e-law

UKELA Making the law work for a better environment

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EDITORIAL

Welcome to the summer edition of e-law with news of our packed autumn events programme. There's something for you whether you live in Scotland, Wales, Northern Ireland or England. We hope to see you at one of our events after the summer holidays. We hope that the journal may accompany you on your travels!

If you were at the UKELA conference in Exeter you can see if you can find yourself in one of the photos in the conference report. If you were not able to attend, you can read about what you missed and hopefully plan to come along next year. Please look out for our survey – coming to you soon – to find out what changes you'd like us to make to the conference and what might make you more likely to attend. Nearly everyone who came along this year said they'd book again and recommend it to their colleagues and friends.

We have some great contributions in this edition – from climate change to the Brazilian rainforest and the case for an international court for the environment. Thanks to all who have contributed articles.

By the time you read this we hope to have three interns in place helping with the research on our major project reviewing Environmental Law. They are looking at why we think there might be a problem, what the principles of Environmental law could be and what models for scrutiny we could usefully investigate. We'll keep you posted but if any of our interns get in touch please do help them out. If you think you can help with information please do contact Vicki.elcoate@ntlworld.com who will pass on any suggestions to UKELA's team of supervisors.

Have a good break (if you're having one!)

In this issue

UKELA CONFERENCE REPORT

Vicki Elcoate, Executive Director of UKELA

For the benefit of those unable to be in Exeter for the UKELA annual conference the unofficial feedback from the conference has been very positive. Here are some of the comments:

"Best conference I've ever been to, unlike some other dry-as-burned-toast legal conferences";

"I much enjoyed the whole weekend, and thought it really was superbly organised. I certainly plan to be more assiduous in my attendance in the future, with the encouragement of the Exeter experience";

"The speakers were all excellent. The events, location and hospitality were also great".

"Well done for the commitment to local food sourcing and English wine....all excellent"

The topics – on a theme of the changing face of climate change and regulation - were timely and popular. Robert Upton – deputy chair of the Infrastructure Planning Commission whose abolition was announced on the following Monday – opened proceedings. His analysis of the new regime and what lies ahead was most relevant.

Left to right: Robert Upton; Lord Justice Carnwath; Prof Malcolm Grant

Lord Justice Carnwath, UKELA's President, and Prof Malcolm Grant, new UKELA patron chaired the opening sessions with humour and excellent timekeeping – our thanks to them.

The climate change session provided an insider's view of the Copenhagen proceedings (by Adrian Roberts of DECC), with solicitor Kate Harrison capturing the increasingly litigious environment on climate change issues and Sarah Holmes of Bond Pearce galloping through her 20 years' experience of wind energy and facing the turbulent breezes ahead.

Saturday morning speakers and chair, Peter Kellett on the right

On the changing face of regulation, Prof Richard Macrory reported back from his recent sojourn in the USA where their civil penalties regime is embedded into enforcement; Anne Brosnan of the Environment Agency set out the challenges ahead in being at the forefront of introducing civil penalties; and Lynda Warren talked about "the Janus dilemma" – how to meet our energy needs from the marine environment without causing a spin-off set of environmental disasters: "sustainable development now should be founded on an ecosystem approach", she said, "not balance, which is always a fight between sectors".

Field visits followed, to Dawlish Warren for a trip through the tourists with their ice creams and deck chairs (it was a very hot day) to spot warblers and whitethroats hidden just metres away in the sand dunes. The boat trip party enjoyed some cool breezes while others did a walking tour around the City. Fortunately there were no England World Cup clashes to worry about.

Powderham Castle group photo

The gala dinner was in the truly memorable setting of Powderham Castle, with a pink harvest moon lighting up the deer park as we ate almost in the open air, and Satish Kumar (the post dinner speaker and

editor of Resurgence magazine) inspiring many.

Hot cases on the Sunday morning was an eye watering race from a giant bottle factory built without planning permission to the dangers of road traffic to the Iberian Lynx to the memorable Mr Fiddler who concealed his new house behind straw bales. Thanks to Nathalie Lieven QC (Landmark Chambers), Andrew McCullough QC (1 Crown Office Row) and Martin Edwards (39 Essex Street) for their contributions.

The organisation ran like a well oiled machine (thanks to Origin Events) whose efforts to handle the new paperless regime and demands for local and organic produce went far beyond the call of duty.

There were also two new innovations of a raffle and a quiz - thanks to Stephen Sykes and Stephen Tromans for help with these and thank you to all who helped source some fantastic prizes – which raised £1259 for the endowment fund.

Feedback has been very positive – thanks to everyone who responded:

100% said it lived up to their expectations; 96% said it was value for money and their time; 97% rated the presentations very useful overall.

On the new innovation of having as paperless a conference as possible a majority (78%) agreed. Of the ones that didn't there were suggestions on how to improve which we'll be considering for next year.

We also had some comments on the format and timings which we're considering and will be sending out a survey to all members soon to get your views. It's your conference and we want it to work well for you.

Many thanks once again to the main sponsors:

Landmark Information Group; 39 Essex Street; GroundSure Ltd and WSP Environment and Energy.

We also thank our other sponsors: Argyll Environmental for the bags; One Crown Office Row for the pens; Landmark Chambers for the organic and locally produced food and drink; 39 Essex Street for the memory sticks.

UKELA CONFERENCE - NORWICH 2011

Next year we'll be travelling to Norwich and the University of East Anglia for the conference on June 24th – 26th. We've already had expressions of interest in sponsoring or having a stall. If you're interested please contact Mark Brumwell, UKELA's vice-chair and sponsorship co-ordinator (mark.brumwell@dundas-wilson.com).

LORD NATHAN MEMORIAL FUND FOR THE ENVIRONMENT

A big thank you to everyone who's contributed to the Lord Nathan Memorial Fund for the Environment this year. It now has nearly £30,000 in it.

As well as the regular contributors who support the fund with regular payments, many of you have supported our sponsored events. The kayak in May, organised by David Hart QC, raised £4,500, which is a huge boost to the fund. The raffle and quiz at the UKELA conference raised over £1200. If you've got any good ideas for raising funds, UKELA's council has a fundraising team who would be happy to discuss your ideas. Please get in touch with Vicki Elcoate (Vicki.elcoate@ntlworld.com).

NEW MEMBERS

Council has been joined by three new members. No election was needed this year as the number of applications perfectly fills the 20 places available.

Ben Stansfield – Clifford Chance

Ben is a solicitor at Clifford Chance, specialising in environmental and planning law. Ben joined Clifford Chance in 2001 and before that spent a year at Slaughter and May. Ben advises on a broad spectrum on environmental, climate change and energy issues.

Mothiur Rahman – Bircham Dyson Bell

Mothiur joined Bircham Dyson Bell in 2005, having completed his training contract at CMS Cameron McKenna. He has advised clients in relation to objections to Compulsory Purchase Orders, Stopping Up Orders and Transport and Works Act Orders. In addition, he has experience in advising on planning agreements and objections to planning applications.

Paul Collins – DEFRA

Paul is a solicitor with DEFRA. Before joining DEFRA, he worked for the Environment Agency and in private practice, advising on a wide range of environmental issues.

AND THOSE RETIRING

Council members **Tim Jewell** and **Michael Woods** both decided to step down from Council at the AGM. The Chair and Trustees would like to thank them for all their hard work for UKELA over the past 4 years and wish them well.

Council has also thanked **Andrew Wiseman** for fulfilling the role of Treasurer for more than a year. **Tom Mosedale** has now taken over as Treasurer.

THE CASE FOR AN INTERNATIONAL COURT FOR THE ENVIRONMENT

Stephen Hockman QC 6 Pump Court

1. The Nature of the Problem

In his Foreword to the first edition of "Principles of International Environmental Law" by Philippe Sands, Sir Robert Jennings QC, sometime Whewell Professor of International Law in the University of Cambridge, and former President of the International Court of Justice (ICJ), wrote: *"It is a trite observation that environmental problems, although they closely affect municipal laws, are essentially international; and that the main structure of control can therefore be no other than that of international law".*[1] Jennings wrote those words in 1995, many years before the potential effects of climate change had transformed public perceptions of this topic. And yet, even today, after all the many millions of words that have been written on the subject of climate change and its causes and consequences, many may think that we are hardly any further forward in establishing, in Jennings' words, a *"structure of control"*. Indeed, Jennings' observation that the problem is mainly to be solved by legal means might now seem, not so much *"trite",* as unorthodox, bold or even eccentric.

Of course no-one doubts the scale of the problem. When Jennings wrote in 1995, the problems were perceived mostly in terms of major cases of environmental pollution which were regarded as having potentially international implications. Perhaps the most infamous case of environmental liability on the part of a trans-national corporation occurred on 2nd December 1983 in Bhopal, India, when Union Carbide, a multi-national company incorporated in the United States, released 40 tonnes of toxic

1 Sands, P., 2003. *Principles of International Environmental Law*. 2nd Edition. Cambridge University Press. Page 187

methyl isocyanate from its plant, killing 3,500 people and affecting over 200,000 others. Proceedings brought in the United States courts having failed, the injured parties settled the ensuing litigation in the Indian courts for some $470 million (an average of about $15,000 per deceased person).

Scroll forward to 2010, and, the potential effects of climate change have of course been given an altogether new and critical focus by a number of recent developments, including reports by the Intergovernmental Panel on Climate Change and by Nicholas Stern on behalf of the UK Government. Few now deny the urgency of a solution to these problems, though even fewer claim to have to hand a serious and comprehensive set of solutions. Statements emanating from international summits only confirm the diplomatic efforts involved in attaining linguistic (not to mention policy) consensus.

In these circumstances, it seems at least timely (a) to review those international legal instruments which already exist to facilitate a solution to the problem, and (b) to suggest that the creation of a new instrument deserves consideration.

I do entirely acknowledge that to many distinguished international environmental lawyers this idea is still heterodox. Indeed I understand that Robbie Jennings himself may have disclaimed support for the idea. On the other hand, Jennings himself in the Foreword which I have already mentioned pointed out that what is urgently needed today is a more general realisation in the contemporary global situation of the need to create a true international society. And if the inspiration of former President of the International Court of Justice is insufficient, let me also cite the views of our last and perhaps most distinguished Senior Law Lord, Lord Bingham of Cornhill, who in his recent book, 'The Rule of Law'[2] lamented the fact that the compulsory jurisdiction of the ICJ is accepted by only a minority of member states of the United Nations, and by only one of the five permanent members of the Security Council (namely the United Kingdom). Lord Bingham states: "*if the daunting challenges now facing the world are to be overcome, it must be in important part through the medium of rules, internationally agreed, internationally implemented and, if necessary, internationally enforced. That is what the rule of law requires in the international order*".

2. Dispute Resolution Systems

I now turn to review some of the existing provisions and mechanisms for dispute resolution. The oldest legal institution dedicated to resolving international disputes is the Permanent Court of Arbitration (PCA), established at The Hague by inter-governmental agreement in 1899. The PCA has jurisdiction over disputes when at least one party is a state (or an organisation of states) and when both parties to the dispute expressly agree to submit their dispute for resolution. It has been suggested in the past that the Permanent Court of Arbitration might be an interim forum for resolving international environmental disputes. In 2001 the PCA adopted some 'optional rules' for arbitration of disputes relating to the environment and/or natural resources. However, as already indicated, at least one party to any dispute must be a state, the Court has no compulsory jurisdiction and, importantly, its decisions are not, as I understand, made available for public inspection.

Turning to the ICJ, this was established (as a successor to the earlier Permanent Court of International Justice) in 1945. In this case, jurisdiction depends on whether two or more states have consented to its jurisdiction. While the ICJ may accept cases that are environmentally related, only states have standing. The ICJ established within its structure in 1993 a Chamber specifically to deal with environmental matters. However, no state has ever submitted a dispute to that environmental Chamber and the Chamber has now been disbanded. On rare occasions, the ICJ has heard a case in an environmental context, including most recently the case of the *Pulp Mills on the River Uruguay*, in which Argentina brought proceedings against Uruguay based upon the allegedly unlawful construction of two pulp mills on the river Uruguay which are said to jeopardise conservation of the river environment. The case has been fully argued (with British Counsel on either side) and a decision is awaited.

In 1992, representatives from 176 States and several thousand NGO's (non-governmental organisations) met in Brazil for the United Nations Conference on Environment and Development. At this Conference, often referred to as the Earth Summit, there was adopted the Rio Declaration on Environment and Development, Principle 10 of which provides that *"States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be available"*.

The Rio Declaration of 1992 (and accompanying Framework Convention on Climate Change) famously led on to the Kyoto protocol signed in Japan on 11th December 1997. This Protocol, for the first time, contained international obligations requiring countries to reduce their greenhouse gas emissions below specified levels. It had been agreed that the Kyoto Protocol would only come into force when countries emitting 55% of the world's carbon dioxide had proceeded to ratification. The 55% trigger was finally met in February 2005 after ratification by Russia. The protocol was ratified by Australia in December 2007, leaving the United States of America as the only developed nation not to have ratified. However, constraints upon enforcement remain in the view of many, a significant weakness.

Another important method of dispute resolution is international arbitration. An environmental treaty can provide for the submission of disputes to arbitration by mutual consent of the relevant parties, and cases like the *Trail Smelter* case in 1935

2 Bingham, T., 2010. *The Rule Of Law.* Allen Lane. Pages 128-9.

reflect the historical importance played in inter-state cases by arbitration in the development of international environmental law. Also relevant is the ITLOS regime.

At the European level, the European Union has, for many years, legislated on environmental matters; and compliance with European environmental law is regulated by the European Commission, with disputes being referable to the European Court of Justice in Luxembourg. Within the European Union, there was established from January 2005 an emissions trading scheme, based on the allocation and trade of carbon allowances throughout the Union. Significantly too, in 1998, a number of states, principally European, entered into the so-called *"Aarhus Convention on Information, Public Participation in Decision-making and Access to Justice in Environmental Matters",* ratified by the UK in February 2005. Recent studies (including for instance, a report by working group under the chairmanship of Sullivan J) suggest that a number of member states within the European Union may not be fully in compliance with Aarhus' requirements concerning access to justice. The Aarhus Compliance Committee has recently heard just such a complaint against the United Kingdom. Moreover, the Aarhus Convention of course only applies to its signatory states. There is no global equivalent.

