has not gone unnoticed by academics, with Birnie, Boyle and Redgwell commenting that: 'the obvious advantage of Article 218 is that it may ensure prompt prosecution where the coastal state is unable or incompetent to act, or where the vessel is unlikely to come within the flag state's authority'.¹²

This overlap in verification and enforcement between flag states and port states is a well-reasoned and pragmatic approach to ensuring compliance with the MARPOL and UNCLOS Conventions: it may well often be the case that vessels will rarely, if ever, return to their flag states, such that effective ship management by the flag state is hampered, and so the port states are arguably more appropriate to make effective inquiries as to seaworthiness. After all, it would more likely be the port state which would suffer from environmental degradation should polluting discharges occur.

We have seen here, therefore, a clear instance of an attempt to strike an effective balance in international marine conservation between the responsibilities of flag states and the practical difficulties of ensuring compliance with convention obligations. The balance is, on the face of the matter, successfully struck by engaging the port states

6 Patricia Birnie, Alan Boyle and Catherine Redgwell *International Law and the Environment* (3rd edn OUP 2009) 380.

7 Marine Environment Protection Committee (MEPC) 57/4 (2007) paras 87–106.

8 United Nations Convention on the Law of the Sea 1982 preamble.

9 United Nations Convention on the Law of the Sea 1982 art 217.

10 *ibid* art 218(1).

11 *ibid* art 218(2).

12 See Birnie, Boyle and Redgwell (n 6) 422.

to carry out the inspections of the vessels. Further, this approach is engendering and encouraging one of the key principles of environmental protection, that is proactive dialogue between parties.

However, if one considers the issue a little more closely, then some cracks in this regime do become apparent. Relying on the port states to conduct inspections and ensure compliance places a relatively heavy burden on those authorities, not just in terms of time or cost, but also expertise and technical resources. Compliance with the conventions is, necessarily, only as good as the standards of enforcement which can be adopted, and this will inevitably vary state by state (or even port by port). This limitation is statistically borne out in the Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection Report from 2007.¹³

This report demonstrated that MARPOL and UNCLOS have certainly had a not insignificant effect, with the amount of oil entering the seas from shipping falling from around 1.47 million tonnes in 1981 to 457,000 tonnes annually by 1997. However, this impressive drop masks the fact that shipping still accounts for 70 per cent of the total oil discharge from human activities, and around 45 per cent of this discharge was estimated to come from operational sources.

So, the balance has been struck, and to an extent it appears to be working, but the results commend some fine-tuning. Arguably, a purposive approach to these conventions would encourage port states in particular to engage in greater dialogue and resource sharing schemes. A dogmatic or blinkered approach to interpretation of state obligations must be avoided when approaching environmental legislation which is outcome-focused: surely this is the spirit of the precautionary principle writ large.

To some extent, the UNCLOS Convention recognised the limitations which would result from solely relying on flag and port states, and so introduced the Exclusive Economic Zone (EEZ) as a quasi-extension of states' jurisdictional spheres of influence.¹⁴ The EEZ expands the area over which a state can exert legislative control to up to 200 miles beyond the territorial sea,¹⁵ and grants 'sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources' and jurisdiction with regard to 'the protection and preservation of the marine environment'.¹⁶

It is not at all surprising that such an approach, whereby states' areas of responsibility have been expanded, has been adopted as a means of preventing marine degradation. Garrett Hardin's 'tragedy of the commons'¹⁷ argument is well rehearsed, and the parallel between the common pasture and the unowned high seas is obvious: it is in each

state's interests to utilise the common property because any disbenefits are shared amongst all, as opposed to borne exclusively by that state/user. By increasing the areas over which states bear responsibility, international law is trying to ameliorate this powerful tendency to over-consume and to pollute wantonly.

This expansion of jurisdiction for specific purposes represents a well-struck balance. At the Third UNCLOS Conference there was a notable divide between, on the one hand, a lobby, led principally by Australia and Canada and supported by most developed states, which sought 'a general extension of coastal state legislative and enforcement jurisdiction', and, on the other, a body of maritime nations who expressed grave concerns for freedom of navigation if such a blanket expansion were to occur.

The history of striking an appropriate balance between the rights of free navigation and the maritime jurisdiction of states is long, and this is a clear instance of further compromise. In addition, the compromise reflects the socio-economic differences and capabilities of the interested parties: an expansion of full jurisdictional authority to coastal states would risk the inequitable disruption of less economically and technologically advanced states.

By only granting legislative and enforcement jurisdiction to coastal states for limited purposes within the EEZ, in the vast majority of instances the freedom to navigate those waters unhindered is preserved. A coastal state may only interfere with a ship in a number of limited situations (listed in Article 220). If there are 'clear grounds for believing that a vessel navigating in the exclusive economic zone [has committed a violation of applicable international rules] resulting in a substantial discharge causing or threatening significant pollution of the marine environment, that State may undertake physical inspection of the vessel'.¹⁸ Alternatively, if the navigating vessel has committed a violation which resulted 'in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal State ... that State may ... provided that the evidence so warrants, institute proceedings, including detention of the vessel'.¹⁹

One feature of these graduated powers which is immediately obvious, even from a cursory reading, is the flexibility and ability to reach an appropriate discretionary balance afforded to the coastal state. Notwithstanding this breadth of competence, however, one might also submit that the threshold for coastal state intervention is set rather high: only where there have been discharges causing or threatening significant pollution or major damage to the coastline or interests can the coastal state institute actions against the vessel. It is of course likely that the port states' expanded Article 218 jurisdiction could be sufficient to tackle other operational discharges, but a question may reasonably be asked as to whether port states have been purposive and adequately engaged in dialogue or collaboration to the extent required wholly to address the continued problem that is polluting discharges from sea-based sources.

13 Joint Group of Experts on the Scientific Aspects of Marine Environmental Protection Reports and Studies No 75: *Estimates of Oil Entering the Marine Environment from Sea-based Activities* (IMO 2007) www.gesamp.org/data/gesamp/files/media/Publications/Reports_and_studies_75/gallery_1042/object_1042_large.pdf.

14 United Nations Convention on the Law of the Sea 1982 pt V.

15 *ibid* art 57.

16 *ibid* art 56.

17 Garrett Hardin 'The tragedy of the commons' (1968) Science 1243–48.

18 United Nations Convention on the Law of the Sea 1982 art 220(5).

19 *ibid* art 220(6).

Pollution arising from land-based activities

'The biggest threat to the health of the marine environment stems from land-based activities',²⁰ with sewage, industrial waste and agricultural run-off being the most common forms of pollutant entering the oceans. Understandably, these pollutants will affect the marine environment in different ways, with some leading to oxygen depletion or overwhelming nutrient input (eutrophication), whilst others directly degrade and damage ecosystems.

As mentioned earlier, the regimes which have sought to address land-based pollution of marine environments have been far less effective and the results far more sporadic than the efforts taken to address maritime sources. One does not have to look very far to appreciate the reason for this disparity. For a start, shipping is far more closely linked in the minds of the majority as capable of having deleterious effects on the marine environment than land use is.

If one were to ask the person in the street what amounts to marine pollution, he or she would probably use spills from oil tankers as the popular example. Even if one adopts a more consequentialist mindset, recognising the wider role of land use in global pollution, it is likely that one would list oceanic degradation relatively low down on the list of concerns for how best to operate the land-based venture. This somewhat stacks the scales against legislation and precautionary reform. Put simply, because the inherent link between land use and marine pollution is often overlooked, the political and socio-economic impetus for addressing the problems is somewhat (if not entirely) lacking.

This regrettable divorce of understanding of cause and effect is reflected in the final wording of the relevant sections of the UNCLOS Convention. We have seen that in relation to sea-based activities a minimum international standard was set, but no such legislative safeguard was agreed in relation to land-based operations. Principally, Article 207 requires states to 'adopt laws and regulations to prevent, reduce and control pollution of the marine environment from land-based sources ... taking into account internationally agreed rules, standards and recommended practices'.²¹ This broad, but largely individual provision is supplemented by the permission to 'take other measures as may be necessary to prevent, reduce and control such pollution'²² and an aspiration that '[s]tates shall endeavour to harmonise their policies in this connection at the appropriate regional level'.²³

States can choose which measures to take, at what level to take the action, and what level of enforcement to adopt. Indeed, it is even free for states to determine which substances require regulation and control.

At first blush, then, this discretion seems so wide as to be devoid of substantive content. The lack of any concrete or measurable obligations imposed on states, and the implicit *laissez-faire* approach to enforcement from the somewhat toothless relevant provisions of the UNCLOS

Convention are concerning. Obviously, it is vital to recognise that Article 207 was a compromise between economic and environmental interests:

The phraseology leaves little doubt that states did not wish to commit themselves to the same level of international control as is imposed on other sources of marine pollution. The social and economic costs of such measures were seen as unacceptably high, and the preferred solution was thus a weaker level of international regulation, a greater latitude for giving preference to other national priorities, and resort to regional cooperation as the primary level at which international action.²⁴

But the question then remains as to whether, when subjected to holistic scrutiny, the regime for dealing with land-sourced pollution is sufficient.

The emphasis on a regional approach is understandable insofar as a regional approach allows states to account collaboratively for shared concerns, geographical parallels and economic similarities. For example, it is recognised that the North Sea and the Mediterranean are both particularly sensitive to ecological changes, whilst the economic sensibilities of the relevant states are broadly comparable, and so regional approaches have been adopted to ensure that appropriate and focused protection is provided. The North Sea has been largely regulated through the OSPAR Convention and engagement of the EU, the outcomes being mixed.

Rather than leading to substantive legislative action, the principal benefit stemming from these regulatory regimes has been an increased use of accepted environmental principles. Barnes, Freestone and Ong have characterised the shift as one to 'prohibited unless permitted', whereas previously the opposite was the case, which is clearly adopting a precautionary approach.²⁵ Further, under Article 11,²⁶ there is some scope for NGO involvement and discourse, which is in broad compliance with the need for public participation advocated in the Aarhus Convention. This shift can be seen expressly in the use of EIA as an additional means of preventing marine pollution pre-emptively.

But compromise or not, the balance is not correctly struck with regard to land-based sources of marine pollution. As is often the case with environmental problems – particularly those which operate on a global scale – there is a severe lack of understanding and of scientific data which can be used to inform public debate or political action. This is not necessarily a criticism of scientific or legislative bodies: it is an environmental truism that reliable data is particularly difficult to collate, interpret and implement in the form of policy. However, this absence of genuine and popular understanding of the impacts of land use is problematic.

20 United Nations UNCLOS at 30 (2012) 6 www.un.org/depts/los/convention_agreements/pamphlet_unclos_at_30.pdf.

21 United Nations Convention on the Law of the Sea 1982 art 207(1).

22 *ibid* art 207(2).

23 *ibid* art 207(3).

24 Birnie, Boyle and Redgwell (n 6) 454.

25 Richard Barnes, David Freestone and David M Ong (eds) *The Law of the Sea: Progress and Prospects* (OUP 2006) 188.

26 Convention for the Protection of the Marine Environment of the North-East Atlantic (1992 OSPAR Convention) art 11.

Further, as Andersen and Skjørseth have asserted: 'science and knowledge make only a modest difference for the effectiveness of environmental regimes. Management of the environment is ultimately a political question where powerful economic actors are usually involved'.²⁷ The obvious concern in light of this assessment is that the absence of an international minimum standard and the prevalence of national or regional discretionary measures is insufficient systematically and coherently to address marine conservation issues. Indeed, Andersen and Skjørseth go further and conclude that 'there are few, if any, examples in which science (and the environment) "wins" when powerful counter forces are involved in the decision-making process'. If this is the case – and I confess some difficulty in disagreeing with their analysis – then unless and until there is a popular political drive to engage meaningfully with the concept of sustainable development, and a true appreciation of the need for ecological responsibility, the balance can never and will never be adequately made.

Provisions expressly concerned with conservation of marine biodiversity

Flying somewhat – although not wholly – in the face of the anthropocentric legislation which has been developed in relation to pollution of the oceans, there are a number of legal regimes which have sought expressly to provide protection and preservation of marine biodiversity and ecology. Indeed, as will be seen, the variety of measures or strategies adopted in addressing marine conservation is remarkable, and denotes a somewhat inevitably ad hoc approach depending on the balance sought. Measures variously focusing on species, arbitrary jurisdictional boundaries, or different types of pollutant each have been utilised, with differing levels of success. Birnie et al have been somewhat critical of this approach, commenting that: 'the marine biological diversity conservation problem is essentially ecosystemic',²⁸ and the obvious truth of this observation must be at the front of our minds when recommending or assessing future legislative proposals.

By way of setting the groundwork, it is perhaps wise to caveat the following observations with a clarification that, for the most part, the UNCLOS Convention remains the prevailing legislative instrument relevant for marine conservation purposes.

On a first reading, the 1982 UNCLOS Convention is surprisingly sparse in the obligations which it imposes on signatories to protect and preserve the environment, with Article 194(1) being the only real foray into ecosystem conservation: when states are seeking to prevent, reduce or control pollution 'the measures taken ... shall include those necessary to protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life'.²⁹

This somewhat blithe requirement is not so empty as it might first appear because there is sufficient scope within UNCLOS itself to accommodate compliance with higher standards and other conventions. For example, Article 237 makes clear that the provisions of the UNCLOS Convention 'are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment'.³⁰ Further, and varying from the comment I made a moment ago about the precedence of UNCLOS, Article 22 of the Convention on Biological Diversity explains that that Convention would have priority 'where the exercise of those rights and obligations [under UNCLOS or other existing international agreements] would cause a serious damage or threat to biological diversity'.³¹

A more comprehensive approach to the protection of biodiversity was adopted in the 1992 Convention on Biological Diversity (CBD), which is an international instrument that applies both to terrestrial and marine biodiversity. The broad principle underlying the CBD is that states have a responsibility 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction'.³² The approach adopted by the CBD – and subsequently endorsed and acted upon through the Jakarta Mandate, Agenda 21 of the Rio 1992 UN 'Earth Summit' and the Johannesburg Plan of Implementation³³ – has been to encourage contracting parties to adopt strategies for conservation in a more harmonised and considered manner, with express appreciation of integration, precaution and sustainability. Returning to the concern expressed by Birnie et al, the CBD to some extent does engender an ecosystemic approach by advocating the establishment of marine and coastal protected areas. As Spalding et al have commented: '[w]orld-wide efforts at marine conservation were given a clearer framework within the ... CBD. This Convention called for a broad ecosystem approach to conservation, and ... protected areas were described as one important means to achieve conservation gains'.³⁴

The call for the adoption of a strategic, ecosystem-focused approach has not gone unanswered. Indeed, '[r]ecent trends in marine protection areas suggest that global coverage could reach 10 per cent by 2020',³⁵ although it is important to recognise that this approach alone cannot be seen as sufficient. Successful conservation must always depend on relevant available scientific data, and so there is here a clear question of funding and state subsidisation. There is also the need for governmental agents to appreciate the need to strike the balance in a way

27 Steinar Andersen and Jon Birger Skjørseth 'Science and technology: from agenda setting to implementation' in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds) *The Oxford Handbook of International Environmental Law* (OUP 2007).

28 Birnie, Boyle and Redgwell (n 6) 749.

29 United Nations Convention on the Law of the Sea 1982 art 194(5).

30 *ibid* art 237(1).

31 Convention on Biological Diversity 1992 art 22(1).

32 *ibid* art 3.

33 See in particular para 32(c) of the Johannesburg Plan of Implementation: 'Develop and facilitate the use of diverse approaches and tools, including the ecosystem approach ...'.

34 Mark D Spalding et al 'Protecting marine spaces: global targets and changing approaches' in Aldo Chircop, Scott Coffen-Smout and Moira McConnell (eds) *Ocean Yearbook* 27 (Brill 2013) 214.

35 *ibid* 242.

which is not necessarily economically motivated, or at least in a way which is sustainable if exploitative.

Other pieces of international legislation have embraced the ecosystem approach, or at least have embraced the logic behind adopting such an approach.

The pre-eminent post-UNCLOS international measure is the 1995 UN Fish Stocks Agreement; an agreement which seeks to 'ensure the long-term conservation and sustainable use of straddling ... and highly migratory fish stocks'.³⁶

It should be apparent from my discussion earlier of the UNCLOS regime that states have strong powers to deal with marine resources contained within their territorial or EEZ waters, and there was a sizeable problem with enforcement of international laws beyond those bounds. The UN Fish Stocks Agreement seeks both to enhance the powers of coastal states within their spheres of influence whilst at the same time giving definitive guidance and principles as to acceptable fishing on the high seas. A slightly limiting factor is that the agreement deals only with fish species which either straddle or exist beyond those jurisdictional areas. However, this limitation ought not to detract from the progressive steps which are present in the agreement: '[o]n the high seas, while freedom of fishing is still recognised in principle, broadly shared concerns for over-exploitation have opened the way to cooperative efforts to impose responsible fishing practices'.³⁷

Unlike the UNCLOS Convention, the 1995 Agreement expressly details the requirements of taking a precautionary approach. Article 6 explains that states 'shall apply the precautionary approach widely'³⁸ and that '[t]he absence of adequate scientific information shall not be used as a reason for postponing or failing to take conservation and management measures'.³⁹ Significantly, the agreement requires states to improve their collection of data and research into the impacts of their fishing operations, and use the 'best scientific information available' to set 'stock-specific reference points and the action to be taken if they are exceeded'.⁴⁰ This legislative requirement is notable because it imposes a quantifiable limit on states' economic activities for the purposes of environmental conservation. Freestone has also commended this precautionary formulation as it 'represents a major change in the traditional approach of fisheries management which until recently has tended to be reactive to management problems only after they arrived at crisis levels'.⁴¹

The UN Fish Stocks Agreement therefore reflects, perhaps more clearly than any of the other measures

discussed so far, the desire to strike an acceptable balance. It is a truism that it is in a state's interests both to exploit fish stocks for economic gain whilst at the same time seeking to conserve those reserves for future use, not to mention the environmental benefits. The emphatic expression of the need for precaution and sustainable management reflects the impetus within the international community to act pre-emptively and responsibly. The anticipation that states will seek to 'pursue cooperation' through regional or subregional agreements or organisations repeats this multinational aspiration.⁴² Obviously, given the occasional inadequacies of data and compliance with the precautionary principle, the looseness of the substantive obligations can sometimes be exploited, but the shift in attitude is broadly encouraging.

Of perhaps greater concern is the fact that the enforcement of the 1995 Agreement falls under the same regime as the UNCLOS Convention with its somewhat dogmatic reliance on flag state, port state and coastal state capabilities. Notwithstanding the comments I have just made about the positive international intentions, there remains a real risk that states – particularly flag states – will merely pay lip service to these obligations whilst continuing to follow its economic agendas. Flag state management includes the allocation of licences and the collection of fishing data from its vessels.⁴³ Port states have a power to inspect vessels making port,⁴⁴ whilst states which are members of regional or subregional agreements that have arisen under the auspices of the 1995 Agreement may, 'through its duly authorised inspectors, board and inspect ... fishing vessels flying the flag of another ... for the purpose of ensuring compliance with conservation and management measures'.⁴⁵ The findings of any impropriety should then be reported to the flag state, and so then it will either be for the flag state or other 'policing' state to institute enquiries and prosecutions where appropriate. Notwithstanding the flexibility which I have just criticised, it is worth bearing in mind that the 1995 Agreement is a voluntarily accepted measure, and the national sensibilities and governmental character must be considered. Finding a satisfactory balance between purposive and aggressive enforcement is a difficult line to draw, and this difficulty is compounded when one considers that each individual state has to find the measures acceptable. The conservation objectives will only be met if the terms of the agreements are sufficiently acceptable for states actually to ratify them, and this multiplies the issues and problems discussed.

These concerns have manifested themselves in the regrettable conclusion that 'fish stocks continue to decline throughout the world'. It is evident, therefore that '[f]urther efforts are needed to promote sustainable fisheries and enhance the implementation of existing instruments in order to ensure that fisheries continue to make a contribution to food security and economic growth'.⁴⁶

36 Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks 1995 (UN Fish Stocks Agreement) art 2.

37 Tullio Treves 'Fisheries disputes: judicial and arbitral practice since the entry into force of UNCLOS' in Rüdiger Wolfrum, Maja Seršić and Trpimir Šošić (eds) *Contemporary Developments in Environmental Law* (Brill 2015) 328.

38 UN Fish Stocks Agreement 1995 art 6(1).

39 *ibid* art 6(2).

40 *ibid* art 6(3)(b).

41 Alan Boyle and David Freestone (eds) *International Law and Sustainable Development* (OUP 1999) 160.

42 UN Fish Stocks Agreement 1995 art 8.

43 *ibid* art 18.

44 *ibid* art 23(2).

45 *ibid* art 21(1).

46 www.un.org/depts/los/convention_agreements/pamphlet_unclos_at_30.pdf.

We can perhaps fairly say, therefore, that sizeable hurdles in adopting comprehensive conservation legislation remain. More regional or national measures have also shown the problems which are present, particularly with adopting legislation which is truly ecosystemic. For example, the Law Commission is currently in the process of advocating a consolidation of wildlife law in the UK with the objective that all existing legislation pertaining to wildlife should be replaced by a single statute thereby ensuring improved protection, control and management. Whilst one can clearly see the benefits of harmonising interrelated provisions, the problems with this draft Bill are, again, that it is focused on species as opposed to ecosystems (which is of course different from habitats), and, for today's purpose, the Bill is of limited utility because it does not extend to the EEZ but is constrained to the UK's territorial waters.⁴⁷

The impacts of climate change on marine biodiversity and conservation

Damage to the ocean's ecosystems is not solely caused by the direct release of pollutants into the waters, but is also caused more broadly by climate change. The impacts of climate change on the oceans are well rehearsed, with the rise in global temperatures necessarily impacting on the oceanic environment. The Secretariat of the Convention on Biological Diversity has broadly outlined the effects of climate change as being 'warming, increasing thermal stratification and reduced upwelling [of nutrient-rich colder water], which can alter nutrient fluxes and induce hypoxia, sea level rise, increase in wave height and storm surges and loss of sea ice. ... Marine mammals, birds, [and fish] are vulnerable to climate-related changes in prey populations. Melting ice sheets will reduce salinity, disrupt food webs and cause poleward shifts in community distributions'.⁴⁸

Similarly well rehearsed are the arguments attributing significant culpability for climate change at its current rate to human activity. In recognition of this causative link, there has been a truly impressive global drive to address climate change issues – most notably through the UN Climate Change Conference – as well as regional attempts to control and regulate to this end.

The Paris Agreement of last year famously committed parties to '[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C'.⁴⁹ This 'ambitious'⁵⁰ agreement, if more widely ratified, will prove a useful instrument to attain the global aim of preventing or reducing the impacts of climate change.

Concluding remarks

I mentioned at the outset that the laws and regimes concerning marine conservation provide a broadly typical example of international environmental law insofar as they represent attempts on a global stage to reach achievable and worthwhile agreements. The centrality of compromise to these agreements was recognised in a Reflections Note by the Presidents of the 21st and 22nd Conference of the Parties when assessing how to take the Paris Agreement forward, although the wording which they used could just as feasibly be applied to any of the instruments which we have gone into some detail in discussing: 'it will be vital to maintain the spirit of [the negotiations], to build on the momentum that was created, to respect the balance that was found and to continue working together so as to strengthen action, support and ambition, moving from a focus on negotiation to a focus on implementation and cooperation'.⁵¹

I have, I hope, demonstrated the genuine difficulty which is faced by states in seeking to draw the balance when engaging in global environmental legislative discourse. In the context of marine conservation, a strong argument can be made that the balance is still not yet appropriately struck. There is a greater need for an appreciation of our collective lack of knowledge about the oceans and its role in the global ecosystem, and the impacts of pollution for all sources on global sea life. Whilst it is true that movements have been made towards a more precautionary approach – particularly in the UN Fish Stocks Agreement and the Convention on Biological Diversity – these measures have not yet been truly successful in seeking to remedy the problems which they were drafted to resolve. The State of the World Fisheries and Aquaculture (SOFIA) 2014 report explained that: '[t]he fraction of assessed stocks fished within biologically sustainable levels has exhibited a decreasing trend, declining from 90 percent in 1974 to 71.2 percent in 2011. Thus, in 2011, 28.8 percent of fish stocks were estimated as fished at a biologically unsustainable level'.⁵²

The invitation has been repeatedly made for meaningful and substantive change to be pursued, and it has been reiterated that, in many cases, it is not yet too late to halt, prevent, or even reverse the deleterious effects of human activity on marine conservation. Indeed, as José Graziano da Silva, the Director General of the Food and Agriculture Organization of the UN, has recently written: '[the challenges] can all be overcome with greater political will, strategic partnerships and fuller engagement with civil society and the private sector'.⁵³

The true challenge, then, is in generating this normative shift; in amending the balance of the public's opinions toward sustainable development. This change in popular opinion will then drive good governance which is, arguably, the key obstacle to conserving marine biodiversity successfully.

47 Law Commission *Wildlife Law* (Law Comm No 362 2015) Wildlife Bill cl 168.

48 Alison Campbell et al *Review of the Literature on the Links between Biodiversity and Climate Change* (Secretariat of the Convention on Biological Diversity 2009) 21 www.cbd.int/doc/publications/cbd-ts-42-en.pdf.

