HANDBOOK ON ENVIRONMENTAL LAW IN UGANDA

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GREENWATCH

If we all did little, we would do much

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Foreword

Since 2000 Greenwatch has been involved in training of lawyers, judicial officers, local government leaders, environmental officers, police officers, public prosecutors, and others in basic principles and concepts of environmental law and procedure.

Throughout this period, we have been assisted by a number of people in different organizations to whom we are greatly indebted. These organizations and persons funded and personally contributed to the research, writing and presentation of different papers on different subjects during our training programmes.

Papers presented were usually distributed as loose handouts to participants. They were so valuable that we decided to put them together in a form of a handbook. A handbook is an easy tool for any practitioner or judicial officer. It's easy to use as a reference.

In order not to produce a large voluminous book, we found it appropriate to produce the hand books in volumes as we envisage that with time more and more papers with new ideas, new opinions, will be availed to us. We do not want to loose the opportunity of being able to trace the growth of environmental law in Uganda by producing the handbook that contains only recent decisions and materials but rather to trace the growth and development of environmental law and procedure in Uganda. Consequently, we have produced the second volume of this handbook, we hope that the reader will find it useful and practical.

I would like to pay special tribute to the people who made this possible and who have encouraged Greenwatch over the past ten (10) years. Mr. Peter Veit of the World Resources Institute (WRI), John Pendergrass of Environmental Law Institute (ELI), Professor Okidi formerly with the University of Nairobi, Carl Bruch formerly of ELI, Phillip Karugaba of The Environment Action Network (TEAN), Justice Opio Aweri and Justice David Wangutusi both of the High Court of Uganda for their support, encouragement and contribution towards this handbook. Special thanks also got to our sister NGOs, Advocates Coalitions for Development and Environment (ACODE), Environmental Alert, Uganda Wildlife Society (UWS) and Lawyers Environment Action Team (LEAT) in Tanzania.

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Executive summary

The study and practice of environmental law in Uganda has reached a level that requires concerted efforts in documenting, analyzing what has been achieved over the years.

The level of documenting the practice of environmental law, however has not reached the same level as how it is taught in academic institutions or practiced in courts of law.

This Handbook seeks to guide practitioners on how to practice environmental law from both an educative and practical manner. The Handbook contains aspects of environmental law which include a summary of the principles and sources known globally, and the current practice of environmental law in Uganda.

In the first area of the Handbook, an attempt is made to examine some of the ways in which international environmental law is born and changes. It addresses the different sources of international environmental law to enable one understand the various forms in which this law takes shape, noting the general principles of international environmental law. It also examines the nature of treaties both at an international and national level, their administration and compliance and enforcement mechanisms.

In an attempt to address issues which are seen to have far reaching consequences among states, treaties are important in international law because of the obligation it imposes on contracting parties or states. In formulating a treaty, there is need for the instrument to be domesticated and acceptable to municipal law with due consideration to consequences.

The handbook also looks at an overview of selected multilateral environmental agreements like the Convention on International Trade in Endangered Species(CITES), the World Heritage convention and the Convention o Biological diversity among others.

The handbook further expounds on the international conventions and other legal instruments used in the field of environment and development which include the Rio Declaration on environment and development and the World Charter for nature and highlight the role played by the United Nations Environment Program in the development of environmental law.

In the second part of this handbook a few examples are highlighted to illustrate the role of the judiciary and legal practitioners with regard to access to environmental justice in Uganda. Various experiences are highlighted by the different judges in their experiences and lessons learned. Also highlighted is the role of the courts vis a vis environmental violators.

The handbook concludes with the concept of sustainable development and its translation into concrete actions. Sustainable development provides a common agenda for both developed and developing countries.

CHAPTER ONE

AN INTRODUCTION TO THE SOURCES, PRINCIPLES AND REGIMES OF INTERNATIONAL ENVIRONMENTAL LAW.[1]

1.0 Introduction

International environmental law is a dynamic construct which is constantly developing. This brief will look at some of the ways in which international environmental law is born and changes. This study must begin by addressing the different sources of international environmental law in order to understand the various forms in which this law takes shape. In the second part of this introductory overview, particular attention will be given to a number of general principles of international environmental law. The last sections of this study will address the creation and growth of international environmental regimes. Developing from the various sources of law, not the least the aforementioned principles of international environmental law, regimes are developed as a response to environmental problems in specific issue areas. Regimes bring forward the dynamic nature of law in this area as it emerges from the continuous interplay between the principles, rules and institutions.

1.1 Sources of International Environmental Law

Several sources of international environmental law exist. Since international environmental law is a particular branch of international law, the theory of its sources mirrors that of the sources of international law generally. Treaties, both bilateral and multilateral, are the source of international law *par excellence*. These are supplemented by binding decisions of international organizations or other intergovernmental bodies established by treaties. In the environmental sphere, some decisions of the conferences or meetings of the Parties (COP or MOP) of Multilateral Environmental Agreements (MEAs) fall into this category. Customary international law has developed from state practice, while international judicial decisions form yet another source of international law. General principles of international law have been developed, often reflecting principles found in national legal systems. Soft law, in the form of non- binding decisions, declarations and resolutions of intergovernmental organizations and meetings, forms another important source of international environmental law. Though such instruments are, strictly speaking, legally non-binding, they are not devoid of normative content and help shape the expectations of the international community."

1.1.1 Treaties

Multilateral environmental treaties, conventions or agreements, form the backbone of

[1] Marc Pallemaerts. Marc Pallemaerts is a professor of international Environmental Law, Universite Librede Bruxelles and Vrije Universite Brussels. This paper is based on a lecture given by the author on 24th August 2004. The Author would like to thank Marko Berglund of the University of Joensuu for his help in preparing this written contribution to the present Review

International environmental law[2]. Prior to 1960, some 42 multilateral treaties which today are considered to be part of international environmental law already existed. They mainly related to the management of living natural resources. The first Multilateral Environmental Agreement (MEA) on marine pollution was concluded in 1954. During the 1960s, MEAs began addressing emerging transboundary environmental risks. A few treaties concerning radioactive, marine and freshwater pollution were concluded. As the international community was incited to further normative efforts ,by the first United Nations environmental ,conference held in Stockholm in 1972, the 1970s saw the adoption ,of no less than 75 new MEAs, more than during the entire period before 1970. The development of MEAs clearly accelerated and both the substantive and geographical scope of these agreements expanded. In the 1980s, the growth of international environmental law slowed down somewhat, but 40 additional MEAs were nevertheless concluded during this decade. The scope of multilateral law-making was again extended, this time to start addressing not merely trans-boundary, but truly global, environmental threats. In the 1990s, international environmental Law-making again increased in speed as, exploiting the positive impetus generated by the 1992 Rio summit, the international community concluded another 75 MEAs.[3]

Several different motives underlie the development of international environmental law. An MEA can be designed for the management and conservation of environmental resources situated beyond the limits of national jurisdiction. This is apparent treaties, such as fisheries agreements, which deal with the so-called global commons. Prevention and control of trans-boundary environmental interferences is another catalyst for international environmental law-making. This can lead to agreements to control various forms of cross-border pollution or to ensure co-operative management of environmental resources which are under the jurisdiction of several states, and are therefore sometimes referred to as shared natural resources. International environmental law can also be developed with a view to minimize or otherwise manage the trans-boundary economic effects, such as trade barriers and distortion of competition, resulting from unilateral, national environmental policies and laws. Finally, MEAs can be aimed at scientific, technological and financial co-operation to enhance the effectiveness of national environmental policies.

1.1.2 Soft Law

Within the overall process of international environmental law-making, soft law has emerged as an important source of law. Although not legally binding, soft law can have a direct influence on the behavior of both states and non-state actors. In this respect, it can act either as a complement or as a substitute of hard law. Soft law often provides a consensual basis for the subsequent development of legally binding international norms.

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[2] For a more in-depth discussion of treaty law see the article by Paivi Kaukoranta in the present Review.

[3] These figures were derived by the author from the data in the ENTRI database of the Center for International Earth Science Information Network (CIESIN) at Columbia University, sedac.ciesin.columbia.edu/ entri/treatySearch.jsp.

It then functions as a precursor of hard law and the gradual transformation of soft law into hard law can be seen as a process of juridification of international environmental policy.[4] In this context, soft law has also been described as the thin end of the normative wedge of international environmental law.[5]

1.1.3 General Principles

The traditional theory of the sources of international law holds that general principles of law are derived by induction from the national legal systems of the so-called civilized nations[6]. According to a more modern view, general principles are derived from positive rules of international law. They can be seen as a reflection of a general legal conviction of the international community or as a type of 'formless interstate consent'.[7] A synthetic view, bringing together these two approaches, would hold that general principles emerge from both national law, and soft and hard international 'law.

Principles are generally distinguished from *rules* of law. Rules are precise prescriptions for specific factual situations. They determine specific action by clearly identifiable subjects. Rules have a determinate content and provide a specific behavioural prescription, thus guaranteeing legal certainty. Principles, however, are flexible norms which help orient decision-making. There is a high degree of abstraction and a low measure of determinacy in principles and no automatic legal consequences can be derived from them. A principle can be seen as a kind of rule with indeterminate content, as addressees enjoy a margin of discretion in its implementation. The difference between rules and principles, in this view, appears more like a question of degree of determinacy rather than a clear cut dichotomy.[8]

1.1.4 Principles of International Environmental Law

Several general principles of international environmental law have emerged from both national and international environmental law. In this overview, it is impossible to address all of them. Therefore, a few important examples will be focused on. These include the polluter pays principle and the precautionary principle, which were first developed at the regional level before gaining universal recognition. The principles of common but differentiated responsibilities address the differences in capacity to act between

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[4]. W. Lang, 'Die Verrechtlichung des internationalen Umweltschutzes: vom "soft law" zum "hard law"'. *Archiv des Volkerrechts* 22 (1984) 283.

[5]. G. Handl, 'Environmental Security and Global Change: The Challenge to International Law', *Year book of International Environmental Law* 1 (1990) 3.

[6]. Article 38(1) of the Statute of the International Court of Justice refers to 'the general principles of law recognized by civilized nations' as one of the sources of international law; www.icj-cij.org/icjwww/ibasicdocument*s* ibasictext/ibasistatute.htm.

[7]. See generally G.J.H. van Hoof, *Rethinking the sources* of International law (Kluwer. Deventer, 1983).

[8]. N. de. Sadeleer *Environmental Principles: From Political Slogans to Legal Rules* (Oxford University Press.2002).

developed and developing countries. The participatory principle addresses the legal position of individuals and civil society organisations by affirming procedural rights of access to information, public participation and access to justice in environmental policy.

Polluter Pays Principle

The polluter pays principle (PPP) was developed in the 1970s as an economic principle within the frameworks of the Organisation for Economic Co-operation and Development (OECD) and the then European Economic Community (EEC). Its aim was to internalize external costs in order to avoid distortions of trade and competition. It was initially recognized in regional soft law instrument of these two organizations. In 1972, the OECD Guiding Principles Concerning the International Economic Aspects of Environmental Policies[9] first articulated PPP as a principle 'to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment'. The principle implies that 'the polluter should bear the expenses of carrying out the measures decided by public authorities to ensure that the environment is in an acceptable state and that 'the cost of these measures ,should be reflected in the cost of goods and services which cause pollution in production and/or consumption.'[10] The EEC also advocated PPP in its 1st Environmental Action Programme of 1973, which included in its statement of the general principles of EEC environmental policy, *inter alia*, that 'the cost of preventing and eliminating nuisances must in principle be borne by the polluter.'[11] This principle was 'further elaborated in a Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, which stated that 'the European Communities at Community level and the, Member States in their national legislation on environmental protection must apply the "polluter pays" principle."[12]

After being developed in soft law instruments, PPP was subsequently recognized in regional hard law in 1986 with the Single European Act which amended the EEC Treaty and inserted in it specific provisions on environmental policy. One of those provisions, Article 130R (2) of the Treaty, listed the general principles of the Community's environmental policy, including PPP. In 1992 PPP was eventually recognized in a universal soft law instrument. Principle 16 of the Rio Declaration provides: 'National authorities *should endeavor* to promote the internalisation of environmental costs and the use of economic instruments, *taking into account* the *approach* that the polluter should,

[9] Guiding principles Concerning International Economic Aspects of Environmental Policies; OECD Recommendation, 26 May 1972. sedac.ciesin.org/entri/texts/oecd/OECD-4.01.html.

[10] Article 4, *ibid.*

[11] Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the, European Communities on the environment OJ 1973 No. C112, 20 December 1973, at 1.

[12] Council Recommendation of 3 March 1975 regarding cost allocation and action by public authorities on environmental matters, OJ 1975 No. L194, 25 July 1975, at 1.

in principle, bear the cost of pollution.'[13] It's noteworthy that this universal formulation is weaker than that contained in the aforementioned European instruments.