An important dispute resolution mechanism not directly relating to the environment arises under the procedures of the World Trade Organisation, created by an inter-governmental conference in 1994 for the purpose of furthering free trade and facilitating implementation and operation of international trading agreements. Under these arrangements, difficult questions have arisen as to whether the WTO can regulate issues that do not themselves involve trade, but which have a direct impact on conditions of trade, for example the establishment of health, safety, or environmental standards for goods or agricultural produce traded internationally. As Boyle and Redgwell point out in 'International Law and the Environment'[3], in these areas, other international bodies with primary responsibility for international regulation already exist, and there are no hard and fast jurisdictional boundaries between these organisations and the WTO. It is therefore possible, they say, to advance policy arguments both for and against the WTO taking on a more expansive role in regard to the regulation of such matters. As the authors state, it might well make sense to link negotiations on trade issues with setting standards for reducing CO2 emissions and promoting energy efficiency, since it is far from obvious why a country which subsidises pollution by failing to take action on climate change should reap the benefits of free trade. In a fascinating lecture last Easter at the Commonwealth Law Conference in Hong Kong, Professor Gillian Triggs of the University of Sydney showed how the internal WTO dispute resolution mechanism including its Appellate body based in Geneva, grapples with these issues. There is however, no provision for panels adjudicating on environmental cases to have specific environmental expertise, although there is a requirement that panels adjudicating on financial matters should have the necessary financial services expertise.

3. Institutional Reform

There is no doubt that the notion of international reform and restructuring is now beginning to gather momentum. Even before the recent Copenhagen summit held under the UNFCCC, Chancellor Merkel of Germany, and President Sarkozy of France, in a letter to the U.N. Secretary General, called for an overhaul of environmental governance, and asked for the Copenhagen climate talks to progress the creation of a World Environmental Organisation (WEO). More recently, last month, ministers and officials from more than 135 nations converged on the Indonesian island of Bali for the United Nations Environment Program (UNEP) annual meeting. UNEP was established by the UN general assembly in 1972, with headquarters in Nairobi in order to enhance cooperation in Environmental matters. Its Executive Director, Achim Steiner, has stated that environmental governance reform was a key part of the discussions at this annual meeting and that governments raised the possibility of a World Environment Organisation. He said that a high level ministerial group had been established to continue the process with greater focus and urgency and that "*the status quo is no longer an option*". This ministerial group is chaired by representatives from Kenya and Italy.

As Philippe Hugon has said in 'After Copenhagen: An International Environmental Agency Needed'[4] a WEO might unite four parties in its drive to advance the environmental cause: scientists, entrepreneurs, governments, and environmental organisations. Firstly, the scientific community needs a forum where it can voice its concerns and recommendations. Secondly, participation by business enterprises is equally important since they have to put into practice the recommendations made by the scientists. A third party at the conference table would obviously consist of the respective governments which have to put in place the requisite legislative and tax-related measures to protect the environment. Thirdly, a WEO would also do well to integrate existing environmental organisations, which have done much to promote environmentally-conscious thinking worldwide.

Those of us who support the case for an ICE do not in any way exclude the notion that an ICE could sit alongside or be part of a WEO. Mr Steiner said that a WEO could be modelled on the WTO which as already mentioned, has its own dispute resolution mechanisms. The same point was made some months ago by former Euro-Commissioner Lord (Leon) Brittan**.** A WEO might be granted jurisdiction to refer cases to an ICE and indeed it might be provided that complaints intended to be referred to the ICE should first be referred to the WEO for consideration and investigation.

The topic of international governance arrangements in the environmental and sustainable development fields seems likely to

3 Birnie, P., A. Boyle, and C. Redgwell, 2009. *International Law and the Environment*. 3rd Edition. Oxford University Press. Page 79

4 Hugon, P., 2010. *The Need for an International Environmental Agency* . IRIS. Available at: http://www.atlantic-community.org/index/items/view/The_Need_for_an_International_Environmental_Agency

feature strongly on the agenda for the forthcoming conference in 2012 –"Rio +20" at which I hope the ICE coalition will be represented.

4. A New Proposal

In these circumstances, it may be thought that the establishment of an International Court for the Environment (ICE) is a valuable goal that would add to the body of jurisprudence in international environmental law and provide a forum both for states and for non-state entities. Ideally, as explained in more detail below, the arrangements for such a Court would include (i) an international convention on the right to a healthy environment, with broad coverage; (ii) direct access by NGO's and private parties as well as states; (iii) transparency in proceedings; (iv) a scientific body to assess technical issues; and (v) a mechanism (perhaps to be developed by the Court itself) to avoid forum shopping.

Let me acknowledge at once that this is not a wholly new idea. Such a proposal was mooted as long ago as 1999 at a conference in Washington sponsored by a foundation which had been set up to investigate the establishment of an international court for the environment. The proposals then considered defined the functions of the Court as including:

(i) adjudicating upon significant environmental disputes involving the responsibility of members of the international community;

(ii) adjudicating upon disputes between private and public parties with an appreciable magnitude (at the discretion of the President of the Court);

(iii) ordering emergency, injunctive and preventative measures as necessary;

(iv) mediating and arbitrating environmental disputes;

(v) instituting investigations, where necessary, to address environmental problems of international significance.

A similar proposal has been under consideration by a Foundation based in Rome (see also below).

Moreover, it may be thought that the potential benefits of an International Court for the Environment, particularly for the global business community, would include:

(i) a centralised system accessible to a range of actors;

(ii) the enhancement of the body of law regarding international environmental issues;

(iii) consistency in judicial resolution of international environmental disputes;

(iv) increased focus on preventative measures;

(v) global environmental standards of care; and perhaps also

(vi) facilitation and enforcement of international environmental treaties.

The establishment of such a Court might be thought particularly appropriate at the present time, just as the public generally are becoming so much more aware of environmental problems and of the culpability of those who cause them. As Michael Mason has said, "it is the intersection of individual rights and responsibilities with inter-State obligations that offers concrete possibilities for citizen participation in Global decision making."[5]

Such a Court could also influence the world business community to develop risk management programmes and improve present practices which would produce a corresponding reduction in the risk of environmental catastrophe.

As to the feasibility of any such proposal, I will say more in a moment, but an encouraging precedent is surely the establishment, after sustained pressure by NGOs and others of the International Criminal Court, different though that is from the notion of an ICE as we have been developing it to date.

5. Possible Objections

I would like next to discuss some of the objections to this proposal which have been raised in the course of discussions. I would classify these objections under three headings. Firstly the question is raised, what would be the law to be applied by such a body; secondly, why is it necessary for there to be a new body when existing juridical or dispute resolution institutions already exist to undertake the role envisage for an ICE; thirdly, what would be the point of establishing a new international judicial body such as an ICE if it was unable to enforce its decisions.

As to the first issue, my tentative submission would be that international law is already sufficiently developed to enable the court itself to decide upon the appropriate law to apply to a dispute. Clearly if the dispute arises in an area to which a specific bilateral or multilateral treaty relates, then the terms of that treaty will be influential or decisive but on other issues one might expect and indeed hope that the court itself would develop the law. I refer again to the approach to the future of international relations

5 Mason, M, 2006. *Citizenship Entitlements Beyond Borders? Identifying Mechanisms of Access and Redress for Affected Publics in International Environmental Law.* Global Governance 12 (2006) 283-303.

advocated by Sir Robert Jennings and by Lord Bingham, and venture to suggest that the objectives that they have identified are too important to be left solely to the grindingly slow process of inter-state discussion.

As to the second issue, I do not in any way rule out the idea that one or more of the existing institutions grappling with some of these problems might enlarge its role. Indeed as I have indicated the WTO Appellate body has moved in this direction. But it seems doubtful to me that any individual existing institution will be able to assume a role of the kind which we envisage for an ICE. Appropriately and understandably, an international institution such as the ICJ, with an established and hugely distinguished reputation, is content to rest upon its established jurisdictional limits and does not feel it necessary or appropriate to argue for or even consider a possible expansion of those limits.

As to the third issue, there is an interesting answer to this objection in the textbook which I used in Cambridge in 1966 called 'An Introduction to International Law' by J. G. Starke.[6] "*Assuming however that it be a fact that international law suffers from the complete absence of organised external force, would such circumstance necessarily derogate from its legal character. In this connection, there is a helpful comparison to be made between international law and the canon law, the law of the Catholic Church. The comparison is the more striking in the early history of the law of nations when the binding force of both systems was founded to some extent upon the concept of the "law of nature". The canon law is, like international law, unsupported by organised external force, although there are certain punishments for breach of its rules, for example, excommunication and the refusal of sacraments. But generally the canon law is obeyed because as a practical matter the Catholic society is agreeable to abide by its rules. This indicates that international law is not exceptional in its lack of organised external force… In other words the problem of the binding force of international law ultimately resolves itself into a problem no different from that of the obligatory character of law in general".*

6. The early stage ICE

I now turn to consider how one might move towards the establishment of an ICE. I acknowledge that establishing a court at the international level will be a difficult task which will almost certainly require an international treaty. To get to that stage will also be likely to require a campaign over a number of years. To that end there has been established the ICE Coalition, a company limited by guarantee, to which many enthusiasts, young and old, have already lent their support.

There are two points however to make in relation to this first stage of the effort. The first is as to the work already done in this field; the second is as to how, ahead of reaching the ultimate goal of a court, the ICE proposal might be advanced in the meantime.

As to the first point, it is worth taking note of the considerable work already done in this field by other organisations with aims broadly similar to or consistent with the ICE Coalition. For example, an organisation called ICEF, in Rome, has for a number of years being looking at the possibility of creating an ICE. It is to be hoped that cooperation with organisations such as ICEF and with other sympathetic bodies will enable the ICE campaign to move forward swiftly. I shall shortly be speaking at an ICEF event in Rome, alongside the Rt Hon Lord Justice Robert Carnwath, perhaps our most distinguished environmental lawyer at judicial level.

As to the second point, one possibility to consider is that, en route to the ultimate goal, the ICE is constituted as something less than a fully mandated international court, more akin to an arbitral tribunal, providing declaratory relief and dispute resolution services to those who agree to submit to its jurisdiction. It is envisaged that, on this approach, the ICE would from the outset be able to perform the role of an arbitral tribunal – providing declaratory clarification and adjudication and general dispute resolution to those who agree on an ad hoc basis, or by prior agreement, to submit to its jurisdiction. States, NGOs, corporations and individuals would all be able to agree to use and have access to the ICE. This role requires no international treaty; it merely requires the establishment of the body, it being proffered to potentially interested parties as means of resolving disputes in environmental matters, and their agreement to use it. The ICE might well sit at a number of different locations.

It is also envisaged that this straightforward arbitral tribunal model would be able to perform a valuable role as the dispute resolution institution of choice under specific international agreements. For example, Article 14 of the UNFCCC, adopted also *mutatis mutandis* in the Kyoto Protocol, provides that dispute resolution is to be by way of reference of the dispute to the ICJ or by arbitration by a procedure to be agreed by the parties. A problem with this is that, as discussed earlier, the ICJ allows only states to have standing. As to the arbitration option under Article 14, there has been no agreement as to what the arbitration procedure should be. The ICE Coalition envisages the ICE as being able to fill this gap in the legal architecture of the climate change agreements, including any successor agreement reached in Mexico or subsequently.

7. The ultimate goal

6 Starke, J. G., 1963. *An Introduction to International Law.* 5th Edition. Butterworths. Pages 28-29

Ultimately, it is envisaged that the ICE might be mandated as the international environmental tribunal. On the basis that the ICE will, on the interim approach set out above, be offering its services to a wide cross-section of the international governmental, non-governmental and business communities, and on the basis that this creates a positive view of the ICE in the policy debate, the final step of mandating the ICE as the international environmental tribunal might not be so controversial a step as it would otherwise seem to be. It may indeed be that the ICE, by that stage, has become in any event the default port of call for the resolution of international environmental issues requiring clarification or in dispute. This is of course, however, a best case scenario, and it could be on the other hand, that the preparatory effect of an "interim" ICE is minimal.

The ICE, as an international court, could, on this longer term view, sit above and adjudicate on disputes arising out of the UN "environmental" treaties, including the UN Convention on Biological Diversity 1992 and the UN Framework Convention on Climate Change 1992, the Kyoto Protocol (and any successor text to Kyoto and addition or amendment to the UNFCCC that is agreed at the post-Copenhagen Conference of the Parties (COP) in 2010), the UN Convention on the Law of the Sea 1982, any other applicable UN environmental law and, in addition, customary international law. The aim might be for it to incorporate all of the work of the existing tribunals under the existing UN environment treaties (e.g. the Kyoto Protocol Enforcement Branch). However, to the extent that any such incorporation is not possible or not possible to start with, there could be a *"carve out"* of the ICE's jurisdiction so as to prevent overlap with these existing bodies. The aim would be, ultimately, to achieve one single court dealing with all UN environmental law. The additional aim would be for the consolidation of the various environment-related treaties to be incorporated into one single document, the interpretation of which would be within the ICE's jurisdiction.

In addition, it is envisaged that the ICE could provide a judicial review function in respect of environmental decisions made by bodies involved in the interpretation of international environmental obligations – e.g. the Kyoto Enforcement Branch, or any successor or replacement institution established by the COPs under the UNFCCC Kyoto processes; the WTO; and the International Finance Corporation (IFC) and its interpretation of the Equator Principles.[7]

A possible additional feature of the ICE might be the establishment of specialist panels – e.g. relating to aviation or shipping or extractive industries. This feature could be present in both the interim (arbitral tribunal) version and in the final version of the ICE.

Depending on the views of signatory states, there might be a restriction to investigate only the "most serious" breaches – in line with a similar restriction upon the International Criminal Court's jurisdiction. Equally, there might well be a restriction of the remedies available to non-State actors purely to declaratory relief.

The sanctions imposed could include declaratory relief, fines and, along the lines of the EU Environmental Liability Directive, sanctions of restoration and rehabilitation of damaged habitats. The ICE could also be empowered to hand down declarations of incompatibility as regards Signatory State legislation where it conflicts with the UN environmental rules. In addition it could sanction Signatory States for failures to permit enforcement of judgments. There would also be provision for interim measures, specifically, injunctions, enforceable in Signatory States.

It is suggested that the ICE would produce a half-yearly or annual report listing its activities and possibly naming and shaming wrongdoers (be they those who have breached the law or Signatory States which permit failures to enforce judgments). It is also suggested the ICE has a panel of environmental experts to assist it.

8. Recent steps

The proposals set out above have been the subject of considerable discussion over the past few years, including at a symposium on "Climate Change and the New World Order" in November 2008, at the British Library, hosted by my Chambers at 6 Pump Court, Temple – and a seminar on *A Case for an International Court for the Environment* hosted by the ICE Coalition and Global Policy, and chaired by Lord Anthony Giddens at the LSE in November 2009. More recently, the ICE Coalition has met with the Legal Counsel to the UN Secretary General in New York. It has also lobbied and made a presentation at COP 15 at Copenhagen in December 2009. I have been fortunate enough to have the opportunity to talk about the project in the 8th Steinkraus Cohen lecture to the United Nations Association and in a presentation to the World Bar Conference at (where the proposal received the endorsement of Justice Brian Preston, Chief Judge of the Land and Environment Court of New South Wales). A draft Protocol setting out the "constitutional rules" of an ICE is in the course of preparation.