49 Paris Agreement art 2(1)(a).

50 Manuel Pulgar-Vidal and Salaheddine Mezouar 'Taking the Paris Agreement forward: reflections note by the President of the 21st session of the Conference and the incoming president of the 22nd session of the Conference of the Parties' *UNFCCC* (6 May 2016).

51 *ibid*.

52 Food and Agriculture Organization of the United Nations 'The state of world fisheries and aquaculture: opportunities and challenges' (Food and Agriculture Organization of the United Nations 2014) 37.

53 José Graziano da Silva 'The state of world fisheries and aquaculture: opportunities and challenges' (Food and Agriculture Organization of the United Nations 2014) iv.

The EU Habitats Directive and protected area management

A study of the requirements of the directive and its interface with the EU's Common Fisheries Policy

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This article considers the requirements of Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (Habitats Directive) and the requirements set out under the Common Fisheries Policy (CFP) that focus on compliance with this directive in marine areas.

The Habitats Directive

When the Habitats Directive came into force, it complemented the existing EU Birds Directive,¹ introducing special areas of conservation (SACs) alongside the special protection areas (SPAs) designated under the Birds Directive. Together, these form a network of sites: the Natura 2000 network.

One of the main goals of the Habitats Directive is to maintain or restore natural habitats and species of wild fauna and flora of 'Community interest'. In particular, the Natura 2000 network is meant to enable important natural habitats, and the habitats of particularly important species, to achieve or maintain 'favourable conservation status'. Specific habitats requiring protection are listed in Annex I to the Habitats Directive. Protected species are listed in Annex II and include brown bears, beavers and various plant species. Where habitats and species are especially vulnerable and in need of protection they are marked in those Annexes as 'priority' habitats and species. In addition, certain species are subject to a regime of strict protection under the Habitats Directive – these are listed in Annex IV(a) and include, for instance, cetaceans such as harbour porpoises.

SPAs protect migratory birds and the species listed in Annex I of the Birds Directive. Whilst this directive does not itself refer to 'favourable conservation status', it is generally accepted that this requirement is broadly equivalent to, and implicit in, the requirements of Article 2 of the Birds Directive.

This article will focus specifically on the protected areas and their management, as provided for in the Habitats Directive, in particular by Articles 6(2), 6(3) and 6(4). These provisions are applicable to the entire network (ie to both SACs and SPAs).²

Before considering in detail the requirements of the Habitats Directive it is important to note the legal position following the UK's vote to exit the European Union in the June 2016 referendum. While an end to the current relationship is very likely to carry implications for the Habitats Directive, and certainly for the Common Fisheries Policy also considered in this article, at the date of publication the UK remains in the EU. As such these laws are still applicable to the UK and the analysis below represents the current approach.

Plan or project

One of the most legally interesting articles in the Habitats Directive is Article 6(3). This article applies not only to SACs but also to SPAs, and therefore to the Natura 2000 network as a whole, courtesy of Article 7 of the Habitats Directive. Article 6(3) outlines a two-staged approach to regulating human activity in protected sites.

First, for any 'plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon', an 'appropriate assessment' of its 'implications for the site in view of its conservation objectives' must be performed. Secondly, after Member States have undertaken the appropriate assessment, and in light of its conclusions, the plan or project may only be granted permission to proceed if it can be 'ascertained that it will not adversely affect the integrity of the site concerned'.

The terms 'plan' and 'project' are not defined in the Habitats Directive. The understanding of those terms must, therefore, be informed by their interpretation by the EU courts and European Commission guidance. The definition of 'plan or project' is important, not only for triggering the application of Article 6(3), but also for defining the scope of an appropriate assessment of the implications of a plan or project for the Natura 2000 site concerned.

The Court of Justice of the European Union (CJEU) has supported a broad definition of 'project'. In the *Waddenzee*³

accessed online should a more in-depth analysis of each point be required. See 'European protected areas: navigating the legal landscape' www.documents.clientearth.org/library/download-info/an-overview-of-natura-2000/.

1 Directive 2009/147/EC of the European Parliament and of the Council of 30 November 2009 on the conservation of wild birds.

2 ClientEarth has written a series of briefings on Article 6 of the Habitats Directive. These have informed the contents of this article and can be

3 Case C-127/02 *Landelijke Vereniging tot Behoud van de Waddenzee en Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij* [2005] ECR I-7405 (*Waddenzee*).

case, it drew an analogy with the Environmental Impact Assessment Directive.⁴

In this case the CJEU began by examining the definition of 'project' under Article 1(2) of the EIA Directive. It found that the definition was relevant to defining the concept of 'project' under the Habitats Directive, since both directives operate in a similar context, namely by seeking to 'prevent activities which are likely to damage the environment from being authorised without prior assessment of their impact on the environment'.⁵

The EIA Directive refers to interventions in the natural surroundings and landscapes aside from construction, including those involving the extraction of mineral resources. Against that background, it is not surprising that the court found that the cockle fishing with which the *Waddenzee* case was concerned was indeed a plan or project.

The Commission's guidance⁶ also makes reference to Article 1(2) of the EIA Directive in defining a 'project'. This is again owing to the fact that they operate in a similar context, by setting rules for the assessment of environmentally significant projects.⁷ The guidance notes that the definition of 'project' is a broad one, which is not limited to physical construction. As such, the term 'project' does not refer exclusively to building projects but could include, for example, a significant intensification of agriculture.⁸

Appropriate assessments and likely significant effect

Further interpretation questions arise in relation to the test of when a plan or project is considered to have a 'likely significant effect'. This is the trigger for the carrying out of appropriate assessments, which is an essential process underpinning the protection of Natura 2000 sites. The words 'likely' and 'significant' have appeared to cause confusion for decision makers and have sometimes led to legally incorrect decisions. This may in part be addressed by greater public awareness of the correct application of these tests and processes, which will help to ensure that decision makers apply these basic legal principles openly and correctly to the governance of Natura 2000 sites.

In the *Waddenzee* case, the Advocate General considered the meaning of the word 'likely' in the context of Article 6(3). She stated that: 'the criterion must be whether or not reasonable doubt exists as to the absence of significant adverse effects'.⁹ The Advocate General then stated that, in assessing 'doubt', account should be taken of the likelihood of harm, and the extent and nature of the harm. This would include an assessment of whether the harm would be irreversible or temporary, and what habitats or

species would be likely to be impacted. She concluded that an appropriate assessment is always necessary 'where reasonable doubt exists as to the absence of significant adverse effects'.¹⁰

In its judgment in *Waddenzee*, the CJEU took a similar approach to that of the Advocate General. It ruled that, in light of the precautionary principle, an appropriate assessment 'must be carried out if there is a risk that the plan or project will have significant effects on the site concerned, and that risk cannot be excluded on the basis of objective information'.¹¹ The significant effects of a plan or project include its effects when viewed in combination with other plans or projects. *Waddenzee* highlights the level of certainty required as to the absence of significant effects on a site before it can be decided that an 'appropriate assessment' is not needed. That is, an 'appropriate assessment' must be done unless there is no risk of the project having significant effects on the site concerned.

The threshold required at the initial screening stage of Article 6(3) was also referred to by the Advocate General in the *Sweetman* case.¹² She stated that the requirement for the effect to be 'significant' represents 'a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded'. She continued:

The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken of the implications of the plan or project for the conservation objectives of the site. The purpose of that assessment is that the plan or project in question should be considered thoroughly, on the basis of what the [CJEU] has termed "the best scientific knowledge in the field".¹³

It is notable that the question concerns not just the effect on the site but on the site in view of its conservation objectives. So the interpretation by the Advocate General, agreed with by the court, reflects that a broad construction is necessary when considering whether a plan or project is likely to have a significant effect, particularly given the connection to 'favourable conservation status' described above.

If the test of likely significant effect is met, this will trigger an appropriate assessment. Whilst the method of such assessment is not specified in the Habitats Directive, it is clear that the appropriate assessment must allow the decision maker to establish whether the plan or project will have adverse effects on the integrity of the site. *Waddenzee* confirmed that unless there is certainty that there will be no adverse effects, ie there is no reasonable scientific doubt remaining, the plan or project cannot go ahead.

4 Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (OJ L175 of 5 July 1985 para 40) (EIA Directive).

5 *ibid* para 26.

6 European Commission 'Managing Natura 2000 sites: the provisions of Article 6 of the Habitats Directive 92/43/EEC (2000)' http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/provision_of_art6_en.pdf.

7 *ibid* para 4.3.1.

8 *ibid*.

9 Case C-127/02 *Waddenzee* (n 3) Opinion para 73.

10 *ibid* paras 73-74.

11 The precautionary principle provides that protective action may be taken, in the absence of conclusive scientific evidence as to the existence or extent of risks to the environment, where that risk cannot be excluded. For information on the precautionary principle, see the ClientEarth briefing series (n 2).

12 Case C-258/11 *Peter Sweetman, Ireland, Attorney General, Minister for the Environment, Heritage and the Local Government v An Bord Pleanála* [2014] PTSR 1092 (*Sweetman*).

13 *ibid* Opinion para 48.

So what must be adversely affected? It is clear from the directive that this is 'the integrity of the site'. Whilst site integrity is not a very straightforward concept, it is clear that it is a broad one. The *Sweetman* case, in particular, supports this. This was an Irish case involving a limestone pavement over which the aim was to build a road. The road would, in fact, only have caused the loss of a very small amount of limestone pavement but the CJEU found that there was an adverse effect on site integrity. Specifically, the CJEU stated that national authorities must refuse to authorise developments where there is a risk of lasting harm to the ecological characteristics of the sites and that in order for the integrity of a site not to be adversely affected, the site needs to be preserved at a 'favourable conservation status'. This requires 'the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site'.¹⁴ It is clear, therefore, that when considering site integrity, it is essential to take a holistic view and look at the ecological functioning of the site.

Projects of overriding public interest

In spite of an assessment concluding that the plan or project would have a negative effect on the site's integrity, a plan or project can still be authorised if the conditions under Article 6(4) are fulfilled. Those conditions are that there must be an 'absence of alternative solutions', and there are 'imperative reasons of overriding public interest' (IROPI) in favour of proceeding. The text of Article 6(4) reads as follows:

If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted. Where the site concerned hosts a priority natural habitat type and/or a priority species, the only considerations which may be raised are those relating to human health or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other imperative reasons of overriding public interest.

The implied first requirement of Article 6(4), then, is compliance with Article 6(3). As Article 6(4) provides a derogation to Article 6(3), it can only apply after a plan or project has been assessed in accordance with that provision. In order to determine the nature of any compensatory measures, which is the purpose of the tests under Article 6(4), the damage a plan or project would cause to the site must be precisely identified. The CJEU has noted that the Article 6(3) assessment provides knowledge on the implications of a plan or project, in light of the conservation objectives

of the site in question. That knowledge is necessary before Article 6(4) can be applied as, without it, the conditions for the application of the derogation cannot be assessed.¹⁵

The Habitats Directive does not specify how an 'absence of alternative solutions' will be determined, or by whom. Decisions of the CJEU have, however, provided some guidance. First, the CJEU has ruled that it is for the authorising authority to decide whether or not there is an absence of alternative solutions, not the proponent of a plan or project. In *Commission v France*,¹⁶ the Advocate General stated that the authority

... may, in weighing up all the advantages and disadvantages of other variants of the plan or project applied for, reach a different conclusion than that reached by the [proponent]. In choosing between various alternatives, the [proponent] will normally be influenced by his own interests. In contrast, Article 6(4) ... permits an area of conservation to be affected only if this is required by [IROPI]. Only the authorising authority can decide this.

The CJEU also stated in the *Grüne Liga* case¹⁷ that if an option entails risks of potentially significant deterioration or disturbance it cannot be regarded as an alternative solution under Article 6(4).

Once it has been established that there is an 'absence of alternatives' to the proposed plan or project, it must be determined whether there are any IROPI in favour of proceeding with it. The first paragraph of Article 6(4) states that IROPI include reasons of a 'social or economic nature'. The second paragraph, meanwhile, notes that, where a site hosts a priority habitat or species, only issues relating to 'human or public safety, to beneficial consequences of primary importance for the environment or, further to an opinion from the Commission, to other [IROPI]' may be considered. It is therefore clear that human or public safety and beneficial consequences of primary importance for the environment are included within the scope of IROPI.

The case of *Solvay*¹⁸ is an interesting one on this point. It considered the construction of the headquarters of a private company and the question of whether this was an overriding public interest. The court found that it was not, stating that: 'it must be of such an importance that it can be weighed up against that [Habitats Directive] objective of the conservation of natural habitats and wild fauna and flora'.¹⁹ The CJEU was not forthcoming in saying that private projects definitely cannot constitute overriding public interests. What is clear is that an overriding public interest really needs to outweigh the harm that will occur if a project goes ahead and this will of course be a case-by-case decision.

15 Case C-441/03 *Commission v Netherlands* [2005] ECR I-03043 Judgment (14 April 2005) para 83.

16 Case C-241/08 *Commission v France* [2006] ECR I-10183 Opinion (27 April 2006) para 98.

17 Case C-399/14 *Grüne Liga Sachsen eV and others v Freistaat Sachsen* [2016] Judgment (14 January 2016) para 75.

18 Case C-182/10 *Solvay and others v Région wallonne* [2012] ECR I-0000, [2012] Env LR 545 Judgment (16 February 2012).

19 Case C-399/14 *Grüne Liga Sachsen eV and others v Freistaat Sachsen* (n 17) para 75.

14 Case C-258/11 *Sweetman* (n 12) para 39.

Mitigation and compensation

After the tests in Article 6(4) have been satisfied and a plan or project is permitted, the next question relates to compensation measures. In truth, compensation is a difficult issue – often confused with mitigation – and one that should be considered at the same time as the Article 6(4) tests. In any event, the meaning of ‘compensation’ and ‘mitigation’ needs further reflection.

An indication of the distinction between the two concepts can be gathered from guidance²⁰ issued by the European Commission. While not legally binding, this can offer helpful assistance in interpreting the legal requirements. The Commission distinguishes between (i) ‘mitigation measures’, which are ‘those measures which aim to minimise, or even cancel, the negative impacts on a site that are likely to arise as a result of the implementation of a plan or project’; and (ii) ‘compensatory measures’, which are ‘independent of the project (including any associated mitigation measures) [and] are intended to offset the negative effects of the plan or project so that the overall ecological coherence of the Natura 2000 Network is maintained’. The CJEU has established that compensation measures can only be taken into account for the derogation tests for projects of imperative overriding public interest under Article 6(4) of the Habitats Directive. This is not necessarily the case for ‘mitigation measures’.

In order to understand the difference between the two types of measures, it is useful to begin by considering the *Briels* case.²¹ *Briels* concerned the proposed widening of a motorway in the Netherlands, which would result in the loss of a particular section of a nearby SAC containing molinia meadows. In order to reduce the negative impact, hydrological improvements were proposed, which would allow a new, larger molinia meadow area to be created, with the intention of offsetting the loss caused by the motorway development. The CJEU examined whether the provision of new habitat in this way could be considered a ‘mitigation measure’, which would prevent the development from adversely affecting the integrity of the site. If so, the project could be approved under Article 6(3). If not, the measure could only be examined as a ‘compensatory measure’ under Article 6(4). The CJEU found that the provision of a new habitat could not be taken into account for the purposes of Article 6(3), and so could not count as a ‘mitigation measure’. The provision of new habitat, it noted, did ‘not guarantee that the project will not adversely affect the integrity of the [existing] site within the meaning of Article 6(3) of the Habitats Directive’, and was instead simply providing compensation ‘after the fact for those effects’.²²

20 European Commission ‘Guidance document on Article 6(4) of the Habitats Directive 92/43/EEC(2007)’ 10 http://ec.europa.eu/environment/nature/natura2000/management/docs/art6/guidance_art6_4_en.pdf.

21 Case C–521/12 *Briels and Ors v Minister van Infrastructuur en Milieu* [2014] PTSR 1120 (*Briels*).

22 *ibid* judgment of the CJEU para 31.

Article 6(2)

Article 6(2) of the Habitats Directive again applies to all sites in the Natura 2000 network. Article 6(2) contains a general obligation to avoid deterioration and disturbance, stating that:

Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.

A number of cases show that Article 6(2) and Article 6(3) must be interpreted as providing equivalent protection.²³

This means if something is not deemed a plan or project then Article 6(2) still provides an obligation to assess it in a similar way and consider if there is an adverse effect. This has been particularly relevant to ClientEarth’s work on ensuring that damaging fishing practices in marine protected areas in English waters are addressed. Although the English and Welsh Governments appear not to have been persuaded that the issuance of a fishing licence is a plan or project, they have accepted that an assessment of fishing activities is required and that management measures, such as closure of the site or closure to certain gear types, do need to be considered based on those assessments. This is true of both inshore and offshore areas, which is where Article 11 of the Common Fisheries Policy has a specific role to play.

The Habitats Directive and the Common Fisheries Policy

The current iteration of the Common Fisheries Policy (CFP) came into force in January 2014. The CFP Basic Regulation²⁴ is not only about quotas and the newly introduced ‘discard ban’: it is an instrument that also has a strong role to play in conservation. The environmental elements of the policy have become increasingly prominent through successive updates since the first CFP entered into force.²⁵ The Basic Regulation now has a strong role to play in the management of fisheries in Natura 2000 areas, making it an appropriate case study for this article.

The relevant provision of the CFP Basic Regulation is Article 11 on ‘conservation measures necessary for compliance with obligations under Union environmental legislation’. Article 11(1) states that:

Member States are empowered to adopt conservation measures not affecting fishing vessels of other Member

23 The Advocate General in *Waddenzee* pointed out that, while Article 6(2) is not as prescriptive as Article 6(3), any measures taken pursuant to Article 6(2) must be ‘no less effective than the procedure under Article 6(3)’. This view has since been confirmed by the CJEU judgment in the *Sweetman* case.

24 Regulation (EU) No 1380/2013 of the European Parliament and the Council of 11 December 2013 on the Common Fisheries Policy, amending Council Regulations (EC) No 1954/2003 and (EC) No 1224/2009 and repealing Council Regulations (EC) No 2371/2002 and (EC) No 639/2004 and Council Decision 2004/585/EC.

25 The first CFP was adopted in 1983.

States that are applicable to waters under their sovereignty or jurisdiction and that are necessary for the purpose of complying with their obligations under Article 13(4) of Directive 2008/56/EC, Article 4 of Directive 2009/147/EC or Article 6 of Directive 92/43/EEC, provided that those measures are compatible with the objectives of the relevant Union legislation that they intend to implement, and are at least as stringent as measures under Union law.

This article has a broad scope, relating as it does to obligations under the Marine Strategy Framework Directive (2008/56/EC), the Birds Directive (92/43/EEC) and the Habitats Directive (92/43/EEC). It is the first time there has been an explicit link made in legislation between the CFP and marine protected areas conservation required by these laws. Any measures introduced under this article must also be in line with the CFP's objectives and these include the precautionary and ecosystem-based approaches to fisheries management.²⁶

Article 11(1) paints a picture of the purpose of the article as a whole and the Union environmental legislation to which it relates. However, it is limited to situations where the conservation measures do not affect fishing vessels of other Member States. In many situations there are, in fact, a number of different Member State fishing interests involved and this is where Article 11 and its application becomes particularly interesting.

First of all, it is helpful to provide some background to Article 11. There has always been a Member State duty to implement conservation measures in relation to marine protected areas but, in relation to waters in which multiple Member States have interests, the process was not clearly set out in legislation or guidance. The need for clarity was particularly relevant in offshore areas where, as mentioned, various Member States may have fishing interests. Article 11 aims to address this. It was introduced through the 2013 CFP reform and more clearly sets out the process for decision making on fisheries management measures in such Natura 2000 sites.

Regionalised decision making

The process provided for in Article 11 of the CFP Basic Regulation is part of the decisive shift towards regionalised, as opposed to centralised, decision making in the reformed CFP. The increasing focus on regionalisation means that decisions on the details of the proposals are taken at Member State level rather than by the EU institutions, although the European Commission retains power to approve the Member States' proposals, or reject them – see further below. Overall, the decision making process has clear procedural stages. It is worth noting that the regionalised process applies to other measures in addition to those that fall under Article 11 and the full process on regional cooperation is set out in detail in Article 18.

The Article 11 process involves a number of steps. Where a Member State considers that it needs to adopt measures in order to comply with the Habitats Directive,

it must provide the Commission and the other Member States having a 'direct management interest' with 'relevant information' on the measures required.²⁷ A Member State with a 'direct management interest' is one which has an interest consisting of either fishing opportunities, which includes both fishing quotas and time at sea (effort), or fishing taking place in the exclusive economic zone of the Member State concerned (there is a slightly different definition for the Mediterranean that will not be covered here). 'Relevant information' is defined as including rationale of the measures, scientific evidence in support of details on practical implementation and enforcement.

From this point the Member State that initiates the process and the other states with the direct management interest may then work together, cooperating through the regionalised approach, to submit a joint recommendation within six months from the provision of 'sufficient information' by the initiating Member State.²⁸ There is a lack of clarity regarding the term 'sufficient information', which may cause difficulties for the Member States involved in interpreting this requirement. As it is the trigger for the six month period to begin, if there is uncertainty about when the clock starts ticking, then there is confusion about the timescale for working together towards a joint recommendation.

The next step in the process is for the European Commission to adopt the measures, taking into account any scientific advice. This is in line with one of the central principles of good governance of the CFP – 'the establishment of measures in accordance with the best available scientific advice'.²⁹ However, the timescale for this process is far from clear, again due to a lack of definition. The Commission is to adopt the measures within three months of a 'complete request'. What constitutes a 'complete request' is not clarified. If the Commission requests further information after a group of Member States have submitted a joint recommendation, then has the three month period begun or not?

Whilst conservation measures should be adopted on the basis of information that is as full as possible, it is also important to ensure that conservation measures in marine protected areas are adopted at the earliest possible opportunity. This is particularly true where measures should have been adopted as a matter of priority to prevent further damage occurring. Further clarification or guidance regarding what constitutes a 'complete request' will be of great assistance to those involved in the process to prevent unnecessary and time consuming steps back and forth.

Regionalised decision making is seen as a great improvement in the CFP as it allows for tailored decision making. However, there may be a situation where Member States do not agree on a joint recommendation or they do agree but it is incompatible with the requirements set out in Article 11(1), for example the measures do not achieve the requirements of Article 6 of the Habitats Directive. In these circumstances the Commission may submit a

²⁷ *ibid* art 11(3).

²⁸ *ibid*.

²⁹ Regulation (EU) No 1380/2013 (n 24) art 3(c).

²⁶ Regulation (EU) No 1380/2013 (n 24) art 2.

proposal itself, leading to the ordinary legislative (co-decision) procedure. One might expect the Member States, as well as stakeholders engaged in the process, to be keen to avoid this. Where the Commission takes such action, it would mean a failure to agree measures through regional cooperation and the failure of a process that should better take into account the specific needs of the marine areas in question. In addition, it is likely to result in much longer timescales for the adoption of measures as the ordinary legislative procedure is one that requires agreement by both the European Parliament and the Council.

The situation may be different where the Member States have chosen not to commence the joint recommendation process. Here the Commission may adopt the measures by delegated act if the relevant information submitted by the Member State can be deemed a 'complete request'.³⁰ However, the application of this process is unclear and it is not anticipated that this approach will be used often, if at all, given the weight placed on regionalised decision making.

Another situation foreseen in Article 11 is the adoption of conservation measures by the Commission in cases of urgency. The Commission has a duty to adopt measures in this situation. Article 11(4) states that:

[t]he measures to be adopted in case of urgency shall be limited to those in the absence of which the achievement of the objectives associated with the establishment of the conservation measures in accordance with the Directives referred to in paragraph 1 and the Member State's intentions, is in jeopardy.

The measures can apply for a maximum period of 12 months, although this is extendable for a further 12 months if the conditions justifying the measures remain.³¹

As of September 2016, the Article 11 process has been completed in relation to very few offshore sites.³² This makes it difficult to assess the article's success in obtaining legally compliant management of fisheries in offshore marine protected areas. The Member States that have so far initiated discussions under this process in relation to certain offshore sites have included the United Kingdom, Belgium, the Netherlands, Germany, Sweden and Denmark. Whilst there may be other Member State proposals in the pipeline there has perhaps been less progress than one might expect, given that a number of the offshore sites were identified several years ago and that the timescales set in Article 11 do not appear particularly long.

One of the issues relating to regionalisation is the potential for politicised decision making. It is, in theory, only the initiating Member State which is at risk of infringement action by the Commission over failure to comply with the Habitats Directive. Other Member States' interests and

motivation levels will be varied, leading to the risk that discussions will result in weakening of the initial proposals so that they no longer align as strongly with the conservation objectives of the sites in question (assuming that they did so in the first place). The engagement of various stakeholders representing a wide range of interests has a very important role to play in balancing these discussions.

The UK and the adoption of conservation measures

In considering how the adoption of conservation measures in marine areas is progressing, more recently under the Article 11 process, the UK's approach in English waters³³ provides an interesting case study. Defra has announced that it will be taking a number of offshore sites, including some Natura 2000 sites, through the process with a view to having measures in place in some or all sites by mid-2017.