So far, there has been scarce recognition of the principle in Universal hard law instruments, as PPP has found its way mostly into the preambles of various MEA. For example, the 1990 IMO Convention on Oil Pollution Preparedness, Response and Co-operation refers to PPP in its preamble as 'a general principle of international environmental law'.[14] One exception to this rather muted recognition is the 1992 0SPAR Convention, a regional MEA for the protection of the marine environment which states in a straightforward way that 'Contracting Parties shall apply the polluter pays principle.'[15] Other instruments call on their parties to be 'guided by'[16] or to 'take into account[17] the polluter pays principle.

Precautionary Principle

The precautionary principle evolved from the earlier principle of preventive action. It addresses problems of environmental decision-making under conditions of scientific uncertainty. Whereas the principle of preventive action was based on the recognition of the need to act to prevent certain harm, the precautionary principle is coupled with the idea of risk avoidance. The mere existence of a risk of harm is considered a sufficient basis for the adoption of preventive measures. While the principle is now widely referred to in national and international law and policy, it remains highly controversial in its interpretation and application. It is disputed, for example, whether the principle actually reverses the burden of proof, i.e. whether it puts actors under an obligation to prove that the activities which they are engaged in do not cause harm. Moreover, there has been much debate over terminology. The United States, for example, has preferred to refer to the precautionary approach, while other countries have opted to speak of the precautionary principle, a term which carries more normative weight. Also, the scope of application of the precautionary principle is unclear as well, as some states, most notably the members of the European Union, claim that it extends to issues of human health and consumer protection, whereas others maintain that it applies only to the prevention of environmental harm.
From national law, the principle made its way in Europe into regional soft law and regional MEAs in the late 1980s. However, the World Charter for Nature, a universal soft

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[13] Principle 16, Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. NCONE151126 (Vol. I).
aconf15126-1annex1.htm (emphasis added).

[14] Preamble, International Convention on Oil Pollution Preparedness, Response and Co-operation, London, 30 November *1990*, in force 13 May 1995, 30 *International Legal Materials. (1991) 735.*

[15] Article 2(2)(b), convention for the Protection of the Marine Environment of the North–East Atlantic, Paris, 22 September 1992, in force 25 March 1998, 32 *International Legal Materials* (1993) 1072, www.ospar.org/eng/html/convention/welcome.html .

[16] Article 2(5), Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17th March 1992, in force 6 October, www.unece.org/env/water/text/text.htm .

[17] Preamble, protocol on Civil Liability and Compensation for Damage Caused by the Transboundary Effects of Industrial Accidents on Trasboundary Waters, Kiev, 21 May 2003, not yet in force, www.unece.org/env/civil-liability/welcome.html.

law instrument, already contained a precursor of the principle in 1982. It held that 'where potential adverse effects are not fully understood, the activities should not proceed.'[18] The principle was recognized more explicitly in the 1992 Rio Declaration. Principle 15 states that 'In order to protect the environment, the precautionary *approach* shall be widely applied by states according to their capabilities.' The status of the principle in universal MEAs is disputed. Some conventions include hortatory provisions encouraging parties to take 'precautionary measures'[19] while others require their parties to be 'guided by'[20] the precautionary principle or even to apply it.[21] Other instruments still refer to the precautionary approach in their preamble.[22] In a judicial context, the precautionary principle has been applied by the International Tribunal for the Law of the Sea in recent disputes concerning the management of fish stocks,[23] radioactive pollution of the marine environment[24] and land reclamation works.[25]

It should be noted that states are not always consistent in their positions with respect to the precautionary principle. In the latter case, for instance, Malaysia, which in some multilateral negotiations has sided with the US in opposing recognition of precaution as a general principle, as a claimant state whose environmental interests were threatened by land reclamation activities carried out by its neighbour Singapore, argued in its request for provisional measures: 'The rights of Malaysia….relating to the maintenance of the marine and coastal environment…..are guaranteed by… *the precautionary principle, under international law, must direct any state* party[to UNCLOS] in the application and implementation of [its] obligations.[26]

Principle of Common but Differentiated Responsibilities

The influence of international development law and the New International Economic Order principles of the 1970s and 1980s advocating differential treatment of developing countries in economic matters, led to the advent of the principle of common but differentiated responsibilities in international environmental law in the late 1980s and

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[18] Para. 11, World Charter for Nature, GA Res. 37/7, 28 October 1982, www.un.org/documents/ga/res/37/a37r007.htm

[19] Article 3(3), UNFCCC, *infra* note 40

[20] Article 2(5), Transboundary Watercourse Convention, *supra* note 17.

[21] Article IV, African Convention on the Conservation of Nature and Natural Resources (Revised Version), Maputo, 11 July 2003, not yet in force, www.africa-union.org/home/Welcome.htm

[22] preamble, Cartagena Protocool on Bio safety to the Convention on Biological Diversity, Montreal, 29 January 2000, in force 11 September 2003, www.biodiv.org/doc/legal/cartagena-protocool-en.pdf

[23] International Tribunal for the law of the Sea, Order of 27 August 1999, *Southern Bluefin Tuna Cases(New Zealand v. Japan, Australia v. Japan*), www.itlos.org/stat2_en.html, at Para. 80.

[24]International Tribunal for the law of the Sea, Order of 3 December 2001, *The MOX Plant Case(Ireland v. United Kingdom)*, www.itlos.org/stat2_enhtml, at para.84

[25] international Tribunal for the Law of the Sea, Order of 8 October 2003, *Case concerning Land reclamation by Singapore in and around the straits of Johor(Malaysia v. Singapore), www.itlos.org/start2_en.html, at paras. 95-99.*

[26] International Tribunal for the Law of the Sea. *Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia .v. Singapore) Request for provisional* measures, 8 September 2003, www.itlos.org/start2_en.html, at para. 18 (emphasis added).

early 1990s. The principle was first applied *avant la lettre* in an MEA in the late 1980s, namely in the Montreal Protocol's provisions granting differential treatment to development country parties with respect to the phase-out of ozone-depleting substances.[27] It was later formally recognized in general terms in Principle 7 of the Rio Declaration which states:

> In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.[28]

Since the Rio Declaration, the principle has been enshrined in a number of universal MEAs.

The principle of common but differentiated responsibilities is a two-pronged concept. It allocates responsibly differently between countries and at the same time provides for a universal duty of co-operation common to all states. Thus its substantive content is based on the twin principles of partnership and of differential treatment. There is an economic as well as a temporal dimension to the principle, with reference, respectively, to the different economic capacities of developed and developing states and to their different historical and current contributions to the causes of environmental degradation. States should be held accountable in different measure according to their respective contributions to the creation of global environmental problems and to their respective financial and technological capabilities to address those problems.[29]

However, the exact status and Scope of application of the principle remain contested. Developed countries consider it relevant only to environmental issues that are truly global in nature, whereas developing countries argue that the principle of common but differentiated responsibilities should be applied in all areas of international environmental co-operation. The latter view made some headway at the Johannesburg World Summit on Sustainable Development (WSSD).The WSSD, Plan of Implementation contains the following statement:

> We commit ourselves to undertaking concrete actions and measures at all levels and to enhancing international co-operation, taking into account the Rio principles, including inter alia, the *princp1e of common but differentiated responsibilities* as set out in principle 7 *of* the Rio Declaration on Environment

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[27] Montreal Protocol on Substances that Deplete the Ozone Layer, Montreal, 16 September 1987, in force 1 January 1989, 26 *International Legal Materials* (1987) 154, www.unep.org/ozone/pdfslMontreal-Protoco12000.pdf.

[28] Principle 7. *Rio* Declaration. *supra* note 14

[29] See generally Ph. Cullet. *Differential Treatment in International Environmental Law* (Ashgate Publishing: AIdershot. 2003).

and Development.[30]

Participatory Principle

The increasing articulation of procedural environmental rights at the national and international level has gradually led to the emergence of what the author would refer to as the Participatory principle Access to information public participation and access to justice have long been recognized in many national legal systems. Moreover, such participatory rights have also been recognized in international soft law instruments such as the World Charter for Nature,[31] the Rio Declaration[32] and the Malmo Ministerial Declaration.[33] The classic statement of the participatory principle at the universal level is to be found in Principle 10 of the Rio Declaration. An increasing number of hard law instruments of a regional nature also contain provisions based on this principle. The first was the 1985 ASEAN Agreement on the Conservation of Nature and Natural Resources, which unfortunately has not entered into force twenty years after its adoption and signing. The most well-known instrument implementing the participatory principle is a pan-European MEA, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters[34]. The most recent is the African Union's 2003 African Convention on the Conservation of Nature and Natural Resources.[35] The participatory principle essentially calls for environmental information to be made public and disseminated as widely as possible, for public participation to be guaranteed in decision-making projects, plans and programmes with significant environmental implications, and for access to justice to be granted to the public in environmental matters.

1.2 International Environmental Regimes

States draw on these international environmental law principles and other sources of international environmental law in creating international environmental regimes. Such regimes are the response of an international community still composed of a multitude of sovereign states to the challenge of international environmental governance. International environmental governance is one of the many forms of emerging processes of global

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[30] Resolution 2. Annex. para. 2. World Summit on Sustainable Development, *Johannesburg Plan of lmplementation* .UNDoc.A/CONE.I99/20.

www.un.org/esa/sustdev/documenrs/WSSD_POI_PD/English/POIToc.htm, (emphasis added)

[31] World Charter for Nature, *supra* note 19.

[32] Rio Declaration, *supra* note 14.

[33] Malmo Ministerial Declaration, 31 May 2000, www.unep.orglmalmo/malmo_ministerial.htm

[34] For more detailed analysis, see M. Pallemaerts, 'Proceduralising Environmental Rights: The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters in a Human Rights Context', *Human Rights and the Environment,* Proceedings *of* a Geneva Environment Network Roundtable (UNEP: Geneva, 2004) 14-22.

[35] African Conservation Convention, *supra* note 22.

governance, which can generally be described as a process of interest accommodation and co-operative action to address global issues beyond the control of individual state and non-state actors and to cope with the absence centralized authority in the international community. It is increasingly involving not only governments but also a variety of other, non-state actors or stakeholders. It includes both formal institutions and informal arrangements.

International regimes are a means of organizing the international community for the collective pursuit of common interests and for the management of interdependence in specific issue areas, such as, inter alia, environmental issues. Regimes tend to establish stable patterns of relationships, permanent lines of communication, interaction and collective decision-making and governance mechanisms among state and non-state actors.

The notion of regimes was first conceptualized by international relations scholars. From an international relations theory perspective, international regimes have been defined as 'a set of implicit or explicit principles, norms, rules and decision-making procedures around which actors' expectations converge in a given area of international relations.[36]
According to another definition, international regimes are 'a form of collective action by states, based on shared principles, norms, rules and decision-making procedures which constrain the behaviour of individual states in specific issue areas.[37] From a legal institutionalist perspective, international regimes have been defined as 'a conglomerate of hard law rules, soft law instruments and institutions that are indispensable for the effective working, of hard and soft law.[38] The latter definition highlights the dynamic relationship between the various of norms and institutions, as often the creation and development of international environmental regimes Starts with soft law and eventually leads to hard law in the form of an MEA, for example. But even regimes based on a binding treaty framework continue to generate soft law, for example in the form of COP decisions. Regimes are also instrumental in entrenching and operationalizing principles of international environmental law.
An international regime is typically composed of several characteristic elements. Functional roles are attributed to state, and non-state actors. Specific roles are associated with specific rights and entitlements and with specific behavioural norms and prescriptions. Social choice mechanisms and institutional frameworks, and procedures for collective decision-making about the operation and transformation of the regime norms in question are also an indispensable component of any regime. These conceptualizations can easily be illustrated by reference to a typical global environmental regime.

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[36] S. Krasner, 'Structural Causes and Regime Consequences', *International Organisation* 36 (1982) 1785-205, at 186.

[37] M. List and V. Rittberger, 'Regime Theory and International Environmental Management, in A. Hurrell and B. Kingsbury, *The Internationals Politics of the Environment, Actors, Interests and Institutions* (Clarendon Press: Oxford, 1992) 85-109.

[38] W. Lang 'Diplomacy and International Environmental Law-Making: Some Observations', *Yearbook of International/ Environmental Law* 3 (1992) 108-122.

1.2.1 The Climate Change Regime as an Illustration

The climate change regime provides an example of an international regime in the field of the environment. The regime unites several categories of actors. These are the contracting parties to the United Nations Framework Convention on Climate, Change (UNFCCC)[39] which are divided into developed - referred to as Annex I Parties in UNFCCC jargon – and developing country parties, as well as Regional Economic Integration Organizations (REIOs) of which in actual fact there is only one in the regime: the European Community. Developed countries are further divided into member countries of the Organization for Economic Cooperation and Development (OECD), - referred to as Annex II Parties in UNFCCC jargon - and Countries with Economies in Transition (CElTs). Other actors included in the climate change, regime include Intergovernmental Organizations (IGOs), Non-Governmental Organisations (NGOs), representing a wide variety of civil society and business interests, the various intergovernmental bodies established under the Convention itself (the COP and it subsidiary bodies), the Global Environment Facility (GEF), which acts as the operating entity of the Convention's financial mechanism, and the UNFCCC Secretariat.