9. Overall conclusion

Many may feel that some of these ideas are very idealistic, but 100 years ago the same would have been said of the idea of the UN itself. For further details of the ICE Coalition, please see www.environmentcourt.com. It is to be hoped that support will be forthcoming. At stake is our very survival.

7 See Kingsbury, B. and others, 2005. *The emergence of global Administrative Law.*

CLIMATE CHANGE – CASE-LAW UPDATE

James Maurici Landmark Chambers

Introduction

1. The purpose of this paper is to look at the major cases (domestic and European) concerning climate change in the last 12 months or so.

(i) Domestic

(a) Aviation

2. ***R. (Hillingdon LBC) v Secretary of State for Transport*** [2010] EWHC 626 (Admin). This was a judicial review of the decisions announced in January 2009 ("the January decisions") to confirm Government support for a third runway at Heathrow with additional passenger facilities. The Government had first announced support in principle for this in the 2003 Air Transport White Paper. Climate change issues were an important part of the challenge before the Court. Carnwath LJ in setting out the background recorded:

> "3. The issues should be considered against the background of the development of government policy since the 2003 ATWP. Of particular relevance is the White Paper Planning for Sustainable Communities (Cm 7120), published in May 2007, which set the policy background for two major statutes in 2008, the Planning Act 2008 and the Climate Change Act 2008. The White Paper discussed two issues, which bear directly on the matters raised by the parties in this case: first, the increasing importance of climate change as a factor directing planning policies, and secondly, the need for a more efficient procedure for establishing and applying national planning policy in relation to major projects.
>
> 4 First, in relation to climate change, the Paper said:
>
> > "*Meeting the challenge of climate change*: The evidence is now compelling that greenhouse gas emissions from human activity are changing the world's climate. The recent Stern Review makes it clear that ignoring climate change will eventually damage economic growth, people's health and the natural environment. The Climate Change Bill published on 13 March will introduce a clear, credible, long-term framework for the UK to achieve its goals of reducing carbon dioxide emissions and ensure steps are taken towards adapting to the impacts of climate change. The planning system also has an important role to play in enabling the UK to meet those challenges…." (para 1.14)
>
> The new framework was given legislative effect by the Climate Change Act 2008 …
>
> …
>
> 13 It is noteworthy that, although the ATWP contained some discussion of climate change (para 3.35ff), it was not seen as a limiting factor at that stage. Government policy (as set out in the Energy White Paper 2003) was that there should be a 60% reduction in CO2 from 1990 levels by 2050, but international aviation was not included in these figures. In the ATWP the view was taken that the best way for aviation to contribute to the "goal of climate stabilisation" would be through "a well-designed emissions trading regime" (para 3.39).
>
> 14 In October 2006 the Stern Review on "the Economics of Climate Challenge" was published. In the words of the claimants' expert (Mr Lockley), the Review "reflected a fundamental shift in attitudes to climate change in the UK", and in particular made clear that an emissions trading scheme was not enough in itself to address the problem. He draws attention to the Review's warning against "overinvestment in long-lived, high-carbon infrastructure – which will make emissions cuts later on much more expensive and difficult" (p xix).
>
> 15 The increased significance of climate change was reflected in the ATWP "Progress Report", issued by the Department of Transport in December 2006. It contained a detailed discussion of the Stern findings, under the heading the "Global challenge of climate change", describing it as "the biggest single issue that we face" (para 2.1). The government was –
>
> > "…clear that major decisions on increases in airport capacity need to take account of not only their local environmental effects, but also the wider context of aviation's climate impacts". (para 2.33)
>
> A new "emissions cost assessment" was to be introduced, following further consultation, to inform decisions on major increases in aviation capacity. In spite of the increased emphasis on this issue, Mr Lockley criticises the report as a "selective" treatment of the Stern Review, and he notes in particular the absence of any reconsideration of the principle of airport expansion.
>
> 16 On 22 November 2007 the Secretary of State began a new consultation process, with the publication of Adding Capacity at Heathrow Airport, Consultation Document …
>
> 18 In a chapter headed "The Policy Context", it was explained that the consultation was concerned with "the local environmental impacts" of the proposal, and that although the context included "our response to the global challenge of climate change", these topics were "outside the scope of this consultation" (p 18). The questions were accordingly relatively limited in scope, relating to such issues as whether a third runway should be supported by associated passenger terminal facilities. Views were also sought on whether the three conditions identified in the ATWP (noise, air quality and public transport access) remained valid.
>
> 19 During the course of the consultation, the Climate Change Act 2008 was passed. Section 1 imposed a statutory duty

on the Secretary of State to ensure that the "net UK carbon account" for the year 2050 is at least 80% lower than the 1990 baseline ("the 2050 target"). Emissions from international aviation were not included initially, but provision was made for their inclusion in accordance with regulations to be made by the Secretary of State, with a deadline of the end of 2012 for the making of such regulations, or an explanation to Parliament of the reasons for not making them (s 30). The Act also established a new independent, expert Committee on Climate Change ("CCC") (chaired by Lord Adair Turner) to advise the government (inter alia) on possible amendments to the 2050 targets, on the consequences of including international aviation, and on progress towards the target (ss 32–7)" (emphasis added).

3. The January decisions were announced in Parliament and the learned Judge recorded that:

"23 In his statement to Parliament the Secretary of State also announced a target to bring aviation emissions in 2050 below 2005 levels. He had asked the Committee on Climate Change "to advise on the best basis for its development". Emissions from aviation would be monitored with the help of the CCC:

"Any future capacity increases at Heathrow beyond the decision that I have announced today will be approved by the Government only after a review by the Committee on Climate Change in 2020 of whether we are on track to achieve the 2050 target that I have announced."

4. Carnwath LJ noted that NPSs under the Planning Act 2008 require reasons (see s. 5(8)) including "an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change" (see paras. 35 and 42 of the judgment).

5. The learned Judge said that "common sense demanded that a policy established in 2003, before the important developments in climate change policy, symbolised by the Climate Change Act 2008, should be subject to review in the light of those developments. Even if the immediate purpose of the 2007 consultation was limited to the three specific conditions identified in 2003, that did not remove the need for a general reappraisal of the policy in the light of other material changes since that time" (see para. 52). He also said (see para. 62) that "[a] policy decision to construct a third runway at Heathrow combines elements from both ends of the "spectrum" (to use a term adopted by Sullivan J in ***R(Wandsworth LBC) v Secretary of State*** [2005] EWHC 20 (Admin) para 60). At one end it involves broad judgments about the importance of aviation to the national economy, and the balance between such considerations and environmental issues, including climate change. At the other, the decision to meet some of the demand by construction of a new runway and passenger facilities at Heathrow has very direct implications for the planning of that locality and the environment of those living in it".

6. On the grounds of challenge advanced in relation to climate change the learned Judge said:

"Climate change

72 The claimants' grounds under this head are based principally on failure to reopen the consultation to deal with three new aspects of the Departmental thinking: the new target for aviation emissions to be capped in 2050 below 2005 levels; the initial support for expansion only up to 605,000 ATMs; and the new "green slots" policy. They also point to a (since acknowledged) inaccuracy in the statement to Parliament, which suggested wrongly that the green slots policy was relevant to CO2 emissions.

73 Of these, the most significant seems to me to be the 2050 cap, particularly in the light of the December 2009 CCC report. Although the December report cannot be directly relevant to the legality of a decision taken some eleven months earlier, neither side has objected to reference to it. Indeed, both rely on it for different purposes.

74 The claimants say that this report shows that the objectives of the 2003 ATWP for the expansion of aviation are fundamentally inconsistent with the policy on climate change as it has now developed. I can best explain this by drawing on the summary in their skeleton argument:

i) Under the 2003 ATWP, overall growth in passengers to 470mppa by 2030 was predicted, substantially more than a 100% increase. No assessment of the further growth from 2030 to 2050 was provided.

ii) In the 2009 forecasts, the "central" forecast was 455mppa by 2030 under the "capacity scenarios supported by the ATWP". The figure for 2050 on the same basis (as corrected in later correspondence) was 572mppa. That equated to an increase above the 2003 level of well over 150%.

iii) The Air Traffic Movements (ATMs) represented by these figures led to the 2009 Forecasts showing overall CO2 emissions increasing by 60% by 2050 (from 2005 levels).

iv) The "stark contrast" between the 2009 Forecasts (60% increase over 2005 levels) and the 2050 Target (reduction below 2005 levels) was an issue raised in the original grounds for judicial review.

v) The CCC Report (December 2009) was a response to the government's own request, made at the time of the 2009 Decision, as to how the 2050 target could be met.

vi) That report, taking into account likely CO2 savings from biofuels, and likely developments in aircraft technology, and operational efficiencies, concluded that demand growth would need to be constrained to 60% between 2005 and 2050, if the 2050 Target was to be achieved. That equated to about 370mppa in 2050.

vii) By contrast, using existing rates of Air Passenger Duty, but a much higher carbon price than used in the 2009 Forecasts, the CCC forecast that under the capacity scenarios supported by the ATWP, demand growth would rise by

about 115% over the same period, to around 490mppa in 2050.

viii) The skeleton concluded:

> "Thus even with technological improvements, biofuels and a much higher price of carbon, there remained a stark disparity between the predicted mppa (following from the policies in the ATWP) and that which could be accommodated within the 2050 Target.
>
> In short, the best current evidence is that steps will have to be taken to constrain demand to well below that which would be provided for by the capacity increases in the ATWP 2003; and
>
> The level of growth in mppa consistent with the 2050 Target (60% from 2005) is 'dramatically lower' than the growth envisaged at any earlier stage."

75 The evidence for the Secretary of State, as I understand it, does not provide direct answers to these points. It is accepted that the 2050 target may require "some constraint on overall growth" in aviation demand, but reliance is placed on the CCC's own observation that their conclusions are directed at the overall position and have "no implications for specific airports". The difference between the "central forecast" and the target does not show that the target cannot be achieved. Rather (in Mr Swift's words):

> "… it demonstrates the extent to which the Government needs to formulate policies to divert the future path of CO2 emissions from the central forecast to the target. The Government will formulate such policies having regard to the advice of the Committee on Climate Change."

Furthermore, even an increase in capacity at Heathrow to 702,000 ATMs would account for no more than a 10% increase on the present level ATMs overall, and would be well within the 55% cap on additional ATMs suggested by the Committee.

76 To the latter point the claimants make the rejoinder that it relates the increases at Heathrow alone to a cap designed to apply nationally. The argument thus assumes a policy decision, contrary to the ATWP, that Heathrow is to be favoured at the expense of other London and regional airports. The 55% cap itself implies a very significant reduction to the general expansion envisaged in 2003. For example, at Stansted, the growth supported by the 2003 ATWP involved an increase in ATMs from 166,000 in 2005 to 371,000 in 2030, amounting to growth of 205,000. By contrast, the 55% cap proposed by the CCC would allow for growth only to 257,000 in 2050, equivalent to growth of only 91,000, even assuming no bias in favour of Heathrow.

77 Judicial review proceedings are not a suitable forum to resolve this technical debate. However, the claimants' submissions add up, in my view, to a powerful demonstration of the potential significance of developments in climate change policy since the 2003 White Paper. They are clearly matters which will need to be taken into account under the new Airports NPS. As has been seen, the Act specifically requires an explanation as to how the NPS takes account of the government's climate change policy. Whether or not these matters should have been treated as "fundamentally" affecting the scope of the 2007 consultation (under the authorities referred to at para 29 above) seems to me of little moment, given that they will be subject to further statutory consultation and consideration under the NPS procedure. The "green slots" point adds nothing to the argument. I do not see this as a "fundamental" point, and I see nothing objectionable in it being put forward as an idea for further consideration. The confusion over its relevance to CO2 emissions was regrettable but no more.

78 Finally, I am not able, at least on the material before me, to hold that any of these points amounts to a "show-stopper", in the sense that the only rational response would be to abandon the whole project at this stage. Indeed I do not understand the claimants to go that far. Irrationality is not part of the amended grounds of challenge".

7. At the every least the judgment stands as an important reminder to Government that climate change is now a hugely important consideration in decision-making on major projects.

CASE 2

8. ***Barbone v Secretary of State for Transport*** [2009] EWHC 463 (Admin)[2009] Env. L.R. D12 was a challenge under s. 288 of the Town and Country Planning Act 1990 to the grant of permission for BAA's proposals to increase the capacity of Stansted Airport by varying existing planning conditions that regulated the annual number of air traffic movements ("ATMs") and the annual throughput of air passengers that the airport could lawfully accommodate under its existing planning permission.

9. One of the grounds of challenge alleged a failure to assess the impact of the proposals on climate change.

10. In setting out the background to the case Forbes J. noted that in "December 2006, the Government published the ATWP Progress Report ("the ATPR"). Amongst other matters, the ATPR set out progress on the Government's commitment to responding effectively to climate change and proposed the inclusion of flights within and from EU Member States in the European Union's Emissions Trading Scheme ("the EU ETS") with effect (it then hoped) from 2008. Subject to the policy intention of including flights within the EU ETS , the Government re-affirmed in the ATPR its policy support for major continued expansion of aviation at Stansted and elsewhere …".

11. The material part of the judgment is in these terms:

"Climate Change: the Greenhouse Gas Emissions

68 As Mr Mould observed, it is important to appreciate the nature of SSE's case on the materiality of climate change and aircraft emissions as put forward in BAA's appeal. It is recorded by the Inspector in paragraphs 6.379 to 6.400 of the IR.

SSE's Case at the Appeal

… It is important to note that it was common ground between BAA, SSE, the LPA and Essex County Council that no climate change effect directly linked to the proposed additional use of the existing runway could be demonstrated.

70 As Mr Mould and Mr Humphries pointed out, SSE's case was principally to question the efficacy of Government policy in seeking to reconcile the expansion of aviation with its stated commitment to meet the challenge of global warning: see paragraphs 6.389 to 6.394 of the IR, the latter of which is in the following terms:

> "6.394 Thus it is possible to have an evidence-based policy for air traffic expansion or for climate security, but not both together. Indeed, it is only possible to support air traffic expansion and climate security together by replacing a respect for evidence with a vague hope that " something will turn up " to rescue us from the contradiction to which all current evidence points."