It is clear that many competing factors, including political ones, are playing into Defra's approach and its proposals. Policy decisions are made with regard to the level of protection, ie how much of the site should be closed and to what type of fishing gears. For instance, towed gears such as beam trawling are seen as having a particularly negative impact. For many sites, Defra proposals show only partial closure of the site rather than full closure, with closures across a cross section of the site in areas that might represent different biotopes. The stated aim is to ensure some coverage of the different biotopes within the closed areas. However, one clear policy that Defra does have is to fully close reef sites to bottom towed gears. Here there is no uncertainty regarding the harm these activities cause in these areas. In relation to habitat types where the damage done by fishing gears is less certain, Defra wants to use an 'adaptive management' approach. This means that it will decide on some measures now and then test them later to see if they are too lax or too stringent.

There are a number of questions regarding whether the UK's approach (and resulting proposals) is compliant with the Habitats Directive. As discussed above, whether or not it is agreed that fishing should be regarded as a plan or project, Article 6(3) and Article 6(2) of the Habitats Directive require the same standard of protection. As such, certainty that the integrity of the site will not be adversely affected by the fishing activity is required before the activity can be permitted. In recognising that there is uncertainty regarding the impacts of the fishing gears but still allowing fishing to take place in sections of the site, Defra's adaptive management approach is not in line with this requirement. Where such a lack of certainty exists, full closure is the only certain way of complying with the directive. Defra's approach does not take full account of the important consideration of site integrity. Where it focuses instead on the site's features, this is too narrow a construction to be in line with Article 6.

30 For further discussion, see ClientEarth briefing 'Article 11 of the EU Common Fisheries Policy' (July 2014) paras 45–46 www.documents.clientearth.org/wp-content/uploads/library/2014-08-01-clientearth-briefing-on-article-11-of-the-eu-common-fisheries-policy-ce-en.pdf.

31 Regulation (EU) No 1380/2013 (n 24) art 11(4) and (5).

32 Commission Delegated Regulation (EU) No 2015/1778 of 25 June 2015 establishing fisheries conservation measures to protect reef zones in waters under the sovereignty of Denmark in the Baltic Sea and Kattegat is an example of the completed process.

33 This is referring to Defra's approach to sites in English waters as the approach in Scottish waters is the responsibility of Marine Scotland.

An additional concern is that proportionality has been raised as an argument (most vocally by the fishing industry) for less onerous measures than those proposed. It is argued that the measures proposed place a disproportionate socio-economic burden on those undertaking fishing activities in these areas and that 'proportionality' is just as important as being precautionary when designing management measures. However, it is incorrect to suggest that there is a separate test of proportionality, which can over-rule compliance with the directive. As outlined above, Article 6(4) specifically builds the consideration of social and economic factors into the decision on whether a plan or project can proceed (through the IROPI test), which is where Article 6 incorporates the question of proportionality.³⁴ If a number of different options would achieve compliance with the Habitats Directive (ie certainty of absence of adverse effect on site integrity), the most proportionate should be chosen. But it would be incorrect to argue that measures that do not ensure compliance with the directive should be introduced instead of those which do ensure compliance.

Consultation of stakeholders

Central to regionalised decision making under the CFP is the consultation of stakeholders. As discussed, Article 18 of the CFP provides for Member States with direct management interests to cooperate to formulate joint recommendations. As part of this process, these Member States must consult the relevant Advisory Councils. Advisory Councils are bodies made up of fisheries stakeholders, which provide advice on the management of fisheries in their specific sea basin to the European Commission and the Member State groups. Their members include those from fisheries organisations and other interest groups, including those from environmental NGOs.

Consultation of the Advisory Councils has an important role to play in the adoption of conservation measures in Natura 2000 areas. However, through ClientEarth's experience of the Article 11 process so far, a number of uncertainties surrounding the consultation process have created an obstacle to the full engagement of these bodies in the decision making process. On a practical level, the iterative nature of consultation leading to revision of proposals by the initiating Member State (strengthening or weakening, depending on the individual's perspective) creates difficulties of staying up to date and understanding how and when to push views forward. Stakeholders need to be engaged in a consultation process that is transparent, both in terms of the form of response expected and the timescales for such a response. These problems may have implications for the efficacy of, and 'buy in' to, the measures adopted, particularly from the fishing industry which is impacted by them.

It is not possible to assess ClientEarth's experiences of the approach to consultation within Article 11 processes against any kind of standard. The form and timescales for consultation are not set out in the CFP Basic Regulation

and the approach taken by the different Member States has not been uniform. Interpretation of what would constitute sufficient consultation has been varied, from formal to informal, in person or in writing. Generally, the initiating Member State starts with an informal consultation with the aim of ensuring that all the Member States involved in the discussions (those with a direct management interest) are largely in agreement, and that the joint recommendation is in a largely finalised form before the formal consultation, with its accompanying six month window, is initiated. In fact, this means that a significant amount of time is being spent on an informal discussion and consultation process. Taking this staged approach means that the timescales set out in Article 11 are being exceeded and the ultimate result is further delays to protection.

As a member of two Advisory Councils,³⁵ ClientEarth is experiencing first hand the lack of clarity as to when and how stakeholders, for example Advisory Councils, are to be consulted. Recent engagement with Defra, for example, has shown that the consultation of the Advisory Councils has been good at some stages and lacking in others. Further, there are practical questions that need to be considered. The nature of the Advisory Councils means that to produce formal Advisory Council advice, the consulting Member State needs to provide sufficient timescales to allow time for discussion, the preparation of advice and final sign-off by the Executive Committee. So far, required response times have not allowed for this procedure, although signs show that this is set to improve.

Despite all of these issues, the positives of this process are clear. While there may be some early hiccups, overall the Article 11 procedure does provide for increased engagement of stakeholders with regional knowledge. This knowledge should allow for conservation measures that are effective at achieving their objectives and properly tailored to the sites in question. The involvement of Advisory Councils means the involvement of both fishing interests and NGOs and therefore the opportunity for a range of views to be fed into the process, contributing to, and hopefully strengthening, the protection in these marine areas. Further, it is clear that issues surrounding consultation, particularly of the Advisory Councils, are being steadily addressed, largely following feedback from these bodies to the Member States involved. Things are moving in the right direction.

Conclusion

It is clear from the discussion above that the Habitats Directive is a strong piece of law with the potential to result in strong protection in marine areas. However, to do this it needs proper implementation, including through the CFP, and it is essential that all stakeholders better understand the directive's requirements. Improvements have been made but efforts need to continue.

34 Case C-127/02 *Waddenzee* (n 3) Opinion para 106.

35 ClientEarth is a member of the North Sea Advisory Council and the North Western Waters Advisory Council.

TTIP: what is it and should I even be bothered?

Stephen Tromans 39 Essex Chambers, London

The Transatlantic Trade and Investment Partnership (TTIP) has assumed a rather bizarre prominence in 2016 during the Brexit imbroglio. Would the UK, as Barack Obama suggested on his visit to the UK in April, be 'at the back of the queue' in terms of negotiating a trade deal with the US in the event of a 'leave' decision? But in any event would that be such a bad thing if, as the alliance of Labour and Eurosceptic Conservative MPs claimed in May at the time of the Queen's Speech, the TTIP presents a mortal threat to the NHS?¹

Is the TTIP of any relevance to environmental lawyers? Is it, as critics suggest, a potential disaster for the environment, affecting the ability of states to improve environmental standards? Or is it, as apologists assert, a potential game-changing force for good, harnessing economic and environmental forces to drive up environmental standards and bring about a more sustainable future? The truth, as always, lies somewhere between the two extremes.

The TTIP is a trade and investment treaty being negotiated between the EU and the US. It could become the world's largest bilateral free trade agreement. The EU Council gave the Commission a mandate to negotiate in 2013. In the directives laid down by the Council, the objective is stated as follows:²

The objective of the Agreement is to increase trade and investment between the EU and the US by realising the untapped potential of a truly transatlantic market place, generating new economic opportunities for the creation of jobs and growth through increased market access and greater regulatory compatibility and setting the path for global standards.

Some 13 negotiating rounds have taken place so far, the latest having been held from 25–29 April 2016 in New York. If not finalised before President Obama leaves office, its future will no doubt depend on whether President Clinton II or President Trump takes over. There are important differences still, on matters such as exclusion of areas of services, agriculture and procurement. Once negotiated, the final decision will rest with the Council and the European Parliament. If, as seems likely, it is a 'mixed agreement' involving shared competence between the EU and its Member States,³ it is also subject to signature and

ratification by all Member States individually. In May 2016, Greenpeace Netherlands leaked – to the joy of anti-TTIP campaigners – restricted documents giving the respective negotiating positions.⁴ There plainly remain some very sensitive and difficult areas, as set out in the 'Tactical State of Play' note of March 2016. These include some agricultural areas, sub-Federal public procurement, regulatory cooperation in financial services, cosmetics and chemicals (particularly the sharing of confidential data for regulatory purposes). Equally, however, in other areas significant progress has been made, for example in regulatory coherence and mutual recognition of pharmaceuticals and automotive standards.

The implications are massive at many levels: economic, social and environmental. The interim report of Ecorys (appointed by the Commission to produce the Trade Sustainability Impact Assessment), published in May 2016,⁵ points some of these out. GDP both in the US and EU is predicted to increase as a result of the agreement, as should employment and disposable income. However, the gains will not be even, either nationally or by industry sectors, and some sectors (such as electrical machinery) may be adversely affected. Material use and energy consumption will increase, which will have carbon emissions implications. On the one hand, energy sources may change as Europe opens up to imports of liquefied natural gas (LNG) from the US, displacing coal. Facilitating trade in unhealthy commodities (eg tobacco, alcohol and some foods) may have negative consequences; on the other hand, cheaper and more available medical equipment and devices will be beneficial.

If it can be brought off, the TTIP will be a unique achievement in both scale and content. Ecorys describes it as follows:

TTIP is the largest bilateral trade and investment agreement ever to be negotiated. It will be a unique agreement where (traditional) tariff liberalisation is complemented by significant commitments on regulatory cooperation and a joint rules-based framework for bilateral trade and investment, fit for modern globalised commerce. The future agreement will consist of three pillars: market access, regulatory cooperation and rules. Within these three parts respectively, TTIP aims to remove nearly all customs duties, improve EU and US access to each other's services and public procurement markets; address and reduce behind-the-border barriers to trade and investment with full regard and respect for consumer, labour, environmental, health and other public policy goals; and to set new and clear rules on horizontal issues governing

¹ The assertion is ill-informed because, as long ago as 1995 in the GATS, the EU negotiated four key safeguards to protect national health services (including that they do not have to give access to service providers from outside the EU, and can organise and subsidise public health services as they see fit). See further the letter from Commissioner Cecilia Malmström to UNITE (25 May 2016) http://trade.ec.europa.eu/doclib/docs/2016/june/tradoc_154617.pdf.

² <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

³ See TFEU art 4.

⁴ <https://ttip-leaks.org/>.

⁵ <http://data.consilium.europa.eu/doc/document/ST-11103-2013-DCL-1/en/pdf>.

bilateral trade and investment, such as sustainable development, competition policy and how to integrate small business in trade, which may serve as examples to the rest of the world.

So what's not to like? Quite a bit, according to some. Opponents of the TTIP suggest that it may lead to a variety of uninvitingly produced food being served up on European plates, including 'chlorine rinsed chicken', hormone treated beef, ractopamine laced sausages and genetically modified popcorn.⁶ Other concerns have included possible watering-down of EU chemicals legislation, such as REACH, and weakening of EU renewables policies. However, before going on to that topic it is worth putting TTIP in context.

Globalisation

Since the Second World War, going back to the Bretton Woods Agreement, the encouragement of international trade and investment and the removal of barriers to trade have been regarded as economically desirable. According to the FT, global trade increased by an estimated 100 times in the 50 years from 1955, from US\$95 billion to US\$12 trillion. Globalisation can be defined as the integration of national and regional economies, societies and cultures through a global network of trade, communication, investment, immigration and transportation. Its features are:

- greater trade in goods and services
- increasing transfers of capital and foreign direct investment
- the development of global brands
- spatial division of labour (outsourcing and offshoring)
- high levels of labour migration
- new players globally and a consequent shift in balance of economic power
- drivers such as containerisation, technology, opening of financial markets
- changes in business models – franchising rather than direct ownership

What this means is that the old model of environmental regulation – command and control of polluting activities within a state's own territory – has to change.

The changing face of trade agreements

The old model of bilateral trade agreements between two trading partners has given way (although not entirely) to the creation of trading blocs: NAFTA, ASEAN etc. As the EU has grown, so it has negotiated trade deals on behalf of an ever increasing number of states. The TTIP is of course an example of such an agreement, as is the recent Comprehensive Economic and Trade Agreement with Canada (CETA) discussed below.

There has been an important shift in US trade policy. The post-war US administrations tended to favour multi-lateral negotiations through the General Agreement on

Tariffs and Trade (GATT), later the World Trade Organization (WTO) and, secondly, the negotiation of bilateral agreements with individual nations, for example the US–Korea Agreement signed in 2007. However, the 2001 Doha Round of WTO talks has essentially failed to deliver, which has led to the perception that the future of US trade diplomacy lies with agreements with large blocs of nations as the next best thing. This has resulted in the Trans-Pacific Partnership (TPP), signed by 12 Pacific Rim nations in February 2016 and discussed below. The TTIP is a further example of this strategy.

Whether we like it or not, we live in an era of trade liberalisation and globalisation. This has inevitable implications for environmental protection. It presents threats, but also opportunities to improve environmental standards and to exert pressure on countries lagging behind in such standards.

Possible threats

So far as the threats are concerned, these primarily relate to whether the TTIP would prejudice the ability of EU Member States to impose more stringent environmental standards. This is intimately linked with the concern over investor–state dispute settlement (ISDS) mechanisms, which have been portrayed as allowing US multinationals to seek crippling damages against EU governments for loss of their investment or future profits. It is seen as giving new and asymmetrical rights to corporations, which might prejudice attempts, for example, to curb use of fossil fuels. The strength of public opposition⁷ to ISDS procedures probably took the EU institutions by surprise, given that the EU and all but one of its 28 Member States are already parties to trade agreements containing such provisions.

In October 2015, economists Joseph E Stiglitz and Adam S Hersh attacked the ISDS provisions of the TPP in forthright terms:⁸

To be sure, investors – wherever they call home – deserve protection from expropriation or discriminatory regulations. But ISDS goes much further: the obligation to compensate investors for losses of expected profits can and has been applied even where rules are non-discriminatory and profits are made from causing public harm. ... Imagine what would have happened if these provisions had been in place when the lethal effects of asbestos were discovered. Rather than shutting down manufacturers and forcing them to compensate those who had been harmed, under ISDS, governments would have had to pay the manufacturers not to kill their citizens. Taxpayers would have been hit twice – first to pay for the health damage caused by asbestos, and then to compensate manufacturers for their lost profits when the government stepped in to regulate a dangerous product.

⁶ www.foeeurope.org/served-by-ttip.

⁷ In the online consultation carried out by the Commission in 2014, of the 120,000 of respondents (97 per cent) were mobilised by eight NGOs opposed to ISDS and 70,000 answers were identical or very similar on the issues.

⁸ www.marketwatch.com/story/the-trans-pacific-partnership-charade-tpp-isnt-about-free-trade-at-all-2015-10-05.

ISDS provisions do not typically require remedies in domestic courts to be exhausted before resorting to arbitration. The most frequently used forum is the International Centre for the Settlement of Investment Disputes (ICSID) operated by the World Bank. The disputes are frequently complex and the proceedings protracted. Both the legal costs and compensatory awards can be extremely high. Awards will usually be final, with very limited scope for challenge. They are therefore something which needs to be taken seriously.⁹

By way of example, in 2009 the Swedish energy utility Vattenfall initiated ICSID proceedings against Germany in respect of the licensing of a new coal-fired power plant in Hamburg-Moorburg. Vattenfall said that the required water quality standards for the plant's licence would make the investment unviable, contrary to Article 3 of the Energy Charter Treaty, and filed a claim for about €1.4 billion, plus costs and interest. Germany agreed to issue a less exacting licence and the dispute was settled in 2011.

Interestingly, in March 2015, it was reported that the EU Commission was about to lodge a complaint against Germany before the European Court of Justice for having reduced its environmental requests for Vattenfall, which it was said had breached EU requirements. Vattenfall also made claims, still unresolved, following Germany's decision to phase out existing nuclear power stations after Fukushima, two of which were owned by Vattenfall: these were older plants (Krümmel and Brunsbüttel) which were required to close almost immediately. This claim is thought to be for some €4.6 billion, according to the most recent press coverage, with Germany estimating the total legal costs at some €9 million. A common concern is the confidentiality attaching to such proceedings. This contrasts with the challenges brought by German utility companies RWE and E.ON to the same law, which had to be brought in the Federal Constitutional Court, with full transparency in the proceedings.¹⁰

These proceedings were under the Energy Charter Treaty, which entered into force in 1998, and which applies to trade, transfer and protection of investments in the energy sector. The types of provision under which such claims may be made are, however, typical of bilateral and multilateral investment treaties and would be likely to be included in the TTIP. These are the requirement for 'fair and equitable treatment'¹¹ and the prohibition on indirect expropriation.¹² These concepts are of their nature

imprecise and elastic and are open to potentially quite different interpretation and application by different arbitral tribunals. The legitimate expectation of investors has an important role to play here, and has been applied in arbitrations such as *Tecmed v Mexico*¹³ and *MTD v Chile*.¹⁴ Thus, in the *Vattenfall II* case the company will no doubt argue that it had invested heavily (some €700 million) in the two reactors, in the expectation based on then current German law that they would have an extended life. Another possible weapon is the so-called 'umbrella clause' which obliges the host country to comply with all obligations entered into with the investor (eg under contract), thus allowing such obligations to be enforced in the arbitration.

It would be wrong to suppose that the decisions all go one way – for example in *Parkerings-Compagniet AS v Lithuania* (a case involving building and operating a parking system in Vilnius) it was said by the tribunal that investors must expect regulatory and legislative changes and anticipate them by structuring investments and by exercising due diligence.¹⁵ Equally, in *Methanex Corp v USA*,¹⁶ the banning of methanol as a gasoline additive by the State of California was found not to be a breach of fair and equitable treatment (FET) or to be indirect expropriation: a non-discriminatory regulation adopted in accordance with due process and without any specific commitment that the host state would refrain from such regulation would not be expropriatory. The unpredictability of approach is a problem in itself. Further, as in *Glamis Gold v US*,¹⁷ even a significant loss of profits due to the introduction of more stringent environmental requirements (in that case, a mining permit) may not be found to amount to expropriation, as the applicant is not 'radically deprived of the economic use and enjoyment of its investment'.

Critics of ISDS provisions often point to the fact that whereas national law (such as the German Constitution) may provide a carefully calibrated balance between investor rights and the public interest, the outcome of ISDS proceedings may not reflect such interests. Arbitrators are drawn from a narrow set of experienced individuals, expert in investor protection law, who may have a mind-set towards investors' rights. The outcome may be at best unpredictable, and the threat and uncertainty may itself have a 'chilling effect' in discouraging legislative or regulatory action.

There is to some extent a solution to these problems. If a treaty or investment agreement does not mention the environment as an issue, then expropriation for environmental purposes is treated no differently to any other expropriation.¹⁸ Environmental and sustainability issues can be referred to as legitimate objectives and, indeed, the right

9 See Christiane Gerstetter and Nils Meyer-Ohendorf *Investor-State Dispute Settlement under TTIP: a risk for environmental regulation?* (Heinrich Böll Stiftung, December 2013) www.boell.de/sites/default/files/investor-state-dispute-settlement-under-ttip-hbs.pdf.

10 See Nathalie Bernasconi-Osterwalder and Martin Dietrich Brauch *The State of Play in Vattenfall v Germany II: Leaving the German Public in the Dark* (International Institute for Sustainable Development, December 2014) www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-ii-leaving-germanpublic-dark-en.pdf.

11 See eg art 10(1) of the Energy Charter Treaty, which requires that each state party shall encourage and create stable, equitable and transparent conditions for investors of other state parties and to accord at all times to investments of the investors of other parties fair and equitable treatment.

12 See eg art 13 of the Energy Charter Treaty, which provides that investments may not be nationalised or subjected to an action equivalent to nationalisation or expropriation.

13 *Tecnicas Medioambientales Tecmed SA v Mexico* ICSID Case ARB (AF)/00/2, Award (29 May 2003). The case concerned failure to renew the permit for a landfill site, which it was said had been operated in breach of specific environmental regulations.

14 *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* ICSID Case ARB/01/7, Award (25 May 2004).

15 *Parkerings-Compagniet AS v Lithuania* ICSID Case ARB/05/08.

16 *Methanex Corp v USA* (UNCITRAL 2005).

17 *Glamis Gold Ltd v USA* (UNCITRAL 2009).

18 *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica* ICSID Case ARB/96/1.

of states to take measures to protect the environment and other public interests can be explicitly affirmed.¹⁹ This should be the case with the TTIP since the EU Commission's mandate from the Council expressly states that ISDS clauses must be without prejudice to the right of the EU and Member States to adopt and enforce, in accordance with their respective competencies, measures necessary to pursue legitimate public policy objectives such as social, environmental, public health and safety, in a non-discriminatory manner. It is also possible to draft terms such as FET and expropriation tightly in order to achieve greater certainty as to what is and is not covered.

The US and EU have a mutual interest in avoiding unmeritorious claims from investing companies. There is also a mutual interest in drafting modern, state of the art ISDS provisions which prevent multiple claims, ensure independence and impartiality of the tribunal and make the arbitration system more transparent and publicly accountable. The US Model Bilateral Investment Treaty (MBIT) has provisions, for example, which allow submissions by third party non-government organisations (NGOs) and requires written submissions by the parties to be made public. Despite this, there remain calls from NGOs on both sides of the Atlantic for ISDS provisions to be excluded from the TTIP, often on the basis that there is no need for them: trade and mutual investment are proceeding already well enough without such protections, and both the US and EU have national courts which are capable of providing protection to investors.

There remain questions over ISDS procedures and how well suited they are to environmental disputes, but there is scope for improvement. As a recent paper on the subject concluded:²⁰

Despite the increasing number of cases involving the environment, investment treaties themselves are not well equipped to provide guidance to tribunals on environmental issues. As a result, these issues are generally handled on a case-by-case basis with tribunals assessing the overall reasonableness of the state policy or regulatory process followed. All the while, tribunals attempt the formidable, and at times seemingly impossible, task of balancing the public interests that the State represents and the negative impact of measures on foreign investments. Despite these theoretical and structural burdens, the arbitral system allows for much discretion on the part of

the tribunal. In the short term, relying on the tribunal's use of appropriate standards of review and properly considering factors, such as the legitimacy of the State's aim, the nature of the measure, and due process, can help lead to decisions that better consider environmental harm. Encouragingly for the long-term, States have begun to recognize the importance of environmental issues in their treaty negotiations. Even with new treaties, however, a key question will continue to be how much tribunals should look at the merits of the State's action rather than the process in which the policy was made ... Ultimately, the goal for the arbitral system is to develop the capacity to seriously consider the public policy issues and environmental concerns often at stake while fairly adjudicating the claims of investors harmed by state action.

The EU Parliament has published a valuable discussion on ISDS provisions in the EU's international agreements.²¹ This indicates that the EU is well aware of the issues, which have been the subject of negotiation in its recent agreements with Canada and Singapore. This includes ensuring through drafting that the principles of FET, expropriation,²² full protection and security and most favoured nation cannot be used to undermine the right to regulate or preclude changes in legislation. It also includes procedural safeguards for dealing with parallel or frivolous claims, to prevent claims by 'shell companies', clarifying and limiting powers of tribunals, and increasing transparency.

The positives

ISDS represents the perceived negative side of the TTIP. However, there has been perhaps less focus on the possible positives. Cooperation between the US and EU would create an enormously powerful bloc, which would wield enormous economic power. Provisions for regulatory cooperation and for collaboration in furthering environmental and sustainability goals could potentially be a game-changer in an era when multilateral environmental agreements are achieving very little.

To an extent it is not necessary to guess what provisions might ultimately be in the TTIP, because there is already a fully negotiated agreement between the EU and Canada which contains such provisions, CETA. Obviously it is an

19 For example, in the TPP Agreement, the chapter on investment provides that: 'Article 9.16: *Investment and Environmental, Health and other Regulatory Objectives* Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health or other regulatory objectives. Article 9.17: *Corporate Social Responsibility* The Parties reaffirm the importance of each Party encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party'.

20 Christina L Beharry and Melinda E Kuritzky 'Going green: managing the environment through international investment arbitration' (2015) 30(3) *American University International Law Review* 383–429 <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1847&context=auilr>.

21 DG for External Policies, September 2014 [www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU\(2014\)534979_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2014/534979/EXPO_STU(2014)534979_EN.pdf). See also the Commission's Concept Paper Investment in TTIP and Beyond – the path for reform: http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF.

22 So for example the negotiating draft produced by the Commission in November 2015 contains an Annex defining expropriation and including the following: 'For greater certainty, except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-discriminatory measures of a Party that are designed and applied to protect legitimate policy objectives, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity do not constitute indirect expropriations'. By way of comparison, the TPP Agreement contains the following provision in Annex 9-B on Expropriation: 'Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations, except in rare circumstances'.

example, not a template, but nonetheless it provides a good insight. There are three relevant chapters in CETA on regulatory cooperation, sustainable development, and environment.