The climate change regimes functions according to agreed principles laid down in key provisions of the framework Convention. The ultimate objective of the regime, as set out in Article 2 of the Convention, is to achieve 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climatic system'. The guiding principles of the convention are laid down in Article 3 and include promoting sustainable development[40] and the principle of common but differentiated responsibilities.[41] Although worded in slightly different terms from those of the Rio Declaration, the precautionary principle also features in the Climate Change Convention.[42] Article 3 includes economic principles too, such as the principle that measures taken by parties 'should not constitute a means of arbitrary or unjustifiable discrimination or disguised restriction on international trade.'[43]

The climate change regime lays down specific rules relating to the differentiated obligations and entitlements of the parties.[44] Reporting obligations exist for all parties but the different groups *of* countries need to report with different frequencies and have different data requirements. The national programmes which need to be set up by all parties to address climate change require different levels *of* detail and purpose. In the Kyoto Protocol, an additional legally binding instrument which was developed pursuant

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[39] Article 3(3), United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849, unfccc.int/files/essential background/background publications htmlpdf/application/pdf/conveng. pdf

[40] Article 3(4), *ibid*

[41] Article 3(1), *ibid.*

[42] Article 3(3), *ibid.*

[43] Article 3(5), *ibid.*

[44] For more detailed analysis, see M. Pallemaerts, 'Le cadre international et europeen des politiques de lutte contre les changements climatiques', *Courrier hebdomadaire du* CRISP (2004) n° 1858-1859.

to the Framework Convention and adopted in 1997, quantified emissions limitation and reduction commitments have been undertaken by developed countries only.

Developing country parties enjoy certain preferential rights. Their reporting obligations are conditioned on financial assistance. They are also entitled to benefit from technology transfer and the clean development mechanism (CDM), from which only developing countries are eligible to benefit as host parties, has been established under the Kyoto Protocol in part to further this goal. Financial assistance is provided to meet the incremental costs of certain national measures and special financial assistance is provided to meet the costs of adaptation to climate change of those developing countries, such as small island states, that are most vulnerable to its adverse effects.

Finally the climate change regime includes elaborate decision-making procedures. Within the COP decisions are made by consensus, as parties did not manage to agree on any other decision-making rue. The specialized subsidiary bodies, the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBATA) have an advisory role. Other, more specialized regime bodies have been established under the Kyoto Protocol and the Marrakeesh Accords, which lay down the detailed rules for the implementation of both the Protocol and certain provisions of the Framework Convention. The climate change regime is subject to continuous further development through decisions of the COP, which can also adopt additional protocols, such as the Kyoto Protocol, and formal amendments to the Convention itself.

1.3 Conclusion

This introduction has aimed to shed light on the dynamic and varied nature of *the* norms of *international* environmental law. Developed from a variety of sources, international environmental law has drawn on these different sources in the process of establishing complex regimes. In turn, these regimes, which deal with the governance of specific issue areas, play a central role in further developing the sources of international environmental law, from hard law MEAs to soft law decisions and resolutions. They also provide a fertile ground for the articulation and implementation of general principles of international environmental law.

CHAPTER TWO

INTERNATIONAL ENVIRONMENTAL LAW: OVERVIEW OF INTERNATIONAL TREATIES, CONVENTIONS AND PROTOCOLS[45]

2.0 INTRODUCTION

2.1 Background

The years since the 1972 UN Conference on the Human Environment in Stockholm have witnessed ever increasing priority given to environmental protection and an increasing recognition of the need for international cooperation to this end. This cooperation has been undertaken in a variety of contexts not the least of which is the codification of new legal obligations in the form of an impressive array of global, regional and bilateral international environmental agreements. These agreements address all forms of pollution of the marine environment, conservation of wildlife and their habitats, transboundary air pollution, desertification. Together with related international developments and the efforts of international organizations and the NGO community, international environmental agreements prescribe basic obligations of states. The agreements also frequently establish rulemaking procedures intended to supplement those agreements.

At the outset, it is important to note the distinction between international law and domestic law. This distinction has a direct bearing on enforcement issues. International law, despite the quasi-legislative nature of some international organizations and agreements, does not have the same hierarchical structure as do national legal systems. National legal systems have legislative bodies, courts and the executive that create, define, and enforce legal obligations. Notwithstanding the establishment and operation of the international law has been characterized by one commentator as a "horizontal system" without enforcement mechanisms that operate from above. Although the international system has a relatively developed structure of institutions, there is no international police force and international bodies do not possess ultimate sanction authority to issue and enforce decisions.

In general, international law, including agreements, is based on the voluntary acceptance of sovereign states that recognize it to be in their interest to sacrifice some degree of sovereignty in return for commitment from others. At the same time, comply with international legal obligations in order to maintain good standing in the international community.

[45] George Wamukoya. Dr. George Wamukoya is the Director, Development and External Relations WWF, Eastern Africa Regional Programme Office, Nairobi, Kenya. Paper presented at the Judicial symposium on environmental law, 11-13th September, 2005 at Imperial Resort Beach Hotel, Entebbe, Uganda.

For the most part, states do comply with their international obligations. They consider the longer term advantages of compliance to outweigh shorter term gains obtained as a result of noncompliance in any specific instances. In many ways, these motivating factors are not dissimilar from those of individuals responsible for complying with domestic laws at the national level. Nonetheless, although governments are created in part to ensure adherence with the rule of law, at the international level many facets of "government" exist only on a "good faith" or rudimentary levels. As a general rule, international environmental agreements have not yet evolved to the extent of having sophisticated, centralized enforcement mechanisms to ensure strict compliance. As a result, their viability remains dependent upon the good faith efforts of parties to comply with stated obligations with respect to both the agreements itself and decisions by bodies established thereunder.

While states generally comply voluntarily with their international obligations, there is an additional, supporting principle of international law that treaties must be observed. That principle has been codified in the 1969 Vienna Convention on the Law of Treaties. Article 26 of the convention, entitled *"pacta sunt servanda*" provides that every treaty in force is binding upon the parties to it and must be carried out by them in good faith. This principle of customary and conventional international law underpins all the other mechanisms embodied in international agreements concerning compliance and is the most fundamental legal basis for the requirement that states meet their treaty obligations.

In addition, it is worth noting the informal means that states use to seek compliance from other parties to agreements. These means include informal persuasion and consultation, as well as what has been termed the "mobilization of shame" - the public identification and dissemination of specific acts of noncompliance or questionable compliance. States generally prefer to settle their differences through dialogue and quiet diplomacy, and usually resort to more formal and public means only after all other methods fail. Under these less formal procedures there may be dialogue and consultation among the parties to agreement, identification of potential problems by a Secretariat to an agreement and possibly discussions concerning a state's compliance with the findings subsequently published in a report.

2.2 The scope of the Paper

The paper covers the following areas:

- Formulation and adoption of international environmental law instruments;
- Administering treaties: conference of parties, secretariats and subsidiary bodies;
- Overview of selected multilateral environmental agreements;
- Compliance and enforcement mechanisms in international environmental agreements; and
- Conclusion.

2.3 Formulation And Adoption Of International Environmental Law Instruments

Article 38(1) of the International Court of Justice (ICJ) Statute, the judicial organ of the UN system, identifies four sources of law the court can employ to determine the applicable international law that is binding in a particular. These are:

"(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;
(c) the general principles of laws recognized by civilized nations; and
(d) …judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."[46]

2.4 What is a Treaty or Convention?

Article 2.1(a) of the Vienna Convention defines a treaty as:

> *"An international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation."*[47]

In other words, a treaty is a contract between States and, just as with commercial contracts, what is important is the manifest intent of the parties – in this case States – to be bound by their agreement. It is the obligatory character of the terms of a treaty, not its nominal designation that determines whether a binding rule of international law has been created. However, the only nominal requirement is that there be a writing. While States may undertake binding international agreements without concluding a written instrument, the Vienna Convention does not govern such agreements, although they may be governed by general principles of international law. It is important to note that the instrument need not be called a treaty; it can be called an agreement, convention, pact, covenant, protocol or virtually any other name.

Treaties play a dual role in the international system. Their primary function is to create specific legal obligations between the treaty parties. Treaties are the most easily discernible sources of international law because they derive their legitimacy directly from the express consent of States. They are the principle method for creating binding rules of international law, including international rules regarding the environment. Treaties can also contribute to the development of customary international law. In this regard, treaties may codify the practice in normative terms, eventually it becomes well established that new international law on the subject has emerged. An example is the UN Law of the Sea (UNCLOS), where negotiations took more than ten years, even before workable rules for governing the world's oceans were developed, *opinion juris* developed around many new norms such as the 200 mile exclusive economic zone (EEZ). Other instances where a

[46] Charter of the United Nations including the Statute of the International Court of Justice, Art. 38(1) of the ICJ Statute, 1945.
[47] Vienna Convention on the Law of Treaties, 1969.

treaty may contribute to the development of customary law is when a number of treaties and declarations incorporate a rule with increased support that an international consensus emerges.

2.4.1 The Treaty-Making Process

Just as there is no prescribed form for treaties, neither is there a prescribed process for initiating the treaty making process or for negotiating a treaty. Although States are still the predominant actors in the treaty making process, international governmental organizations (IGOs), non governmental organization (NGOs) and other non-State actors are playing an increasingly significant role. This role is most pronounced in the early stages of the treaty making process, where IGOs and NGOs have been instrumental in laying the groundwork for important Multilateral Environmental Agreements (MEAs).

Four basic steps are inherent in the conclusion of any international agreement:

(a) identification of needs and goals;
(b) negotiation;
(c) adoption and signature; and
(d) ratification.

2.4.1.1 Identification of Needs and Goals

Before an international agreement can be concluded, certain preliminary steps must be taken. The first step, of course, is that the need for action must be discovered – someone must conduct research and synthesize the data that demonstrate, for example, that a particular substance harms the environment or a particular species is in danger of extinction. This seems an obvious point, yet it bears mention for two reasons. First, many important environmental problems have gone unaddressed for years or even decades before someone accumulated sufficient data to convince the international community to address them. Second, because there is neither a prescribed process for identifying treaty needs, nor any group of actors vested with primary responsibility for doing so, need identification has proven an important strategy for non-State actors to influence the international environmental law making process. At this stage the primary factor is elevation of an environmental condition to the status of a problem, scientists, policy makers and ordinary citizens typically construct their diagnoses or definitions on a foundation of preconceptions and predispositions that direct their attention to particular factors of causation, change and response. The role of scientists in the development of policy to protect the ozone layer offers one of the most dramatic examples of how epistemic communities operate.

Once an issue has been defined there is typically a call for authoritative analyses by government and NGOs of the policy implications raised by prior scientific reports. A key factor in agenda building has to do with the addition or subtraction of issues that can be linked to the lead issue(s) under consideration. Basically, there are four broad

possibilities.[48] The first type of issue linkage involves the addition of differentially valued, unrelated issues. In the greenhouse case, for example, this could involve linking proposals for a carbon tax, and the revenue it would generate, to proposals for the development of a global environment trust fund. A second type of issue linkage focuses on overcoming distributional impediments to jointly beneficial agreements by adding side payments. The provision of technology transfers (e.g., CFC substitutes) or direct monetary assistance would constitute a side payment that could facilitate Third World compliance with possible agreements for ozone and climate protection. A third approach emphasizes the addition of issues to exploit their dependencies. Linking the rainforest-protection issue and industrial CO2 emissions, for example, would exploit the existing dependencies between these issues (e.g., trees can absorb some of the CO2 emissions from power plants). Finally, issue linkage can also lead to a reduction in a zone of possible agreement, for example, by adding issues that have no possibility for consensus or by linking issues that have individual zones of possible agreement but a smaller combined zone for concurrence. Proposals to reduce CO2 emissions by adding nuclear power development to energy conservation strategies have had this effect on the environmental community.

2.4.1.2 Negotiation

In the case of a bilateral treaty, a State may initiate the treaty – making process simply by inviting another State to negotiate on a particular issue. Negotiations may then proceed, and a binding agreement be concluded, through a simple exchange of diplomatic correspondence – face-to-face negotiation between the parties is not required. Regarding MEAs, in recent decades, a somewhat standardized negotiating process has emerged. Negotiations may be initiated by individual States; more often, however, a State will recommend that an international organization, particularly the United Nations General Assembly (UNGA) or the UN Economic and Social Council (ECOSOC), establish a committee or convene an international conference to consider a particular issue. The host organization will then organize preparatory committees, working groups of technical and legal experts, scientific symposia and preliminary conferences. Increasingly, the organizing body will invite, or at least accept, comments from NGOs, scientific unions and other private groups such as the indigenous peoples. During these informal discussions, information is disseminated, the preliminary positions of interested States are established, the parameters of a possible agreement are narrowed and the slow process of building international consensus begins.