71 It is clear that it was SSE's contention that, in terms of global warming and climate change, the impact of aircraft emissions, resulting from the promulgation of policy for the expansion of air transport in the ATWP (as exemplified by the increased emissions that would result from the G1 proposal), would be highly damaging: see paragraphs 6.381 to 6.386 of the IR, the latter of which is as follows:

> "6.386 Aviation is highly damaging to the climate both because it is energy intensive and because plane exhausts in the upper atmosphere cause further warming effects, roughly doubling or quadrupling the effect of the carbon emissions alone [the so-called "radiative forcing" effect]. Any further increase in aviation would be disproportionately climate damaging over the timeframe in which Stern says action is most important and valuable."

72 SSE went on to argue that the Government's proposals to manage the impact of aviation through concerted international action under an emissions trading scheme were unrealistic and uncertain as to the timing of their delivery …. Thus, in paragraph 6.392, the Inspector recorded part of the evidence given by SSE's witness in support of that contention in the following terms:

> "6.392 SSE's witness drew a distinction between a Government policy and a Government claim which purported to be factual but was not supported by the evidence. He provided examples from the ATWP Progress Report …, for example, the statement that " Inclusion in the Emissions Trading Scheme is the most efficient and cost-effective way to ensure that the sector plays its part in tackling climate change ." However, that was a claim of fact rather than a policy statement and one which was not supported by the evidence. The history of the EU ETS and the lack of progress in including aviation in the scheme did not justify the Government's confidence that it would achieve the benefits claimed for it in the ATWP Progress Report. …"

73 SSE therefore contended that, in determining BAA's planning appeal, the Secretaries of State had to choose between the competing policies of (i) expanding air traffic and (ii) addressing climate change. In paragraphs 6.394 and 6.395 of the IR, the Inspector summarised SSE's argument in these terms (already quoted in part in paragraph 68 above, but repeated for convenience):

> "6.394 Thus it is possible to have an evidence-based policy for air traffic expansion or for climate security, but not both together. Indeed, it is only possible to support air traffic expansion and climate security together by replacing a respect for evidence with a vague hope that " something will turn up " to rescue us from the contradiction to which all current evidence points.
>
> 6.395 It is therefore not possible for a decision either to allow this Appeal or to refuse it to be consistent with Government policy on air traffic expansion, climate security and respect for evidence simultaneously. It is, accordingly, impossible to the Inquiry to avoid taking a position, implicitly or explicitly, on the relative merits of the three."

74 SSE then went on to argue that there was only one realistic and responsible means of delivering the Government's policy commitment to address climate change and that was to refuse to authorise any further increases in aircraft or passenger movements, at least until the proposed emissions trading scheme became an effective reality: see paragraphs 6.397 to 6.400, the latter of which was in the following terms:

> "6.400 Allowing a non-essential increase in climate impacts at just the point when reduction is most urgent and important would seriously undermine the Government's credibility on climate change. The only decision which could potentially reconcile climate security with expansion would be to allow the expansion to proceed if and when – but not until – some combination of technical improvements or emissions trading can be demonstrated to have actually achieved a net reduction of climate change impacts from aviation in line with Government and EU targets for reduction of other categories of emissions."

The Inspector's Conclusions

The Inspector addressed SSE's arguments in his conclusions at paragraph 14.72 to 14.80 of the IR. In paragraph 14.74, he correctly identified SSE's fundamental argument that Government policy on expanding aviation was simply incompatible with its policy of addressing greenhouse gas emissions. The Inspector put the matter in the following way:

> "14.72 SSE reminded the Inquiry of the gravity of the challenge represented by climate change, and of the need to take action to reduce emissions of greenhouse gases as soon as possible. It pointed out the contribution that the G1 development would make to CO2 emissions, exacerbated by radiative forcing – the enhanced effect of emissions of CO2 and other greenhouse gases at high altitude – adding to the already growing effects of aviation relative to the UK's targets on CO2 emissions, and the limited potential for reducing this through operational or technological means. It also gave moving evidence of the impacts of climate change on the environment and peoples of the Arctic, and of their understandable fears for the future. Such points and similar ones were also made by many others at the Inquiry and in written representations.
>
> 14.73 I find it very significant, though not in the least surprising, that none of this is disputed by BAA, nor indeed by any other party at the Inquiry or in written representations.
>
> 14.74 SSE goes on to submit in various ways that policy support for expansion of aviation is incompatible with the acknowledged need to address greenhouse gas emissions. Again this view, in general terms or with specific reference to Stansted, found support among many others."

76 However, the Inspector concluded that the Government had faced up to the need to reconcile these policy objectives, both in the ATWP and in the ATPR (see paragraphs 14.75 to 14.79 of the IR) and commenced this section of the IR in the following terms:

> "14.75 To my mind the Government's policy on aviation as set out in the ATWP cannot legitimately be said to have ignored the issue of climate change. On the contrary, as BAA points out, it explicitly addresses the matter including consideration of how aviation contributes to climate change and the Government's approach to it generally and with particular reference to aviation. …"

77 I agree with Mr Mould's submission that this was a conclusion that the Inspector was entitled to reach on the evidence before him.

78 Thus, the Inspector summarised paragraphs 3.36 and following of the ATWP which state the Government's commitment to taking a lead in tackling the problem of climate change and to putting the UK on a path to a substantial, long term reduction in carbon dioxide emissions. They go on to state that the aviation sector needs to take its share of responsibility for tackling the problem of global warming. However, the reduction in greenhouse gas emissions across the economy does not mean that every sector is expected to follow the same path. The Government states that it is committed to a comprehensive approach, using economic instruments to ensure that growing industries are catered for within a reducing total. The Government believes that the best way of ensuring that aviation contributes towards the goal of climate stabilisation will be through a well-designed emissions trading regime, operating on an international basis. It is pressing for the development and implementation of such a scheme. A more detailed description of emissions trading is included as Annex B to the ATWP.

79 So far as concerns the ATPR, the Inspector summarised paragraphs 1.5 and 1.6 which refer to the recommendation of the Stern Review on the Economics of Climate Change and progress in relation to the policy of the ATWP itself that the price of air travel should, over time, reflect its environmental and social impacts. These matters are considered in more detail in Chapter 2 of the ATPR, which concludes with a summary of the next steps which the Government expects to take in the short to medium term.

80 At paragraphs 14.77 and 14.80 of the IR, the Inspector then said this:

> "14.77 … In the light of the matters I have outlined above, I am in no doubt that Government policy seeks to reconcile growth in aviation to meet the needs identified in the ATWP with action to address climate change. It is clear that SSE and others do not believe that the correct balance has been struck and/or question the likely effectiveness of the proposed mechanisms to address the issue of climate change, but that goes to the heart of Government policy. I do not question or seek to curtail the legitimacy of debate on the matter, but I maintain my view that such debate lies outside the scope of the present appeal.
>
> …
>
> 14.80 In conclusion on climate change policy, I consider that questions of the appropriateness and effectiveness of Government policies on aviation and climate change and their compatibility, while undoubtedly of great importance, are matters for debate in Parliament and elsewhere rather than through this appeal. I respectfully suggest that the Secretaries of State should not consider such questions in this context."

81 The Secretaries of State agreed with both the Inspector's approach and his conclusions on this aspect of the matter, see paragraph 29 of the DL, which is in the following terms:

> "Government Policy on Climate Change
>
> 29 The Secretaries of State agree with the Inspector's reasoning and conclusions on Government policy on climate change as set out in IR14.72 -14.80. They share the Inspector's view that Government policy seeks to reconcile growth in aviation to meet the needs identified in the ATWP with action to address climate change (IR14.77). They also agree with the Inspector's conclusion that questions of the appropriateness and effectiveness of Government policies on aviation and climate change, and their compatibility, are matters for debate in Parliament and elsewhere, rather than through this appeal (IR14.80). …"

The Parties' Submissions

82 Mr Stinchcombe submitted that the conclusions reached by the Inspector and the Secretaries of State on this aspect of

the matter amounted to a decision that the millions of tonnes of aviation emissions which would ensue over the years as a result of the G1 proposal was an entirely immaterial planning consideration, not an environmental effect even to be taken into account. Such a decision was, he contended, plainly wrong in law and a clear breach of the assurances given in the various ministerial statements upon which he relied.

83 Again, I agree with Mr Mould that, taken as a bald proposition, Mr Stinchcombe's criticism does less than justice to the way in which the Inspector (and thus the Secretaries of State) approached the issue of climate change. Thus, in paragraph 14.41 of the IR the Inspector acknowledged the importance of climate change and the contribution of aviation to it. He went on to state that he would address climate change and deal with the extent to which the G1 proposal accorded with Government policy on climate change in the context of main issue 2 (see above) and weigh the environmental effects in this respect in his overall conclusions. As Mr Mould pointed out, that is the approach the Inspector followed and the Secretaries of State took a similar approach in the DL.

84 However, I accept Mr Mould's submission that it is clear that the essential nature of SSE's case at the appeal was that the Inspector and the Secretaries of State should determine the G1 proposal on the basis that the relevant national policy as stated in the ATWP and ATPR (see the summary in paragraphs 76 to 80 above) was misjudged and unlikely to succeed in realising its objectives (see paragraph 14.77 of the IR). In short, SSE argued that the Secretaries of State should determine the appeal otherwise than in accordance with relevant and up to date national policy. The Inspector rightly decided that such a course of action was inappropriate and concluded that the appeal should be determined in accordance with national policy (see paragraph 14.80 of the IR). In paragraph 29 of the DL, the Secretaries of State agreed with the Inspector's approach and conclusion.

85 In my view, the approach adopted by the Inspector and the Secretaries of State on this aspect of the matter was legitimate, in accordance with established legal principles and the propositions summarised in paragraphs 5 and 6 above. In my view, it is also consistent (as Mr Mould submitted) with the approach indicated as correct in the passage from Lord Diplock's speech in ***Bushell*** to which I have already referred (see paragraph 47 above). On analysis, SSE's argument on climate change was just such a proposal as Lord Diplock described in that passage. It was an attack on national transport planning policy which seeks (in very simple terms) to offset that aspect of the environmental impact of the development of air transport against commensurate changes elsewhere in the economy.

86 Furthermore, as both Mr Mould and Mr Humphries pointed out, SSE's case was not based upon the anticipated local impact of the aircraft emissions associated with the G1 proposal. Rather, it was based upon the alleged global impact of that national planning policy, as exemplified by the evidence of a resident of Greenland (see paragraph 6.401 of the IR). The Inspector rightly recognised that fact (see paragraph 14.80 of the IR) and the Secretaries of State agreed. As it seems to me, their approach is entirely consistent with principles stated in ***Bushell***.

87 Accordingly, I am satisfied that there is no substance in this particular complaint which discloses no error of law on the part of either the Inspector or the Secretaries of State."

12. In ***Hillingdon*** Carnwath LJ was somewhat doubtful about the reliance on ***Bushell*** in this context, see para. 59 of the judgment.

CASE 3

13. ***R (Air Transport Association Of America Inc) v Secretary Of State For Energy And Climate Change*** [2010] EWHC 1554 (Admin). This is challenge a challenge to the Aviation Greenhouse Gas Emissions Trading Scheme Regulations 2009. Underlying the challenge is an attack of the bringing into the EU ETS for Phase III of aviation emissions. It is Directive 2008/101/EC which brings aviation activities of aircraft operators that operate flights arriving at and departing from Community aerodromes within the EU ETS as of 1 January 2012, and including therefore flights from and to the US which arrive and depart from Community aerodromes. Among the allegations is the assertion that this contravenes the Chicago Convention. The matter has it is understood us shortly to be referred to the ECJ. A coalition, consisting of three US-based organisations, the Environmental Defense Fund, Earthjustice, and the Center for Biological Diversity, as well as WWF-UK, Transport & Environment, and the Aviation Environment Federation in Europe, is intervening in the proceedings.

(b) Planning

CASE 4

14. ***Derbyshire Dales DC v Secretary of State for Communities and Local Government*** [2009] EWHC 1729 (Admin); [2010] 1 P. & C.R. 19. In this case an application was made to the Council for planning permission for the erection of four wind turbine generators, substation, access track and ancillary equipment. The Council refused the application. There was an appeal and an inspector was appointed to determine the appeal. He allowed the appeal and granted planning permission subject to conditions. The Council challenged the decision under s.288 of the Town and Country Planning Act 1990.

15. The Inspector identified one of the issues as being the contribution that the proposals would make to achieving regional and national targets for renewable energy generation, bearing in mind extant and emerging national planning policy, and the extent to which any such contribution should be weighed against any adverse impacts in terms of the other issues. On this issue the Inspector rejected the Council's argument (based on a sentence in a recent policy statement, Planning and Climate Change: Supplement to Planning Policy Statement 1) that renewable energy targets were immaterial to the determination of an individual planning application, and found the appeal proposal would make a valuable contribution to achieving regional

and national targets for renewable energy generation, bearing in mind extant and emerging national policies. He stated that an approach which sought to keep individual planning applications and regional targets entirely separate would be irrational not only in terms of the government's aims of securing substantially more renewable energy generation capacity but also of the whole basis of the plan-led system.

16. Carnwath LJ (again sitting as a Judge of the Administrative Court) noted:

> "39. … the Council had argued that targets set out in the RSS were not relevant to individual planning applications. This submission was based on a sentence in a recent policy statement, "Planning and Climate Change: Supplement to Planning Policy Statement 1". Under the heading "Managing performance", para.16 reads:
>
> > "Strategic targets, including any developed for cutting carbon dioxide emissions, and trajectories used to identify trends in performance form part of the framework for planning decisions provided by the RSS. They should be used as a strategic tool for shaping policies and contributing to the annual monitoring and reporting expected of regional planning bodies. They should not be applied directly to individual planning applications …."
>
> 40 The inspector was unimpressed by this argument. He said:
>
> > 88. My interpretation of para 16 of the PPS Supplement is that it proscribes assessing individual proposals directly by reference to regional targets, perhaps in the sense that a planning application should necessarily be refused because a particular target has been met, or allowed because there is a shortfall against a target. RSS policies, including Policy 41 of the extant RSS and Policy 39 of the draft Regional Plan, on renewable and low carbon energy respectively, are aimed at those preparing development plans rather than those assessing planning applications. However, it seems to me that regional targets, and the extent to which they have been or might be achieved, must be a relevant consideration when considering individual proposals simply because it is only through an accumulation of those individual proposals that any target will be achieved.
> >
> > 89. An approach which sought to keep individual planning applications and regional targets entirely separate would be irrational not only in terms of the Government's aim of securing substantially more renewable energy generation capacity but also of the whole basis of the plan-led system …."