Chapter 21 is on regulatory cooperation. It affirms that the parties are committed to ensuring high levels of protection for human, animal and plant life or health, and the environment. Without limiting the ability of each party to carry out its regulatory, legislative and policy activities, the parties commit to further develop regulatory cooperation in light of their mutual interest in order to: (a) prevent and eliminate unnecessary barriers to trade and investment; (b) enhance the climate for competitiveness and innovation, including by pursuing regulatory compatibility, recognition of equivalence, and convergence; and (c) promote transparent, efficient and effective regulatory processes that support public policy objectives and fulfil the mandates of regulatory bodies, including through the promotion of information exchange and enhanced use of best practices. The aims include leveraging resources in areas such as research and risk analysis, promoting transparency and predictability in the development of regulations, avoiding unnecessary regulatory differences and improving regulatory implementation and compliance. The parties should also address the interface between regulations, standards and conformity assessment in this context; and compare methods and assumptions used to analyse regulatory proposals, including, when appropriate, an analysis of technical or economic practicability and the benefits in relation to the objective pursued of any major alternative regulatory requirements or approaches considered. This may involve where practicable conducting concurrent or joint risk assessment or regulatory impact assessment. A Regulatory Cooperation Forum (RCF) is established to that end.

The House of Commons Environmental Audit Committee in its July 2015 report on the TTIP²³ highlighted a number of concerns about regulatory cooperation, which the government endorsed in its response.²⁴ These included: (1) the application of the precautionary principle²⁵ should not be weakened; (2) mutual recognition of environmental standards should be applied only in cases where the 'safety equivalence' test is genuinely satisfied; and (3) ensuring ISDS provisions do not compromise the 'right to regulate'.

Chapter 22 of CETA deals with sustainable development. The parties recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development, and reaffirm their commitment to promoting the development of international trade in such a way as to contribute to the objective of sustainable development, for the welfare of present and future generations. They stress the importance of transparency

and public participation. They affirm that trade should promote sustainable development and each party shall strive to promote trade and economic flows and practices that contribute to enhancing decent work and environmental protection, including by:

- (a) encouraging the development and use of voluntary schemes relating to the sustainable production of goods and services, such as eco-labelling and fair trade schemes
- (b) encouraging the development and use of voluntary best practices of corporate social responsibility by enterprises, such as those in the OECD Guidelines for Multinational Enterprises, to strengthen coherence between economic, social and environmental objectives
- (c) encouraging the integration of sustainability considerations in private and public consumption decisions
- (d) promoting the development, the establishment, the maintenance or the improvement of environmental performance goals and standards

The parties to CETA constitute a Committee on Trade and Sustainable Development to oversee the implementation of these provisions. They also agree to facilitate a joint Civil Society Forum composed of representatives of civil society organisations established in their territories with a balanced representation of relevant interests, including independent representative employers, unions, labour and business organisations, environmental groups, as well as other relevant civil society organisations, as appropriate.

It remains to be seen whether similar consensus will be reached in the TTIP negotiations. The EU text is currently substantially more ambitious and innovative than the US position, but it is a relatively early stage in the negotiations on this topic.

Chapter 24 of CETA deals with the environment. The parties recognise that the environment is a fundamental pillar of sustainable development and recognise the contribution that trade could make to sustainable development. They stress that enhanced cooperation to protect and conserve the environment brings benefits that will:

- (a) promote sustainable development
- (b) strengthen the environmental governance of the parties
- (c) build upon international environmental agreements to which they are party
- (d) complement the objectives of the agreement

They recognise the right of each party to set its environmental priorities, to establish its levels of environmental protection, and to adopt or modify its laws and policies accordingly and in a manner consistent with the multilateral environmental agreements to which it is party and with this agreement. Each party must seek to ensure that those laws and policies provide for and encourage high levels of environmental protection, and shall strive to continue to improve such laws and policies and their underlying levels of protection. Each party reaffirms its commitment effectively to implement in its law and practices, in its whole territory, the multilateral environmental agreements to which it is party.

²³ Environmental Risks of the Transatlantic Trade and Investment Partnership (9th Report of Session 2014–2015, HC 857).

²⁴ Cm 9104 (July 2015).

²⁵ As the government pointed out, it is questionable in fact whether the EU does consistently take a more precautionary approach than the US. See www.notre-europe.eu/media/precautionprincipleuseu-fabrygarbassone-jdi-july14.pdf?pdf=ok.

The parties commit to consult and cooperate as appropriate with respect to environmental issues of mutual interest related to multilateral environmental agreements and, in particular, trade-related issues. They acknowledge their right to use Article 28.3 (General exceptions) in relation to environmental measures, including those taken pursuant to multilateral environmental agreements to which they are party. They recognise that it is inappropriate to encourage trade or investment by weakening or reducing the levels of protection afforded in their environmental law. It is agreed that a party shall not waive or otherwise derogate from, or offer to waive or derogate from, its environmental law in order to encourage trade or the establishment, acquisition, expansion or retention of an investment in its territory. It is also agreed that a party shall not, through a sustained or recurring course of action or inaction, fail to enforce its environmental law effectively to encourage trade or investment.

These provisions may be compared with the less-developed provisions of Chapter 20 of the Trans-Pacific Partnership dealing with the environment. These recognise the importance of mutually supportive trade and environmental policies and affirm the sovereign right of each party to establish its own levels of domestic environmental protection and its own environmental priorities and to establish, adopt or modify its environmental laws and policies accordingly. Each party must strive to ensure its environmental laws provide for high levels of environmental protection and to continue to improve these. Each party retains the right to exercise discretion and to make decisions regarding regulatory and compliance matters. These provisions are less developed and less sophisticated than those in CETA (as might be expected of an agreement negotiated between parties as diverse as the US, Canada, Australia, New Zealand, Brunei, Japan, Mexico, Peru and Vietnam when compared with an agreement essentially negotiated between the EU and Canada). They do, however, contain a robust recognition of the importance of environmental protection.

Of particular interest in CETA are the provisions on access to justice in environmental matters under Article 24.6, which bear more than a passing resemblance to those of the UNECE Aarhus Convention on public participation and access to justice. Each party shall, in accordance with its law, ensure that its authorities competent to enforce environmental law give due consideration to alleged violations of environmental law brought to its attention by any interested persons residing or established in its territory; and shall ensure that administrative or judicial proceedings are available to persons with a legally recognised interest in a particular matter or who maintain that a right is infringed under its law, in order to permit effective action against infringements of its environmental law, including appropriate remedies for violations of such law. Each party must, in accordance with its domestic law, ensure that such proceedings are not unnecessarily complicated or prohibitively costly, do not entail unreasonable time limits or unwarranted delays, provide injunctive relief if appropriate, and are fair, equitable and transparent. There are also strong provisions on public information and awareness, including

the encouragement of public debate, promotion of awareness and understanding of environmental law.

The precautionary principle is enshrined in CETA by acknowledgement that where there are threats of serious or irreversible damage, the lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. The parties shall, consistent with their international obligations, pay special attention to facilitating the removal of obstacles to trade or investment in goods and services of particular relevance for climate change mitigation and in particular trade or investment in renewable energy goods and related services. Whether the US would be willing to stomach a similar provision in the TTIP may be doubtful: certainly the leaked texts mentioned previously do not give any indication of specific status being given to the principle.

There are specific obligations in CETA on sustainable forest management and cooperation on initiatives to combat illegal logging. The same is true of trade in endangered species and in aquaculture and fisheries products including combating illegal, unreported and unregulated (IUU) fishing. Under Article 24.14 there is a dispute resolution mechanism, through the Committee on Trade and Sustainable Development or failing that, through a panel of three experts with specialised knowledge or expertise in environmental law, or in the resolution of disputes arising under international agreements.

WTO

There is of course some experience of the relationship of trade and environment through the World Trade Organization (WTO). The WTO has no specific agreement dealing with the environment. However, the first recital to the preamble of the agreement establishing it recognises the issue:

Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.

The relationship between trade and the environment is relatively recent, dating back to the Uruguay Round of talks in 1994, and the creation of the Committee on Trade and Environment. It proceeds on the premise that an open, equitable and non-discriminatory multilateral trading system has a key contribution to make to national and international efforts to better protect and conserve environmental resources and promote sustainable development. However, the WTO is only competent to deal with environmental issues in so far as they significantly impact on trade. The WTO has identified that of the 200 or so

multilateral environmental agreements in force, some 20 include provisions that may affect trade: obvious examples are the Basel Convention on Transboundary Movements of Hazardous Waste, and the Washington Convention on International Trade in Endangered Species.

The WTO view is that it is preferable to deal with environmental problems through multilateral environmental agreements (MEAs) rather than through trade rules. A particular concern is the invocation by a state A taking trade actions against another state B, of an MEA which state B has not signed. The WTO website summarises the position as follows:²⁶

Suppose a trade dispute arises because a country has taken action on trade (for example imposed a tax or restricted imports) under an environmental agreement outside the WTO and another country objects. Should the dispute be handled under the WTO or under the other agreement? The Trade and Environment Committee says that if a dispute arises over a trade action taken under an environmental agreement, and if both sides to the dispute have signed that agreement, then they should try to use the environmental agreement to settle the dispute. But if one side in the dispute has not signed the environment agreement, then the WTO would provide the only possible forum for settling the dispute. The preference for handling disputes under the environmental agreements does not mean environmental issues would be ignored in WTO disputes. The WTO agreements allow panels examining a dispute to seek expert advice on environmental issues.

There has been some limited experience of trade and environment issues within the WTO. In the US *Shrimp-Turtle* case of 1998,²⁷ India, Malaysia, Pakistan and Thailand brought a joint complaint in respect of Section 609 of US Public Law 101–102, enacted in 1989, dealing with imports. Shrimp caught with technology that may adversely affect certain sea turtles could not be imported into the US unless the harvesting nation was certified to have a regulatory programme comparable to that of the US, which meant in practice the use of turtle-excluding devices (TEDs). The Appellate Body supported in general terms the imposition of such requirements under Article XX of GATT, but the US was found to have discriminated between WTO members in that it provided some states in the Caribbean with technical and financial assistance and longer transition periods for their fishermen to start using TEDs.²⁸

185. In reaching these conclusions, we wish to underscore what we have not decided in this appeal. We have not decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have not decided that the sovereign nations that are Members of the WTO cannot

adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have not decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do.

186. What we have decided in this appeal is simply this: although the measure of the United States in dispute in this appeal serves an environmental objective that is recognized as legitimate under paragraph (g) of Article XX [ie 20] of the GATT 1994, this measure has been applied by the United States in a manner which constitutes arbitrary and unjustifiable discrimination between Members of the WTO, contrary to the requirements of the chapeau of Article XX. For all of the specific reasons outlined in this Report, this measure does not qualify for the exemption that Article XX of the GATT 1994 affords to measures which serve certain recognized, legitimate environmental purposes but which, at the same time, are not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade. As we emphasized in *United States – Gasoline* [adopted 20 May 1996, WT/DS2/AB/R, page 30], WTO Members are free to adopt their own policies aimed at protecting the environment as long as, in so doing, they fulfil their obligations and respect the rights of other Members under the WTO Agreement.

In the other leading case, the GATT *Dolphin-Tuna* dispute of 1991, again the US restricted imports, this time of yellowfin tuna, unless the importer could show that US standards under the Marine Mammals Protection Act to prevent dolphins being inadvertently caught, were complied with. Mexico and a number of intermediary countries which processed tuna before import brought the proceedings. The panel found that the US could not impose its own standards extra-territorially in this way; nor could it impose controls over the process by which the tuna was caught, as opposed to its quality.²⁹ This might seem a rather depressing outcome. The WTO justifies the ruling on its website in the following terms:

What was the reasoning behind this ruling? If the US arguments were accepted, then any country could ban imports of a product from another country merely because the exporting country has different environmental, health and social policies from its own. This would create a virtually open-ended route for any country to apply trade restrictions unilaterally – and to do so not just to enforce its own laws domestically, but to impose its own standards on other countries. The door would be opened to a possible flood of protectionist abuses. This would conflict with the main purpose of the multilateral trading system – to achieve predictability through trade rules.

A balanced consideration of the WTO's record was provided in 2004 by Eric Neumayer:³⁰ It has done much less to

²⁶ www.wto.org/english/thewto_e/whatis_e/tif_e/bey2_e.htm.

²⁷ *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WTO case nos 58 and 61.

²⁸ It should be noted that a later complaint by Malaysia in 2001 against the US failed: the US had by then begun to negotiate in good faith international agreements to protect sea turtles and was allowing shrimp to be imported on a shipment basis if it could be proved that sea turtles had not been harmed.

²⁹ The Panel Report was never formally adopted under the old GATT rules.

³⁰ Eric Neumayer 'The WTO and the environment: its past record is better than critics believe, but the future outlook is bleak' (2004) 4(3) *Global Environmental Politics* 1–8.

hamper or damage environmental protection policies than its critics would suggest, and its jurisprudence has become increasingly favourable to environmental concerns. So long as restrictions are applied even-handedly and without discrimination against foreign producers, they are likely to be compatible with WTO agreements. Referring to contrasting cases such as the European Communities asbestos products ruling³¹ (EC restriction on asbestos products found to be compatible) and the US taxes on automobiles and standards for gasoline cases³² (US restrictions found not compatible), Neumayer cites the following extract from another article:³³

The reason that the WTO, and the GATT before it, usually ruled against regulation that claimed environmental exceptions to international trade rules is that the regulations were not particularly good; they were either clear attempts at industrial protection dressed up in environmentalist clothes, or they were poorly thought through and inappropriate tools for the environmental management intended.

Neumayer also makes the following important point: the fact is that no country can be forced to remove restrictions imposed for environmental reasons which are incompatible with WTO rules. The response it may face is retaliatory trade sanctions, which if it is economically strong enough and sufficiently committed to the relevant environmental goal, it should be willing to weather. As he points out, the EU did not lift its 1989 ban on imports on beef from hormone treated cattle for many years, despite the WTO Appellate Body finding it was not based on a sufficient risk assessment, and despite retaliatory import tariffs from the US and Canada affecting bovine and swine meat products, Roquefort cheese, chocolate, juices, jams and fresh truffles.³⁴ The WTO in practice puts few hindrances in the way of national policymakers with the will to impose strong measures.

On the other hand, the WTO is probably not the answer to the world's environmental problems. It has done little to remove environmentally detrimental trade barriers, such as subsidies for coal or agriculture, or to secure the easing of restrictions on trade in environmentally beneficial goods and services, such as pollution abatement technologies and renewables. It has failed to come to grips with the precautionary principle, and the Committee on Trade and the Environment has not delivered any significant results, probably because of lack of uniform support from developed and developing countries. There remains a mistrust of 'green' trade rules as disguised protectionism. It is therefore questionable whether the WTO represents a viable means of securing environmental protection. It may be that the TTIP, with the consensus and clout of two major trading blocs, can do better.

Conclusion

The new model of trade agreements is not just about increasing trade: it is about cooperation on social and environmental goals. The US and EU have, between them, probably the most stringent standards to be found on environmental protection and on worker protection. Cooperation (including with Canada under CETA) could potentially yield great benefits, not only in environment but in other areas. Like environment, social issues are global in nature, such as combating forced labour and child labour. These are still serious problems, for which North America and the EU as the major consumer societies and importers bear responsibility. Since 1945, fortunately for the West, but sadly not in other parts of the world, military power has been superseded by economic power. The challenge is to make that economic power a force for good.

31 WTO 2001.

32 GATT 1994, WTO 1996.

33 Elizabeth R DeSombre and J Samuel Barkin 'Turtles and trade: the WTO's acceptance of environmental trade restrictions' (2002) 2(1) *Global Environmental Politics* 12.

34 www.europarl.europa.eu/news/en/news-room/20120314IPR40752/Win-win-ending-to-the-hormone-beef-trade-war; www.fas.org/sgp/crs/row/R40449.pdf.

What UK lawyers need to know about environmental and climate change issues in North America

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Introductory remarks

At the outset I would like to thank the organisers for inviting me. I have been asked to speak about what UK lawyers need to know about environment and climate change issues in the US and Canada. I am going to cover three things. I will update you on where we are on climate change regulation in North America. Then I will talk about environmental law developments. Finally, I want to focus on what I think is an interesting development internationally, in light of the theme of this conference, and that is to talk about the internationalisation of litigation and what I think is the breakdown of the corporate veil in environmental and resource law matters. Canada, for better or worse, seems to be leading the field in that area.¹

To quickly address the context of UK–Canadian relations in light of the recent EU referendum vote, the new Canadian Prime Minister Justin Trudeau has already announced that he is not concerned about Brexit in the context of CETA because he thinks CETA will be done long before Article 50 is invoked.² However, he did not go on to discuss what he thought might happen if Brexit subsequently actually happened.

Climate change regulation in North America

I will start with a summary of climate change regulation in North America. I shall start briefly with the US and I should note that I am not an American lawyer: I am a Canadian lawyer. Federally not much is happening in Washington, at least legislatively. That has been the case for quite some time and it is well documented. There has been activity on the regulatory front: *Massachusetts v EPA*³ gave the government or the EPA the power to regulate greenhouse gases and they have begun to do so through the Clean Power Plan, which creates national standards to address current pollution from power plants and the states then develop plans to implement that. There is also a New Source Review in the US, which applies to new factories and power plants. The EPA is also busy governing transportation sources and requiring greenhouse gas reporting. At the state level it is a mixed bag. California is well ahead of the field and is doing a lot on the climate change front. Curiously, they have linked their system with the system

that Quebec has implemented. My province, Ontario, is soon to join that cap and trade system. In many of the East Coast states the power plants have the RGGI programme, which sets out a cap and trade regime in the north-east. Again, various states have implemented greenhouse gas reporting and emission standards, but it really does vary from state to state.

Canada signed, ratified and then pulled out of Kyoto. There is a story that when Jean Chrétien, the prime minister at the time, went to negotiate Kyoto he sent his emissaries and reportedly told them: 'whatever Gore does do one per cent better'. So the Americans had then agreed to a five per cent reduction on 1990 emissions; Canada had six per cent. Of course Canada ratified; America did not. It turned out it was completely unachievable, particularly with a government that was not willing to make any hard decisions to achieve it. Ultimately the subsequent government, which was not particularly climate change sensitive, realised that they did not want to and probably could not achieve the targets and pulled out. However, Canada has now signed the Paris accord and has a 30+ per cent reduction target by 2030. Canada has already implemented a reporting programme, but thus far the federal government has not actually done anything else to implement this, although they have announced an intention to do so.

However, provincially Canada is doing a fair bit. Two of the provinces have now instituted carbon taxes and three have implemented cap and trade systems. Without going into any detail on them, the trend we are seeing in North America is that climate change regulation is happening at the state and provincial level. The federal governments have been unable or unwilling to accomplish much.⁴

What is also interesting is that there is now some litigation happening, both in the US and Canada, where activists are going to the courts to try and get the courts to intervene. In the US there was a constitutional claim, an allegation that the federal government was violating the right to life, liberty and property by not dealing with climate change. What was interesting was that at least a preliminary motion to dismiss for no cause of action was denied. Similarly, in Canada there was a case where an activist tried to get public interest standing on what was a coal storage facility. They were denied it on the facts but the court found that at least on the right facts they might have granted public interest standing and so again the door is somewhat open in Canada for intervention in judicial proceedings on the climate change issue.

¹ This paper is a summary of the presentation given by the author at the UKELA conference and not a written article.

² CETA was signed on 30 October 2016 but as at the time of publication was yet to be ratified.

³ 549 US 497 (2007).

⁴ The Canadian Government has, since the delivery of this presentation, announced that if all provinces have not adopted carbon pricing mechanisms by 2018 it will step in and legislate.

Trends and developments

The Toxic Substances Control Act

Very few US lawyers really understand the Toxic Substances Control Act of 1976 (TSCA), and I am not even a US lawyer. However, the headline is that after years of a relatively ineffective TSCA and then years of trying to reform it, they have finally managed to get legislation passed and it has been signed by President Obama. It is viewed as significantly more effective than the previous iteration: only a few chemicals were actually regulated by the old TSCA, there was a limited ability under the old regime to review existing chemicals and there was a significant loophole where anybody could easily claim confidentiality. As such, the old TSCA was not effective.

The new TSCA is viewed as more effective. However, there is still some scepticism from interest groups on a number of things, including whether there is enough power to ban chemicals. It is always, as with any initiative, a funding concern and there is a limited reach on downstream users as to the information flow, whether downstream users have to tell suppliers about what use chemicals have been put to, and the amount of information that has to be passed from upstream users to downstream users. These are all issues to be determined, but it certainly is viewed as a considerable improvement over the existing TSCA.

An expanding federal presence

Another trend of note in North America is an expanding federal presence in various areas. For example, in the US there was controversy for a couple of years over so-called 'WOTUS' legislation (Waters of the United States) which expanded federal jurisdiction in water regulation. In Canada, the broad toxics regime was challenged but ultimately upheld constitutionally. Strangely, it was upheld under the criminal law power, which allows the Canadian federal government to legislate on almost anything it wants to environmentally, which was not the historic trend. But what we are seeing is that at this point, the controls on the federal government's power to legislate on environmental matters are, in Canada, really political as opposed to legal.

Enterprise risk management

The area of enterprise risk management is a growing area. We are seeing increased fines, penalties and expensive settlements: for example, Volkswagen agreed a penalty of US\$15.3 billion (of which US\$2.7 billion are fines) with the US Justice Department.⁵ This trend extends to Canada, which was traditionally more like the UK, with relatively modest fines. In 2014 a mining company in Quebec was charged with several breaches of the Canadian Fisheries Act where mine tailings polluted a creek and ended on a plea arrangement. Again, it was a criminal enforcement

matter, with a payment of Can\$7.5 million in fines, which was more than double the previous high for an environmental offence.⁶ In all likelihood, the UK will also see these increasing numbers: regulators are beginning to understand not only that these penalties are a great message to sell to the public but also that they are an effective deterrent.

A duty to consult

The last trend to mention in terms of North America is that aboriginal issues are ever a concern. In Canada, there have been successive court decisions underscoring the duty to consult and accommodate the First Nations in all forms of project development, so this is something that any project work in North America must be attuned to. How to manage First Nations relationships is an ever-growing area on pipelines in particular, but also in other forms of development.⁷

Canada as a forum for litigation

The idea of Canada as a forum for litigation is a real development on the internationalisation of environmental law. Many projects are in jurisdictions that are open to mining and to exploration: some of them have weak governments, some of them have corruption issues, many of them have poverty issues and we are seeing a growing trend for courts to look at whether the foreign country where the mines are located is able to provide justice for claimants when they go to court in that jurisdiction. Another development in Canada in particular is to allow litigants to hold corporations accountable for the acts of their affiliates: this is a partial breakdown of the corporate veil. However, no-one is admitting it. I am astounded in Canada at the number of times courts blatantly breach the corporate veil yet deny doing so to maintain the business myth that the corporate veil is still intact.

Under the common law conflicts of law rules, defendants would argue *forum non conveniens*, with all the issues that surround that. But now plaintiffs are arguing that Canada is a more appropriate forum because they cannot get justice in the jurisdiction where the mine happens to be, for example. As the *Trafigura* case illustrates, Canada is not the only jurisdiction where this is happening, but it is happening here a great deal. This is in part because many international resources companies are headquartered in Canada and the Canadian courts have proved to be very sympathetic to these sorts of claims.

As an example of this trend that people are coming to Canada to litigate is the *Garcia* case⁸ where Garcia was a Guatemalan plaintiff. There were protestors in Guatemala alleging an indigenous land claim in respect of a mine, and

5 Margaret Cronin Fisk et al 'Volkswagen agree to \$15 billion diesel-cheating settlement' *Bloomberg* (28 June 2016) www.bloomberg.com/news/articles/2016-06-28/volkswagen-to-pay-14-7-billion-to-settle-u-s-emissions-claims.

6 'Bloom Lake General Partner Limited ordered to pay \$7.5 million for environmental infractions' *Environment and Climate Change Canada* (22 December 2014) www.ec.gc.ca/alef-ewe/default.asp?lang=En&n=87E31737-1.

7 Since the delivery of these remarks, Native Americans have launched a significant protest over a proposed pipeline in North Dakota, similar to some of the protests Canada has experienced.

8 *Garcia v Tahoe Resources Inc* [2015] BCSC 2045.

some of them were shot by security guards. The plaintiffs argued that they should be able to go to Canada to litigate this because they could not be assured a fair trial in Guatemala. Effectively, the Canadian court ended up trying to decide on whether Guatemala was able to provide a fair trial. That matter is currently under appeal. Another case called *Araya*⁹ pertained to an Eritrean mine, and again there were allegations of conscription for slavery, human rights violations and there was a *forum non conveniens* motion; again, there is no decision on that case yet.

The other issue relates to the corporate veil. In the Canadian case of *Choc v Hudbay*¹⁰ – again in Guatemala – there was a situation where there were some atrocities at a mine. The plaintiffs came to Canada and sued the parent company. They did not say they were piercing the corporate veil; cleverly, they pleaded a novel duty of care: they claimed that because the parent had control over decisions that were being made by the mine, the parent itself had a duty of care to the plaintiffs in Guatemala. There was a motion to strike the pleading in Canada, and the motion to strike was denied because the court found that there was at least enough for the case to go to trial on whether or not this novel tort existed. It is not the first time in Canada that the parents have been directly sued, because – and it is not under the old *Salomon v Salomon*¹¹ test of a sham or where there is complete control – now there is a middle ground where if there is some control or sufficient control (and what parent does not have some control over the subsidiary) there will be at least an argument that the parent is responsible. So it seems that such litigation is the future and it follows that multinationals should be aware of this trend. In fact, this has also been the case in environmental cases where parent companies are routinely sued for pollution caused by subsidiaries, even where the subsidiary was created without any assets to own the

land. Through the shifts in liability highlighted above, the effectiveness of corporate structures such as these will diminish.