These informal exchanges are then followed by a conference of plenipotentiaries' i.e. representatives with authority to negotiate and approve an international agreement on behalf of their respective governments. In the interim, the host government or organization, or some other qualified international body, will develop a draft convention to serve as the basis for discussions at the plenipotentiary conference. Generally, draft conventions are prepared with significant participation by the interested parties and many disagreements among States are likely to be ironed out before the final conference

[48] Sebenius, James K. 1983. "Negotiation Arithmetic: Adding and Subtracting Issues and Parties." International Organization 37: 281-316.

convenes. At the plenipotentiary conference, delegates will seek to resolve their remaining disputes, and produce a final, authoritative version of the treaty, an "authentic text".

As Robert Putnam (1988) argues, this part of the process can be thought of as a "two-level game" in which domestic and international politics interact in ways that often require strategic bargaining at each level to be reconciled by some central decision maker:

> *"At the national level, domestic groups pursue their interests by pressuring the government to adopt favourable policies, and politicians seek power by constructing coalitions among those groups. At the international level, national governments seek to maximize their own ability to satisfy domestic pressures, while minimizing the adverse consequences of foreign developments. Neither of the two games can be ignored by central decision makers, so long as their countries remain interdependent, yet sovereign."* [49]

In Putnam's view, domestic political concerns about what is in the "national interest" will inevitably influence international diplomacy in ways that usually limit and sometimes expand the opportunities for negotiation and agreement. However, national self interest is becoming harder to calculate in a world of transboundary environmental risks and expanding transnational networks of economic trade and political communication.

2.4.1.3 Adoption and Authentication

Before the negotiation phase of the treaty-making process can be concluded, and the treaty "opened" for signature and ratification, the text must be adopted. Unless a State has specified otherwise, adoption of a treaty text does not make the treaty binding on that State. Adoption simply signifies the participant's agreement that the text of the treaty is acceptable in principle. Article 9 of the Vienna Convention sets out the procedure for adoption:

> " 1. *The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.*
>
> 2. *The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule."*[50]

The conference delegates adopt a "Final Act" of the conference, which summarizes the history of the Conference and incorporates by reference all the documents and records produced there. The text of the treaty will be incorporated in or annexed to this Final Act. If the treaty negotiations occurred within an established international organization, such

[49] Putnam, Robert D. 1988. "Diplomacy and Domestic Politics: The Logic of Two-level Games. "International Organization 42, 3 (summer): 427-460.
[50] Vienna Convention on the Law of Treaties, 1969. Art. 9

as United Nations or one of its permanent organs or agencies, the treaty will be approved through the adoption of an appropriate resolution, in which the final text will be incorporated.

When the final draft of the treaty has been adopted, it must be "authenticated" by a representative of each State, generally by signing the treaty. Authentification identifies the treaty text as the actual text the negotiating States agreed to and establishes that each signing State agrees in principle to its terms. Although there are exceptions, a State's signature on a treaty generally does not signify its consent to be bound by the treaty. By signing a treaty, however, a State does agree to refrain from acts "which would defeat the object and purpose of the treaty," until it has made clear its intention not to become a treaty party.[51]

2.4.1.4 Ratification

A State will be bound by the terms of a treaty only if it takes affirmative steps to demonstrate its consent to be bound. Theoretically, there is no limit on the ways a State may express this consent. The means of expressing consent to a treaty include: "signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed."[52] With respect to MEAs, the most common method of demonstrating consent is by ratification. Ratification is any authoritative act whereby a State declares to the international community that it considers itself bound by a treaty. The MEAs are typically ratified by depositing an "instrument of ratification" with the United Nations or another designated depositary organization.

In some jurisdictions such as the United States of America, a treaty must be approved through domestic political processes before the treaty can be ratified. In such instance, the President must present a treaty to the Senate for its "advice and consent" before the treaty can be ratified. The Senate may refuse its consent, in which case the President cannot ratify it, or the Senate may make its consent contingent on certain changes or exceptions. If these cannot be accommodated through reservations to the treaty, the President must renegotiate the treaty to incorporate the changes or the treaty cannot be ratified. A good example is the Kyoto Protocol.

2.4.2 Limited Consent and Reservations

A State may consent to be bound by only a portion of a treaty if the treaty permits or the other treaty parties agree to the limited consent.[53] Even when limited consent is not available, a party may enter reservations or objections to any part of a treaty so long as that reservation is not prohibited by the terms of the treaty, or incompatible with the treaty's object and purpose.[54] Any reservations must be entered at the time the State expresses its consent to be bound. The entry of a reservation affects the operation of the

[51] Vienna Convention on the Laws of Treaties, 1969, Articles 10 and 18.
[52] Ibid Art. 11
[53] ibid Art.17.
[54] Ibid Art. 19.

treaty as between the reserving State and other treaty parties. The nature of those effects depends upon whether other parties to the agreement accept or object to the reservation.[55]

2.4.3 Entry Into Force

The parties to a treaty are not bound by its terms until the treaty enters into force. No treaty enters into force for a specific State until that State has ratified the treaty and deposited an instrument of ratification with the appropriate depositary, and any pre-conditions of the treaty's entry into force have been satisfied. If the treaty makes no special provision for entry into force, it enters into force as soon as all the negotiating States have ratified. More often, however, the treaty will provide for its entry into force after a certain minimum number of States have ratified, even if other States have not. The treaty then becomes effective as between the ratifying States.

2.4.4 Keeping Treaties Up-To-Date

A treaty may be amended by agreement of the parties. In the case of MEAs, every party to the treaty is entitled to participate in the amendment negotiations and to become a party to the new amendment. States are required to do so, however, and a State can remain a treaty party without becoming party to the amendment.[56] States that adopt the amendment are bound by the terms of the original treaty with respect to States that do not become party to the amendment.

Two or more parties to a treaty may also modify the terms of the treaty as between themselves if the treaty so provides, or if the modification will not affect the treaty rights of other parties and the modification is not compatible with the object and purpose of the treaty as a whole.

2.4.5 Interpreting a Treaty

The methodology for interpreting a treaty is outlined in Articles 31 and 32 of the Vienna Convention. Just as with a commercial contract, the court must look first to the text itself in determining the intent of the treaty parties. Article 31(1) provides that "(a) treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."[57] The object

[55] Ibid. Art. 21 deals with legal effects of reservations and of objections to reservations: (1) A reservation established with regard to another party in accordance with articles 19, 20 and 23: (a) modifies for the reserving State in its relations with that other party the provisions of the treaty to which the reservation relates to the extent of the reservation; and (b) modifies those provisions to the same extent for that other party in its relations with the reserving State. (2) the reservation does not modify the provisions of the treaty for the other parties to the treaty inter se. (3) when a State objecting to a reservation has not opposed the entry into force of the treaty between itself and the reserving State, the provisions to which the reservation relates do not apply as between the two States to the extent of the reservation.

[56] Ibid Art. 40

[57] Vienna Convention, Art. 31(2) The context for interpreting a treaty includes the text itself, including the preamble and annexes, as well as: (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument

and purpose are often stated clearly in a treaty, including in a preamble. Other times, they may have to be inferred from the overall structure of the treaty taken as a whole.

2.5 International Soft Law

In addition to treaty making, international law is also created through the customary practice of States, general principles, declarations and action plans.

2.5.1 Creation of Soft Environmental Law

Most of the time, States are not interested in strong, binding agreements. In fact, the most popular metaphor used to describe international environmental policy selection is one of softening or dilution – attempts to "water down" proposals. Rather than opposing strong environmental policies outright, governments often attempt to preserve flexibility by softening proposed policies into non-binding principles, standards and guidelines. Examples of these soft laws include the international drinking water guidelines established by the World Health organization.

Another popular strategy, first employed in preparations for the Stockholm Conference[58], is to develop a comprehensive action plan for environmental management. Here the emphasis is on creating a consensus document to guide national development policies with respect to environmental protection. Action plans are not legally binding, but they often presuppose international movement, eventually, toward binding policies. The 1992 Agenda 21, the best known action plan, contains hundreds of pages of environmental objectives and proposed policy measures to achieve them. The 2000 Millennium Development Goals (MDGs) and 2002 WSSD Johannesburg Plan of Implementation (JPoI), like Agenda 21, represent agreements among nations to act on environmental problems, but without the force of binding deadlines or the fear of sanctions for failing to act.

The legal effect of soft environmental law, one could say, using the classical working of legal theory in regard to the creation of custom that the cumulative enunciation of the same guideline by numerous nonbinding texts helps to express the *opinion juris* of the world community.

Soft law can also be of great help in every day inter-state diplomacy. They may also effectively be taken into account by municipal judges in evaluating the legality, with regard to international law, of any internal administrative action having had or able to have some damaging impact on the environment beyond national boundaries. Furthermore, municipal judges may take these international standards and guidelines into account in order to give a correct interpretation to very generally formulated international obligations.

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related to the treaty; (c) any relevant provision of international law applicable in the relations between the parties….

[58] Stockholm Conference on the Human Environment, 1972.

2.6 Administering Treaties: Conference Of Parties, Secretariats And Subsidiary Bodies

In addition to establishing the specific obligations of State parties, most environmental treaties also create their own administrative and policymaking bureaucracy to help the parties fulfill treaty obligations, to help further the treaty's mission, and to provide for a for international environmental governance. These institutions may be permanent or intermittent, and include conferences of the parties, secretariats and subsidiary bodies including technical or expert committees.

2.6.1 Conference of the Parties

Much like a corporate board of directors, the conference of the parties (CoPs) are the primary policy–making organs of most MEAs. The CoPs usually occur once every one or two years and conduct the major business of monitoring, updating, revising and enforcing the conventions. Furthermore, once an MEA has entered into force, the CoP provides the mechanism by which new protocols are adopted and amendments and modification made. Thus, the CoPs play a crucial role in the vitality and continuing development of environmental regimes, adapting those regimes to new information and changing circumstances as the need arises. Indeed, it is often through the CoP that the most stringent treaty obligations are created. The CoPs are also crucial to addressing environmental crises that cannot wait for the development and entry into force of entirely new conventions. For example, when elephant stocks plummeted in the 1980s and early 1990s, the CoP to the 1973 Convention on International Trade in Endangered Species (CITES) adopted a moratorium on trade in elephant ivory. Elephant populations have recovered significantly in many of its range states.

2.6.2 Secretariats

Secretariats are responsible for the day-to-day operations of the convention. The precise functions of the secretariat vary from one treaty to the next; among the more common functions are monitoring and reporting on treaty implementation, assisting implementation when necessary, promoting scientific research relevant to the treaty's objectives and contributing to the further development of the law. In addition, virtually all secretariats serve as conduits for communications among the treaty parties. More specifically Secretariats do the following:

(a) *Gathering, analyzing and distributing information:* Secretariats are the information clearinghouses for most conventions. Most MEAs often require that parties submit annual or biennial reports related to the specific convention goals;
(b) *Maintaining authoritative convention records:* Secretariats play the critical role of maintaining the official, technical and other annexes that can be heart of the convention. For example, the CITES Secretariat is charged with maintaining the different appendices to the convention, which list all species regulated under the convention. Similarly, the Bureau for the Convention on Wetlands of

International Importance Especially as Waterfowl Habitat (known as the Ramsar Convention) maintains the list of designated wetlands as well as a list of "conservation targets."

(c) *Supporting the Conferences of the Party*: A routine but important function of treaty secretariats is to prepare and support the annual or biennial meetings of the parties. Each CoP requires staff to prepare, receive, translate and circulate the official conference documents, as well as manage the logistics of the meeting itself. Preparation of the background papers for the CoP is particularly important for promoting the further development of the treaty regime.

(d) *Monitoring compliance and facilitating implementation*: Most treaty secretariats do not have actual enforcement authority, but some secretariats do have the "power of persuasion" to bring a violating party into compliance.

(e) *Coordinating with other treaty regimes and secretariats:* with recent proliferation of MEAs, as well as the growing interest in environmental protection at other international institutions, treaty secretariats are increasingly being asked to coordinate their activities with other secretariats or institutions.

2.6.3 Subsidiary Bodies and Committees

In addition to secretariats, many MEAs also create subsidiary bodies or committees to address specific (and usually technical) issues arising under the treaty. For example, the Convention on Biological Diversity's (CBD's) Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA) is established to provide the CoP… with timely advice relating to the implementation of the convention. Another model used to address significant issues of treaty administration or implementation is the use of committees, typically authorized directly under the CoPs. For example the biennial meetings of the CITES CoP are supplemented by the more frequent meetings of supplemental committees formed to address specific concerns. The standing committee addresses issues relating to the budget, administrative concerns and internal affairs.

2.7 Overview Of Selected Multilateral Environmental Agreements

2.7.1 Treaties/Conventions

2.7.1.1 Wildlife and Biodiversity

2.7.1.2 The Convention on Biological Diversity (CBD, 1992)

The Convention on Biological Diversity's objectives are "the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources, including by appropriate access to genetic resources and transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding." Some of the commitments under the convention include: to develop national strategies, to undertake identification and monitoring of components of biological diversity, to establish systems of protected areas, to facilitate access to genetic resources, to provide access to

technology and biotechnology, to protect the knowledge of traditional and indigenous communities, and to provide financial resources for developing countries.