17. The learned Judge upheld the Inspector's approach. He said "[i]t also appears to have been common ground that there is a shortfall of renewable energy sources judged by reference to regional targets, and also that the renewable energy output from this development had to be given significant weight in the planning judgment. The Inspector grappled with his submission based on para.16 [of the PPS Supplement], and understandably adopted what he regarded as a rational reconciliation of the apparent conflicts in the policy statements. I cannot see any legal objection to that approach".

(c) Other

CASE 5

18. ***R. (People & Planet) v HM Treasury*** [2009] EWHC 3020 (Admin) is an interesting case. This was an application for permission to bring judicial review proceedings in relation to the policy adopted by HM Treasury for handling its investment in Royal Bank of Scotland ("RBS"). The claimant argued that HM Treasury acted unlawfully in adopting the policy it has promulgated relating to how investment in RBS should be managed. The policy adopted called for a commercial approach. The claimant which is a body which presses for action to combat climate change and improved performance in relation to securing respect for human rights argued that there was a legitimate expectation engendered "that when the government exercises its powers, it does so with a view to preventing public money being spent on projects that have the most obviously detrimental impact on climate change" (see para. 7). This was in part said to arise from the Climate Change Act 2008 itself. Sales J. said "Section 1 of that Act creates a broad duty on the Secretary of State but does not support the legitimate expectation pleaded. For these reasons, in particular, I consider that this head of claim is hopeless" (see para. 11). The Judge also recorded that the Green Book which sets out HM Treasury guidance regarding decision-making in central government recognised "the importance of reducing the UK's dependence on fossil fuels and emissions of greenhouse gases, as reflected in the Climate Change Act 2008" and that this required "the banks in which the Government holds shares to take greater account of environmental issues in their lending policy than purely commercial considerations". The Judge recognised that (see para. 32) "[t]here will be many arguments for and against such an approach to regulation of banks as a means to promoting policies to combat climate change and protect human rights".

19. Permission to apply for judicial review was refused.

CASE 6

20. ***R. (Friends of the Earth) v Secretary of State for Business, Enterprise and Regulatory Reform*** [2009] EWCA Civ 810; [2010] P.T.S.R. 635. This case concerned s. 2(1) and (2) of the Warm Homes and Energy Conservation Act 2000 which imposes a duty on the Secretary of State to prepare and publish a strategy setting out policies for reducing fuel poverty in England "as far as reasonably practicable" and specifying target dates for achieving that objective. The claimants alleged the Secretary of State had failed to take steps to attain the targets. A key issue that arose was whether it was legitimate for the Secretary of State to have regard to government resources and budgetary constraints in considering what steps reasonably

practicable.

21. In the Court of Appeal Maurice Kay (with whom the rest of the Court agreed) said:

> "17 Until recently, one would not have expected legislation to impose upon central government a model which defines the route from policy, via strategy, to implementation in terms of legal obligation within a temporal framework. However, in so doing—and here the dispute is about the extent not the fact of legal obligation—the 2000 Act is not unique.
>
> 18 At the hearing, counsel were unable to tell us of any other statute which imposes this sort of obligation on a Secretary of State. However, the following examples have since come to my attention. Section 4 of the Climate Change and Sustainable Energy Act 2006 requires the Secretary of State to designate one or more national microgeneration targets and section 4(5) requires him to "take reasonable steps to secure that the target is met". Section 1 of the Climate Change Act 2008 imposes on the Secretary of State a duty "to ensure that the net UK carbon account for the year 2050 is at least 80% lower than the 1990 baseline". By section 2 he is empowered to amend this target in certain circumstances. Any decision he takes must take into account numerous matters, including, by section 10(2)(c) : "economic circumstances, and in particular the likely impact of the decision on the economy and the competitiveness of particular sections of the economy"".

CASE 7

22. The Court of Appeal's decision in ***Risk Management Partners Ltd v Council of the London Borough of Brent & Ors*** [2009] EWCA Civ 490; [2010] P.T.S.R. 349 concerned, inter alia, s. 2 of the Local Government Act 2000 which provides "[e]very local authority are to have power to do anything which they consider is likely to achieve any one or more of the following objects– (c) the promotion or improvement of the environmental well-being of their area". The Court of Appeal in passing twice noted (without any disapproval) the view expressed in guidance pursuant to s. 3(5) of the 2000 Act, issued by the Secretary of State that the powers could be used "to contribute locally to shared national priorities, such as action to combat climate change …".

CASE 8

23. It is worth mentioning in passing ***Grainger Plc v Nicholson*** (2010) 2 All ER 253. Tim Nicholson, was an ex-employee of Grainger Plc who argued successfully before the EAT that his strongly-held belief in the importance of combating climate change was capable of constituting a philosophical belief for the purposes of the Employment Equality (Religion or Belief) Regulations 2003. During his time with Grainger, Mr Nicholson was Head of Sustainability, a post in which he was to recommend means by which Grainger could become a more environmentally-friendly organisation. However, his case was that many of his suggestions went unheeded, and eventually he was made redundant by the company.

24. Finally, on the domestic cases a search of the Casetrack database tantalisingly references an application for judicial review entitled ***R (Anam) v Intergovernmental Panel on Climate Change***. No further details are available. The Intergovernmental Panel on Climate Change is the leading body for the assessment of climate change, established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) to provide the world with a clear scientific view on the current state of climate change and its potential environmental and socio-economic consequences. Whether the Panel is amenable to judicial review in this jurisdiction must be doubtful.

(ii) European

The cases here all concern the EU ETS - see *Litigation and the EU Emissions Trading Scheme*, James Maurici, Env. Law 2009, 50, 7-24.

CASE 9

25. Case T-16/04 ***Arcelor v Parliament and Council***.

26. Arcelor is a major steel producing company with installations for the production of pig iron and steel in France, Spain, Germany and Belgium. It has been fighting a lone war against the whole EU ETS and in particular Directive 2003/87/EC.

27. It began by seeking judicial review of a decision by the French authorities not to revoke the decree implementing Directive 2003/87 in France. In support of its application the applicant submits that the contested provisions infringe its fundamental rights to property and the pursuit of an economic activity, by requiring it to operate its plants under economic conditions that are unsustainable. The applicant also invoked a breach of the principle of equality, alleging that other sectors in direct competition with the applicant and with comparable or even higher emissions of greenhouse gases, such as producers of non-ferrous metals and chemicals, are not subject to the Directive.

28. The Conseil d'Etat dismissed the application in all respects save breach of the equality principle which it saw as a challenge to Directive 2003/87 itself rather than the constitutionality of the implementation. The Conseil d'Etat referred the issue of

equal treatment to the ECJ: Case C-127/07.

29. The ECJ in a judgment dated 16 December 2008 ([2008] E.C.R. I-9895) held that the principle of equal treatment did not affect the validity of the EU ETS in so far as it makes the EU ETS applicable to the steel sector without including the chemical and non-ferrous metal sectors in its scope.

30. The ECJ held that:
    a. the steel, chemical and non-ferrous metal sectors are therefore, for the purposes of examining the validity of Directive 2003/87 from the point of view of the principle of equal treatment, in a comparable position while being treated differently;
    b. the inclusion of an economic activity in the scope of Directive 2003/87 creates a disadvantage for the operators concerned in relation to those carrying on activities not so included;
    c. as regards objective justification:
        i. in the exercise of the powers conferred on it by the Community legislature has a broad discretion where its action involves political, economic and social choices and where it is called on to undertake complex assessments and evaluations (see Case C-344/04 ***IATA and ELFAA*** [2006] ECR I-403, paragraph 80);
        ii. where the legislature is called on to restructure or establish a complex system, it is entitled to have recourse to a step-by-step approach (see, to that effect, Case 37/83 ***Rewe-Zentrale*** [1984] ECR 1229, paragraph 20; Case C-63/89 ***Assurances du crédit v Council and Commission*** [1991] ECR I-1799, paragraph 11; and Case C-233/94 ***Germany v Parliament and Council*** [1997] ECR I-2405, paragraph 43) and to proceed in the light of the experience gained (reference was made to the review provided for by Art. 30 of Directive 2003/87, see e.g. para. 49 of the judgment);
        iii. The EU ETS "is a novel and complex scheme whose implementation and functioning could have been disturbed by the involvement of too great a number of participants, and, second, that the original definition of the scope of the directive was dictated by the objective of attaining the critical mass of participants necessary for the scheme to be set up";
        iv. As regards the exclusion of the chemicals sector:

> "64 As regards, first, the chemical sector, it may be seen from the history of Directive 2003/87 that that sector has an especially large number of installations, of the order of 34 000, not only in terms of the emissions they produce but also in relation to the number of installations currently included in the scope of the directive, which is of the order of 10 000.
>
> 65 The inclusion of that sector in the scope of Directive 2003/87 would therefore have made the management of the allowance trading scheme more difficult and increased the administrative burden, so that the possibility that the functioning of the scheme would have been disturbed at the time of its implementation as a result of that inclusion cannot be excluded. Moreover, the Community legislature was able to take the view that the advantages of excluding the whole sector at the start of the implementation of the allowance trading scheme outweighed the advantages of including it for attaining the objective of Directive 2003/87. It follows that the Community legislature has shown to the requisite legal standard that it made use of objective criteria to exclude the entire chemical sector from the scope of Directive 2003/87 in the first stage of implementation of the allowance trading scheme.
>
> 66 The argument of the applicants in the main proceedings that the inclusion in the scope of Directive 2003/87 of undertakings in that sector emitting a quantity of CO2 above a certain threshold would not have caused administrative problems cannot call into question the above assessment".

        v. As regards the non-ferrous metals sector:

> "70. As regards, second, the non-ferrous metal sector, it appears from the scientific report mentioned in paragraph 52 above, which, according to the observations of the Parliament, the Council and the Commission, the Community legislature made use of in drafting and adopting Directive 2003/87, that direct emissions from that sector amounted to 16.2 million tonnes of CO2 in 1990, while the steel sector emitted 174.8 million tonnes of CO2.
>
> 71 In view of its intention of defining the scope of Directive 2003/87 in such a way as not to upset the administrative feasibility of the allowance trading scheme in its initial stage by involving too many participants, the Community legislature was not required to have recourse solely to the method of introducing, for each sector of the economy that emitted CO2, a threshold for emissions in order to attain its objective. Thus, in circumstances such as those in which Directive 2003/87 was adopted, it could when introducing the scheme legitimately delimit its scope by means of a sectoral approach without exceeding the bounds of its discretion.
>
> 72 The difference in the levels of direct emissions between the two sectors concerned is so substantial that the different treatment of those sectors may, in the first stage of implementation of the allowance trading scheme and in view of the step-by-step approach on which Directive 2003/87 is based, be

regarded as justified without there having been any need for the Community legislature to take into consideration the indirect emissions attributable to the various sectors".

vi. Accordingly there was no breach of the principle of equal treatment.

31. The ECJ it appears considered the issues raised to be more difficult than did Advocate-General Maduro (opinion delivered on 21 May 2008).

32. The Advocate-General referred to the fact (see para. 24 ff) that Arcelor sought to extend the scope of the reference to include the other arguments it had lost on before the Conseil d'Etat. The Advocate-General considered this impermissible even having regard to the fact that Arcelor had a pending CFI action challenging the validity of Directive 2003/87 on that basis.

33. The CFI gave judgment in that matter on 2 March 2010. The proceedings before the CFI sought a declaration that Articles 4, 6(2)(e), 9, 12(3) and 16(2), (3) and (4) of Directive 2003/87/EC were void to the extent that they applied to installations for the production of steel and pig iron. It also sought damages from the Community institutions as a result of the losses Arcelor were said to have suffered.

34. The CFI ruled the challenge to the legality of Directive 2003/87/EC as inadmissible on the basis that Arcelor was not individually or directly concerned by Directive 2003/87/EC within the narrow meaning given to that phrase by the European jurisprudence. The CFI so ruled despite finding that Arcelor was: (i) affected by the Directive in that its activities were caught by it; (ii) one of the largest pig iron and steel producers in Europe with a production of 40 m tonnes of steel; and (iii) particularly affected by the Directive because of an ongoing restructuring process in which it was involved. This is a nonsensical result, but one that is in accord with the case-law.

35. The CFI ruled that the damages action was admissible. In order for the damages claim to succeed Arcelor had to show a sufficiently serious breach of a rule of law intended to confer rights on individuals. The CFI rejected the submission that there was a sufficiently serious breach of:

a. The right to property, or the freedom to pursue economic activity. The CFI held:

"154 More specifically, in relation to the alleged infringement of the right to property, it should be noted that, apart from the very general claim that the contested provisions give rise to a situation in which the applicant is no longer able to exploit, in a profitable manner, its steel-production installations established within the internal market, the applicant has not made it clear to what extent its right to property in relation to certain tangible or intangible assets involved in its production process is actually affected or rendered meaningless as a result of the application or transposition into national law of those provisions. The applicant has also failed to indicate which production installations would be particularly affected by the contested provisions and why exactly those installations would be affected in the light of the individual situation of each of those installations in the territory within which they are established and in the light of the relevant NAP. In that regard, the applicant has merely stated, in vague terms, that it would not be able to close certain inefficient and non-profitable installations so as not to lose the emission allowances allocated to them, but it has failed to explain to what extent that lack of efficiency or profitability and the resulting economic difficulties are specifically attributable to the application of the contested provisions as such. According to its own assertions, those economic difficulties already existed well before the 2001 merger (see paragraph 30 above) and was one of the economic reasons behind that merger.

155 In addition, as regards the alleged violation of the right to property and the freedom to pursue an economic activity, taken together, the applicant has failed in both its written pleadings and at the hearing to explain in a plausible and substantiated manner how and to what extent, by reason of the implementation of the contested directive, it was likely to become a 'net purchaser of emissions allowances' unable to pass on its costs to its customers. The applicant did not claim that, during the first allocation period, which ended in 2007, it was obliged to purchase additional emissions allowances because of a possible allowance shortage in one of its production installations established in the internal market. On the contrary, at the hearing, in response to a question put by the Court, the applicant acknowledged that, in 2006, it had sold surplus allowances on the exchange market and made a profit of EUR 101 million, which was noted in the minutes of the hearing. Therefore, it cannot reasonably be claimed that, taken together, the contested provisions necessarily give rise to negative financial consequences which adversely affect the applicant's right to property and its freedom to pursue an economic activity.