Another issue is the *Chevron*¹² case, which involved an indigenous Ecuadorian villager suing Texaco, which then merged with Chevron, for pollution in Ecuador and the Ecuadorian court ultimately awarded US\$9.5 billion in damages to the Ecuadorian villagers. What is curious about this case is that the Ecuadorian villagers, who had a hard time getting their money, are now ultimately trying to enforce the judgment in Canada against a seventh generation subsidiary that happens to be Chevron Canada. Although the court has not yet decided on the merits, the Ontario Court decided that it would take jurisdiction, even though there was no connection between Chevron Canada and the judgment in Ecuador.

In closing I would like to comment that the piercing of the corporate veil is not limited to litigation. Most legislation in Canada in terms of regulatory and environmental matters is being written to make persons in control of pollutants or land liable for administrative orders. Some provinces in Canada are applying this very aggressively.

The *McQuiston* case¹³ involved a contaminated site west of Toronto, with a long and sordid history: a business which had a tenant on the site went bankrupt; the tenant was clearly the polluter. The innocent landowner had held the land for years and when the landowner died, the land was bequeathed to his son, who was a UK national. The owner held the land through a corporation. When the environmental disaster happened, among the large number of people who were subject to the order was the son of the innocent landowner, the UK national who owned the shares he had inherited from his father. This example illustrates the extent to which the Canadian regulators are chasing people and are piercing the corporate veil.

9 *Araya v Nevsun Resources Ltd* [2016] BCSC 1856. On 6 October 2016, the British Columbia Supreme Court dismissed the Forum application and allowed the action to proceed.

10 *Choc v Hudbay Minerals Inc* [2013] ONSC 1414.

11 [1896] UKHL 1.

12 *Yaiguaje v Chevron Corp* [2015] SCC 42.

13 *McQuiston v Ontario (Ministry of Environment and Climate Change)* (12 June 2015) ERT Case No 15–019.

Commercial issues: environmental issues in China as described by Dr Geoff Raby

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I How is the Chinese economy faring?

Outside of China, there is a veritable growth industry in 'China pessimism'. However, for those who live in China, it is still as dynamic and vibrant as it has ever been. Indeed, there is still a lot of momentum and growth in the Chinese economy. There is no doubt the Chinese economy is undergoing an interesting and important transition. Cities in East China in particular are maturing and approaching per capita income which would be at developed country levels. This includes the better known cities of Beijing, Shanghai and Guangzhou, as well as lesser known cities such as Dalian, Qingdao and Xiamen. An economic rebalancing of the Chinese economy is also occurring. Whereas a couple of years ago, most growth came from investment (67 per cent in 2012), in 2015, 66 per cent of GDP was driven by consumption. Services has become the biggest sector in the economy, accounting for 52 per cent of GDP in the first quarter of 2016. These economic changes are in large measure due to the emergence of the Chinese middle class.

2 Environment

2.1 A dinner table discussion?

The environment is regularly discussed at Chinese dinner tables: it is a 'middle class conversation'. As the middle class expands and grows, political pressure on the Chinese Government to take action on environmental issues will continue to mount. Air pollution in Beijing and Shanghai remains a particular concern; however, the expansion of the services sector and the decline of heavy industry in these places has led to improvements in air quality. The Chinese Government has already responded to this pressure by introducing programmes to close inefficient steel mills, reduce excess capacity in the steel and cement industry and wind back coal-fired power plants and coal mines.

2.2 Five-Year Plan (2016–2020)

Focusing on what President Xi Jinping describes as 'supply-side economics', the Five-Year Plan sets green sustainable development as a very clear objective. It emphasises the technological upgrading of enterprises to raise efficiency

and greenness, as well as the development of renewable energy and nuclear power. There is also an objective to reduce China's reliance on coal (currently at least 60 per cent of China's total commercial primary energy consumption) and higher standards for the sorts of coal that may be used have now been introduced.

2.3 Chinese consciousness of climate change

Climate change is not as much a topic of conversation in Beijing as it is in London, Paris or Sydney. This is because in China other environmental issues are much more manifest (such as air and water pollution); climate change is much more abstract. Nevertheless, there is a growing awareness that extreme weather events are linked to climate change. And with China being home to half the Himalayas, large glaciers and waterways, all of which are at particular risk of climate change, this awareness is only set to increase. One environmental issue that is a constant topic of conversation is ground and water contamination; it is thought 90 per cent of China's groundwater is contaminated and the Chinese Government has not yet come to grips with this problem.

2.4 Has China done enough on climate change?

A recent report in the science journal *Nature* found that China is responsible for a far smaller share of global warming than previously thought, while some in the country began to ask whether China had done enough in response to climate change. However, until only very recently China resisted binding emissions targets and insisted that only developed countries bear the burden of managing climate change. This approach has now changed, beginning with the US–China Joint Presidential Statement on Climate Change in November 2014 and was most recently demonstrated by another Joint Presidential Statement during President Xi Jinping's April 2016 visit to Washington.

2.5 Moving polluters westward?

Some NGOs, such as Greenpeace, have observed that the Chinese Government seems to be moving heavy polluting industries to less developed Western China or even offshore. There is no question that significant geographic and spatial relocation is occurring in China. This is not an attempt to 'trick up the numbers' on climate change, but reflects structural changes in the Chinese economy. Many of these heavy polluting industries were built in areas where costs, prices and wages are increasing rapidly and it

* This article comprises a summary of the key points discussed in the video interview of Dr Geoff Raby by Christine Covington, played at the 2016 UKELA Conference.

is no longer efficient to keep those industries in those locations. In other words, much of the spatial relocation of industry is market-driven. There is also a legitimate expectation that these factories will be rebuilt with advanced and clean technology.

2.6 An increased appetite for enforcement?

Good environmental outcomes are now being built into the key performance indicators for municipal and provincial governments. The Five-Year Plan, which will be read and studied up and down the country, emphasises such outcomes. Chinese NGOs have also been given standing to bring civil actions in respect of pollution and other environmental incidents; however, at this stage, such proceedings are rare. It is very difficult for action to be taken against the Chinese Government and the enterprises it owns. Of concern for those engaged in such proceedings is the fact that there has been a growing crackdown on 'rights lawyers': 250 rights lawyers have been arrested over the past few years.

2.7 COP 21: a real step change in China's approach to climate change

Post Copenhagen, there has been much reflection in China on climate change. Under President Xi Jinping, China has adopted a much more assertive and muscular foreign policy; international agreements on climate change are part of this. China wishes to shape the international order; there is a strong feeling amongst the country's elite that China's time has come. Gone is the all-encompassing Deng Xiaoping era philosophy of 'hide your brightness, bide your time', which led China to avoid foreign activities and events

so as to avoid being distracted from national reconstruction. China is now contributing much more in the UN Security Council, is active against piracy in the waters off Somalia and is heavily involved in its recent initiative: the Asian Infrastructure Investment Bank.

2.8 The effects of COP 21: more stick or more carrot?

Until now, the Chinese Government's approach to environmental issues has principally been 'stick' but it is now beginning to experiment with 'carrot'. Indeed, at least half a dozen Chinese cities have functioning emissions trading schemes and it is intended these schemes will be rolled out nationally. It will certainly take some time for the schemes to gain traction, but it is a start.

2.9 Opportunities

China has become very advanced in the areas of solar and wind energy; there has been massive domestic investment in both areas. For example, in Xinjiang, one can travel 20 kilometres in a straight line through wind farms. The big opportunities for those in the West are at the high-tech level, since China will always be at a stage of 'catch-up'. In Changsha, the capital of Hunan Province, there is a steel mill which has entered into a joint venture with an Indian company, Tata, to produce superlight panels for cars in order to reduce emissions. In fact, anything in the electric car area, where the West has a strong advantage, is of enormous interest to China. If Western companies wish to keep abreast of developments in China, it is necessary to go there and have people on the ground; the contemporary reality is changing very quickly.

International law in domestic practice: advice for practitioners on how international and comparative law arises in domestic case law

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Introduction

My main focus will be on public international law. I will not give any detailed consideration in this article to private international law¹ and its relevance to domestic environmental litigation.² It is also not my intention to examine in detail the law of either the EU³ or the European Convention on Human Rights.⁴ I will, however, touch on both of these as themselves being possible routes to the use of unincorporated international conventions.

Public international law

Introduction

The main sources of public international law are:⁵

- international conventions – ie written bilateral or multilateral treaties (agreements, conventions, protocols and covenants) between states and/or international organisations
- customary international law (CIL)
- decisions, opinions and recommendations of bodies set up in international law (eg the International Court of Justice, international tribunals, committees etc)⁶

The use (and abuse?) of unincorporated treaties⁷

International treaties can be incorporated into domestic law, thereby becoming part of that law.

Incorporation of treaties can be achieved through primary or secondary legislation. This can be direct enactment, eg scheduling the relevant treaties to a statute, as with the Human Rights Act 1998, or indirectly, with the statute referring to the treaty as setting standards to be complied with. Sometimes it is said that policies incorporate an international convention.⁸ For an example of this see the treatment in the National Planning Policy

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. international custom, as evidence of a general practice accepted as law;
 - c. the general principles of law recognized by civilized nations;
 - d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The seat of the court is at the Peace Palace in The Hague. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by states and to give advisory opinions on legal questions referred to it by authorised United Nations organs and specialised agencies. The court is composed of 15 judges, who are elected by the United Nations General Assembly and the Security Council www.icj-cij.org/court/index.php?p1=1.

- 7 I focus largely on use of international law but there is also the issue of the abuse of international law in domestic environmental proceedings. This leads to the doctrine of abuse of rights, which is the notion that an individual may have a right and yet exercise it in a way that is regarded as 'abusive', such that the right cannot be relied on. This has its origins in French private law but has been adopted into EU law and used to prevent reliance upon rights and freedoms by individuals against the state. The adoption of this doctrine into EU law was urged for many years by Advocate General Darmon and was eventually confirmed by the CJEU in Case C-110/99 *Emsland-Stärke* [2000] ECR I-11569. Most commonly the doctrine has been applied in relation to EU tax and company laws and has been applied in domestic courts in an EU context in the immigration case *Sonmez v Secretary of State for the Home Department* [2010] 1 CMLR 7. It should be noted that in public international law there is no agreement as to whether the abuse of rights doctrine is within the category of general principles of law recognised by civilised nations. See the Statute of the Permanent Court of International Justice art 38(1)(c). See eg Steven Reinhold 'Good faith in international law' (2013) 2(1) *UCL Journal of Law and Jurisprudence* 40–63: 'Possibly the most contentious aspect of good faith in international law is the prohibition on the abuse of rights. The aspect of abuse of right and the arbitrary exercise of a right are closely related and not clearly distinguishable'.
- 8 See *National Trusts' Application* [2013] NIQB 60.

* This article was written on 14 June 2016.

1 Lord Collins of Mapebury et al (eds) *Dicey, Morris & Collins on the Conflict of Laws* (15th edn Sweet & Maxwell 2016) vol 1 para 1.001: 'The branch of English law known as the conflict of laws is that part of the law of England which deals with cases having a foreign element'. See also *ibid* vol 2 ch 35(D) on environmental damage and considering art 7 of the Rome II Regulation, which contains a choice of law rule in relation to non-contractual obligations arising out of environmental, or related, damage.

2 See eg *General Motors Corp v Royal & Sun Alliance Insurance Plc & Anor* [2007] 2 CLC 507; *Lungowe v Vedanta Resources Plc* [2016] EWHC 975 (TCC) and *London Steam Ship Owners Mutual Insurance Association Ltd v Spain* [2015] 1 CLC 596.

3 EU law is incorporated into English law through the European Communities Act 1972 and has features that make it distinct from other international law.

4 This has been incorporated into English law through the Human Rights Act 1998. Cases such as *Lopez Ostra v Spain* (1994) 20 EHRR 277, *Guerra v Italy* (1998) 26 EHRR 357, *Fadeyeva v Russia* (2007) 45 EHRR 10, *Önerildiz v Turkey* (2005) 41 EHRR 20, *Taskin v Turkey* (2006) 42 EHRR 50 paras 113–119; *Tatar v Romania* Application No 67021/01 ECtHR (27 January 2009) para 88, *Budayeva v Russia* Application Nos 15339/02 ff (20 March 2008) show how the right to private life, or the right to life, can be used to compel governments to regulate environmental risks, enforce environmental laws or disclose environmental information.

5 There are other sources too, including writings of jurists, UN General Assembly resolutions and 'the general principles of law'; see n 61.

6 Article 38(1) of the Statute of the International Court of Justice provides that:

Framework of Ramsar sites: Wetlands of international importance, designated under the 1971 Ramsar Convention.⁹

Unincorporated international treaties have traditionally had a somewhat restricted use in domestic law. This is, of course, a consequence of our strictly dualist system of law and is a result of two principles of 'constitutional orthodoxy', namely:

- domestic courts have no jurisdiction to construe or apply treaties which have not been incorporated into national law: they are effectively non-justiciable
- that such treaties, unless incorporated into domestic law, are not part of that law and therefore cannot be given direct effect to create rights and obligations under national or municipal law¹⁰

Despite the orthodoxy there are a number of possible routes to the use of unincorporated treaties in domestic law:

- as an aid to statutory interpretation
- in developing the common law
- as a relevant consideration in the exercise of judicial discretion
- through legitimate expectation
- in human rights cases where proportionality under the European Convention on Human Rights (ECHR) is being considered
- through EU law

For an example of the application of this constitutional orthodoxy, and the possible exceptions, in a domestic environmental case see the judgment of Carnwath LJ (as he then was) in *Morgan v Hinton Organics*,¹¹ saying in respect of the Aarhus Convention¹² that: 'For the purposes of domestic law, the convention has the status of an international treaty, not directly incorporated. Thus its provisions cannot be directly applied by domestic courts', albeit that it could (see further below) 'be taken into account in resolving ambiguities in legislation intended to give it effect'. The Aarhus Convention provides a useful, but complex, example of how international law may be used in domestic environmental law cases. It is a complex example because it has been ratified by the EU itself. Carnwath LJ thus explained in *Morgan* that:

Ratification by the European Community itself gives the European Commission the right to ensure that Member

States comply with the Aarhus obligations in areas within Community competence.¹³ Furthermore provisions of the convention have been reproduced in two EC Environmental Directives, dealing respectively with Environmental Assessment and Integrated Pollution Control¹⁴ (neither applicable in the present case).

Moreover, the Aarhus Convention has subsequently in part only, in respect of part of Article 9, been directly incorporated into domestic law via the Civil Procedure Rules (CPR) on 'Aarhus Convention claims'.¹⁵ Despite the fact that prior to the amendments to the CPR the Aarhus Convention was unincorporated it was cited and has nonetheless influenced the approach of the domestic courts to costs issues in environmental cases more generally.¹⁶

Statutory interpretation

There is a presumption of compatibility of domestic legislation with international law.¹⁷ Thus in *Assange v Swedish Prosecution Authority* Lord Dyson said that: 'there is no doubt that there is a "strong presumption" in favour of interpreting an English statute in a way which does not place the United Kingdom in breach of its international obligations'; and see also what Carnwath LJ said in *Morgan* in this regard in the context of the Aarhus Convention.¹⁸ That said, where legislation is clear and unambiguous, it must be given effect to irrespective of any international treaty obligations.¹⁹

Common law

Unincorporated treaties may have a bearing on the development of the common law, in that:²⁰

- developments of the common law should ordinarily be in harmony with the United Kingdom's international obligations²¹
- unincorporated treaties may also be used to resolve ambiguities in the common law²²
- but that the common law cannot be used to incorporate treaties 'through the back door'²³

13 See Case C-239/03 *Commission v France* [2004] ECR I-9325 paras 25-31.

14 Now Directive 2010/75/EU Industrial Emissions Directive.

15 See eg *R (H52 Action Alliance Ltd) v SST* [2015] PTSR 1025. See also CPR 45.43 for so-called Aarhus Convention claims providing for fixed costs in respect of a judicial review 'of a decision, act or omission all or part of which is subject to the provisions of the UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters'. See CPR 45.41-44 and the Part 45 PD at paras 5.1-5.2. Two limits are set: on the costs recoverable by a defendant from a claimant (£5000 where the claimant is an individual and £10,000 in any other circumstances) and on the costs recoverable by a claimant from a defendant (£35,000).

16 See eg *R (Burkett) v Hammersmith and Fulham LBC* [2005] CP Rep 11 and *R (Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2009] CP Rep 8.

17 [2012] 2 AC 471 para 122.

18 See *Morgan v Hinton Organics* (n 11).

19 See *Saloman v Commissioners for Customs & Excise* [1967] 2 QB 116, 143.

20 *R v Lyons* [2003] 1 AC 976 para 13 (Lord Bingham).

21 *A v Secretary of State for the Home Department* (No 2) [2006] 2 AC 221 para 27 (Lord Bingham).

22 *Derbyshire County Council v Times Newspapers Ltd* [1993] AC 534.

23 *A v Secretary of State for the Home Department* (No 2) [2005] 1 WLR 414 paras 266-267 (Laws LJ), para 434 (Neuberger LJ).

9 There can be incorporation in other ways. Thus, in *Golden Fleece Maritime Inc and Pontian Shipping SA v ST Shipping and Transport Inc* [2008] EWCA Civ 584 there is a discussion on the Marine Pollution Convention (MARPOL) in the context of certain oil tankers being chartered. One of the contractual obligations on the owners was to ensure compliance with the MARPOL Convention. At the time the tankers were chartered, the vessels complied. During the chartering, the convention was amended, and the vessels did not comply with the revised provisions. The High Court and the Court of Appeal both held that the charterers were entitled to be compensated for loss of profits flowing from the non-compliance.

10 See *R (SG) v Secretary of State for Work and Pensions* [2015] 1 WLR 1449 para 235 (Lord Kerr) and *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 paras 499F-500C (Lord Oliver).

11 [2009] CP Rep 26 para 22.

12 UNECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.

The exercise of judicial discretion²⁴

An international convention can be used in determining the manner in which judicial discretions are to be exercised.²⁵ In *Morgan*,²⁶ the Aarhus Convention was relied on as a factor relevant to the exercise by a court of its discretion as to costs. The Court of Appeal held that:

44. ... However, from the point of view of a domestic judge, it seems to us (as the Defra statement suggests) that the principles of the convention are at the most something to be taken into account in resolving ambiguities or exercising discretions (along with other discretionary factors including fairness to the defendant).

47 ... iii) With that possible exception, the rules of the CPR relating to the award of costs remain effective, including the ordinary 'loser pays' rule and the principles governing the court's discretion to depart from it. The principles of the convention are at most a matter to which the court may have regard in exercising its discretion.

However, there are limits here. Thus, in the later case of *Venn v SSCLG*,²⁷ the Court of Appeal considered issues arising from the fact that the protections incorporated into the CPR in respect of the Aarhus Convention were limited to judicial review proceedings only:

... exclusion of statutory appeals and applications from CPR r 45.41 was not an oversight, but was a deliberate expression of a legislative intent, it necessarily follows that it would not be appropriate to exercise a judicial discretion so as to side-step the limitation (to applications for judicial review) that has been deliberately imposed by secondary legislation. It would be doubly inappropriate to exercise the discretion for the purpose of giving effect under domestic law to the requirements of an international Convention which, while it is an integral part of the legal order of the EU, is not directly effective (see the *Brown Bear* case [2012] QB 606²⁸), and which has not been incorporated into UK domestic law: see *Morgan* [2009] Env LR 629.

Legitimate expectation

In the recent decision in *R (SG) v Secretary of State for Work and Pensions*²⁹ Lord Kerr stated that: '[t]he proposition that the doctrine of legitimate expectation can generate a right to rely on the provision of an unincorporated treaty in the interpretation and application of domestic law is, at least, controversial'. Such arguments may be traced back to before the decision of the Australian courts in

Minister of State for Immigration and Ethnic Affairs v Teoh,³⁰ but that case is the modern starting point for such arguments. In Australia, *Teoh* has subsequently been seriously doubted.³¹

How has *Teoh* fared in the domestic courts? The Court of Appeal's decisions in *Chundawadra v Immigration Appeal Tribunal*³² and *Behluli v Secretary of State for the Home Department*³³ have rejected the *Teoh* approach (in the latter the court expressly declined to follow it). In *R v Secretary of State for the Home Department, ex parte Ahmed and Patel*³⁴ the Court of Appeal (two months after *Behluli*) indicated a willingness to adopt and follow *Teoh* but without apparently having been referred to *Chundawadra* or *Behluli*.

In *R v DPP, ex parte Kebeline*³⁵ the Divisional Court rejected an attempt to base a legitimate expectation on ratification of the ECHR. Laws LJ specially referred to *Teoh* and stated that:

... in my judgment, the proposition that the Convention has without the aid of statute become part of our substantive domestic public law, in the pragmatic sense that the courts must compel government to apply the Convention and to do so correctly ... ignores the dual nature of our constitutional arrangements in relation to the legal nature of international treaties. And it is contradicted by authority of their Lordships' House in the *Brind* case.³⁶

The argument against using legitimate expectation in this way is that it effectively incorporates a convention via the back door.³⁷ On the current state of the authorities this route is a difficult one; to say it is 'controversial' is an understatement.

Human rights cases

In considering convention rights, regard may be had to other unincorporated international conventions.³⁸ Thus, Lord Reed noted:

As the Grand Chamber stated in *Demir v Turkey*,³⁹ "the precise obligations that the substantive obligations of the Convention impose on contracting states may be interpreted, first, in the light of relevant international treaties that are applicable in the particular sphere". It is not in dispute that the Convention rights protected in our domestic law by the Human Rights Act can also be interpreted in the light of international treaties, such as the [United Nations Convention on the Rights of the Child] UNCRC, that are applicable in the particular sphere.

24 Generally the exercise of executive discretion need not be compatible with international conventions: see *R v Secretary of State for the Home Department, ex parte Brind* [1991] AC 696 paras 747H–748A (Lord Bridge); but see also *R v Secretary of State for the Home Department, ex parte Norney* [1995] Admin LR 861 para 871 (Dyson LJ).

25 See eg *Rantzen v Mirror Group* [1994] QB 670 paras 690G–692H.

26 See *Morgan v Hinton Organics* (n 11) (emphases added).

27 [2015] 1 WLR 2328 (emphasis added).

28 Case C–240/09 *Lesoochranske Zoskupenie VLK v Ministerstvo Zivotneho Prostredia Slovenskej Republiky (Brown Bear)* [2011] ECR-I 1255, [2012] QB 606, considered below.

29 See *R (SG) v Secretary of State for Work and Pensions* (n 10) para 246.

30 (1995) 183 CLR 273.

31 See *Minister for Immigration and Ethnic Affairs, ex parte Lam* (2003) 214 CLR 1.

32 [1998] Imm AR 161.

33 [1998] Imm AR 407, 415.

34 [1998] INLR 570.

35 [2000] 2 AC 326.

36 *R v Home Secretary, ex parte Brind* [1991] 1 AC 696.

37 See *R (SG) v Secretary of State for Work and Pensions* (n 10) para 245 (Lord Kerr).

38 *ibid*.

39 (2008) 48 EHRR 1272 para 69.

Lord Kerr sought to go further in *R (SG) v Secretary of State for Work and Pensions*⁴⁰ and suggested, based on various dicta of Lord Steyn, that human rights treaties are an exception to the general rule and thus directly enforceable in UK law. That view was not endorsed by the majority.

For an example of this in the environmental context regard must be had to the decision of Hickinbottom J in *Stevens v Secretary of State for Communities and Local Government*.⁴¹ The claim concerned a refusal of permission on a planning appeal for the use of land for stationing caravans occupied by Gypsies. This was sought to be challenged under section 288 of the Town and Country Planning Act 1990. The judge noted that given the scope of planning decisions and the nature of the right to respect for family and private life, planning decision making would often engage Article 8 of the ECHR as incorporated into our law by the Human Rights Act 1998. He went on to hold that where Article 8 rights were those of children, they had to be seen in the context of Article 3 of the UNCRC, which required a child's best interests to be a primary consideration.

European Union law⁴²

Under EU law a provision in an international agreement concluded by the EU with a non-EU Member State must be regarded as being directly applicable in the law of the Member States when, regard being had to its wording and to the purpose and nature of the agreement, the provision contains a clear and precise obligation which is not subject, in its implementation or effects, to the adoption of any subsequent measure.⁴³

An example of an agreement in the environmental field held to be directly effective in domestic law by way of EU law can be found in *Syndicat Professionnel Coordination des Pêcheurs de l'Etang de Berre et de la Région v Électricité de France*⁴⁴ concerning Article 6(3) of the Protocol for the Protection of the Mediterranean Sea against Pollution from Land-based Sources (the Protocol),⁴⁵ and Article 6(1) of the Protocol.⁴⁶

For an example of where such arguments were not held directly effective, it is necessary to return to the *Brown Bear* case already mentioned above.⁴⁷ In that case the

CJEU ruled that Article 9(3) of the Aarhus Convention did not contain any clear and precise obligation capable of directly regulating the legal position of individuals in the laws of the Member States.⁴⁸ However, the CJEU went on to hold that: 'it is for the national court, in order to ensure effective judicial protection in the fields covered by European Union environmental law, to interpret its national law in a way which, to the fullest extent possible, is consistent with the objectives laid down in article 9(3) of the Aarhus Convention',⁴⁹ thus creating a very strong indirect effect for international treaties concluded by the EU.