2.7.1.3 The Convention on International Trade in Endangered Species (CITES, 1973)

The international trade in endangered species, worth billions of dollars annually, has caused drastic declines in the numbers of many plant and animal species. The scale of overexploitation for trade aroused such concern for the survival of species that an international treaty was drawn up in 1973 to protect wildlife against such overexploitation and to prevent international trade from threatening species with extinction. However, the impact of CITES is rather limited since the convention addresses only those species that are in danger of becoming extinct, and its regulations refer only to imports and exports of such species.

The Convention regulates or prohibits international trade in threatened and endangered species and thus provides a framework for their conservation and protection against overexploitation. In other words, CITES acts as a border guard, restricting the flow across national boundaries of rare species and parts of species. The core of CITES protections lies in the system of Appendices to the Convention. CITES has three appendices, which establish differing levels of permit requirements for the import and export of endangered species (and parts of species derived there from). Placement in an appendix determines the level of restrictions placed on trade. In rare instances, listing can be quite specific, protecting geographically separate populations while allowing trade in the species elsewhere.

CITES is a dynamic convention and its parties meet every two years to decide whether to add, remove or change the listing of species in the Appendices. Any party may propose an amendment to Appendices I and II. Adoption of an amendment requires a two-thirds majority of parties voting. At the time of amendment, a party may enter a reservation, formally exempting it from complying with the relevant permit requirements and placing it in the same status, in regard to that species, as a non-party.

2.7.2 Freshwater Resources, Protection of Habitat and World Heritage

2.7.2.1 Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention, 1971)

The Convention on Wetlands of International Importance Especially as Waterfowl Habitat **(**Ramsar Convention) which was adopted in 1971 imposes on contracting parties the obligation to formulate and implement planning in a way that ensures conservation and wise use of wetlands within their boundaries.

2.7.2.2 East Africa Community Treaty and its protocols

The Treaty establishing the East African Community which was signed on 30 November 1999, *inter alia*, under Chapter 19 calls for cooperation of Partner States in the management of environment and natural resources. Some of the salient provisions are calling on Partner States to (i) agree to take concerted measures to foster cooperation in the joint and efficient management and sustainable utilization of natural resources within the Community; (ii) undertake, through environmental management strategy, to cooperate and coordinate their policies and actions for the protection and conservation of the natural resources and environment against all forms of degradation and pollution arising from developmental activities; (iii) develop and promote capacity building programmes for sustainable management of natural resources; and (iv) ***adopt community environmental management programmes.***

2.7.2.3 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention, 1972)

The United Nations Educational, Scientific and Cultural Organization (UNESCO) seeks to encourage the identification, protection and preservation of cultural and natural heritage around the world considered to be of outstanding value to humanity. This is embodied in an international treaty called the Convention Concerning the Protection of the World Cultural and Natural Heritage, adopted by UNESCO in 1972. The enabling mechanisms of this instrument facilitate the establishment of "recognized sites" and provide support under the convention.

The Convention joins together the often separate goals of nature conservation and preservation of cultural sites. Its dual missions are to define the world's heritage by creating a list of natural and cultural sites whose irreplaceable value should be preserved for future generations and to ensure the site's protection through international cooperation. While the Convention recognizes the responsibility of the international community to preserve sites with universal heritage, it also explicitly respects national sovereignty. Each party to the agreement is first and foremost responsible for the preservation and protection of the natural and cultural sites located within its territory.

The Convention's protection strategy is three-fold: listing of heritage sites, recognition of sites in danger and financial support for maintenance and restoration of sites. Thus the Convention establishes the List of World Heritage in Danger and a World Heritage Committee, charged with administering the World Heritage Fund.

2.7.2.4 Africa Convention for the Conservation of Nature and Natural Resources (1968, revised 1994)

The Convention focuses on sustainable use and conservation of soil, water, flora and fauna, and cooperation over the management of transboundary natural resources. Its secretariat is the African Union. By this Convention, the various independent African states including Kenya undertook:

> "*to adopt the measures to ensure conservation, utilization and development of soil, water, flora and faunal resources, in accordance with scientific principles and with due regard to the best interests of the people.*"

The Convention also underscores the importance of conservation areas such as forest reserves and obligates Contracting States to "maintain and extend where appropriate, within their territory, the conservation areas existing and preferably within the framework of land use planning programmes in order to protect those ecosystems which are most representative and for conservation of indigenous flora and fauna." The Convention further obligates Contracting States to ensure that conservation and management of natural resources are treated as an integral part of national and/or regional development plans, taking full consideration of their ecological as well as their economic and social factors.

2.7.3 Earth's Atmosphere

2.7.3.1 The UN Framework Convention on Climate Change (UNFCC, 1992)

This Convention acknowledges that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the earth's surface and atmosphere and may adversely affect natural ecosystems and humankind. The convention explicitly recognizes the role of marine ecosystem as carbon sinks and its vulnerability.

The objective of this Convention is to regulate levels of greenhouse gas concentration in the atmosphere, so as to avoid the occurrence of climate change at levels that would harm economic development or that would impede food production activities. Greenhouse gases are gases such as methane and carbon dioxide, emitted by both natural and industrial processes, which have the potential to form a layer in the atmosphere, preventing the escape of heat from the earth, thus leading to global warming or other climate change. The Convention is premised on the principle that State Parties should take courses of action, in respect of their economic and social activities and with regard to the Convention's specific requirements that will protect the climate system for present and future generations.

2.8 Compliance And Enforcement Mechanisms In International Environmental Agreements

2.8.1 State Liability and Compliance with International Environmental Agreements

The concept of an international law of the environment is relatively new. It is principally a result of twentieth century technological advances and a corresponding increased

understanding of the environmental consequences of those advances. In the past two decades, this area of international law has developed rapidly as problems such as oil and chemical spills, acid rain, stratospheric ozone depletion and polluted waterways have clearly demonstrated that environmental degradation does not respect man-made boundaries. There has been a growing recognition that "pollution and other sorts of environmental harm are propagated regardless of state sovereignty and its limits" and that accordingly, "the struggle against it must be international." Furthermore, "the quality of the environment and natural resource management are no longer regarded as solely domestic concerns, for environmental impacts may be much more wide-ranging: they may dramatically affect foreign economies or public health and they may even ignite belligerent actions.

Focusing specifically on the past solutions available to address insults to the environment, legal actions were originally taken within the existing structure of international law which placed little emphasis on the environment. For example, in older treaties involving environmental related disputes, established principles of international law were extended to cover the issues in question, rather than legal concepts being modified to incorporate environmental concepts. In essence, two principles of international law traditionally have been applied to environmental issues. First, "a nation should not permit an action within its territorial jurisdiction to harm the interests of other nations". Second, "nations should cooperate to serve the mutual interests of their respective peoples". In recent years, there has evolved the concept that international cooperation should, when necessary, take the form of legal efforts to protect the environment and that international law should recognize the human right to a clean, pure, healthy and even decent environment."

2.8.2 General Characteristics of State Liability

There exists no universal treaty governing liability for transboundary environmental damage. In the absence of a binding agreement between nations, injured parties must look to customary international law, one cornerstone or which is treaty law. The advantages and necessity of bilateral and multilateral agreements for international environmental issues are obvious. There are limits to the scope of environmental harm to which even the most powerful country can respond unilaterally. For example, global media which such as the oceans are particularly difficult to protect exclusively on the national level given the existence of borders and the right of passage for foreign vessels through coastal waters. As such, some form of international standard setting is required; international agreements between countries provide the most direct means of prevention and control as they can include precise environmental standards. Upon ratification, the provisions containing these standards immediately inquire an obligatory character under the terms of the agreement.

While treaties offer the opportunity to address specific noncompliance with environmental standards, they contain significant limitations. The most obvious is the fact that the group of interested or affected states must arrive at the consensus as to the scope and interest and the historic reluctance to commit to overly restrictive rules can make these a difficult process. Common environmental standards particularly on

developing countries. Thus the net result of negotiations may be weak obligations that reflect the "lowest common denominator" among the signatories.

Once the agreement is reached, a breach of the agreement, particularly a multilateral agreement, may affect one country in particular or even a group of countries as a whole. Whenever the rights and interests of one state are specifically affected, that state suffers a particular injury which under the law international responsibility is supposed to be treated exactly as is any other particular injury. The affected state is "an injured state" that is owed an obligation to make "reparation in an adequate form". The problem becomes more complicated when the breach of a multilateral agreement does not affect one state in particular but all the signatory countries. It is well established to claim adequate reparation. There is however a distinction between this instances in which the consequences of the violation are organized by the treaty itself and those in which they are not.

Though the types of specific enforcement and compliance provisions usually sound in international environmental agreements will be discussed in more details below, it is important to note at this juncture that treaties provide for collective and unilateral remedies against a violating state. Collective reparation can be found in the provisions of the constitutive characters of international organizations which provide for remedies against the defaulting party. For example, Article 19 of the United Nations provides for a collective remedy in so far as the General Assembly may suspend the violating rights of a state in default of payment.

When a treaty does not include provisions addressing the consequences of a violation, the situation is more complex. In many instances, one of the affected states might choose to take steps to unilaterally rectify the violation. The traditional approach to this eventuality links the lawfulness of any unilateral action to an actual and identifiable injury to the aggrieved country. Unfortunately, this approach is flawed with respect to its application to treaty law. The concept of "injured state" is elusive because it is inexorably intertwined with the notion of "moral damage" in international law. Even though the outcome of a violation of a multilateral agreement under this approach is usually a finding injury, the result "does not advice international legal reasoning very far".

An alternative approach, which could be employed by NEMA, is that of separating the right to take unilateral steps from the existence of an actual injury. NEMA should address violations strictly as a matter of enforcement and not simply as a matter of international responsibility. For example, the US addresses violations strictly as a matter of enforcement and not simply as a matter of international responsibility. A statutory example of this practice by the US in the environmental arena is found in the Fishery Conservation and Management Act of 1976 which provides for reductions in fishing allocations within the US 200 mile fishery conservation zone to countries deemed to be compromising the effectiveness of the International Convention for the Regulation of Whaling.

Some scholars have speculated that the US position may be a response to a problem that was tactfully avoided in the Vienna Convention, i.e., whether general international law compels nations not to hinder the execution of valid agreements concluded by other states. The Vienna Convention makes such an obligation binding upon third parties only after the provisions of a treaty have turned into customary rules of international law. The US approach, however, has the effect of enforcing against all states rules which are not truly customary. It is the US perception of effective compliance and enforcement in any given agreement that prompts these unilateral steps.

2.9 Compliance and Enforcement Mechanisms

2.9.1 Reparations

Whatever the legal approach, once it is determined that a state is out of compliance or has otherwise violated a substantive provision of an agreement, a variety of legal consequences may follow. The general rule stated by the Permanent Court of Justice in the *Chorzow Factory case*, namely that a breach of an obligation triggers a second obligation to make reparation, is applicable. Reparation should, as far as possible, erase the consequences of the violation and re-establish the situation which would have existed if that violation has not been committed. Because restoration of the *status quo ante* is usually not possible or feasible once environmental damage has occurred, other means must be found to satisfy injured parties.

International agreements often contain provisions governing the settlement of disputes, discussed in more detail below, which often arise in the context of reparation negotiations. One relatively infrequently used means of reparation worth noting is a declaratory judgment which, when made by an appropriate international tribunal, may provide satisfaction to an injured party. Though a simple finding in favour of the injured state may not restore the environment, it may have a deterrent effect on the violating state for purposes of future behavior. Though compliance mechanisms such as reporting requirements can come into play as forms of reparations, they will be addressed separately because these mechanisms are commonly present as independent provisions of international environmental agreements. By far, the two most effective forms of reparations are the payment of compensation for damage already done and pollution abatement, which involves the cessation or modification of the violator's behavior.

2.9.2 Compensation

Compensation is a common form of reparation where restitution in kind is not practical. The general rule is that a monetary payment for damage suffered is appropriate. There are, however, variances, particularly to provide some new benefit to the injured party to make up for its loss. For example, the Finland-USSR frontier treaty allows the two countries to "make reparation for any loss or damage caused…by granting the Party suffering the loss or damage certain privileges in the watercourses of the other party. The criteria for determining the actual award when monetary compensation is given are

complex and, of course, depend on the forum in which a claim is presented. It may also be difficult to assess the value of the affected environmental resources.

Two further collateral considerations merit brief attention. The first is the possibility of assessing punitive damages as a deterrent in especially egregious cases. Though the decisions of international tribunals offer little support for such an approach, the "International Crimes" whose commission might warrant more than normal reparation. Further analysis by the ILC and interested countries is necessary to determine what value punitive damages may present. At this time international environmental law appears to be insufficiently developed to support such a concept. In this regard, to the extent that international environmental agreements address liability, they typically do nothing more than call upon the parties to develop liability systems.