156 In addition, it should be noted that the applicant has not claimed, within the context of its application for damages, that some of its production installations within the internal market had suffered losses due to the application of the contested provisions and it failed to produce precise figures in relation to the changes in the profitability of those installations since the allowance trading scheme became operational. The applicant also failed to provide information, first, on the way in which each of those installations had adapted to the different objectives of reducing emissions in the Member States concerned, some of which, such as the Kingdom of Spain, even have the possibility of increasing emissions in accordance with Decision 2002/358 and the burden-sharing agreement, and, second, on the question whether the emissions allowance quota to which it was entitled for those installations on

the basis of the various NAPs was sufficient or not. Finally, even assuming that the various NAPs and the national reduction objectives are liable to infringe the applicant's rights, the latter has neither claimed nor shown that that infringement was attributable to the contested provisions as such and not to the national legislation which the Member States adopted in the exercise of their discretion with regard to the implementation of the contested directive under the third paragraph of Article 249 EC.

157 As regards the applicant's argument that steel producers are unable, for technical and economic reasons, to reduce their CO2 emissions any further, it is sufficient to state that criterion 3 of Annex III to the contested directive requires the Member States, when determining the quantities of allowances to be allocated, to take account of the potential, including the technological potential, of activities covered by the allowance trading scheme to reduce emissions (see, to that effect, the Opinion of Advocate General Poiares Maduro in ***Arcelor Atlantique et Lorraine and Others***, cited in paragraph 42 above, at point 57). It follows that, when allocating allowances to the various industrial sectors and to operators of installations within those sectors, the Member States have to take account of the reduction potential of all those sectors and operators, including that of the steel sector and of pig iron and steel producers. In addition, under criterion 7 of Annex III to the contested directive '[t]he [NAP] may accommodate early action [to reduce emissions]', with the result that the Member States have at least the possibility of taking account of efforts to reduce emissions which have already been made within the sector and by the operators at issue. Consequently, the possible failure on the part of the Member State to take sufficient account of that reduction capacity in its legislation transposing the contested directive cannot be attributed to the contested provisions.

158 In those circumstances, it appears that the contested provisions cannot infringe the applicant's right to property and its freedom to pursue a professional activity, or even that that alleged infringement is capable of causing it damage. It must therefore be concluded that the applicant has established neither a sufficiently serious breach or disproportionate restriction of those rights by the contested provisions nor that that alleged infringement may be the cause of the damage which it claims to have suffered.

159 In addition, in so far as the applicant alleges an infringement of the principle of proportionality as an independent plea of illegality, it is already apparent from the findings in paragraphs 154 to 158 above that it has failed to demonstrate the existence of the heavy and disproportionate burden which it claims to have incurred. Similarly, without its being necessary to examine the soundness of the claims concerning the various dysfunctions of the allowance trading scheme (see paragraphs 149 and 150 above), the applicant's main argument that the participation of steel producers, as the largest proven industrial emitters of CO2, is unfit or inappropriate to contribute to the main objective of the contested directive, which is to protect the environment by reducing greenhouse gas emissions, must be rejected as being manifestly unfounded. Finally, in any event, the applicant has not established that the allowance trading scheme as such was manifestly inappropriate to achieve the goal of reducing CO2 emissions and that the Community legislature thus manifestly and gravely disregarded the limits on its broad discretion."

b. The principle of equal treatment (relying on the findings of the ECJ in the earlier reference);
c. Freedom of establishment:
    i. Arcelor argued that Directive 2003/87/EC "affect[ed] its right to transfer production from a less efficient installation in one Member State to a more efficient installation in another Member State by not guaranteeing a corresponding transfer of the allowances allocated to the production capacity which is to be closed and transferred ... This forces the applicant, without objective justification, to continue to operate less efficient plants solely in order not to lose the corresponding allowances. That restriction on its freedom of establishment is disproportionate, bearing in mind the inappropriateness of the contested directive for the purpose of achieving the objective of environmental protection that is pursued (see paragraph 149 above), and the vital importance of exercising the freedom of establishment for the completion of the internal market" (para. 174);
    ii. The CFI considered that the restrictions arose not from the Directive but from national rules made thereunder:

> "187 ... it follows from Article 12(1), read in conjunction with Article 3(a) and (g), of the contested directive that 'Member States shall ensure that allowances can be transferred between … [natural and legal] persons within the Community'. In addition, Article 12(2) of the contested directive requires that 'Member States … ensure that allowances issued by a competent authority of another Member State are recognised for the purpose of meeting an operator's obligations [to surrender unused allowances] under paragraph 3' of that article. It follows, first, in accordance with the objective set out in recital 5 in the preamble to the contested directive, which provides for the creation of an 'efficient European market in greenhouse gas emission allowances', that the exchange market established by the contested directive has a Community dimension and, second, that that market is founded on the principle of the free cross-border transfer of emission allowances between natural and legal persons.
>
> 188 In the absence of the free cross-border transfer of emission allowances within the meaning of Article 12(2) and (3) of the contested directive, read in conjunction with Article 3(a) thereof, the efficiency and performance of the allowance trading scheme for the purposes of Article 1 of the contested directive would be seriously disrupted. It is for that reason that Article 12(2) of the contested directive imposes on the Member States the general obligation to 'ensure' that that freedom is made

effective in the relevant national legislation. Conversely, it should be noted that the contested directive does not provide for any restriction on cross-border transfers of allowances between legal persons within the same group of companies, irrespective of where their registered office and/or principal place of business are located within the internal market. In the light of the aforecited provisions of the contested directive, it cannot therefore be concluded that that directive contains an unlawful restriction on the fundamental freedoms of the EC Treaty, including the freedom of establishment, or that it encourages the Member States not to respect those freedoms.

189 On the contrary, as the applicant itself states in its written pleadings, the problem which it raises originates in the partially divergent legislation adopted by the Member States when transposing the contested directive, without being able to target its claim at one specific provision thereof or at the contested provisions. In that regard, it should be noted that the Member States are required, within the bounds of the freedom left to them by the third paragraph of Article 249 EC, to choose the most appropriate forms and methods to ensure the effectiveness of directives (***Yonemoto***, cited in paragraph 180 above, paragraph 58) and to apply their national law in conformity with those directives and the fundamental freedoms of the EC Treaty, such as the freedom of establishment (see, to that effect and by analogy, ***Lindqvist***, cited in paragraph 181 above, paragraph 87, and ***Promusicae,*** cited in paragraph 179 above, paragraph 68).

190 Therefore, without there being any need to rule on the question as to whether or not the relevant national laws, which are at the origin of the fact that the applicant cannot freely transfer its allowance quotas between its installations established in different Member States, are consistent with the freedom of establishment under Article 43 EC, it must be concluded that such a restriction on that freedom cannot be attributed to the contested directive on the sole ground that the latter does not explicitly prohibit such practice on the part of the Member States. A fortiori, the Community legislature cannot be held responsible for having failed in that respect, in a manifest and grave manner, to have regard to the limits of its discretion under Article 174 EC in conjunction with Article 43 EC.

191 Accordingly, there is no need to examine the validity of the arguments raised by the parties concerning the possibility for the applicant to benefit from the national rules providing all new entrants with free access to the allowances in the reserve. Although Article 11(3) of the contested directive, in conjunction with criterion 6 of Annex III thereto, requires that the Member States take account of the need to make access to allowances available to new entrants, the contested directive does not provide, as such, for the establishment of such a reserve. Thus, the possible inadequacy of that access to offset the loss of allowances as a result of the closure of an installation also cannot be attributed to the Community legislature."

d. Legal certainty:
   i. Arcelor argued Directive 2003/87/EC violated the principle of legal certainty "for two reasons. First, in the absence of any cap or control mechanism concerning the price of the allowances provided for by the contested directive, the applicant, as a 'net buyer of allowances' by reason of its inability to reduce its CO2 emissions, will be required to purchase allowances at 'prices which are completely unpredictable', estimated at between EUR 20 and EUR 60 per allowance (see paragraph 80 et seq. above). Second, the contested directive provides no rule which guarantees the transfer of allowances initially allocated to an installation earmarked for closure to an installation of the same group established in another Member State. Member States, however, have a strong interest in cancelling allowances for installations to be closed, given that such closures allow them to reduce further their CO2 emissions in order to meet their respective reduction targets under Decision 2002/358. The resulting legal uncertainty makes it impossible for the applicant to draw up any long-term business plans and to move forward with its restructuring strategy, consisting of transferring production to its most profitable installations" (see para. 194);
   ii. The CFI rejected this noting that:

"199 Next, it should be pointed out in that regard that the contested directive does not contain any provisions governing the extent of the financial consequences which may result from both a possible insufficiency of allowances allocated to an installation and the price of those allowances, since that price is determined exclusively by the market forces which came into being following the establishment of the allowance trading scheme, which, pursuant to Article 1 of the contested directive, seeks to 'promote reductions of greenhouse gas emissions in a cost-effective and economically efficient manner'. In the light of the findings in paragraphs 178 to 184 above, the Community legislature was not required to adopt specific provisions in that regard and thereby to restrict the scope of the Member States in relation to the transposition of the contested directive.

200 On the contrary, regulation at Community level of the prices of allowances might thwart the main objective of the contested directive, which is to reduce greenhouse gas emissions through an efficient allowance trading scheme in which the cost of emissions and investments made to reduce such emissions is essentially determined by market forces (recital 5 in the preamble to the contested directive). Consequently, in the event of an insufficiency of allowances, the incentive for operators to reduce, or not to reduce, their greenhouse gas emissions will depend on a complex economic decision taken in

> the light, first, of the price of emission allowances available on the exchange market and, second, of the costs of possible measures to reduce emissions which may aim either to reduce production or to invest in more efficient methods of production in terms of energy output (recital 20 in the preamble to the contested directive; see also, to that effect, ***Germany v Commission***, cited in paragraph 114 above, paragraph 132 et seq.)
>
> ...
>
> 204 Accordingly, the lack of a specific rule in the contested directive establishing a cap or control mechanism for allowance prices cannot be categorised as constituting a manifest and grave disregard for the limits of the discretion of the Community legislature."

36. This would appear to be the end of the road for Arcelor's brave battle to bring down the EU ETS!

CASE 10

37. T-183/07 ***Poland v Commission*** and T-263/07 ***Estonia v Commission***.

38. The EU ETS works on a "Cap and Trade" basis. In Phases I and II for the current scheme, an overall "cap" is set by each EU Member State on the total number of allowances issued to installations within its jurisdiction which are within the EU ETS. The allowances are allocated to the installations in accordance with a National Allocation Plan ("NAP") which must be published and notified to the Commission, which has the power to reject a NAP

39. Following Commission decisions rejecting their Phase II NAPs Article 230 challenges have been brought before the CFI against the Commission by:
    a. Poland (T-183/07);
    b. Estonia (T/263/07);
    c. Hungary (T/221/07)
    d. Latvia (T/369/07);
    e. Lithuania (T/368/07);
    f. Romania (T/484/07);
    g. Bulgaria (T/499/07).

40. A challenge brought by Slovakia (T/32/07) was withdrawn.

41. In these cases the common complaints (put in a number of ways) are that:
    a. the Commission in its decisions on the Phase II NAPs in issue acted ultra vires in determining an "upper limit" or total quantity of emission allowances which consistent with Annex III of Directive 2003/87 the Member States concerned can allocate in their NAPs;
    b. the Commission in its decisions acted unlawfully in using its own calculations, data and methodology to assess the NAPs. The bulk of the complaints focus on the use by the Commission of PRIMES data.

42. The challenges also have some other common features including:
    a. reliance on the fact that the Member States concerned are not bound by Decision 2002/358/EC but rather have their own separate Kyoto targets for Phase II which they are meeting;
    b. a failure to take into account the particular position of the East European Accession States whose economies have recently undergone the "process of transition to a market economy" (see Annex B of the Kyoto Protocol) and some of whom have energy security issues linked to dependency on Russia for the supply of gas;
    c. a failure to consult Member States on the use by the Commission of the PRIMES model;
    d. a failure by the Commission in its decisions on the NAPs to give adequate reasons.

43. A number of the challenges also allege that the time limit imposed on the Commission under Art. 9(3) of Directive 2003/87 expired before the decisions were issued with the result that the NAPs submitted must stand as approved. These arguments rely heavily on the CFI's decision in ***UK v Commission*** (see above) at para. 55.

44. The UK intervened in all of these cases to support the Commission. In the CFI's judgment in the ***Estonia*** case it was recorded at para. 42 that the UK "argues that, if the Commission were to be unsuccessful in one of the cases concerning national allocation plans, the price of allowances during the second period would risk falling significantly due to the resulting oversupply of allowances, thereby completely undermining the effects of the Directive as a tool to reduce emissions. In other

words, the consequences would be dire. The United Kingdom of Great Britain and Northern Ireland urges the Court to adopt a teleological interpretation of the Directive so as to allow the Commission to review national allocation plans in an effective manner and thus prevent Member States from fixing ceilings which are not capable of entailing an increase in the price of carbon or, therefore, of encouraging reductions in emissions".

45. Judgment in the ***Estonia*** and ***Poland*** cases were handed down on 23 September 2009. The Commission lost both cases with the result that its decisions to reject the NAPS were annulled. The effect of the judgments is to severely limit the role of the Commission in reviewing and rejecting NAPs.

46. On the day of the judgements the carbon market price fell by 4% and media coverage round the time reported on the bearish impacts on the carbon market (See, ENDS Europe, 23 September 2009). The market only recovered following reassurances from the Commission which included references to appeals being made. Appeals were duly made against both judgments on 4 December 2009: Cases C-505/09 P and C-504/09 P. Then in March 2010 Poland announced it would accept a cap on allowances at the level proposed by the Commission. At present it is unclear where this leaves the appeal proceedings.

James Maurici *appeared for the UK in the* ***Poland*** *and* ***Estonia*** *cases and as junior counsel for the Secretary of State in the* ***Hillingdon*** and ***Barbone*** *cases.*

R (Brown) v Carlisle City Council [2010] EWCA Civ 523
ENVIRONMENTAL IMPACT ASSESSMENT AND SECTION 106 AGREEMENTS

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A recent decision of the Court of Appeal ("Brown") has decided that works required by a s106 agreement were part of the 'cumulative effects' of the development and therefore should have been subject to Environmental Impact Assessment ("EIA"). This means that the effect of works required by s106 agreements should now be assessed as part of the effects of the development for which permission is granted.

Background

The case concerned proposals to construct a new freight storage and distribution centre at Carlisle Airport. However, a key part of the justification for the development was that this would act as 'enabling development', allowing the operator to upgrade the runway and passenger facilities at the airport. These works were secured by a s106 agreement.

Interestingly, the council's committee had taken the view that this meant that the proposal as a whole was in compliance with the development plan, although the freight centre alone would not have been.