On the issue of when international law can be invoked to question the validity of EU secondary legislation reference can be made to the Joined Cases C-401/12P to C-403/12P *Council of the European Union v Vereniging Milieudefensie*,⁵⁰ which once again concerned the Aarhus Convention.

Customary international law

The judgment of Lord Mance in *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs*⁵¹ contains the following analysis of the incorporation of customary international law (CIL) into the common law:⁵²

- rules of CIL 'are incorporated⁵³ into English law automatically and considered to be part of English law unless they are in conflict with an Act of Parliament⁵⁴ or the recognition at common law would 'abrogate a constitutional or common law value, such as the principle that it is Parliament alone who recognises new crimes⁵⁵
- CIL rules incorporated into domestic law by decisions of a domestic court were subject to the ordinary rules of stare decisis ('On that basis, once they had been recognised at Court of Appeal level (as the rules of State Immunity have been), they would be capable of alteration only by the House of Lords')⁵⁶
- 'in my opinion, the presumption ... is that CIL, once established, can and should shape the common law, whenever it can do so consistently with domestic constitutional principles, statutory law and common law rules which the courts can themselves sensibly adapt without it being, for example, necessary to invite Parliamentary intervention or consideration'⁵⁷

The CIL being argued for in this (non-environmental) case failed. Identifying, and evidencing, the existence of CIL is not an easy task. Article 38(1)(b) of the Statute of the International Court of Justice requires two elements to

40 *R (SG) v Secretary of State for Work and Pensions* (n 10).

41 [2013] EWHC 792 (Admin).

42 See Simon Marsden 'Invoking direct application and effect of international treaties by the European Court of Justice: implications for international environmental law in the European Union' (2011) 60(3) ICLQ 737-757; Jan Wouters et al (eds) *The Europeanisation of International Law – The Status of International Law in the EU and its Member States* (TMC Asser Press 2008).

43 See in particular Case C-265/03 *Simutenkov v Ministerio de Educación y Cultura* [2005] ECR I-2579 para 21 and Case C-372/06 *Asda Stores Ltd v Revenue and Customs Comrs* [2007] ECR I-I 1223 para 82.

44 Case C-213/03 *Syndicat Professionnel Coordination des Pêcheurs de l'Etang de Berre et de la Région v Électricité de France* [2004] 3 CMLR 19.

45 Signed in Athens on 17 May 1980, approved by Council Decision 83/101 of 28 February 1983.

46 As amended at the Conference of Plenipotentiaries held in Syracuse on 7 and 8 March 1996, which amendments were approved by Council Decision 1999/801 of 22 October 1999.

47 Case C-240/09 *Lesoochranárske Zoskupenie VLK v Ministerstvo Životeho Prostredia Slovenskej Republiky (Brown Bear)* (n 28).

48 *ibid* para 45.

49 *ibid* para 52.

50 [2015] 2 CMLR 32.

51 [2015] 3 WLR 1665.

52 *ibid* paras 144 ff.

53 *ibid* para 148 (Lord Mance) on the debate about whether CIL becomes part of domestic law either by incorporation or by transformation.

54 *Trendtex Trading Corp v Central Bank of Nigeria* [1977] QB 529, 553.

55 *R v Jones (Margaret)* [2007] 1 AC 136 para 29.

56 *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* (n 51) para 147.

57 *ibid* para 150.

establish CIL: (i) a state practice, and (ii) that it is 'accepted as law'.⁵⁸

In *R (European Roma Rights Centre and others) v Immigration Officer at Prague Airport and another (United Nations High Commissioner for Refugees intervening)*⁵⁹ Lord Bingham said:

23. The conditions to be satisfied before a rule may properly be recognised as one of customary international law have been somewhat differently expressed by different authorities, but are not in themselves problematical. Guidance is given by the International Court of Justice in *In re North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands)* [1969] ICJ Rep 3, paras 70–71, on the approach where a treaty made between certain parties is said to have become binding on other states not party to the treaty:

"70. The court must now proceed to the last stage in the argument put forward on behalf of Denmark and the Netherlands. This is to the effect that even if there was at the date of the Geneva Convention [on the Continental Shelf, 1958] no rule of customary international law in favour of the equidistance principle, and no such rule was crystallized in article 6 of the Convention, nevertheless such a rule has come into being since the Convention, partly because of its own impact, partly on the basis of subsequent state practice—and that this rule, being now a rule of customary international law binding on all states, including therefore the Federal Republic, should be declared applicable to the delimitation of the boundaries between the parties' respective continental shelf areas in the North Sea.

71. In so far as this contention is based on the view that article 6 of the Convention has had the influence, and has produced the effect, described, it clearly involves treating that article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the Convention. There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed. At the same time this result is not lightly to be regarded as having been attained."

The relevant law was, I think, accurately and succinctly summarised by the *American Law Institute, Restatement of the Law, Foreign Relations Laws of the United States (Third)* vol 1, 1986, para 102(2) and (3):

"(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted."

This was valuably supplemented by a comment to this effect:

"c. *Opinio juris*. For a practice of states to become a rule of customary international law it must appear that the states follow the practice from a sense of legal obligation (*opinio juris sive necessitatis*); a practice that is generally followed but which states feel legally free to disregard does not contribute to customary law. A practice initially followed by states as a matter of courtesy or habit may become law when states generally come to believe that they are under a legal obligation to comply with it. It is often difficult to determine when that transformation into law has taken place. Explicit evidence of a sense of legal obligation (e.g., by official statements) is not necessary; *opinio juris* may be inferred from acts or omissions."

Where there is a ruling from, for example, the ICJ that something is CIL, or from the domestic courts, the position will be clear. Beyond such cases, it can get very difficult. It can also be difficult, as noted in the *Roma Rights* case,⁶⁰ to distinguish treaties and CIL, because treaties can themselves (through codification for example)⁶¹ be authoritative statements of what CIL is. This then provides another possible route around the rule that treaties cannot be directly relied on absent incorporation. Also, even where a treaty is not intended to be a codification but rather is new and designed to change the rules, it can (eventually) become part of customary law if it is accepted in practice.

CIL is different from 'the general principles of law recognized by civilized nations',⁶² although there is a relationship between them.⁶³ For an example of such a general principle see *W v H*.⁶⁴ It is undoubtedly true that a right of access to court is recognised as a fundamental principle of law, alongside the twin principle in international law forbidding a "denial of justice" ; and see further *Golder v United Kingdom*,⁶⁵ where the European Court of Human Rights had regard to such general principles in interpreting Article 6 of the convention.

60 See *Roma Rights* (n 59).

61 For an example in the environmental field see eg the obligation to protect and preserve the marine environment as reflected in customary international law embodied in Part XII of the United Nations Convention on the Law of the Sea art 194(1), which obliges parties to take all measures that are 'necessary to prevent, reduce and control pollution of the marine environment from any source'. The convention is not itself CIL but the ICJ has taken the approach that individual provisions of it may be assessed in order to conclude whether they may themselves nevertheless be regarded as CIL: see *Continental Shelf (Libya v Malta)* [1985] ICJ Rep 13, 30.

62 See art 38(1) of the Charter of the ICJ (n 6).

63 See *Khurts Bat v Investigating Judge of the Federal Court of Germany* [2013] QB 349 para 69: 'Identification of principle in customary international law depends upon state practice and *opinio juris* to be culled from those sources recognised by the International Court of Justice: international conventions, international custom, general principles of law recognised by civilised nations and, as a subsidiary means, judicial decisions and the teachings of the most highly qualified publicists of the various nations: article 38 of the Statute of the International Court of Justice'.

64 [2016] EWHC 213 (Fam) para 20.

65 (1979–90) 1 EHRR 524 paras 35–36.

58 See *North Sea Continental Shelf* cases [1969] ICJ Rep 3 para 44: 'Not only must the acts concerned be a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it ... The States concerned must feel that they are conforming to what amounts to a legal obligation'.

59 [2005] 2 AC 1, cited with approval in the later House of Lords decision in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426.

For some examples of CIL being sought to be relied on in domestic environmental cases, see:

- *Emanuela Marchiori v The Environment Agency*⁶⁶ (unsuccessful argument that the production and maintenance of Trident violated humanitarian principles which were part of the law of the nations and thus CIL)
- *R (Air Transport Association of America, Inc, American Airlines, Inc, Continental Airlines, Inc, United Airlines, Inc) v Secretary of State for Energy and Climate Change*⁶⁷
- *Case C-366/10 Air Transport Association of America v Secretary of State for Energy and Climate Change*⁶⁸

In this latter case the High Court referred questions to the CJEU for a preliminary ruling on whether certain rules of customary international law and international treaty law could be relied upon to challenge the validity of Directive 2008/101, which amended Directive 2003/87/EC so as to include airline activities in the scheme for greenhouse gas emissions allowance trading within the EU. The principles of CIL sought to be relied on were:

(a) the principle of customary international law that each state has complete and exclusive sovereignty over its airspace; (b) the principle of customary international law that no state may validly purport to subject any part of the high seas to its sovereignty; (c) the principle of customary international law of freedom to fly over the high seas; (d) the principle of customary international law (the existence of which is not accepted by the defendant) that aircraft overflying the high seas are subject to the exclusive jurisdiction of the country in which they are registered, save as expressly provided for by international treaty ...

The CJEU ruled that points (a)–(c) were CIL but that they did not prevent the EU institutions within the limits of review as to a manifest error of assessment attributable to the European Union regarding its competence from legislating as it had done in Directive 2008/101. Also relevant in this context and touching on CIL is the case of *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* (No 3),⁶⁹ which concerned a judicial review of a decision of the Foreign Secretary deciding to create a no-take marine protected area for environmental protection of a colony.

A search of the internet reveals an extraordinary range of matters, which organisations and individuals assert is CIL. It has been argued that the following environmental law principles and approaches should be seen as CIL norms:

- the precautionary principle⁷⁰

- sustainable development⁷¹
- the polluter pays principle⁷²
- the principle of common but differentiated liability⁷³
- the rights of indigenous peoples
- the prevention and control of transboundary harm⁷⁴
- that the Arctic is to be treated as 'an international commons under the customary international law'⁷⁵

Whether all or indeed any of the above are actually established as CIL is very much open to question. The strongest case can probably be made in respect of the precautionary principle.

There are other matters which, going forward, it might also be possible to construct as arguments amounting to CIL, for example public participation, access to justice and access to information in the environmental field.⁷⁶

Decisions, opinions and recommendations

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations. For an example of the citation of a decision of the ICJ in a domestic

that have generally avoided ruling on whether the precautionary principle is CIL. Thus, in *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R at para 123 it is stated that: 'The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it is widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. The precautionary principle is regarded by some as having crystallized into a general principle of customary international environmental law. Whether it is widely accepted by Members as a principle of general or customary international law appears less than clear. We consider, however, that it is unnecessary and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question'. See also Indian cases such as *AP Pollution Control Board v Prof MV Nayudu* (1999) SOL Case No 53 supporting the view that the precautionary principle is CIL.

71 See *UNEP Training Manual on International Environmental Law* www.unep.org/environmentalgovernance/Portals/8/documents/training_Manual.pdf. Note that the National Planning Policy Framework referring to Resolution 42/187 of the United Nations General Assembly defines sustainable development as meeting the needs of the present without compromising the ability of future generations to meet their own needs.

72 See the *UNEP Training Manual* (n 71). There is also the prevention principle.

73 The Rio Declaration states: 'In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command'.

74 See Alan Boyle 'Human rights and the environment: where next?' (2012) 23(3) *EJIL* 613–42, 633 discussing, inter alia, the 'good neighbour' principle that no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence. See eg *Trail Smelter (US v Can)*, reprinted in 35 Am J Int'l L 684 (1941). See also the *UNEP Training Manual* (n 71).

75 Giselle M Arruda 'Arctic governance regime: the last frontier for hydrocarbons exploitation' (2015) 57(5) *International Journal of Law and Management* 498–521.

76 Having regard to the Aarhus Convention, Rio Principle 10. See also *UNEP Putting Rio Principle 10 Into Action: An Implementation Guide for the UNEP Bali Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (UNEP 2015).

66 [2002] EWCA Civ 03.

67 [2010] EWHC 1554 (Admin).

68 [2013] PTSR 209.

69 [2014] 1 WLR 2921 paras 26, 49 and 52.

70 Owen McIntyre and Thomas Mosedale 'The precautionary principle as a norm of customary international law' (1997) 9(2) *J Env L* 221–41; Aaron Cooper 'The Oslo Principles and climate change' (2015) 20(1) *Cov LJ* 45–49 which says: 'This is widely recognised and established as a rule of customary international law, see principle 2 of the Rio Declaration on the Environment and Development 1997: "...the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction" ...'. There are some relevant decisions of the WTO Appellate Body

environmental judicial review see *Emanuela Marchiori v The Environment Agency*,⁷⁷ where the claimants challenged certain authorisations granted by the Environment Agency to permit the discharge of radioactive waste by contractors to the Ministry of Defence from two nuclear sites respectively situated at Aldermaston and Burghfield. One of the grounds of challenge was that the Environment Agency wrongly treated the nuclear defence programme as a benefit or advantage for the purposes of the justification principle⁷⁸ (indeed, they held themselves bound to treat it as such), whereas in fact they were required to treat it as a detriment, having regard to the 'humanitarian' principles of international law as explained in the Advisory Opinion of the ICJ on the Legality of the Threat or Use of Nuclear Weapons given on 8 July 1996.⁷⁹

Beyond the ICJ there are in the international context a plethora of bodies, committees etc which issue decisions, opinions or recommendations in relation to issues arising under the treaty for which they are responsible. If the treaty itself under which such bodies are set up is unincorporated, can these really have any influence on domestic environmental law? It seems to me that the answer is that they really should not but that they might.

Here are some examples of how this could arise. First, in *Walton v Scottish Ministers*⁸⁰ Lord Carnwath referred to a decision of the Aarhus Compliance Committee. The Committee is responsible for enforcement of the Aarhus Convention, to which the UK is a party. He stated that: '[a]lthough the Convention is not part of domestic law as such (except where incorporated through European directives), and is no longer directly relied on in this appeal, the decisions of the Committee deserve respect on issues relating to standards of public participation'. Can this be correct? Does it not risk incorporation through the back door?

Secondly, in *R (An Taisce (National Trust for Ireland)) v Secretary of State for Energy and Climate Change*⁸¹ the claimants sought to rely on a decision of the Espoo Convention⁸² Implementation Committee on the meaning of that convention, which could then be read across to the similar terms on transboundary effects contained in the EIA Directive on which they relied in the domestic proceedings. Patterson J held, following a detailed examination of the role of that Committee and Article 31 of the Vienna Convention, that:

135. In my judgment the meeting was not purporting to determine the legal position. What the meeting is doing is setting out a pragmatic approach for parties to the Convention to follow. The committee has no status to give a legal ruling ...

77 See *Emanuela Marchiori v The Environment Agency* (n 66).

78 The 'justification principle' stipulated in art 6(a) of Council Directive 80/836/Euratom made under Chapter III of Title 2 of the EURATOM Treaty.

79 See paras 3 and 43–48.

80 [2013] PTSR 5 para 100.

81 [2013] EWHC 4161 (Admin) and [2015] PTSR 189, where there is also in the Court of Appeal's decision some mention of the ICJ para 44.

82 The United Nations Economic Commission for Europe (UNECE) Convention on Environmental Impact Assessment in a Transboundary Context was adopted in 1991.

139. ... there is nothing to suggest that the committee has a normative function ...'

Following the judgment, the chair of the Committee wrote a letter dated 14 March 2004 to the United Kingdom Government. The Committee had requested a copy of Patterson J's judgment, and had considered the matter between 25 and 27 February 2014 at its 30th session held in Geneva. The Committee's letter dated 14 March 2014 expressly endorsed the view that it had expressed in the decision the claimant was relying on, as to the circumstances in which transboundary consultation was required by the convention. This was instrumental in persuading Sullivan LJ to grant permission. The Court of Appeal, however, ultimately upheld the judge's views, saying:

44 In reaching that conclusion, I have not ignored the views expressed by the committee in its letter dated 14 March 2014 ... While I respect the committee's view, it is not the function of the committee to give an authoritative legal interpretation of the Convention. The correspondence with the committee makes it clear that there is a dispute as to the proper interpretation of the Convention. Article 15 makes provision for the settlement of such disputes. If the dispute cannot be resolved by negotiation between the parties it may be either submitted to the International Court of Justice, or referred to arbitration in accordance with the procedure set out in Appendix VII to the Convention.

45. ... Of critical importance for present purposes, the committee understandably focuses simply on the terms of the Espoo Convention, and does not consider the need for the words "likely to have significant effects on the environment" to have a consistent meaning throughout the EIA Directive. For these reasons, the views expressed by the committee in its letter dated 14 March 2014 do not persuade me that it is necessary for this court to make a reference to the Court of Justice in order to determine this claim.

The matter was subsequently considered by both the Aarhus Compliance Committee and the Espoo Convention Implementation Committee. Their decisions are awaited.

Thirdly, *National Trusts' Application*⁸³ concerned the grant of permission for a hotel and golf resort on 148 hectares of land some 550 metres south of the Giant's Causeway, which is a world heritage site. A number of challenges were made around consultation on the effects on the land. The 1972 United Nations Educational Scientific and Cultural Organisation (UNESCO) World Heritage Convention concerning the protection of the world cultural and natural heritage was ratified by the United Kingdom in 1984, although the provisions of the convention have not been incorporated directly into UK national law. The Giant's Causeway was added to the world heritage list. A World Heritage Committee (WHC) is responsible for the implementation of the World Heritage Convention. Guidelines have been issued in relation to the operation of the Convention. They are described as Operational Guidelines

83 [2013] NIQB 60.

for the Implementation of the World Heritage Convention, issued by the United Nations Educational Scientific and Cultural Organisation by its Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage.

The court rejected an argument that a reference to the guidelines in national planning policy in Northern Ireland meant that the WHC had to be consulted on the planning application or that the guidelines applied to applications for planning permission affecting the land. In 2011 the applicant wrote to the WHC to express its concern about the proposed golf development. After some time had elapsed, the WHC notified the applicant that it had made a formal request to the UK ambassador to arrange a response. This led to a report being furnished by the department in February 2012 when a decision had been made to grant planning permission. In March 2012, the department submitted a further report to the WHC on the decision to approve the development. The practice in the UK is only to notify the WHC once a decision to grant permission affecting a world heritage site has been made. The judge concluded that:

30. International Treaties are not justiciable in the domestic courts. In examining the obligations that may or may not arise under the Convention or under the Guidelines issued under the Convention the Court must step away from seeking to implement directly or indirectly the requirements of the Convention or the Guidelines so as to afford individuals rights under the Convention. If the State does not adopt the terms of the Treaty into the domestic law the terms are not capable of affording rights to citizens.

34. ... The applicant seeks an interpretation of the Guidelines as opposed to the Treaty. The applicant contends that the interpretation adopted by the Department and throughout the UK is incorrect in relation to consultation between the agencies of the State and the agencies of UNESCO. The applicant seeks to impose a contrary interpretation on the Department which would have the effect of obliging the Department to consult with the WHC before making a decision on a planning application affecting a World Heritage Site. I have found that there is no such domestic obligation. The Court is not entitled to grant to the citizens of the State a right that only arises in international law between States.

...

36. The domestic requirement is to treat the status of the World Heritage Site as a material consideration for planning purposes. That requirement was acknowledged by the Department but it does not entail a legal obligation to consult with the WHC either under the Convention or the Guidelines or Policy BH5 or by reliance on the statements of the Department officials or the ministerial statements referred to by the applicant.

37. I find the outcome on the role of UNESCO to be surprising in a number of respects. First, that the Department does not have to engage with the WHC before making a decision. While there is a Treaty in place and the matter is to be dealt with initially on the international plane, protection might better be afforded by some requirement for engagement with the WHC before a decision is made that may affect the site. However, no such

domestic obligation has been adopted. Secondly, it is surprising that the Department did not canvass the views of the WHC on the impact of the particular proposal before making its final decision and I am satisfied that they did not do so. The Department reported on the fact of the application having been made but prior to making the final decision the Department did not seek to obtain the views of the WHC. Thirdly, it is surprising that the UK considers that notification of a decision after it is made accords with paragraph 172 of the Guidelines. A reading of the Guidelines suggests that the object of the exercise is to engage with the WHC so that they will present a view on the impact of development on the World Heritage Site before the decision is made. I do not know the basis on which this advice has been furnished, nor what the view of the WHC is on this approach but that is a matter between the United Nations and the State. It is not a matter for the Court. There was no challenge to the fact that this was the national advice and the national approach, although there were internal misunderstandings to which I have referred. None of this operates at a level at which the Court has power to intervene and therefore I am unable to do so.

There are dangers if weight is given to the views of bodies tasked with expressing views on unincorporated treaties. This may risk incorporation through the back door. There are also risks in attaching more weight than is perhaps deserved to the views of such bodies. They are not courts; sometimes they are not staffed by lawyers and they are simply not tasked with making definitive legal rulings. They can also produce some very odd outcomes, for example (in a non-environmental context) the decision of the UN Working Group on Arbitrary Detention that Julian Assange was being 'detained' in the Ecuadorian Embassy.⁸⁴

Comparative environmental law

There is a strong trend by courts to discourage excessive citation of authorities, most notably in the Court of Appeal Practice Directions. That provides an unhelpful starting point in citing authorities from other countries in domestic environmental cases.

Below are some examples where courts have had regard to case law from other jurisdictions in the environmental context:

- *Tesco Stores Ltd v SSE*:⁸⁵ Lord Hoffmann in considering the scope of agreements under section 106 of TCPA 1990 has comparison of 'Law and policy in the United States'
- *Lawrence and another v Fen Tigers Ltd*,⁸⁶ which looks at the practice of other common law countries on remedies for nuisance in Australia, New Zealand, Canada and the USA⁸⁷

84 David Barrett 'Julian Assange: UN ridiculed after its experts rule Wikileaks founder "detained" in embassy' *The Telegraph* (5 February 2016) www.telegraph.co.uk/news/uknews/12141755/Julian-Assange-should-receive-compensation-UN-says.html: 'The findings were described as "ridiculous" by David Cameron ... as it emerged the UN Working Group on Arbitrary Detention was deeply divided over its conclusions'.

85 [1995] 1 WLR 759 (HL).

86 [2014] AC 822 (SC).

87 *ibid* paras 241–243.

- *Armstrong DLW GmbH v Winnington Networks Ltd*,⁸⁸ which concerned fraudulent transfer and restitution of allowances under the EU emissions trading scheme, citing Australian case law on permits to explore for petroleum in an area in the continental shelf⁸⁹

Note also that the International Comparative Legal Guides website provides free online access to its guides to the law of 30 jurisdictions and covers, inter alia, environmental policy and its enforcement, reporting/disclosure obligations, environmental permits, waste, emissions trading and climate change, asbestos, contaminated land and environmental insurance liabilities, and powers of regulators.⁹⁰

There is also the role of the Privy Council in deciding environmental cases on appeal from other jurisdictions:

- *Belize Alliance of Conservation Non-Governmental Organisations v Department of the Environment*.⁹¹

EIA Belize hydro-electric project and interim relief issues

- *Bimini Blue Coalition Ltd v Prime Minister of The Bahamas*:⁹² interim injunction, impact of construction of cruise terminal on conservation grounds
- *Marlborough Aquaculture Ltd v Chief Executive, Ministry of Fisheries*: JR of marine fishing permits in New Zealand⁹³
- *Fishermen & Friends of the Sea v Environment Management Authority*: EIA of natural gas project; delay in seeking JR in Trinidad and Tobago⁹⁴
- *Goldman v Hargrave*: a very well known and applied Australian case on nuisance and negligence from fire⁹⁵

Such decisions are not binding on English courts but are clearly persuasive given the overlap of membership with the Supreme Court, and previously the Judicial Committee of the House of Lords.

88 [2013] ch 156.

89 *ibid* paras 55–56.

90 See eg www.iclg.co.uk/practice-areas/environment-and-climate-change-law/environment-and-climate-change-law-2016.

91 [2004] Env LR 38, [2003] 1 WLR 2839.

92 [2014] UKPC 23.

93 [2005] UKPC 29.

94 [2006] Env LR 15.

95 [1967] 1 AC 64.

Recent developments in transboundary environmental law

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EU law is an essential aspect of international law and invariably essential to UK lawyers advising global companies. One cannot talk about how international law influences UK law without looking through the concentrating lens of EU law (at least, pre-Brexit). EU legislation often codifies and implements international treaties. The EU can be a signatory to international conventions (such as the Aarhus Convention and the Nagoya Protocol on Access to Genetic Resources) in its own right, along with the UK and other Member States.