A second collateral issue is the role of liability-limiting agreements which are attempts by countries to limit the potential for huge claims following events such as the Bhopal disaster, or the Amoco Cadiz and Exon Valdez supertanker spills. Some countries, such as the United States, have refused to ratify conventions whose liability provisions they consider to be inadequate according to their legal and political judgment, and instead utilize the enforcement provisions of domestic legislation to govern liability for spills from vessels entering their ports.

2.9.3 Pollution Abatement

Compensation, while an important means of making an injured party whole, will not in and of itself prevent a reoccurrence of identical or similar activities by the violating party. It is reasonable to expect that provisions will be made to eliminate or modify environmentally-detrimental behaviour. At the same time, the total cessation of an injurious activity may not be necessary except in extreme circumstances such as where there is a need for a prohibition on the manufacturing and export of dangerous substances, or the dumping of hazardous wastes in a certain body of water.

Because of the potential economic and social value of behaviour that has the effect of causing pollution, it is far more common for states to agree to liability regimes that entail an obligation to minimize or reduce those detrimental effects rather than cease the activity. Typically, the violator’s abatement obligation is qualified by language such as "in so far as such measures are economically feasible". The Finland-Sweden Frontier Rivers Agreement, which calls for the cessation of construction that "injures a substantial public interest," is modified to the extent that it provides that construction can resume "on the condition it is of particular importance for the economy."

2.9.4 Compliance Monitoring

Growing international concern over environmental problems has led to the inclusion of a wide array of enforcement and liability provisions in bilateral and multilateral agreements which govern the behaviour of states after environmental injuries have already occurred. Scholars have increasingly noted that by approaching environmental problems from a

liability perspective, adversarial confrontations are regulated but not reduced. Furthermore, there is no corresponding benefit to the environment. Accordingly, it is appropriate that enforcement provisions should be supplemented by provisions whose goal is the prevention of environmental damage. In these cases, states are required to take some preventive measures even before commencing environmentally-threatening activities.

For example, in the US, preventive measures, are cumulatively, termed "pollution prevention." It is anticipated that pollution prevention planning will be implemented throughout every environmental regulatory programme in the near future. The emphasis on preventing pollution as the source is intended to reduce or eliminate root causes of pollution thus many violations, thereby increasing the prospects for minimal pollution and continuous compliance in the future. It is further anticipated that final environmental guidelines will explicitly encourage enforcement personnel to incorporate pollution prevention conditions in enforcement settlements.

2.9.5 Evaluation Requirements

The duty to make an environmental evaluation of certain activities is relatively noncontroversial and is probably an element of international law despite the lack of universally accepted evaluation criteria. The essential issue is the weight that a state must give in its internal management decisions to the transboundary impact of environmentally-dangerous activities.

The need for a proper environmental planning was a constant theme at the 1972 Stockholm Conference on the Human Environment; Principle 17 of the declaration states "appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources of states with a view of enhancing environmental quality." General state practice reflects the concern that states share with respect to boundary and frontier resources. Many early treaties, however are exceptionally vague in defining the obligations entailed I applicable provisions; the 1960 Frontier Treaty between the Netherlands and the Federal Republic of Germany only references the "due regard" each is expected to give to the other's "interest in the boundary waters". The Nordic Convention is more precise in that parties must treat the damaging effects that environmentally-threatening activities might cause in another country as if they were created domestically.

At the present time, the institution of the environmental impact assessment process is a basic principle which is reflected in a multitude of international agreements which vary in the degree to which they are legally binding. The following, for example, have the force of treaty: the 1985 Agreement of the Association of South-East Asian nations on Conservation of Natural Resources (Articles 14, 19 and 20); the 1983 Convention on Protection and Utilizing the Aquatic Environmental of the Caspian Region (Article 12), and the 1982 United Nations Convention on Maritime Law (Article 206).

2.9.6 Notification Requirement

The duty to notify states of possible transboundary harm is an emerging principle of international environmental law. In the context of the Chernobyl incident, the United States concluded that the Soviet Union had a duty to notify. (After Chernobyl, the IAEA rapidly concluded the 1986 Convention on Early Notification of a nuclear Accident.) OECD policies promulgated by the Nuclear Energy Agency (NEA) often serve as the basic for some international law relating to transboundary air pollution by developing further the principle of notification and consultation. Requirements the notifying others in risk of environmental harm have been most developed in the marine environment context.

Many international agreements require there to be a certain level of potential damage before there is a duty to inform, a threshold often loosely described only as "significant harm". Further, while some agreements contain standards as to the timeless of notification, others do not. An exceptional to the general rule is the Moon Treaty which does not suffer from the vagueness in that it obligates all parties to notify the Secretary General of the United Nations before any radioactive materials can be placed on the moon, regardless of the level of environmental damage posed.

2.9.7 Consultation Requirement

The duty to consult theoretically also arises when a proposed activity is expected to cause a level of damage that may be higher than that required for the duty to inform. Because consultation can involve extensive discussions and potential liability, it is a duty which states may in some cases be unwilling to comply with other than to supply rudimentary information to the affected states.

Most of the consultation standards that exist in international agreements lack specific guidance as the degree of environmental damage that needs to be threatened before there is a duty to consult other states. While the normal presumption is that state requesting consultations must demonstrate standing, the consultation procedure established by the Council of Europe in the European Convention for the Protection of International Watercourses Against pollution adopts a significantly different approach. Article 12 requires automatic consultations among all relevant parties at the request of any party. The burden is shifted to any state that wants to avoid consultations to demonstrate that it is not "bound to enter into negotiations."

While the ultimate objective of consultation is the resolution of disputes between parties, the provisions of various international agreements require different results. For example, the UN Economic Council for Europe 1979 Convention on Long Range Transboundary Air Pollution (LRTAP) does not envision any particular goal with regard to its requirement of consultation; a state planning an activity covered by this provision would appear to be obligated only to discuss the matter in good faith with other affected parties. Though many conventions do refer to the negotiation of an explicit agreement as the objective of consultation, it is often unclear what the results will be if the parties are

unable to agree. Some of third party intervention to facilitate an agreement may be appropriate.

2.9.8 Dispute Resolution Mechanisms

Article 2, paragraph 3 of the UN Charter requires that: "All Members shall settle their international disputes by peaceful means in such a manner that international peace and security and justice are not endangered." The UN General Assembly, in adopting the 1982 Manila Declaration on the Peaceful Settlement of Disputes, emphasized the: need to exert utmost efforts in order to settle any conflicts and disputes between states exclusively by peaceful means" and that "the question of the peaceful settlement of disputes should represent one of the central concerns for states and for the United Nations."

When national governments engage in activities which irreparably damage the global environment and threaten human health, their behaviour may give rise to disputes. As noted earlier, claims brought by other states for breach of obligations under international law or under treaty can usually be handled through traditional interstate dispute resolution processes such as diplomacy and adjudication. As to treaty agreements, there frequently exists not only general obligations of peaceful settlement, but requirements or recommendations related to the use of specific dispute resolution techniques such as negotiation, conciliation and arbitration. At the present time, there are over 250 bilateral and multilateral agreements that incorporate "compromissory clauses" or other obligations to settle disputes peacefully. Many identify the International Court of Justice as a possible forum for resolving disputes as to the interpretation or application of the agreements.

The principal element differing the various dispute resolution techniques is the extent to which third parties can legitimately participate in helping to bring about or determining the settlement and conversely, the extent to which the parties can reject a settlement proposed by the third party. In practice, distinctions between these techniques may be more theoretical than real, and a particular process of dispute settlement may combine elements of several techniques.

2.9.9 Settlement Procedures

2.9.9.1 Negotiation

Negotiation is a process whereby the parties directly communicate and bargain with each other in an attempt to agree on a settlement of the issue. By choosing to employ this technique, parties retain maximum control of the dispute resolution process and outcome. Negotiation is clearly the predominant and preferred method of resolving disputes. The use of other techniques, including adjudication, is invariably preceded, accompanied by the arranged through some sort of negotiation process.

Many existing environmental agreements require negotiation, and it may be considered part of the state's consultation duty. In most instances, negotiation is required only in response to a specific problem and only when it has reached a certain threshold of seriousness. This permits an early identification of potential areas of disagreement as well as an opportunity to agree on temporary measures should conditions warrant such.

Third parties can play an important role in facilitating negotiations. Through investigation and analysis, they provide a neutral body of data to serve as the basis for negotiations and, as appropriate, recommend technical measures. Third parties can also encourage dispute resolution through mediation and conciliation and are apt to discuss political as well as technical issues.

2.9.9.2 Arbitration

This technique involves the referral of the dispute by agreement of the parties or at the request of one party depending on the agreement, to an ad hoc tribunal for a decision usually on the basis of international law. The parties to the dispute establish in advance the issue or issues to be arbitrated and the machinery and procedure of the tribunal, including the method of selection of the arbitrator. While arbitration is normally binding, the parties can agree in advance that the tribunal's opinion will only be advisory.

Although there are few arbitral decisions on record involving environmental disputes, many international environmental agreements rely on arbitration as the primary means of dispute settlement should negotiations between the parties prove unproductive. For example, the Baltic Sea Convention declares that states "shall" use arbitration if negotiation and mediation fail. However, the agreement further notes that this will require "common agreement" among the parties to the dispute and goes no further in describing the arbitral process. Nonetheless, a number of agreements outline in detail an arbitral process that must proceed at a prescribed time, even if one party is uncooperative. Under these circumstances states are able to commence the proceedings despite the recalcitrance of one party.

2.9.9.3 Adjudication

This technique involves the referral of the dispute, by agreement or consent of the parties, to the International Court of Justice (ICJ) or some other standing and permanent judicial body for a binding decision, usually on the basis of international law. As in the case of arbitration, and if the rules establishing the court allow, the parties may agree to an advisory or non-binding opinion rather than a binding decision, or to a declaratory judgment specifying the principles which the parties should apply in the settlement of their dispute. A declaratory judgment was issued in the *North Sea Continental Shelf* case.

Several environmental agreements contain provisions encouraging parties to submit their disputes to the ICJ, though usually as a last resort. Disputes normally come before the court only after the parties agree to refer their differences to the court. Provision is made in Article 36 of the ICJ Statute, however, for compulsory jurisdiction when both parties

have previously submitted declarations accepting the court's jurisdiction with regard to that agreement or dispute, or when treaties in force between them authorize referral to the court. The right of the court to determine its own jurisdiction enhances its ability to hear cases even when one of the parties refuses to appear.

2.9.10 Applications

2.9.10.1 Duty to Legislate

As noted, parties to international agreements are bound by general international law to carry out their treaty obligations, which include the adoption of appropriate and necessary domestic legal measures. This helps to assure other parties that each state has taken the required domestic steps to review and implement obligations. Many agreements contain explicit language obligating states to adopt national legislation aimed at preventing and punishing violations of the agreement.

For example, the 1972 Convention on the Prevention of Marine Pollution by Dumping of wastes and Other Matter (the London Dumping Convention or LDC) provides that each party is to take "appropriate measures to prevent and punish conduct in contravention of the Convention." Under the 1978 Protocol Relating to the International Convention for Prevention of Marine Pollution from Ships (MARPOL), parties are obligated to provide the Secretariat with texts of laws, orders, decrees, regulations and other instruments promulgated for purposes of the convention, and to establish sanctions pursuant to their domestic laws in the event of violations thereof. Under the 1973 Convention on International Trade in endangered Species of Wild Fauna and Flora (CITES), parties are obligated to report biennially on all legislative, regulatory and administrative measures taken to enforce the convention and to take measures to penalize trade in violation of the convention.

The 1972 Convention for the protection of the World Cultural and Natural Heritage requires that parties take appropriate legal and administrative measures for the identification and conservation of "natural heritage" including the habitats of threatened species and that they report to the General Conference of the United Nations Educational Scientific and Cultural Organization (UNESCO) information on the legislative and administrative provisions they have adopted in accordance with the convention."

The United Nations Environment Programme (UNEP) Regional Seas Agreements for Eastern African region, Mediterranean and the Wider Caribbean generally provide that parties shall take appropriate measures to discharge their obligations, as well as report regularly to the meeting of the parties.

The LRTAP Convention generally provides for the development of "policies" for combating air pollution and for the exchange of information thereon, including major changes in national policies likely to cause significant changes in long-range transboundary air pollution. National policy reports are a regular agenda item at meetings of the parties.

The 1985 Vienna Convention on the Protection of the Ozone Layer, which is patterned after the UNEP Regional Seas Agreements, obliges the parties to adopt appropriate legislative or administrative measures and to transmit such information to meetings of the parties. (In response to the concerns of developing countries, the obligation to legislate among other general obligations was qualified by a party's capabilities). Interestingly, while the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer contains more detailed obligations than its parent Vienna Convention, it does not contain a specific provision on adopting and reporting on legislative measures.

Finally, the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal requires that each party undertake the appropriate legal and administrative measures necessary to implement and enforce the convention including measures to prevent and punish conduct in violation thereof.