It was accepted by all parties that the Town and Country Planning (Environmental Impact Assessment)(England and Wales) Regulations 1999 ("the EIA Regulations") applied. However, the Environmental Statement ("ES") accompanying the application for planning permission only dealt with the likely significant impacts of the freight distribution centre itself.

Challenge

Planning permission was granted and this was challenged on the basis that the EIA Regulations required the ES to describe the "likely significant effects of the development on the environment, which should cover the direct effects and any… cumulative… effects" (Sch 4, Part I, para 4). This information must be included in the ES if it is 'reasonably required' to assess the environmental effects of the development (EIA Regulations, r2(1)(a)).

There was an alternative ground of challenge, that the works required by the s106 agreement were part of the 'project' which had to be assessed; this was not determined by the court so remains to be decided in another case (*Brown* [31]).

Sullivan LJ, giving the judgment of the Court of Appeal, found in favour of the claimant. Rejecting arguments advanced by the defendant council and the developer he held that:

1) There was no need to have a 'functional link' between two developments for one to be part of the cumulative effects of the other. It would be a question of fact in every case (*Brown* [21]).
2) The claimant's case was supported in the instant case because the council had relied on the works in the s106 agreement to say that the development was in compliance with the development plan (*Brown* [24]). There is no suggestion that this was required for the works to be regarded as part of the 'cumulative effects' of the development.
3) The lack of full detail about the works in the s106 agreement did not mean that it was not reasonable (within the terms of the EIA Regulations) to require an assessment of their environmental effect. The contrary argument failed on the facts of the case (the council had assessed various benefits of the works). The court also suggested that the minimum of works required by the s106 agreement could have formed the basis of the assessment if there had been any doubt (*Brown* [29]-[30]).

The court therefore held that there had been a breach of the EIA Regulations.

Discretion

Arguments of discretion were also relied upon to defeat the claim, on the twin bases that (1) the works in the s106 agreement would themselves be subject to a requirement for EIA and (2) there had been an EIA in respect of an earlier planning application for more extensive works than those required in the s106 agreement, which had not identified any substantial adverse effects. Therefore it was said that quashing the permission would serve no purpose.

The Court rejected both these arguments and reaffirmed the strict approach to discretion set out by Lord Hoffmann in *Berkeley v Secretary of State for the Environment* [2001] 2 AC 603: "It is exceptional even in domestic law for a court to exercise its discretion not to quash a decision which has been found to be ultra vires".

Point (2) was dismissed on the basis that the two applications were significantly different and, even if they had not been, that the environmental information to be considered included not just the ES but also consultation responses. This had clearly not been taken into account.

Point (1) was also rejected on the basis that "the object of both the Directive and the [EIA] Regulations is to ensure than any cumulative environmental effects are considered before any decision is taken as to whether permission should be granted" (*Brown* [40]). Therefore it would only be in 'exceptional circumstances' (which had not been shown in this case) that a promise of assessment tomorrow would prevent quashing today.

Undertaking

The developer also offered the court, as an alternative to quashing the decision, an undertaking not to proceed with the works for which planning permission had been granted, until after an EIA was carried out for the airport works.

The court declined to accept the undertaking, on the basis that a planning permission was a public document/instrument, in which the public had an interest, and also because agricultural tenants on the land (including Mr Brown) were affected by the existence of the planning permission, in relation to (in particular) possession proceedings brought against them by the Council (the development was going to take place on the land they farmed). A "very good reason" would have to be shown for not quashing an unlawful permission on the basis of an undertaking, and none had been shown in this case.

It is significant that this approach has been rejected; hopefully this will discourage reliance upon it in future.

Conclusion

This decision means that it is now likely that the environmental effect of any works required by a s106 agreement made in respect of EIA development will need to be included in the EIA process as 'cumulative effects'.

As discussed above, this case was on particularly strong facts as the council had relied on the works in the s106 agreement to hold that the proposal was actually in accordance with the development plan. There was therefore a strong link between them and the main development proposal. However, there is no reason why the same logic should not apply wherever works in a s106 agreement

are relied on as a material consideration. It is arguable that even that qualification is not required and that, as a matter of fact, works required by a s106 agreement will, without more, form part of the cumulative effects of a development.

The case also provides a warning to councils or developers who seek to rely either on previous or on future EIAs. The Court has re-emphasised the importance of (a) taking into account all relevant environmental information (including consultation responses) for each successive application and (b) conducting the EIA early enough in the decision making process for it to make a difference.

There is the possibility of an appeal to the Supreme Court. Unless and until this decision is overturned, however, developers and authorities would be well advised to include the effects of works required by s106 agreements in their EIAs.

COMPARATIVE ANALYSIS OF THE CLIMATE CHANGE AND ENVIRONMENTAL POLICIES IN BRAZIL- CHALLENGES RISKS AND OPPORTUNITIES FOR THE AMAZON REGION.

Authors :Gisele Ferreira de Araújo, PhD ,Professor of Comparative Law Researcher of International Environmental Law University of São Paulo (USP) ;**Alexandre Betinardi Strapasson** Head of the Sugarcane and AgriEnergy Department Brazilian Ministry of Agriculture, Livestock and Food Supply (MAPA) and **Lucas Bulgarelli Ferreira** Research Assistant University of São Paulo (USP)

Space prevents publication of the full paper. At the end of this introduction to this fascinating paper you will find a link to it on the UKELA website.

The study addresses the situation (as at November 2009) for Payment for Environmental Services seen from the view of Sustainable Development and Land Use Change in Brazil. It covers the key environmental public policies, instruments of environmental management, legal frameworks, and new regulatory frameworks applicable to the states in the arch of deforestation. It also highlights the lessons learned in programs that have been perfected in Brazil's most developed states. The predominance of national and state programs and the situation of decentralization in relation to the municipalities shows that the Brazilian scenario is still under construction and that there is a long way to go, especially when focusing on the states in the arch of deforestation which, on the one hand, present pioneering initiatives, and on the other, are out of pace regarding socio-environmental public policies, creation of legislation and mechanisms of coercion, showing the need for synergetic and integrated management in order to face the challenges set forth by climate change and deforestation.

The growing concern with global warming and the sense of urgency from climate change has placed scientific research and international debates on the topic of deforestation and of new approaches to environmental management on the agenda. Costa Rica was one of the first countries to implement Payment for Environmental Services schemes aimed at forestry conservation and in Brazil the first steps taken in this direction were the Proambiente (Pro-environment) programs and Bolsa Floresta (Forest Stewardship Program) program in the state of Amazonas.

Brazil's environmental policy has been generally supported on command and control instruments and despite strict environmental laws, deforestation, influenced by the hike in the prices for commodities on the international market and by the growing demand for products from agriculture and livestock, has reached extremely high levels, in a trend that will be difficult to reverse using the public policy instruments that are currently available.

Considering the size of the forest areas, the difficulty in accessing many Amazonian regions, and the fact that many farmers are unable to comply with the law without directly compromising their well-being, it is insufficient and unviable to maintain an environmental policy based solely on control and oversight due to the high costs of the implementations demanded.

The issue must be considered according to the ecological, economic, social, legal and political view, with the legal dimension being strengthened and gaining more clear and specific boundaries.

In this context, the PES proposal has two very important innovations regarding conservation policy and sustainable use of the

Amazon rainforest, specifically the great potential for self-regulation, taken into account the difficulty faced by agents in Brazil to monitor the forest, and the ability to create and increase the income of environmental service providers, considering the costs of opportunity.

We can find statements in legal codes and in state and federal legislation. We must analyze the existing legal and political infrastructure as well as what the new instruments are that will give us a new legal and political framework that will be able to strengthen the mechanisms to protect environmental services and natural resources. We must protect what we have and we must not just regret the things we no longer have.

This paper will clarify the PES concept for conservation stakeholders, insofar as its potential is concerned and will lead to a better understanding of the most important promise of innovation concerning conservation since Rio 1992.

The aim of this paper is to review the existing legal framework and public policies of the main Brazilian states in the region located in the so-called “arch of deforestation” using a comparative view. In other words, it is relevant to analyze the institutions, existing policies and the legal framework of the states of Amazonas, Pará, Rondônia and Mato Grosso. The aim is also to compare the existing legal framework, concentrating on state and federal law and drawing a comparison between them.
In relation to environmental services, carbon sequestration, forests, biodiversity and protection of water resources will be examined.

A relevant approach identifies the legal and institutional conditions to develop payment for environmental services schemes and natural resource protection schemes in Brazil.

The paper addresses the following specific questions and concerns regarding Payment for Environmental Services in the specific states of Amazonas, Roraima, Pará, and Mato Grosso:

What is the interaction between federal and state law and what are the pros and cons for new regulatory frameworks?

What is the Forest Code and what are the current transitions and flexibilities and positive and negative impacts?

Another relevant aspect to be considered is what the approach would be for the future and what new methodologies can be developed and effectively applied. What are the boundaries of the current and future policies to support conservation and maintenance of environmental services in the Legal Amazon? What legal and political infrastructures are available for preserving environmental services, natural resources and national capital in the long term.

Based on this, the paper outlines perspectives for applying PES in the Amazon region, as a complementary measure to current environmental policy, identifies the essential elements for designing a present and future application.

A copy of the full study can be found on the UKELA website.

DECISION-MAKERS' PERSPECTIVES ON THE USE OF BIOACCESSIBILITY FOR RISK-BASED REGULATION OF CONTAMINATED LAND

Agnieszka Latawiec- Research Associate, University of East Anglia in Norwich.

Within my PhD I conducted a survey, over 2008 and 2009, regarding decision-makers' perspectives on the use of bioaccessibility. This work resulted in a manuscript entitled recently published in the scientific journal 'Environment International' (Volume 36, Issue 4, May 2010, Pages 383-389).

Information on contaminant bioaccessibility has been recognized by researchers, legislators and regulators as a decision-support tool for contaminated land assessment and has been subject to interest and discussion at both national and international levels. A sustainable, proportionate and risk-based approach to contaminated land management has been adopted by contaminated land regimes throughout the world. While this approach guides national and international priorities, its practical implementation in many countries, including the United Kingdom, is reliant upon local authorities. This manuscript presents results from an investigation into the views of local authorities in England and Wales regarding the practical application of bioaccessibility and constraints associated with its implementation. A majority of survey respondents (70%) perceived bioaccessibility to be a useful tool that facilitates contaminated land management. However, 76% of participants indicated a need for more information regarding bioaccessibility as well as emphasising a need for more research into polycyclic aromatic hydrocarbons. Lack of statutory guidance was indicated by 78% of respondents as the main factor hampering the use of bioaccessibility data in regulatory decision-making. Divergence of policy-maker and local regulator perceptions of bioaccessibility was also indicated by the respondents.

The study suggests that unless a greater commitment is made with respect to developing a standardised approach to the use of bioaccessibility and securing it within a framework from an authoritative source, local regulators will continue to be cautious or ambivalent about its use, and its potential contribution to contaminated land management may not be realised.

This research brings the voice of front-line regulators for contaminated land into the on-going discussion between policy-makers and scientists on the uses of bioaccessibility. It goes beyond the identification of local authorities' opinions on bioaccessibility and considers the influence of contextual factors, such as institutional or political pressures on Officers' views and on their decision-making. Recognition of the 'real-world' priorities that inform local decision-makers' perspectives can help to better understand the day-to-day concerns associated with contaminated land decision-making and their consequences for technical choices in the assessment process.

The results of this research also have relevance beyond the UK context in that the findings draw attention to the way that understanding regulator practices helps to identify differences in the perspectives of practitioners, policy-makers and academic researchers on the integration of emerging scientific research into risk-based decision-making. Drawing on the insights offered by the study, it concludes by proposing action priorities both for the research community and for policy-makers, which can be transferable to risk-based regimes elsewhere.

The manuscript, along with associated supporting material, is available online http://www.sciencedirect.com/science?_ob=ArticleURL&_udi=B6V7X-4YR49XV 2&_user=10&_coverDate=05%2F31%2F2010&_rdoc=1&_fmt=high&_orig=search&_sort=d&_docanchor=&view=c&_acct=C000050221&_version=1&_urlVersion=0&_userid=10&md5=3b37bc9851b17b7aaf6a2565cf3558e8.

60 second interview

Paul Collins is a solicitor in the Water and Sustainable Development Team at the Department for Environment, Food and Rural Affairs (DEFRA). Before joining DEFRA, he worked for the Environment Agency and in private practice, advising on a wide range of environmental issues. Paul is a keen cyclist and plays the guitar (or at least attempts to!)

What is your current role?

Environmental lawyer at the Department for Environment, Food and Rural Affairs (DEFRA)

How did you get into environmental law?

I joined the Environment Agency as a chemistry graduate. My first job was with the Agency's Local Government Liaison department, where one of my roles was to advise businesses on obtaining environmental permits. During this time, I found the range and complexity of environmental legislation and its intended application to be of great interest and challenge.

What are the main challenges in your work?

Drafting clear legislation and explaining to my clients why simpler language does not always result in clarity!

What environmental issue keeps you awake at night?

I sleep well but I feel we are still doing far too little to protect our rainforests.

What's the biggest single thing that would make a difference to environmental protection and well-being?

More safe cycle routes in towns and cities. Fewer cars, healthier people and more smiles.

What's your UKELA working party of choice and why?

The Water Working Party – a great group of people from a diverse range of professional backgrounds and interests. I need to attend more often though!

What's the biggest benefit to you of UKELA membership?

There are several benefits to joining UKELA but for me the biggest benefit is having the opportunity to listen to and engage with a large number of diverse and enthusiastic members who share a common interest in environmental law.

Students

SIMON BALL PRIZE FOR OUTSTANDING ACHIEVEMENT

Colin T. Reid and Elizabeth Hattan (judges of the prize)

This year four strong nominations were made for the Simon Ball Prize for Outstanding Achievement, which is sponsored by OUP. Two students were nominated on the basis of substantial written work completed as part of their studies of Environmental Law, one for involvement in extra-curricular activities connected with pro bono work at home and abroad and a final group of students who had organised a simulation of the negotiations at the Copenhagen climate conference. Although it made our task as judges harder, it was encouraging to see nominations being made that reflected not just high academic achievement but activities that go beyond the classroom and library to stimulate wider engagement with the subject, within and beyond the university

context.

In the end the award was made to Elizabeth Muir from the University of Strathclyde on the basis of her LLB (Hons) dissertation: 'Properly conceived environmental regulation: the drive towards the low-carbon economy'. This challenged some of the orthodox thinking on emissions trading, examining this in the wider context of regulation and competition law, and pointed to weaknesses that suggest that alternative approaches are more likely to be successful in encouraging innovation and achieving long-term reductions in emissions. For writing a dissertation that demonstrated an understanding across a range of fields, a willingness to tackle big issues and to challenge widely accepted ideas and the ability to write in an engaging style, she deserved to edge ahead of a strong field.