The three areas I have selected to cover are:

- the Aarhus Convention, which is probably the clearest example of international treaty obligations in a domestic context
- the EU chemicals regime, REACH, which, while not being specifically international law, merits note this year
- the EU Emissions Trading Scheme (EU ETS), which implements the international Kyoto Protocol, and now the Paris Agreement, in the EU

I Aarhus Convention and access to information: background

The United Nations Economic Commission for Europe (UNECE) Convention on access to information, public participation in decision making and access to justice in environmental matters (Aarhus Convention) consists of three pillars granting rights to the public in respect of:

- access to environmental information
- participation in the environmental decision-making process
- access to environmental justice

The EU and the UK both ratified the Aarhus Convention and became parties in 2005. A number of directives and regulations implement the three pillars of the Aarhus Convention in the EU.

I.1 ClientEarth and access to environmental information

ClientEarth's name has come up a lot in the last year concerning access to information. These are cases at an EU level that therefore apply to the UK.

The access to environmental information provisions in the Aarhus Convention are partially implemented in the EU by the EU Public Access Regulation 2001, which sets out the principles of, conditions for, and limits to, the right

of access to documents held by certain EU institutions, including the European Commission.¹

On 16 July 2015, in *ClientEarth v European Commission*,² the Court of Justice of the European Union (CJEU) partially overturned a 2013 ruling by the General Court (EU) that the European Commission could withhold documents about breaches of EU environmental law by Member States. In particular, the CJEU said that the Commission should disclose documents that had not yet led to a formal notice of infringement. Those documents did not benefit from an exception in the EU Public Access Regulation 2001 that documents should not be disclosed where that would undermine the protection of 'the purposes of inspections, investigations and audits'.

The CJEU dismissed two of the main grounds argued by ClientEarth. It said that, contrary to ClientEarth's arguments, the General Court:

- had been right in law to say that the provision in Article 4 of the EU Public Access Regulation 2001 forbidding disclosure where it would undermine the protection of 'the purpose of inspections, investigations and audits' was compatible with the Aarhus Convention requirements on access to environmental information. Documents that had not yet led to a formal notice of infringement did not benefit from an exception in the EU Public Access Regulation 2001
- had correctly interpreted the concept of overriding public interest

I.2 ClientEarth and access to environmental information on chemicals under REACH

On 23 September 2015, in *ClientEarth v European Chemicals Agency (ECHA)*,³ the General Court (EU) gave its decision in a challenge brought by ClientEarth and the International Chemical Secretariat (ChemSec) to a refusal by the European Chemicals Agency (ECHA) to disclose information relating to 365 chemical substances regulated under the EU REACH chemicals regime.

The case considered in detail the complex interaction between different EU regulations on access to environmental information (implementing the Aarhus Convention), the commercial confidentiality exception and overriding public interest in the context of information about substances under the REACH regime.

* This article was written before the outcome of the EU referendum was known.

1 Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 31 May 2001 regarding public access to European Parliament, Council and Commission documents.

2 Case C-612/13 *ClientEarth v European Commission* (16 July 2015).

3 Case T-245/11 *ClientEarth and the International Chemical Secretariat v European Chemicals Agency (ECHA)* (23 September 2015).

The court decided that information relating to:

- names of manufacturers and importers of substances *should* be disclosed
- precise tonnage or tonnage bands of substances *should not* be disclosed

Note that there are two cases currently going through the EU courts that explore this tension between commercial confidentiality (for plant product testing) and access to environmental information.

1.3 CPR cost capping safeguards for Aarhus Convention claims

It is also worth mentioning a domestic consultation on complying with Article 9(3) of the Aarhus Convention, which requires access to a judicial procedure that is not prohibitively expensive. It has been incorporated into domestic law by special costs rules under rules 45.41 to 45.55 of the Civil Procedure Rules (CPR) for 'Aarhus Convention claims'. These are, broadly, environmental judicial review (JR) claims. The special costs rules are similar to protective costs orders (PCOs). A succession of cases has challenged whether the preceding Part 45 costs protection framework for environmental legal challenges complied with the Aarhus Convention, in particular, whether it was prohibitively expensive.

Between September and December 2015, the Ministry of Justice (MoJ) consulted on its proposals to adjust the costs protection for Aarhus Convention claims in the civil courts in England and Wales. The MoJ's proposals will:

- change the types of case for which costs protection is available to extend beyond JR to include certain statutory reviews that are similar to JR. Importantly, this will extend to applications under section 288 of the Town and Country Planning Act 1990 (TCPA 1990) questioning the validity of planning decisions. It will also extend to appeals against planning enforcement under sections 289(1) and (2) of the TCPA 1990 and section 65(1) of the Planning (Listed Buildings Conservation Areas) Act 1990. It will continue to be for the court to decide whether the claim falls within the definition, if disputed by the defendant
- allow the courts to reduce the level of costs protection for financially well-resourced claimants. Currently, the same levels of costs protection are applied in every case, regardless of the claimant's financial means. It is proposed that costs would be set at a default level, but any party could apply to vary their own or another party's costs cap. The court would be required to ensure any variation would not make the costs prohibitively expensive for the claimant
- ensure that claimants who seek costs protection provide information about their own financial resources to the court and defendant as well as details of any third party funding they are receiving, to ensure they do not receive unnecessary costs protection at the taxpayer's expense
- clarify that the costs protection applies to 'members of the public' to align it with the Aarhus Convention

- consider whether claimants should only receive costs protection once the court has granted permission to apply for JR or statutory review
- reduce a defendant's liability for costs when it unsuccessfully challenges whether a claim is an Aarhus Convention claim, from usually paying on the indemnity basis (all costs) to the standard basis (more limited costs). A claimant will continue to be protected if it wrongly asserts that its claim is an Aarhus Convention claim by the court making no order for costs
- clarify the factors that the court should use to assess whether a cross-undertaking in damages under an interim injunction in the case would make continuing with a claim prohibitively expensive for an applicant. The principles are drawn from the Supreme Court's judgment in *R (Edwards and another) v Environment Agency and others* (No 2)⁴

Separately, the government is introducing a new costs capping regime for non-Aarhus Convention claims. When commenced, sections 88 and 89 of the Criminal Justice and Courts Act 2015 will introduce a costs capping order (CCO), which will replace PCOs and limit or remove the liability of one party to pay another's costs in appropriate JR cases. However, importantly, the new costs capping order regime will not apply to Aarhus Convention claims. Instead, costs protection in those cases will continue to be governed by the costs rules under section VII of Part 45 of the CPR.

2 REACH – EU chemicals regime: background

REACH stands for the Registration, Evaluation, Authorisation and Restriction of Chemicals.

The EU REACH Regulation 2006 imposes obligations on EU manufacturers, importers and downstream users of a wide range of chemical substances used in industrial, commercial and household application.⁵ The European Chemicals Agency (ECHA) is the European authority for REACH.

Under the REACH regime, EU manufacturers and importers are required to share certain data for the purposes of registering REACH chemical substances with the ECHA. The lead registrant collates the studies and data to support the registration dossier. In other than exceptional cases, the lead registrant can usually expect to recoup and share some of the costs of the studies by selling letters of access to new entrants wanting to join the registration.

There has been limited case law to clarify the regime, so it is notable when two cases come along in the same year:

⁴ [2013] UKSC 78.

⁵ Regulation (EC) No 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH), establishing a European Chemicals Agency, amending Directive 1999/45/EC and repealing Council Regulation (EEC) No 793/93 and Commission Regulation (EC) No 1488/94 as well as Council Directive 76/769/EEC and Commission Directives 91/155/EEC, 93/67/EEC, 93/105/EC and 2000/21/EC.

2.1 REACheck solutions one substance, one registration

On 15 March 2016, the Board of Appeal of the ECHA issued its decision on Case A-022-2013. This was an appeal lodged by the lead registrant of a chemical substance because the ECHA had granted a registration to an individual company for the same substance, outside of the existing joint submission for registration.

The lead registrant successfully argued that the individual company's registration dossier:

- ignored data sharing under REACH, with the expected cost sharing that goes with it
- was missing key information and data
- had not been properly checked by the ECHA

The Board of Appeal agreed that, as a consequence, the ECHA's decision to grant the registration gave the individual registrant an unfair market advantage. The case has been remitted back to the ECHA for further examination.

2.2 Fédération SVHC obligations apply to component as well as product

On 10 September 2015, in *Fédération des entreprises du commerce et de la distribution (FCD) and Fédération des magasins de bricolage et de l'aménagement de la maison (FMB) v Ministre de l'écologie, du développement durable et de l'énergie*,⁶ the EU Court of Justice delivered an important judgment clarifying the meaning of 'article' under the REACH Regulation 2006, which affects the obligations of producers and suppliers in relation to chemical substances of very high concern (SVHCs) in products.

The court decided that producers and suppliers have SVHC notification and information obligations in relation to each component part of a complex product, rather than just the finished product. This is because, while the REACH Regulation 2006 gives a basic definition of 'article', it does not contain provisions specifically governing the situation of a complex product containing several articles. Each of the articles incorporated as a component of a complex product is, therefore, covered by the relevant duties when they contain an SVHC in a concentration above 0.1 per cent of their mass.

The CJEU's decision places a significant new regulatory burden on producers, suppliers and retailers, particularly with complicated supply chains, who had previously relied on guidance to the contrary from the European Commission and the ECHA. The ECHA has subsequently had to amend its guidance, which previously took the opposite approach.

3 The EU Emissions Trading Scheme (EU ETS): background

At an international level, governments are under an obligation to each other to take steps to address their emissions of greenhouse gases (GHGs) under the United Nations

Framework Convention on Climate Change. These obligations are supplemented by the requirements of the Kyoto Protocol.

Under the Kyoto Protocol, signatory industrialised countries (Annex B countries) pledged to reduce or limit their emissions of GHGs, for the period 2008–12, by a percentage of their GHG emissions in 1990. Some signatories to the Kyoto Protocol agreed the Doha Amendment in December 2012, which commits them to further GHG emissions reductions in the period 2013–20 (the second Kyoto commitment period, or KP2).

In December 2015, 195 countries adopted the Paris Agreement. A key element is for each party country to submit nationally determined contributions, setting out national climate action plans. These must be as ambitious as possible, and reviewed and tightened every five years.

3.1 Getting Phase IV right

The EU ETS has not been a runaway success, mainly because it has not been possible to achieve a good price for carbon. This is in part due to the economic downturn, but also to overgenerous allocation of free EU allowances (EUAs). The current Phase III runs from 2013–20 and has been considerably tightened by allowing the 'backloading' of EUAs, which removes 900 million EUAs from the 2014–16 auctions and reintroduces them in the 2019–20 auctions. Phase IV runs from 2021–30, under the Paris Agreement, and is the big opportunity to tweak the EU ETS to try to get it right.

Significant developments in the EU ETS include the following developments. In July 2015, the European Commission published a draft directive amending Directive 2003/87/EC to enhance cost-effective emissions reductions and low carbon investments, which will implement a number of changes to the EU ETS for Phase IV. The changes include a faster reduction in the number of EUAs available and a new Innovation Fund (for innovative low carbon projects) and Modernisation Fund (for energy efficiency in lower income Member States). The draft directive is going through the EU legislative process.

In October 2015, the (EU) Council Decision on the creation of a market stability reserve (MSR) for the EU ETS was published. The MSR will automatically adjust the annual supply of EUAs to be auctioned, either downwards or upwards, if the total number of EUAs in circulation is outside a predefined range. The Commission is introducing the MSR to reduce the significant surplus of allowances in the EU ETS and to protect the price of carbon.

The MSR will be introduced in 2018 and will begin to operate on 1 January 2019. This is two years earlier than the date the Commission had proposed, of 1 January 2021.

3.2 Free allocation of EUAs in Phase III will have to be corrected

On 28 April 2016, in *Borealis Polyolefine*,⁷ the Court of Justice of the European Union delivered an important

⁶ Case C-106/14 *Fédération des entreprises du commerce et de la distribution (FCD) and Fédération des magasins de bricolage et de l'aménagement de la maison (FMB) v Ministre de l'écologie, du développement durable et de l'énergie* (10 September 2015).

⁷ Joined Cases C-191/14, C-192/14, C-295/14, C-389/14 and C-391/14 to C-393/14 *Borealis Polyolefine GmbH and others v Bundesminister für Land-, Forst-, Umwelt und Wasserwirtschaft and others* (28 April 2016).

judgment concerning the free allocation of EUAs in Phase III (2013–2020) of the EU ETS.

The court declared that the European Commission's determination on the maximum annual amount of free EUAs for Phase III, known as the correction factor, was invalid. The correction factor is used to correct the provisional allocations of free EUAs made by EU Member States to EU ETS installations. The Court gave the Commission ten months to establish a new amount.

Fortunately, the decision does not affect free EUAs that have already been allocated.

3.3 European Commission not liable for refusing to block fraudulent EU ETS transactions for reason of confidentiality

On 7 April 2016, in *Holcim (Romania) v Commission*,⁸ the CJEU dismissed an appeal by cement company, Holcim, against the decision of the General Court that the European Commission was not liable to Holcim for refusing to block or suspend the EUA accounts that it administered on a confidential basis under the EU ETS. Recovery of any EUAs transferred fraudulently was a matter for an EU Member State's national law enforcement authority.

Note that since 2012, EUA accounts have been held in a single, centralised Union Registry operated by the Commission, which replaced the Member States' national EU ETS registries. However, this decision is still relevant to claimants seeking to recover fraudulently transferred EUAs because current legislation also requires that the infor-

mation on the Union Registry remains confidential for a period of time.

3.4 Energy intensive industries

It is impossible not to mention the impact of the EU ETS on energy intensive industries (EIs) in the year of Tata Steel's demise in the UK, which is arguably partly due to the cost of the EU ETS, but importantly driven by the dumping of cheap Chinese steel.

One of the problems with the EU ETS is that EI sectors can find operating in the EU becomes uneconomic, due to the high cost of emitting GHGs. There is, of course, the real risk of carbon leakage, where EIs will simply relocate to operate in countries without similar levels of GHG emission regulation. The EU ETS seeks to address this risk by allocating 100 per cent free EUAs to sectors identified as at risk of carbon leakage.

In addition, EU Member States can adopt financial measures to protect the competitiveness of sectors at risk of carbon leakage. The main way the UK has implemented this so far is through its EI support scheme, which has developed to cover:

- compensation for the costs of the EU ETS
- compensation for the costs of the carbon price floor (CPF)
- exemption from the cost of contracts for difference (CFDs)
- compensation for the costs of the Renewables Obligation (RO) and feed-in tariffs (FITs)
- exemption from the costs

⁸ Case C–556/14 *Holcim (Romania) SA v European Commission* (7 April 2016).

Business and the global environment: the reality of business coalitions and carbon reduction

Nigel Topping CEO, *We Mean Business*

The formal, the rational and the emotional arguments

Given the turmoil around Brexit, it is helpful to reflect on the positive process that delivered such an extraordinary result in Paris, particularly thinking about some of the soft power, the thinking and the organisation which delivered the result.

This contribution addresses this unique learning experience that comes under the rubric of what is described as 'the diplomacy of love' in the sense used by Adam Kahane in his extraordinary book *Power and Love*,¹ in which he races through some of his experiences trying to find solutions to the most difficult conflicts of our age around the world. Here, Kahane describes 'generative love' as a strong, positive, honest transformational love, which was personified in the Paris process by an extraordinary group of leaders.

Similarly, Felipe Calderón, the former President of Mexico, explains that these kinds of political processes can be rationalised as having three domains: the formal, the rational and the emotional. Deconstructing a conversation on Brexit in this way, it will address the formal such as the sovereignty of Parliament. The rational side is assessed by addressing the economic arguments and the downturn in the economic growth forecasts of the UK and its financial relationship with Europe. Ultimately, it can be concluded that Brexit arguments have been all about the emotional. By comparison, the emotional engagement with the negotiators was successfully managed in the Paris process. This complex negotiation was twofold: the negotiation amongst the 196 parties and those negotiations between negotiators and their national governments.

For example, the way the Indian negotiating party was embraced in particular typifies this approach. Instead of pointing to concerns about the ongoing construction of coal-fired power stations in India, their ambitious plans to build photovoltaics and wind power stations were welcomed and encouraged as an inclusive part of the solution. Such use of emotion in the negotiations was crucial to their success in Paris.

The cycle of reflexivity

The second element that was powerfully used was the cycle of reflexivity. George Soros writes at length about

reflexivity,² focusing on a very positive narrative around expectations since expectations determine actions. This is exemplified in the work carried out with the World Bank on carbon pricing. Two years ago there was almost silence. In September 2014 a statement was published with 1000 companies in support of carbon pricing.³ In May 2015, business organisations with over six million members put a full-page advertisement in the FT, saying they wanted a strong deal out of Paris and they wanted carbon pricing.⁴ Now hundreds of businesses and an increasing number of jurisdictions want and expect carbon pricing. Indeed, President Hollande announced in Paris that in his judgment 90 per cent of the G20 countries' GDPs will have carbon pricing in place by 2018.

Projecting a very strong narrative for the future and setting up these expectations has led to businesses creating plans in expectation of that policy. This in turn makes it easier for policymakers to enact that policy. Engaging in such a cycle of reflexivity was really important.

Maintaining a positive narrative

The next element, which Cristiana Figueres probably personifies better than anyone else, is the notion of radical optimism or, better still, relentless positivity. Figueres touched on the inevitability of the transition, given the science and given the rapidly declining costs of clean technology. In fact, there is an irresistibility of the economic argument with evidence that businesses who commit to bold climate action are getting much higher returns on investment. This is evidenced by the 'Better growth better climate' report from the new Climate Economy Commission.⁵

Maintaining a positive narrative is so important that Amber Rudd, the then Secretary of State for Energy and Climate Change, attended the Business and Climate Summit in London on 29 June 2016 and told the business community that she expected the UK Government to approve the fifth carbon budget. And then the news came out the next day that this was done, and if we can expect the UK to ratify the Paris Agreement well before

1 Adam Kahane *Power and Love: a Theory and Practice of Social Change* (Berrett-Koehler 2010).

2 George Soros 'Soros: General Theory of Reflexivity' *Financial Times* (26 October 2009) www.ft.com/content/0ca06172-bfe9-11d1-ae22-00144feab49a.

3 World Bank on carbon pricing www.worldbank.org/en/programs/pricing-carbon.

4 'Business & Climate Summit conclusions: towards a low-carbon society' *Business & Climate Summit 2015* (21 May 2015) www.businessclimate-summit.com/wp-content/uploads/2015/05/Business-Climate-Summit-Press-release.pdf.

5 <http://newclimateeconomyreport/>.

Marrakesh, there is evidence that the positive narrative now moving forward will continue.

The four As of radical collaboration

The next question is how we can actually organise ourselves as a community. This is where coalitions such as We Mean Business can play a crucial role. It is composed of seven core partners including the World Business Council, the Carbon Disclosure Project (CDP) and the Climate Group, and approximately 30 additional partners – all ostensibly committed to the same end but often historically treading on each other's toes. All participants are so passionate about the individual cause they seek to achieve that they forget that it is the collective goal that is much more important. It is following this overlap that a new approach has been developed: a collaboration called radical collaboration. To be complete, a collaboration must meet 'the four As of radical collaboration':

- *alignment*: this requires getting a disparate group of stakeholders to agree on its aims rather than focussing on the differences between peers within the group, ultimately to achieve a single, consistent message
- *allocating responsibility*: choosing which stakeholder is most suited for each role and not interfering with their responsibilities
- *aggregating*: aggregating all stakeholder resources behind whoever has been allocated responsibility
- *amplifying*: making sure that all stakeholders are transmitting the same message and talking about the collective successes

This radical collaboration was also transparent in the transformational approach the UN system adopted through its invitation to nation states to offer their best plans in the form of non-binding Intended Nationally Determined Contributions (INDCs) for discussion. This is a complete reverse of the top-down approach from Copenhagen.

Whilst the UNFCCC did not expect to receive more than 60 plans, they gathered an almost universal coverage with over 180 INDCs being presented at Paris. Moreover, given the ambitious nature of these INDCs, there is something to be said about the power of inviting people as opposed to ordering them and extending such an invitation to the so-called non-state actors, to businesses, to the states and the regions and the cities of the world. Ultimately, the Paris negotiations saw hundreds of mayors, governors and CEOs contributing their voice, their positivity and their plans and commitments, transforming the atmosphere within which the negotiations were taking place.

'Going all in'

The corollary of radical collaboration can be referred to here as 'going all in'. This is exemplified by Steve Howard, the chief sustainability officer of IKEA, who famously com-

mitted to 100 per cent renewable energy.⁶ Steve talks about the fact that commitment to 100 per cent is part of making this policy transformational as if you commit to 50 per cent, he says you will always have more than 50 per cent thinking they are in the half that does not have to change. This is why the absolute commitment drives innovation in a very powerful way.

Moreover, this has led many of the largest companies in the world to make such a commitment. This has impacts beyond expectation and means that, for example, the conversation with the governor of a state in America around a clean power plan is very different. A 100 per cent commitment is not an abstract commitment to values such as 'save the environment', it is a concrete direction of thought such as: 'you might want to think about the number of major manufacturers who have facilities in your state, who are employing people in your state, who are paying tax in your state, who are looking for 100 per cent renewable energy'. Such awareness affects the way a particular law is interpreted.

Radical empathy

Finally, mention should be given to the idea that can be labelled 'radical empathy'. On stage in London at the Business and Climate Summit in June 2016, one of the leading climate campaigners in Canada who cut her teeth on addressing clear-cut logging in British Columbia, was Tzeporah Berman, the former Head of International Climate and Energy at Greenpeace.⁷ She was on stage in London with Steve Williams, the CEO of SunCor Energy Inc, Canada's largest energy company and a major developer of oil sands.

They have been involved in a two year dialogue to find a common ground, to understand what they can all agree on, so now the science and the economics came together to submit a joint position to the Government of Alberta, which is an economy that relies largely on fossil fuels, with lots of tar sand exploitation. This made it much easier for the provincial government to enact a very bold plan putting an end to coal in Alberta, implementing a Can\$30 per tonne price on carbon in Alberta and creating the first ever basin-wide limit on direct emissions from oil extraction. This was all made possible by the two parties both taking the risk and facing the risk of being shamed as traitors by their peers. It is the courage to enter into that space between the poles that was so important.

Such radical empathy was also clearly present in Paris. A memorable moment in Paris was immediately after the gavel was struck. The representative of the Association of Small Island States (whose young people chanted '1.5 to stay alive' for the duration of the conference and for whom

6 'Can you power a business on 100% renewable energy? Ikea wants to try' www.theguardian.com/sustainable-business/2016/apr/08/renewable-energy-ikea-walmart-google-mars-hp-wind-solar-power.

7 www.businessclimatesummit.com/watch-bold-new-climate-policy-in-canadas-oil-sands-how-oil-companies-and-environmental-organizations-are-creating-new-conversations-about-decarbonization-in-a-resource-rich-economy/.

climate really is existential) looked at Laurent Fabius (who so brilliantly managed the negotiations) and with raw emotion said: 'I would like to thank you personally, Laurent Fabius. We feel listened to for the first time ever'.

And it was that act of listening to one another – that deeply respectful listening – which meant that the final agreement in Paris was something that no one was 100 per cent happy with. And that was all that everyone could

live with. It is this tension between something we could live with and something we were happy with which seemed to be the element that unlocked that complete consensus. Perhaps ultimately there is something in that respectful listening to those that we really do not agree with that we can all take from Paris and use to find a constructive way out of the mess we now find ourselves in, post Brexit.

Ten tips for outside counsel

Pamela Barker *Chair, SEER, ABA and Member, Lewis Rice LLC, USA*

This article is about ten tips for outside counsel, regardless of where you practice. It doesn't matter whether you are in the UK, in the United States or in Canada. These tips are universal. You are going to look at this information and say 'well that is just common sense', but you would be amazed at how often outside counsel does not follow these tips.

I was in private practice for 27 years and then was Assistant General Counsel and Chief Regulatory and Environmental Counsel for eight years at Appvion and am now back in private practice at Lewis Rice. I know and understand both the in-house and outside counsel roles and you will see that these tips are very practical but need to be followed in order to develop a good relationship with your client. At the end of each tip is a quote from a meeting of 35 General Counsel from global corporations.

Tip 1: know and understand your client

To begin with, you must know your client's name and what they would like to be called. If the General Counsel's name is Elizabeth does she go by Elizabeth, Beth, or Liz? If you do not know, it is not a good relationship starter. Next, you need to understand your client's business. You want to be a partner with your client and, in order to do that, you need to understand your client's business objectives as well as understand what constraints they are under.

Next, be sure to take your cues from the in-house counsel. Oftentimes outside counsel will pay attention to the General Counsel but do not pay careful attention to others in the legal department. In-house counsel are extremely helpful resources. If you pay attention and listen to all in-house counsel you will learn critical information that will help you in developing a solid relationship with everyone in the legal department.

Don't be arrogant and think you know everything about your client. Ask questions. The perception of in-house counsel is that if outside counsel does not care enough to learn about their business and its priorities, then in-house counsel will find someone else who does care. All legal departments have constraints of some sort and it is really important that you know what they are and understand them. What pressures are they under? What are their big initiatives that they are trying to undertake? What type of culture do they have? Is it a risk-averse culture or risk-taking culture? This is all information you need to know in order to provide them with the advice they are seeking.