2.9.10.2 Reporting obligations

MEAs generally incorporate reporting requirements which affect specific aspects of the agreement's implementation including the collection of data, record keeping and other activities, such as the reporting of national legislative actions previously discussed. In general, reports are prepared and submitted by states at specified format for distribution to other parties. Not only does the information provide assurances as to the compliance status of states, it promotes future effective implementation by virtue of access to an expanding data base.

The LDC provides a good example of contemporary reporting requirements. Parties are required to inform the Secretariat, inter alia, of any acts of dumping of prohibited wastes in *force majeure,* of any acts of dumping of prohibited wastes in *non force majeure* emergency situations (articles V, 1 and 2), and all dumping permits issued, including the nature, quantities, location and timing of permissible acts of dumping (Article VI, 1 and 4).

CITES require that records be kept of all transactions involving protected species, including the types of permits authorized. Furthermore, a party must report annually to the Secretariat (Article VIII, 6 and 7). Such reports allow the parties to CITES to ascertain the volume of trade in a given species as well as to review the propriety of permits issued.

MARPOL mandates that parties report on required certificates, such as for the seaworthiness of vessels, provide a list and description of reception facilities (as they are required to provide adequate facilities), and report the penalties imposed annually (Article II).

The LRTAP Convention contains one general reporting obligation, namely that parties exchange data on the emissions of air pollutants and the amount of emissions that cross national borders (Article 8). On the other hand, the Convention's NOX Protocol contains detailed reporting obligations, including the reporting of levels of national annual

emissions, and calculations on progress made in establishing required availability of unleaded fuel (Article 8).

The Montreal Protocol also contains precise reporting requirements relating to annual production and imports and exports of controlled substances (Article 7), and requires that parties notify the Secretariat of any allowed transfer of production between parties of any addition to calculated production allowed by the Protocol. Reporting of the data enables the Secretariat and the parties to be assured that other parties are meeting their consumption level under the defined baselines.

Finally, the Basel Convention requires parties to report annually to the Secretariat information relation to the amount and types of wastes governed by the convention which are exported and imported. More specifically, information is required on disposal operations and efforts to reduce the amount of waste subject to transboundary movements. As one of the objectives of Convention is to minimize waste generation and transboundary movements, this information is of particular interest.

It is important to note that reporting requirements address many concerns, and not simply that of enforcement, and may indeed serve a dual purpose. Information provided under the agreement serves not only as a basis for determining compliance, but also as a basis for determining whether new policies need to be developed.

2.9.10.3 Specific Compliance Procedures

A number of MEAs contain specific procedures relating to the review and detection of compliance and noncompliance. These procedures may take a variety of forms, including a specific role for the Secretariat. For example, under CITES, the Secretariat is empowered to study reports of the parties and request any information it deems necessary to ensure the implementation of the Convention and to focus the attention of the parties on any pertinent matter (Article XII, 2(d) and (e)). The Convention also provides for the Secretariat to notify a party directly if it believes that the Convention is not being effectively implemented, whereupon the party in question is to respond. (It may also request an inquiry, with information from the inquiry being furnished for the next meeting of the parties) (Article X). The CITES example represents one of the more independent Secretariats in the environmental field, the Secretariats authority is more limited.

The marine field incorporates some of the most highly developed enforcement and compliance procedures. It is in the marine environmental agreements that the actual inspection procedures involving other parties have been developed. Other environmental agreements must rely on reporting rather than individual or collective "on-site" verifications. MARPOL provides that the parties should cooperate in the detection of violations and in the enforcement of the agreement with respect to environmental monitoring, reporting and the accumulation of evidence (Article 61). MARPOL also establishes a port state enforcement regime whereby the port state may inspect on its own violation, or where the flag state has concurred where after appropriate notification

(Article 6, (4) and (5)… finally, MARPOL sets out detailed requirements for the reporting of discharges of harmful substances, including reporting requirements for a party's maritime inspection authorities (Article 8 and Protocol 1). The U.S. Coast Guard, for example, conducts routine surveillance operations and reports discharges through the U.S. State Department to flag states. This is consistent with the obligations placed on all parties to furnish flag states information on violations committee by their vessels (Article 6(3)).

The Secretariat of the London Dumping Convention is also responsible for the consulting with the parties by providing recommendations (Article XIV, 3) and has, in the past, brought a number of implementation issues to the party's attention. The LDC also requires the parties to punish the violators of the Convention (Article VII), but also requires the parties but also to cooperate in developing procedures for the reporting of vessels which are observed dumping in violation of the agreement (Article VII, 3). (Procedures have been proposed but never adopted). Regarding radioactive waste disposal to sea, in 1977 the members of the OECD set up within the NEA a multilateral consultation and surveillance mechanisms to promote the objectives of the LDC. It sets out detailed notification, assessment, reporting and inspection procedures. It is consistent with the IAEA's revised recommendations on the disposal of low level radioactive waste under the LDC, and calls for international observation of the loading and disposal of such waste to ensure compliance with the Convention.

2.10 CONCLUSION

It is trite that MEAs per se are not binding in most municipal jurisdictions especially the common law based legal systems unless they are incorporated in municipal law. However, because of the interconnectedness of the environmental goods and services, they may be taken into account by municipal judges in evaluating the legality, with regard to international law, of any internal administrative action having had or able to have some damaging impact on the environment beyond national boundaries. Furthermore, municipal judges may take these MEAs into account in order to give a correct interpretation to very generally formulated provisions in the Constitution and/or municipal laws.

Examples of application:

(i) *Oposa case* – The Phillipines (see environmental Law Case Book pg281-297).
(ii) *Aziz Timber Corp & Others v State of Jammu & Kashmir through Chief Secretary & Others* (India, O.W.P No 568-84/96) – illegal logging and deforestation.
(iii) *Bulankulama v The Secretary, ministry of Industrial Development* (the Eppawela Case), Supreme Court, application No. 884/99 (FR) Sri Lanka – Judicial actions to protect heritage site.
(iv) *Prakash Mani Sharma & Others on behalf of Pro Public v Hon. Prime Minister Girija Prasad Koirala & others,* Supreme Court of Nepal, 312 NRL 1997 – cultural heritage sites and international obligations.

(v) *MC Mehta v Union of India*, WP© 13381/1984 (the Taj Mahal Case) – addressing question of air pollution and industrial emissions. This was referenced in the judgement in *Advocates Coalition for Development v Attorney General*, Environmental Law Case Book, p11.

CHAPTER THREE

INTERNATIONAL CONVENTIONS AND OTHER LEGAL INSTRUMENTS IN THE FIELD OF ENVIRONMENT AND DEVELOPMENT

3.1. UN GENERAL ASSEMBLY RESOLUTION 37/7: WORLD CHARTER FOR NATURE

The General Assembly,

Having considered the report *of* the Secretary-General on the revised draft World Charter for Nature,

Recalling that, in its resolution 35/7 *of* 30 October 1980, it expressed its conviction that the benefits which could be obtained from nature depended on the maintenance *of* natural processes and on the diversity *of* life forms and that those benefits were jeopardized by the excessive exploitation and the destruction *of* natural habitats,

Further recalling that, in the same resolution, it recognized the need for appropriate measures at the national and international levels to protect nature and promote international co-operation in that field,

Recalling that, in its resolution 36/6 *of P* October 1981, it again expressed its awareness *of* the crucial importance attached by the international community to the promotion and development *of* co-operation aimed at protecting and safeguarding the balance and quality *of* nature and invited the Secretary-General to transmit to Member States the text *of* the revised version *of* the draft World Charter for Nature contained in the report *of* the Ad Hoc Group *of* Experts on the draft World Charter for Nature, as well as any further observations by States, with a view to appropriate consideration by the General Assembly at its thirty seventh session,

Conscious of the spirit and terms of its resolutions 35/7 and 36/6, in which it solemnly invited Member States, in the exercise *of* their permanent sovereignty over their natural resources, to conduct their activities in recognition *of* the supreme importance of protecting natural systems, maintaining the balance and quality *of* nature and conserving natural resources, in the interests of present and future generations,

Having considered the supplementary report *of* the Secretary-General,

Expressing its gratitude to the Ad Hoc Group *of* Experts which, through its work, has assembled the necessary elements for the General Assembly to be able to complete the consideration *of* and adopt the revised draft World Charter for Nature at its thirty-seventh session, as it had previously recommended,

Adopts and solemnly proclaims the World Charter for Nature contained in the annex to the present resolution.

ANNEX

World Charter for Nature

The General Assembly,

Reaffirming the fundamental purposes *of* the United Nations, in particular the maintenance *of* international peace and security, the development *of* friendly relations among nations and the achievement *of* international cooperation in solving international problems *of* an economic, social, cultural, technical, intellectual or humanitarian character,

Aware that:

(a) Mankind is a part *of* nature and life depends on the uninterrupted functioning *of* natural systems which ensure the supply *of* energy and nutrients,

(b) Civilization is rooted in nature, which has shaped human culture and influenced all artistic and scientific achievements, and living in harmony with nature gives man the best opportunities for the development *of* his creativity, and for rest and recreation,

Convinced that:

(a) Every form of life is unique, warranting respect regardless *of* its worth to man, and, *to* accord other organisms such recognition, man must be guided by a moral code of action,

(b) Man can alter nature and exhaust natural resources by his action or its consequences and, therefore, must fully recognize the urgency *of* maintaining the stability and quality *of* nature and *of* conserving natural resources,

Persuaded that:

(a) Lasting benefits from nature depend upon the maintenance *of* essential ecological processes and life support systems, and upon the diversity *of* life forms, which are jeopardized through excessive exploitation and habitat destruction by man,

(b) The degradation *of* natural systems owing to excessive consumption and misuse *of* natural resources, as well as to failure to establish an appropriate economic order among peoples and among States, leads to the breakdown *of* the economic, social and political framework *of* civilization,

(c) Competition for scarce resources creates conflicts, whereas the conservation *of* nature and natural resources contributes to justice and the maintenance of peace and cannot be achieved until mankind learns to live in peace and to forsake war and armaments,

Reaffirming that man must acquire the knowledge to maintain and enhance his ability to

use natural resources in a manner which ensures the preservation of the species and ecosystems for the benefit of present and future generations,

Firmly convinced of the need for appropriate measures, at the national and international, individual and collective, and private and public levels, to protect nature and promote international co-operation in this field,

"Adopts, to these ends, the present World Charter for Nature, which proclaims the following principles of conservation by which all human conduct affecting nature is to be guided and judged.

I. GENERAL PRINCIPLES

1. Nature shall be respected and its essential processes shall not be impaired.

2. The genetic viability on the earth shall not be compromised; the population levels of all life forms, wild and domesticated, must be at least sufficient for their survival, and to this end necessary habitat shall be safeguarded.

3. All areas of the earth, both land and sea shall be subject to these principles of conservation; special protection shall be given to unique areas, to representative samples of all the different types of ecosystems and to the habitat of rare or endangered species.

4. Ecosystems and organisms, as well as the land, marine and atmospheric resources that are utilized by man, shall be managed to achieve and maintain optimum sustainable productivity, but not in such a way as to endanger the integrity of those other ecosystems or species with which they coexist.

5. Nature shall be secured against degradation caused by warfare or other hostile activities.

II. FUNCTIONS

1. In the decision-making process it shall be recognized that man's needs can be met only by ensuring the proper functioning of natural systems and by respecting the principles set forth in the present Charter.

2. In the planning and implementation of social and economic development activities, due account shall be taken of the fact that the conservation of nature is an integral part of those activities.

3. In formulating long-term plans for economic development, population growth and the improvement of standards of living, due account shall be taken of the long-term capacity of natural systems to ensure the subsistence and settlement of the populations concerned, recognizing that this capacity may be enhanced through science and technology.

4. The allocation of areas of the earth to various uses shall be planned and due account shall be taken of the physical constraints, the biological productivity and diversity and the

natural beauty of the areas concerned.

5. Natural resources shall not be wasted, but used with a restraint appropriate to the principles set forth in the present Charter, in accordance with the following rules:

(a) Living resources shall not be utilized in excess of their natural capacity for regeneration;

(b) The productivity of soils shall be maintained or enhanced through measures which safeguard their long-term fertility and the process of organic decomposition, and prevent erosion and all other forms of degradation;

(c) Resources, including water, which are not consumed as they are used shall be reused or recycled;

(d) Non-renewable resources which are consumed as they are used shall be exploited with restraint, taking into account their abundance, their rational possibilities of converting them for consumption, and the compatibility of their exploitation with the functioning of natural systems.

6. Activities which might have an impact on nature shall be controlled, and the best available technologies that minimize significant risks to nature or other adverse effects shall be used; in particular:

(a) Activities which are likely to cause irreversible damage to nature shall be avoided;

(b) Activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed;

(c) Activities which may disturb nature shall be preceded by assessment of their consequences, and environmental impact studies of development projects shall be conducted sufficiently in advance, and if they are to be undertaken, such activities shall be planned and carried out so as to minimize potential adverse effects;

(d) Agriculture, grazing, forestry and fisheries practices shall be adapted to the natural characteristics and constraints of given areas;

(e) Areas degraded by human activities shall be rehabilitated for purposes in accord with their natural potential and compatible with the well-being of affected populations.