Facebook

UKELA's Facebook page isn't just for students. You can use it to network and share information.

UKELA's student adviser, Claire Collis, is organising an online live chat session with some members of Council. She'll be in touch with the details so you can join in.

Visit UKELA's page.

Bursary Winners

Both UKELA's 2010 bursary winners attended the UKELA conference. Kirsty Schneeberger (pictured right) is being funded to work with THINK2050 and Nicola Peart will be doing an internship with the Law of Nature Foundation in the Philippines.

Student careers' evening

Don't forget to diary our student careers and networking evening on Tuesday November 23rd. This is kindly being hosted by Landmark Chambers in London. Depending on the number of bookings we may need to schedule 2 sessions due to the popularity of the event.

What Environmental Challenges face the Coalition Government?

A UKELA early evening seminar at Freshfields Bruckhaus Deringer in London.

Thursday September 16th 2010

What does the Coalition Government have planned for the environment? What are the challenges ahead? What will the impact of budget cuts and the emphasis upon localism be on environmental policy? For environmental practitioners and those interested in what the government is planning on key issues like the low carbon economy, planning and energy, our post election seminar on September 16th 2010 is not to be missed.

Chaired by Nicholas Schoon, editor of the leading environmental journal, ENDS, speakers who will address the key questions for the new government are:

- Tom Burke, environmental adviser to Rio Tinto plc and visiting professor at Imperial and University Colleges, London. With experience as special adviser to three secretaries of state Tom has a unique insight to the workings of Parliament and business. Tom is also a patron of UKELA.
- Caroline Lucas MP, the first Green Party MP and leader of the Green Party in England and Wales. After three

terms of office as a MEP Caroline can help unravel the relationship between what might be happening in Europe for the environment, and the new government's plans.

- Lord Colin Boyd QC. Lord Boyd is a former Lord Advocate of Scotland and a Labour member of the House of Lords. He is head of the UK Consenting Group in Dundas & Wilson which handles the consenting process for major infrastructure projects. He has taken a keen interest in planning and environmental issues in the Lords and is an honorary professor of law at Glasgow University.

Nicholas Schoon was environment correspondent of the Independent newspaper from before joining the Secretariat of the Royal Commission on Environmental Pollution, where he worked as a policy analyst. His most recent post before joining ENDS was as communications director for the Campaign to Protect Rural England, a long-established green NGO. He has had two books published, one on biodiversity (Going, Going, Gone: the Story of Britain's Vanishing Natural History, Bookman, 1998) and one on UK Cities and urban regeneration (The Chosen City, Spon Press, 2001).

Registration from 1730. Speakers from 1800. Finish by 1945 with drinks and nibbles.

CPD: 1.5

To book visit our online booking website

London meeting on Economics and the Environment

Thursday September 23rd at Herbert Smith in London

This early evening seminar will discuss the relationship between economics and the environment. Delegates at the UKELA conference will recall Satish Kumar's story of trying to persuade the London School of Economics to add Ecology (study of "our house") to their economics (management of "our house") teaching, on the grounds that it was difficult to manage something without knowledge of it first.

Bookings will open shortly.

CPD TBC 1.5

Annual Wild Law Workshop: 5pm Fri 24 Sept – 2pm Sun 26 Sept 2010

Lee Valley Youth Hostel Association, Cheshunt, Herts.

2.5 CPD points (to be confirmed)

This year's wild law workshop will take place at the comfortable and conveniently located Lee Valley YHA, just outside of London. The theme of the workshop is *our habitat* and *how we relate to the land*. We will explore, in the beautiful and uniquely 'wild' setting of the Lee Valley Country Park, how we can move from 'exploitation' to 'relationship' with the land.

Our speakers, David Hart QC, Colin Tudge and Dr. Mayer Hillman, will provide expert insights from a legal, philosophical/ scientific and public policy perspective. Participants will have the opportunity to learn outdoors and experience one of the few remaining semi natural habitats in greater London.

As with previous wild law workshops, the event will be multidisciplinary, highly experiential and participatory. Above all, it will be fun! All new participants are very welcome – you'll meet other 'thinkers' and make new friends. For further information and to book, click here.

UKELA Scottish Conference 2010: Climate Change and Other Issues

The UKELA Scotland Conference 2010 takes place this year at The George Hotel, Edinburgh on Thursday 7th October 2010.

The all day Conference will gather leading speakers from the public and private sectors. Registration is from 9.30am.

Please note sponsorship opportunties are still available for this conference, contact events@originevents.co.uk for further details.
To book visit our online booking site

UKELA events

Half day seminar: Unmasking the significance of waste law and regulation in Northern Ireland

On the afternoon of Tuesday October 12th 2010
Venue: Belfast Stranmillis University College Campus

Second in the annual series of half day seminars run by the UK Environmental Law Association in Northern Ireland. This special event focusing on Waste is for environmental lawyers, government advisers, NGOs, academics, local authorities, business and students. Chaired by Prof Sharon Turner of Queen's University Belfast, speakers include the new Chief Executive of Northern Ireland's Environment Agency.

Bookings open shortly.

Half day seminar on Energy in Wales

An autumn seminar in Cardiff on the topic of Energy is currently being planned. Full details will be circulated shortly.

Diary Date: Garner Lecture

This year's Garner Lecture will be given by Sir Konrad Schiemann at Clifford Chance at 6pm on November 18th. Please put this in your diary. Bookings will open in early September.

Sir Konrad Schiemann

External Courses and Special offers

Environmental Law – Gain a specialised degree without interrupting your employment

Further your knowledge and career without interrupting your current employment by enrolling on this distance learning course from Leicester De Montfort Law School.

Tailor the programme to your needs by selecting your own personal combination of modules - not just from within this course but also from De Montfort University's other LLM programmes!

Environmental Law and Practice modules for you to choose from:

- Environment, Legal Control and EU Regulations
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- Environmental Assessments
- International Environmental Law
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- Environmental Crime
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- Light Pollution
- Negotiated Study Module (Explore an area of law selected by you)

Please see the course brochure for a list of available modules from across DMU's other LLM courses.

Postgraduate Certificate, Diploma or Master of Laws (LLM) levels available.

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Course starts 25th September 2010 – Enrolling now!

For further information and the course brochure:

- Visit: www.informadl.com/environmentUKEE2
- Email: dmu@informa.com
- Call: +44 (0) 20 7017 5906

Quote VIP Code: KW1028UKEE2 in all correspondence

Whose Land is it Anyway? Empowerment and community of place

A short course at Schumacher College

27 September – 1 October, 2010

Teachers: **Alastair McIntosh, Iain MacKinnon, Sulemana Abudulai**

Now more and more communities are demanding the right to have their own land, whether it be urban groups wanting to grow food or have a green recreational space, or traditional societies reclaiming rights to land they have lived on for generations. This course will explore our relationship to the land as a fundamental part of what it means to be a community of place.

The process of securing community governance of land involves working within a legal framework which has not in the past been supportive to community rights. All too often our responsibilities towards land are not recognized or enforced. This course will address both aspects of the process.

Participants will explore why our relationship with land is also about our relationship with ourselves and our communities. They will learn how community empowerment can be encouraged and nurtured, and discuss the necessity of recognising and processing conflict within this.

The course will also address Earth Jurisprudence – where human communities recognise that Earth is the source of law, from which human law should be derived. This shift from human-centred to Earth-centred thinking is what is required for humans to re-develop a mutually enhancing relationship with Earth. Participants will share lessons from indigenous governance systems and relationships to land or territory.

This course is run in association with LandScope and the Gaia Foundation.

A limited numbers of bursaries are available for this course.

Already booked on the Wild Law weekend? - You are entitled to 15% off normal fees for this course at Schumacher.

Visit the Schumacher College website for more information:

www.schumachercollege.org.uk

PLC Environment

PRACTICAL LAW COMPANY

CRC Energy Efficiency Scheme is now in force

Your clients may need to comply, or risk financial and reputational loss. Ensure they are prepared and well-informed with PLC's CRC Survival Kit.

The CRC Energy Efficiency Scheme came into force on 1 April 2010. This is a mandatory emissions trading scheme for large to medium-sized companies and the public sector in the UK.

The CRC Survival Kit is the perfect, practical starting point to help you get to grips with the scheme. It brings together all the information you need to know – such as whether your clients qualify for the scheme, what they should do to comply, and how best to do it.

Features of the CRC Survival Kit:

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- Practical guidance written in plain English.
- Delivered online and fully searchable.
- Constantly updated by experts in the field.
- Weekly e-mails with the latest developments.
- Includes a webcast covering the basics.

The CRC Survival Kit forms part of PLC Environment, a specialist service covering a wide range of developments in environmental law and policy. PLC Environment is one of a range of services available from Practical Law Company, the UK's leading provider of legal know-how.

"I've been very impressed with the quality and accessibility of the documents in the CRC Survival Kit."
Charlotte Prosser, Senior Counsel, Group Legal, AXA UK

"We use the PLC CRC Survival Kit as our external CRC resource. This area is multi-faceted and PLC has done some serious thinking about the various issues that may be of practical concern. It really is a tremendous effort and a great piece of work, which we have been happy to recommend."
Louise Moore, Partner, Herbert Smith LLP

To subscribe or for more information:
Visit: www.practicallaw.com/about/crc-survival-kit
E-mail: info@practicallaw.com
Call: 0207 202 1220

Book Reviews by Jennie Wilson

Prosperity without Growth, Economics for a Finite Planet

By Tim Jackson

Published by Earthscan, London ©2009
ISBN 978-1-84407-894-3 (price on Amazon: from £8.44)

In this timely book with the new UK government, Tim Jackson, a top sustainability advisor to the UK government, makes a compelling case against continued economic growth in developed nations.

Have you ever wondered why, in the face of environmental destruction and decline, environmental law doesn't work better? Jackson's book gives us a better understanding of the economic and policy framework within which we all live and work that will help the reader realise the answer to this question.

Using a specific example of environmental law, Jackson says that "[t]he UK's 2005 Sustainable Development Strategy received widespread international praise. Its 2008 Climate Change Act is a world-leading piece of legislation." (p, 166) But because of our need in the present liberal capitalistic framework to pursue economic growth on the one hand, and conflicting interests such as protection of the environment on the other, policy-makers struggle to make a real difference with the latter. Meanwhile, government's policies shape and co-create the social world and our environment to their disadvantage.

Professor Jackson sets out in layman's terms the economics of our commercial consumer driven world. He explains that decoupling, a popular solution with some, is a myth. He also discusses Keynesianism economics and the 'Green New Deal'. Setting out the picture of the 'Iron Cage' of consumerism that has us and our governments locked up with a misguided vision of unbounded consumer freedoms, Jackson lays a good foundation for his argument for a new economic structure based on degrowth.

Furthermore, Jackson ties the concept of happiness and prosperity to the economic framework within which we live and argues that the ever-increasing materialistic way of life is not increasing happiness or true prosperity, which goes beyond material pleasures. He explains how consumer goods define our position in society. Yet this is making us more isolated, lonely (and vulnerable) and never satisfied because of the continual need for novelty and the built-in obsolescence of many products.

Quality, family, relationships, trust in the community, shared meaning and purpose are the qualities of life that are eroding as quickly as the environment because of the growth-centred economy. Jackson further equates our ecological debts to our financial debts, stating that both are unstable and improperly accounted for in the relentless pursuit of further growth. He favours taking a long-term view, to consider prosperity today in light of prosperity tomorrow rather than the short-term fix for which we are often obliged to settle.

Jackson talks about a simpler life to reach true prosperity and making community connections stronger, which at the moment means living in opposition to the structures and values that dominate society. One example he gives it that "...waste disposal is cheap, economically and behaviourally; recycling demands time and effort...". So the impetus and message from the government is that it isn't important. Historically governments have been elevating consumer sovereignty above social goals. It is plain to see that government actively encourages the expansion of the market into different areas of people's lives.

Jackson also says that government is a victim as well. We need strong leaders to take on the challenge for moving the economic system in the opposite direction, from growth to degrowth. We need leaders that have a vision of how to invest in jobs, assets and infrastructures that are geared with a long term vision and not based solely on materialistic novelty based consumerism for continual growth of monetary profit for the few at the top. However, he does not suggest that we reject novelty and embrace tradition entirely. He seeks a balance with humanity being restored at the centre of our lives rather than commercial enterprise. "The new macro-economics will need to be ecologically and socially literate, ending the folly of separating economy from society and environment." (p.142)

The book reflects the report written in Professor Jacksons capacity as Economics Commissioner for the Sustainable Development Commission. A summary can be obtained online at http://www.ecobuddhism.org/index.php/solutions/sustainable_economy/prosperity_without_growth/ and a copy of the full report is at http://www.sd-commission.org.uk/publications/downloads/prosperity_without_growth_report.pdf.

The World According To Monsanto, Pollution, Corruption, And The Control Of Our Food Supply, An Investigation Into The World's Most Controversial Company

By Marie-Monique Robin, Translated from the French by George Holoch

Published by The New Press, New York ©2010

ISBN 978-1-59558-426-7 (price on Amazon: from £17.79)

"The global ecological crisis calls for a major transformation of the economic and social organization of human communities." Nicholas Hulot in the Preface, p.xi.

I cannot recommend this book strongly enough. Robin set out to make a documentary, free to view at: http://topdocumentaryfilms.com/the-world-according-to-monsanto/. She then wrote a book based on her investigation, originally published in 2008 and now translated into English.

Robin covers the industrial history of Monsanto from its inception in the United States in 1901 to its development as a powerful global corporation, with coverage of issues surrounding its main products: dioxin, Roundup, bovine growth hormone and genetically modified organisms (GMOs). She travelled the world and interviewed politicians, scientists, farmers, victims, business people, ex-government officials, news reporters, community leaders, Vandana Shiva, and others. She reviewed documents and did a thorough investigation on the Internet. She sets the vast quantities of data she collected in a methodical and well-thought out manner.

The translation of Robin's book has been presented to the English speaking market at a very opportune moment, particularly for those of us in the UK because of the overhaul of European food law which is now in progress. The book sheds light on this controversial industry. Do read this book.

UK ENVIRONMENTAL LAW ASSOCIATION

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E - LAW

The editorial team wants articles, news and views from you for the next edition due to go out in September 2010
All contributions should be dispatched to Catherine Davey as soon as possible by email at:
catherine.davey@stevens-bolton.co.uk by 8 September 2010
Please use Arial font 11pt. Single space. Ensure headings are in bold capitals.
Letters to the editor will be published, space permitting

Designed by Kim Elcoate May