To sum this up, as one General Counsel said, '[m]ake the effort to get to know our Legal Department: our goals, our priorities, our constraints and pressures, our initiatives, and

yes our lawyers and our culture. Work harder at learning to work with us'.¹

Tip 2: communication is key

It is important to use effective communication with in-house counsel. Most in-house counsel do not want to receive lengthy memorandums. They do not have the time and they want their information provided to them succinctly. When I was in-house counsel and my CEO wanted my recommendation, he wanted no more than three discussion points and then my recommendation. He did not want minute detail. Oftentimes that is the same with the in-house counsel you will be dealing with. If in-house counsel is coming to you it is because of your expertise and they want to know what you recommend. They do not want a 15-page memo. They will never read it. They are interested in a short email or a phone call. If possible, try to communicate by phone because it will help you develop a relationship with the in-house counsel. You can cover a lot more information and allow them to ask questions so that there is an actual dialog.

At the beginning of a matter, identify the expectations of your in-house counsel. If the in-house counsel is not identifying those expectations, be sure to ask the question. Are there budgetary constraints? What is the end goal? Make sure you understand the expectations when you take the work, rather than finding out you have a problem later on when you are over budget or you did not even know there was a budget.

Keep the in-house counsel properly apprised of any new developments. If a new case comes out that will impact their business or their litigation, be sure to contact them right away and explain the case and how it will impact them. You do not want them to hear about the case from another outside counsel.

When changing legal strategy be sure to explain why, so that the in-house counsel can explain the change internally to the CEO or President. You never want your in-house counsel to be ill-informed and look foolish in front of his or her executives. Your job is to make your in-house counsel look good by keeping them informed.

Return telephone calls as soon as possible. We are all busy but be sure to have a dialog with your in-house counsel to determine what their expectation is. If they expect you to get back to them the same day, it is important to know, so that you can proceed accordingly.

¹ Pam Woldow and Doug Richardson 'Straight from the horse's mouth: GCs say what they want from outside firms' *At the Intersection* (15 October 2014) www.pamwoldow.com/2014/10/15/straight-from-the-horses-mouth-gcs-say-what-they-want-from-outside-firms/.

'Communicate more efficiently. Get to the point and spare us the 10-page memos'.²

Tip 3: stay within the budget

Budget is key. All legal departments – even the biggest corporate legal departments – have budgets. It is important to know and understand the budgetary constraints for a particular project. If the budget for the project is going to be exceeded, be sure you let your in-house counsel know right away, before it happens, and explain why the budget is going to be exceeded. Oftentimes outside counsel does not keep careful track of the budget until it is too late and the budget has been exceeded. Then, because they do not want to address the bad news with the in-house counsel, they will send the bill and keep their fingers crossed that it will get paid and that they will not hear anything negative from in-house counsel. That is unrealistic. You will hear from your client because, if you are given a budget, your client expects that you are monitoring it and in control of the project in such a way that it will remain within the budget. You do not want to put your in-house counsel in the position of having to explain the budget exceedance to the General Counsel or CEO.

You may also want to suggest alternative fee arrangements such as fixed fees or sliding scale fees to in-house counsel. They like their outside counsel to be proactive in suggesting alternative fee arrangements, rather than their having to ask for such arrangements.

Do not over-lawyer. It is important to use the right attorney on a project based on level of experience and expertise. In-house legal departments do not like first and second year associates being trained on their projects if they are going to get a large bill for that training. They would prefer more experienced counsel at the level of expertise that is necessary for the project. First and second year associates often do not understand the client's business and oftentimes do not understand the big picture that is trying to be achieved.

As a general counsel said, 'stop training your associates on our dime'.³

Tip 4: timeliness is everything

Don't promise a deadline if you can't keep it. It is better to be honest on the front end and say 'here's when I'll get it to you' than to promise something and not deliver it on time.

The assumption is that if you promise something, you are going to deliver it timely. If you can't, be sure to be proactive and let the in-house counsel know as quickly as possible, as well as when you will get the document or information to them. Do not let the deadline pass and not say anything, hoping that nobody notices.

It is critical to respect your client's time and understand that the CEO or President may not be available when you want and so you need to plan accordingly. Often outside

counsel have their own timeframes and their own time constraints that they are operating under; but outside counsel needs to be mindful that the same is true of the in-house counsel and they may not be available to provide their input as soon as you need it. For example, if you need the signature of the CEO or General Counsel on an affidavit to be filed in litigation and the CEO or General Counsel is traveling, you may not get the affidavit by your filing deadline. Keep that in mind when you are budgeting your time. Be sure to check what the availability of the client is. Do not presume that in-house counsel is sitting in their office waiting for you to send them something to review.

'Work efficiently, mind the deadlines and respect the budget' and 'please understand that our CEO is not available at your whim. Respect our time'.⁴

Tip 5: assume you are in a partnership with your client

Be sure to consider the relationship you have with your client as a long term business-to-business partnership in which you share your client's concerns, whether they be budgetary or otherwise. In your partnership with your client you need to be direct and honest with each other; so that there are no surprises. In-house counsel needs to know the good and the bad news as early as possible, so that he or she can prepare the company for what is coming. Do not be afraid of delivering bad news, because if you do not and in-house counsel finds out, it will severely damage your relationship.

When thinking about the partnership, consider what you would want to see if you were an internal compliance officer within your client's company, or a member of your client's in-house legal team. Be proactive in planning for future issues or problems. Consider when you send out a bill, does it have all the information you would like to see on a bill if you were paying it. If you received that bill, would you be satisfied that it is a fair fee for the work that was done.

'You should run our matters like they are a business and like your own money is at stake for the results and fees'.⁵

Tip 6: honesty

Be sure to review all bills or invoices before they are sent to the client to determine whether the fee that is charged is fair and appropriate. Do not send it out and hope that you are not going to hear back from the client. Rather, make adjustments to the bill before the client has to ask. If the client is dissatisfied with the bill, you may never hear from that client again, especially if it is a new client.

Be honest and realistic about a client's chances of a favorable or unfavorable outcome on a project. The worst thing is to be overly optimistic and not be honest about the hurdles that lie ahead. Often we cannot predict what will happen in litigation or in negotiations, but the more honest

² *ibid.*

³ *ibid.*

⁴ *ibid.*

⁵ *ibid.*

you are about the pros and cons of a particular matter; the better off you will be. Do not try to manage the client by hiding material information from them.

'If you don't know the answer, admit it. Don't BS us, don't hem and haw. Just go and find out the right answer'.⁶

Tip 7: be proactive in relationship building

The more proactive you are on behalf of the client, the more you will develop a solid relationship with that client. For example, if there has been a change in the law that could affect your client, let the client know. A well-timed phone call regarding a change in the law and describing its impact on the client can prevent unnecessary litigation or unnecessary fees, resulting in a stronger relationship between you and the client.

'Above all, communicate better. No surprises, no excuses. Keep us constantly in the loop'.⁷

Tip 8: diversity

If diversity is important to a client or potential client, they want to see true diversity and not a law firm that is just giving lip service to it. If you are meeting with a company to obtain their business and you know diversity is important to the company, do not bring people to the meeting that are not actually going to be doing the client's work. It is important to discuss how a particular project will be staffed and how the staffing will demonstrate diversity. Many in-house counsel measure performance of the outside counsel by monitoring the billable hours of the diverse lawyers working on their matters.

'Firms should match our genuine commitment to diversity, not just pay lip service'.⁸

Tip 9: expertise

Clients expect quality work and they go to outside counsel to provide the expertise, experience, and manpower that the in-house legal department may not have. This is especially true in specialized areas. Often, in-house counsel need to balance keeping the overall cost down within their legal department, while acquiring quality representation and expertise. Since the client is relying on you, never say you or your firm have the expertise if that is not the case. The client will not want to pay extra for you to learn and you will immediately lose the trust of the client. Often-times in-house counsel will depend on outside counsel not only for expertise and quality work product but also case management skills by putting the right number of lawyers on a project with the right seniority mix.

'Do the right legal work for the risk at issue. This should be so basic, but we still see a lot of overlawyering'.⁹

Tip 10: make the client look good

The best way to retain the work of a client is to develop a relationship built on trust. If you do tips 1–9 you will have made the in-house counsel look good and that is the key. The in-house counsel wants to look good for the General Counsel and the General Counsel wants to look good for his or her CEO or President. By doing a good job on communication, staying within the budget, timely performing with the right amount of expertise, you will make your in-house counsel look good and that will foster a relationship of trust between the law firm and the client. If you do a poor job on tips 1–9, you won't be the outside counsel for long.

'Treat clients as partners, not as customers'.¹⁰

⁶ *ibid.*

⁷ *ibid.*

⁸ *ibid.*

⁹ *ibid.*

¹⁰ *ibid.*

Working party presentations

UKELA has a wide and varied range of working parties comprised of UKELA members, who meet regularly to discuss issues including the practice and impacts of environmental law, and recent developments and proposals for reform in relation to environmental law, policy and practice. They actively contribute to the development of their area of interest, and have an impressive record of contributing working papers and responses to government in relation to the development and reform of environmental law.

At the 2016 conference five different working party sessions were held, with short presentations from several speakers at each session: three of those speakers have kindly contributed their articles to this conference issue.

See the UKELA website
www.ukela.org

Nature Conservation Working Party

Wyn Jones

Nature Conservation Working Party Convenor

Reflections of marine conservation

At the working party meeting at the conference two presentations were given. The first was by Ollie Payne, who is the senior marine protected areas adviser at the Joint Nature Conservation Committee on the complexities of conserving nature in the marine environment. The second was by Professor Lynda Warren, Emeritus Professor in environmental law at Aberystwyth University, who gave a personal perspective on marine conservation.

The complexities of conserving nature in the marine environment

The Joint Nature Conservation Committee (JNCC) is a public body that advises UK Government and devolved administrations on UK-wide and international nature conservation. It works with the other statutory nature conservation bodies and administrations to facilitate a collaborative approach to marine conservation across the UK. It also plays a key role in the UK's offshore waters, including the identification, monitoring and advising on protected areas and providing advice on the impacts of offshore industries.

In providing conservation and casework advice in offshore waters the JNCC has to work with many statutory bodies, including the statutory nature conservation bodies, the Scottish and Welsh Governments, the Department of Agriculture, Environment and Rural Affairs (NI), the Department of Environment, Food and Rural Affairs (Defra), the Environment Agency, the Scottish Environment Protection Agency, the Marine Management Organisation (MMO), Marine Scotland, the Centre for Environment Fisheries and Aquaculture Science, inshore fisheries and

conservation authorities, the Ministry of Defence, the Foreign and Commonwealth Office, the Department of Transport and the Planning Inspectorate.

In providing advice it also has to work with a complex legislative and policy framework, including the UN Convention on the Law of the Sea (UNCLOS), the Convention for the Protection of the North-East Atlantic (OSPAR), the International Convention for the Prevention of Pollution from Ships (MARPOL), the Convention on the Prevention of Marine Pollution by dumping waste and other matter (London Convention), the Convention on Wetlands (Ramsar) and the Convention on Biological Diversity. From the European Union there are the Birds and Habitats Directives, the Marine Strategy Framework Directive, the Environmental Impact Assessment and Strategic Environment Assessment Directives, the Environmental Liability Directive and the Common Fisheries Policy (CFP). National legislation includes the Wildlife and Countryside Act 1981, the Natural Environment and Rural Communities Act 2006, the Marine and Coastal Access Act 2009, the Marine (Scotland) Act 2010 and the Marine Act (Northern Ireland) 2013.

To demonstrate the practical difficulties in marine conservation, three casework examples were provided.

Fisheries management

In England the MMO is the management authority responsible and accountable for the implementation of offshore fisheries management measures. It is also responsible for ensuring fishing activities are managed in accordance with the conservation objectives of marine protected areas. Natural England (NE) (within 12 nautical miles (nm)) and the JNCC (beyond 12 nm) are responsible for providing advice on conservation status and operations likely to damage marine protected areas. Defra has overall responsibility for the development and implementation of fisheries management in UK waters.

In offshore waters Member States have obligations under wildlife directives and the Marine Strategy Framework Directive (MSFD) with regard to the designation and management of marine protected areas. Article 11 of the Common Fisheries Policy Regulation provides a mechanism to protect marine protected areas from fishing activities that may be potentially damaging. Where measures impact upon another Member State a joint recommendation is required. If agreement cannot be reached the European Commission will make the decision. However, it is uncertain how long this process will take and there appears to be reluctance on the part of the Commission to exercise the power.

The Western Channel Marine Conservation Zone was designated in January 2016 through the Marine and Coastal Access Act 2009 for the broad-scale habitat features subtidal coarse sediment and subtidal sand. It is currently subject to considerable fishing activity by UK and EU

trawlers. At a recent workshop organised by Defra to discuss fisheries management measures for Marine Protected Areas in the Channel and South West water, attendees from the UK, French, Irish, Spanish and Dutch fishing industries failed to reach agreement for reducing activity at the Western Channel Marine Conservation Zone. Measures are sought for this site through the CFP to support the UK's obligations to achieve 'good environmental status' under the MSFD. The French fishing industry estimates the site brings them €2 million annually.

Given that the site currently makes little contribution to securing 'good environmental status' under the MSFD and that management is unlikely to reach agreement under the CFP as a joint recommendation, should fisheries measures be pursued for this site? Also given the uncertainty regarding recovery, should limited resources be used elsewhere? A possible solution is to designate an alternative area where there is less activity. In a post-Brexit world, it is uncertain whether the UK would be able to control foreign trawlers fishing in its waters, as under UNCLOS fishing in other countries' waters is permitted, subject to the host country's laws.

Decommissioning

The North Norfolk Sandbanks and Saturn Reef European site is designated for its reefs and sandbanks, which are constantly slightly covered by seawater. The site conservation objective is to restore the features. The site contains many gas platforms that are reaching – or have reached – the end of their economic life. Government and operators seek to decommission the platforms to meet obligations under OSPAR Recommendation 98/3 to dispose of offshore installations. Decommissioning would reduce the direct impact on the nature conservation features but the sealing process requires the deposition of approximately 20 million tonnes of hard substrate, which would be detrimental to the site and its restoration.

The issue here is how best to align the obligations under the Habitats Directive and the OSPAR Recommendation, which is based upon safety requirements. The structures and their exclusion areas are colonised already and make a valuable contribution to conservation status. This latter aspect raises the issue of what is natural. A further concern is that the decommissioning will result in the exposure of the area to fishing. The UK Government will have to decide.

Cable laying

The laying of cables in the marine environment is an extremely complicated matter. Much depends on the type of cable, where it is laid and whether it is domestic or foreign. Under Article 58 of the UNCLOS, cables may be laid within exclusive economic zones (EEZs). Essentially, any international cable that crosses into territorial waters must be allowed to be laid (subject to limited rights and duties). For example, an international cable stretching between France and the UK would be permitted to be laid in the 12–200 nm waters. However, would it be stopped inside territorial waters? In essence, no. Section 81 of the Marine and Coastal Access Act 2009 states that only cables that are directly exploiting the UK continental shelf or natural

resources or are related to operations on the continental shelf or are to do with pollution require a marine licence. Thus, windfarms and oil and gas cables are regulated, but other cables are not. In addition, the Environmental Impact Assessment Directive does not apply to the laying of cables.

A recent application was made for a power cable to lie across the Braemar Pockmarks European site, which is within offshore waters north of Scotland and which is designated for submarine features made by leaking gases. The laying of the cable would have a detrimental impact on these features. This project would not require an EIA. The Scottish Government could impose conditions on the project for between 0 and 12 nm, but can they do so for impact in offshore waters?

In conclusion, the current marine legal framework is complicated, particularly offshore. The implications of leaving the European Union are far from clear but, in the meantime, the current laws, policies and procedures apply and will remain challenging.

Marine conservation: a personal perspective

In view of the referendum result, Professor Warren took the opportunity to reflect on marine conservation and its objectives. Do we know what we want to achieve and whether current EU and/or national legislation and policies are effective? What measures are needed to improve effectiveness?

The current regime focuses on the protection of habitats and species with standards based upon values and judgments such as rarity, sustainable resource and iconic species. The cultural bias influencing this latter aspect is evident. Why are cetaceans valued more highly than sharks and what of marine invertebrates? Much of the marine conservation agenda appears to be driven by public relations and the media. The need to protect is influenced by moral principles from religious beliefs and ethics. There is also a tendency to keep things as they are, or as they are perceived to be.

The existing non-EU international legislative framework includes the UNCLOS, the OSPAR, the Convention on the Conservation of European Wildlife and Natural Habitats (Berne), the Convention on the Conservation of Migratory Species of Wild Animals (Bonn), including the agreement on the Conservation of Small Cetaceans in the Baltic, North-East Atlantic, Irish and North Seas (ASCOBANS), the Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar), and the Convention on Biological Diversity (Rio). Measures contained in the legislation complement and mirror EU legislation.

For example, under the OSPAR, the Convention includes a list of species and habitats that are threatened and declining and for which action is required. The criteria for being listed include global and regional considerations, rarity, sensitivity, whether in decline or deteriorating and for species, whether it is a keystone species (where a species is perceived to be of more importance than others). The current list of threatened/declining species and habitats include:

- 5 invertebrates (4 molluscs and 1 crustacean) – 3 in UK waters
- 9 Birds – 3 in UK waters
- 22 fish – 18 in UK waters
- 2 reptiles – 1 in UK waters
- 4 mammals – 3 in UK waters
- 16 habitats – 12 in UK waters

At a recent meeting of the OSPAR contracting parties, protection was extended to Atlantic salmon and intertidal mudflats. Also, an announcement was made of the designation of ten new marine protected areas (MPAs), bringing the global total to 423.

There is a serious decline in the population of Atlantic salmon. Working together with the North Atlantic Salmon Conservation Organisation (NASCO), OSPAR is undertaking research to discover the cause or causes.

Equally, the provisions of the Berne Convention are mirrored in the Habitats Directive and also in the Wildlife and Countryside Act 1981 as amended, which is the means by which the UK meets its obligations under the Convention.

In addition, the sustainable development approach adopted in the Environment (Wales) Act 2016 is derived from the Rio Convention, reflecting a control of exploitation rather than protection.

A consultation on proposed special areas of conservation (SACs) for harbour porpoise has recently been concluded. Much time, effort and money has been spent by the UK Government, the statutory bodies and NGOs on seeking to identify the areas. Designating vast protected areas for widely dispersed, mobile species is inappropriate and almost meaningless.

In conclusion, all is not lost post-Brexit; there is an existing international and national framework of legislation, which provides a range of conservation measures. In addition, the forthcoming period of change provides a timely opportunity to reflect on and review what it is that marine conservation is seeking to achieve and how best to do so.

Noise Working Party

Francis McManus

Noise Working Party Convenor

Members of the Noise Working Party met at the Annual Conference. A general discussion was held on the subject of the effectiveness of instruments of noise control, with special reference to both common law and statutory nuisance.

Public law presents a serrated edge to the common law generally. For example, one of the issues which has taunted and teased the courts over the years is the extent to which, if at all, public authorities (such as the police and the fire brigade) are liable to the private individual for either the non- or the negligent performance of their duties. As far as common law nuisance is concerned, one of the issues which the courts have had to grapple with is the relationship between the development of common law nuisance and regulatory controls, such as permitting and planning

controls. As far as the former are concerned, the Court of Appeal held in *Barr v Biffa Waste*¹ that for the purposes of determining whether any adverse state of affairs ranked as a nuisance in law (in the instant case, offensive odours which emanated from a landfill site) it was quite irrelevant that the relevant premises, and the general conduct of the site, was in conformity with the relevant permit and other regulatory controls. The test which fell to be applied in determining whether an adverse state of affairs ranked as a nuisance was whether a person would find the state of affairs in question unreasonable to have to put up with.

As far as noise nuisance is concerned, the English courts in recent years have been required to determine the relevance of planning permission to the law of nuisance. Essentially, the courts have held that, whereas planning permission cannot sanction a nuisance, a strategic planning decision does have the effect of changing the character of the land in terms of the nature of the locality. In *Coventry v Lawrence*² the Supreme Court held that planning permission does not result in any change of character of the relevant land for the purposes of the law of nuisance. However, whereas planning permission does not have this effect, the significance of planning permission in relation to noise nuisance remains uncertain. All that can be confidently said in the wake of *Coventry v Lawrence* is that planning permission should be accorded some importance in determining if an adverse state of affairs ranks as a nuisance.

It should be mentioned that, as far as Scotland is concerned, there is no authority as to whether planning permission has any effect on the application of the law of nuisance.

One of the main impediments of nuisance as a remedial device is that the outcome of a case concerning noise is often uncertain. Another hurdle is that of expense. In addition to legal fees, normally, it is advisable for claimants to enlist the services of acousticians to take sound measurements and give evidence in court.

Statutory nuisance represents the oldest branch of environmental law in the United Kingdom, with its roots in the middle of the 19th century. Currently, the Environmental Protection Act 1990 makes provision for statutory nuisance. A local authority can serve an abatement notice under section 79(1)(g) on a person who is responsible for noise nuisance. It is an offence to fail to comply with such a notice. Not only is the law of statutory nuisance of considerable vintage, but it also represents one of the most complex areas of environmental law. The content of the abatement notice which local authorities have served on those who are responsible for nuisance has been a fertile source of litigation. A powerful case could, therefore, be advanced to the effect that statutory nuisance could be made an offence of strict liability, which would, of course, obviate the need for the relevant local authority to serve an abatement notice. The relationship between common

¹ [2013] QB 455.

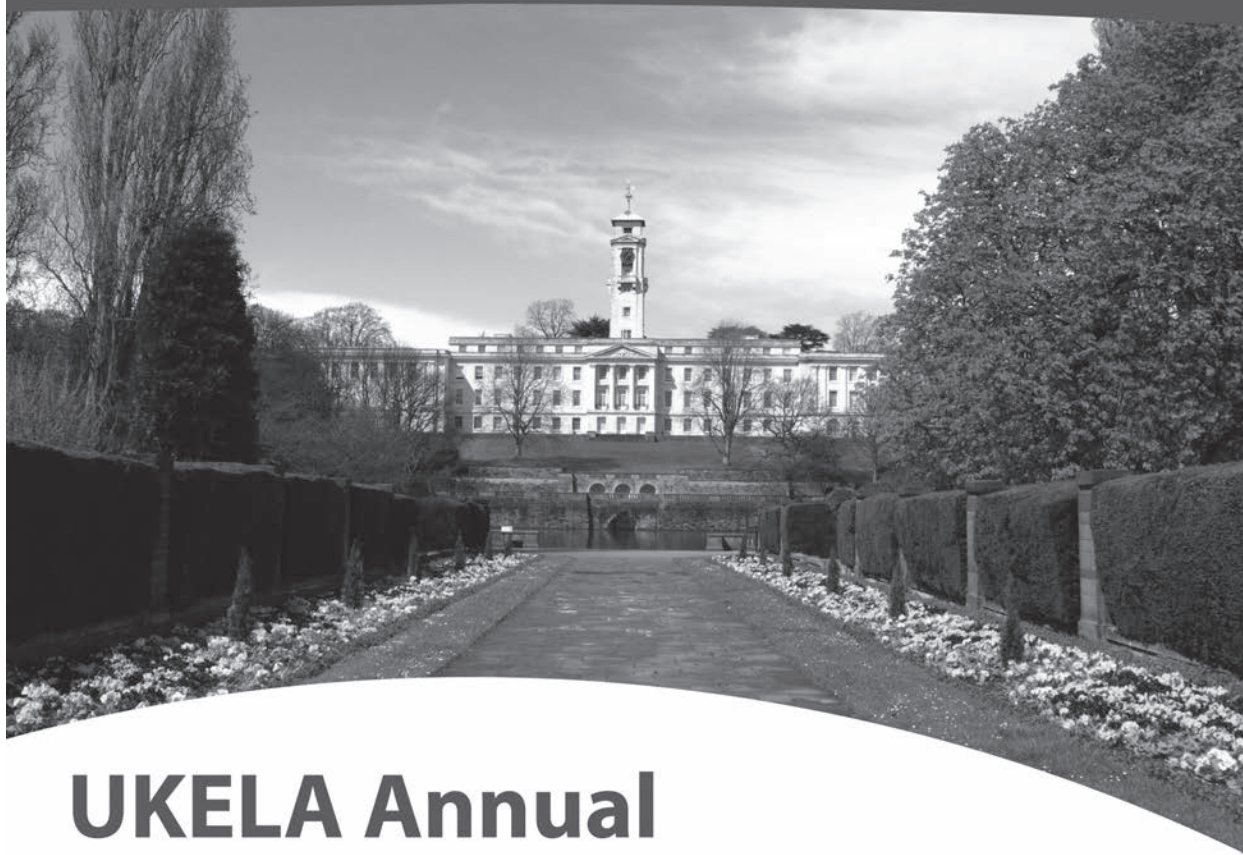
² [2014] AC 822.

law nuisance and statutory nuisance has also presented problems to the courts over the years.³ Some argue that the statutory nuisance regime could be repealed, on the basis that it is now superfluous, given the advent of the environmental and housing legislation of the 20th and 21st centuries.

Finally, on a practical level, some members of the

Working Party found that magistrates often seemed to be baffled by the complexity of the law of statutory nuisance. Furthermore, technical evidence presented at Magistrates' Courts by acousticians also seemed to be difficult to grasp. Anecdotal evidence also suggests that the public may have unrealistic expectations of local authorities employing the law to deal with noise complaints.

3 See eg *Robb v Dundee City Council* 2002 SLT853.



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