7. Discharge of pollutants into natural systems shall be avoided and:

(a) Where this is not feasible, such pollutants shall be treated at the source, using the best practicable means available;

(b) Special precautions shall be taken to prevent discharge of radioactive or toxic

wastes.

8. Measures intended to prevent, control or limit natural disasters, infestations and diseases shall be specifically directed to the causes of these scourges and shall avoid adverse side-effects on nature.

III. IMPLEMENTATION

9. The principles set forth in the present Charter shall be reflected in the law and practice of each State, as well as at the international level.

10. Knowledge of nature shall be broadly disseminated by all possible means, particularly by ecological education as an integral part of general education.

11. All planning shall include, among its essential elements, the formulation of strategies for the conservation of nature, the establishment of inventories of ecosystems and assessments of the effect on nature of proposed policies and activities; all of these elements shall be disclosed to the public by appropriate means in time to permit effective consultation and participation.

12. Funds, programmes and administrative structures necessary to achieve the objective of the conservation of nature shall be provided.

13. Constant efforts shall be made to increase knowledge of nature by scientific research and to disseminate such knowledge unimpeded by restrictions of any kind.

14. The status of natural processes, ecosystems and species shall be closely monitored to enable early detection of degradation or threat, ensure timely intervention and facilitate the evaluation of conservation policies and methods.

15. Military activities damaging to nature shall be avoided.

16. States and, to the extent they are able, other public authorities, international organizations, individuals, groups and corporations shall:

(a) Co-operate in the task of conserving nature through common activities and other relevant actions, including information exchange and consultations;

(b) Establish standards for products and other manufacturing processes that may have adverse effects on nature, as well as agreed methodologies for assessing these effects;

(c) Implement the applicable international legal provisions for the conservation of nature and the protection of the environment;

(d) Ensure that activities within their jurisdictions or control do not cause damage to the natural systems located within other States or in the areas beyond the limits

of national jurisdiction;

(e) Safeguard and conserve nature in areas beyond national jurisdiction.

17. Taking fully into account the sovereignty of States over their natural resources, each State shall give effect to the provisions of the present Charter through its competent organs and in co-operation with other States.

18. All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.

Each person has a duty to act in accordance with the provisions of the present Charter, acting individually, in association with others or through participation in the political process, each person shall strive to ensure that the objectives and requirements of the present Charter are met.

48th plenary meeting
28 *October* 1982

3.2 RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT

PREAMBLE

The United Nations Conference on Environment and Development,

Having met at Rio de Janeiro from 3 to 14 June 1992,

Reaffirming the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16 June 1972, and seeking to build upon it,

With the goal of establishing a new and equitable global partnership through the creation of new levels of cooperation among States, key sectors of societies and people,

Working towards international agreements which respect the interests of all and protect the integrity of the global environmental and developmental system,

Recognizing the integral and interdependent nature of the Earth, our home,

Proclaims that:

PRINCIPLE 1

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

PRINCIPLE 2

States have, in accordance with the Charter of the United Nations and the principles of international law,
the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

PRINCIPLE 3

The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.

PRINCIPLE 4

In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.

PRINCIPLE 5

All States and all people shall cooperate in the essential. task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.

PRINCIPLE 6

The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, shall be given special ,priority. International actions in the field of environment and development should also address the interests and needs of all countries.

PRINCIPLE 7

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command. .

PRINCIPLE 8

To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

PRINCIPLE 9

States should cooperate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.

PRINCIPLE 10

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. 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 provided.

PRINCIPLE 11

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

PRINCIPLE 12

States should cooperate to promote a supportive and open international economic system that would lead to economic growth and sustainable development in all countries, to better address the problems of environmental degradation. Trade policy measures for environmental purposes should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade. Unilateral actions to deal with environmental challenges outside the jurisdiction of the importing country should be avoided. Environmental measures addressing transboundary or global environmental problems should, as far as possible, be based on an international consensus.

PRINCIPLE 13

States shall develop national law regarding liability and compensation for the victims of pollution and other environmental da'1lage. States shall also cooperate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.

PRINCIPLE 14

States should effectively cooperate to discourage or prevent the relocation and transfer to other States of any activities and substances that cause severe environmental degradation or are found to be harmful to human health.

PRINCIPLE 15

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost - effective measures to prevent environmental degradation.

PRINCIPLE 16

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the

polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.

PRINCIPLE 17

Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.

PRINCIPLE 18

States shall immediately notify other States of any natural disasters or other emergencies that are likely to produce sudden harmful effects on the environment of those States. Every effort shall be made by the international community to help States so afflicted.

PRINCIPLE 19

States shall provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith.

PRINCIPLE 20

Women have a vital 'ole in environmental management and development. Their full participation is therefore essential '0 achieve sustainable development.

PRINCIPLE 21

The creativity, ideal, and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.

PRINCIPLE 22

Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.

PRINCIPLE 23

The environment and natural resources of people under oppression, domination and occupation shall be protected.

PRINCIPLE 24

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

PRINCIPLE 25

Peace, development and environmental protection are interdependent and indivisible.

PRINCIPLE 26

States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.

PRINCIPLE 27

States and people shall cooperate in good faith and in a spirit of partnership in the fulfillment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.

3.3 The Stockholm Declaration

PRINCIPLES

States the common conviction that:

PRINCIPLE 1

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations. In this respect, policies promoting or perpetuating apartheid, racial segregation, discrimination, colonial and other forms of oppression and foreign domination stand condemned and must be eliminated.

PRINCIPLE 2

The natural resources of the earth, including the air, water, land, flora 2nd fauna and especially representative samples of natural ecosystems, must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.

PRINCIPLE 3

The capacity of the earth to produce vital renewable resources must be maintained and, wherever practicable, restored or improved.

PRINCIPLE 4

Man has a special responsibility to safeguard and wisely manage the heritage of wildlife and its habitat, which are now gravely imperiled by a combination of adverse factors. Nature conservation, including wildlife, must therefore receive importance in planning for economic development.

PRINCIPLE 5

The non-renewable resources of the earth must be employed in such a way as to guard against the danger of their future exhaustion and to ensure that benefits from such employment are shared by all mankind.

PRINCIPLE 6

The discharge of toxic substances or of other substances and the release of heat, in such quantities or concentrations as to exceed the capacity of the environment to render them harmless, must be halted in order to endure that serious or irreversible damage is not inflicted upon eco-systems. The just struggle of the peoples of all countries against

pollution should be supported.

PRINCIPLE 7

States shall take all possible steps to prevent pollution of the seas by substances that are liable to create hazards to human health, to harm living resources and marine me, to damage amenities or to interfere with other legitimate uses of the sea.

PRINCIPLE 8

Economic and social development is essential for ensuring a favourable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.

PRINCIPLE 9

Environmental deficiencies generated by the conditions of under-development and natural disasters pose grave problems 2nd can best be remedied by accelerated development through the transfer)f substantial quantities of financial and technological assistance as a supplement to the domestic effort of the developing countries and such timely assistance as may be required.

PRINCIPLE 10

For the developing countries, stability of prices and adequate earnings for primary commodities and raw materials are essential to environmental management since economic factors as well as ecological processes must be taken into account.

PRINCIPLE 11

The environmental policies of all States should enhance and not adversely affect the present or future development potential of developing countries, nor should they hamper the attainment of better living conditions for all, and appropriate steps should be taken by States and international organizations with a view to reaching agreement on meeting the possible national and international economic consequences resulting from the application of environmental measures.

PRINCIPLE 12

Resources should be made available to preserve and improve the environment, taking into account the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for this purpose.

PRINCIPLE 13

In order to achieve a more rational management of resources and thus to improve the environment, States should adopt an integrated and co-ordinated approach to their development planning so as to ensure that development is compatible with the need to protect and improve environment for the benefit of their population.

PRINCIPLE 14

Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment.

PRINCIPLE 15

Planning must be applied to human settlements and urbanization with a view to avoiding adverse effects on the environment and obtaining maximum social, economic and environmental benefits for all. In this respect, projects which are designed for colonialist and racist domination must be abandoned.

PRINCIPLE 16

Demographic policies which are without prejudice to basic human rights and which are deemed appropriate by Governments concerned should be applied in those regions where the rate of population growth or excessive population concentrations are likely to have adverse effects on the environment of the human environment and impede development.

PRINCIPLE 17

Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources of States with a view to enhancing environmental quality.

PRINCIPLE 18

Science and technology, as part of their contribution to economic and social development, must be applied to the identification, avoidance and control of environmental risks and the solution of environmental problems and for the common good of mankind.

PRINCIPLE 19

Education in environmental matters, for the younger generation as well as adults, giving due consideration to the underprivileged, is essential in order to broaden the basis for an enlightened opinion and responsible conduct by individuals, enterprises and communities in protecting and improving the environment in its full human dimension. It is also essential that mass media of communications avoid contributing to the deterioration of

the environment, but, on the contrary, disseminate information of an educational nature on the need to protect and improve the environment in order to enable man to develop in every respect.

PRINCIPLE 20

Scientific research and development in the context of environmental problems, both national and multinational, must be promoted in all countries, especially the developing countries. In this connection, the free flow of up-to-date scientific information and transfer of experience must be supported and assisted, to facilitate the solution of environmental problems; environmental technologies should be made available to developing countries on terms which would encourage their wide dissemination without constituting an economic burden on the developing countries.

PRINCIPLE 21

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas, beyond the limits of national jurisdiction.

PRINCIPLE 22

States shall co-operate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction.

PRINCIPLE 23

Without prejudice to such criteria as may be agreed upon by the international community, or to standards which will have to be determined nationally, it will be essential in all cases to consider the systems of values prevailing in each country, and the extent of the applicability of standards which are valid for the most advanced countries but which may be inappropriate and of unwarranted social cost for the developing countries.

PRINCIPLE 24

International matters concerning the protection and improvement of the environment should be handled in a co-operative spirit by all countries, big and small, on an equal footing. Co-operation through multilateral or bilateral arrangements or other appropriate means is essential to effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all States.

PRINCIPLE 25

States shall ensure that international organizations playa co-ordinated, efficient and dynamic role for the protection and improvement of the environment.

PRINCIPLE 26

Man and his environment must be spared the effects of nuclear weapons and all other means of mass destruction. States must strive to reach prompt agreement, in the relevant international organs, on the elimination and complete destruction of such weapons.

21st plenary meeting
16 June 1972

CHAPTER FOUR

THE ROLE OF UNEP IN THE DEVELOPMENT OF ENVIRONMENTAL LAW[59]

4.0 Introduction

I wish to thank the organizers for hosting this important conference on Environmental Law and for inviting me to speak. I commend the hosts for their considerable foresight in holding these international conferences on International Environmental Law that has become a dominant feature of the international political landscape and a colossal challenge to those seeking its enforcement.

We are at a critical turning point. International environmental law, which has typically evolved far from the headlines in the forums of treaty making, the scholarship of eminent law professors, and in the long-standing practice of nations, has burst upon the international scene demanding that attention be paid to it.

In a world that aspires to sustainable development, our system of governance continues to evolve. It is clear that in this globalizing world of ours, progress in promoting and fostering sustainable development will rest as much upon establishing environmental norms and laws at the international level as it does upon efforts at the national level.

I have been asked to speak on the topic: "The Role of UNEP in the Development of Environmental Law.[60] I have divided my presentation on this subject into five sections:

Originally the Council would meet annually but later it met biannually. This was till General Assembly resolution 53/242 called for special sessions when the Council was not meeting at its regular sessions.

This in effect reintroduced the system of annual sessions of the Council in conjunction with the Global Ministerial Environment Forums (GMEF).

As policy organs, the Council/GMEF provide the mechanisms for the development and promotion of legal and policy instruments at global and regional levels calling on Governments, intergovernmental and relevant non-governmental organizations to partner UNEP in this process.

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[59] Donald Kaniaru.Mr Donald Kaniaru &Kaniaru Advocates , And Special Adviser United Nations Environmental Program(UNEP).Key Note Speech Presented On 4th June 2002.6th International Conference On Environmental Law , Sao Paulo,3-6 June 2002

[60] Donald Kaniaru, "UNEP's Development and Implementation of Environmental Law", in South-East Asian Justices Symposium: The Law on Sustainable Development held in Manila, Philippines from 4- 7, p. 137-152; See also Environmental Policy and Law, vol. 30, n. 5, 2000.

The Executive Director and his Secretariat are the engine for the preparation and action in such instances, using a variety of means to prepare pertinent materials for the meetings of these fora. The means include formal, if so determined by the Council, or a mix of formal and informal advice which the Secretariat uses in negotiations and in articulating the rationale or basis of the proposals presented to the Council, or its subsidiary organs.

UNEP's mandate has been amplified[61] to a large degree since the General Assembly resolution 2997 (XXVII) in 1972. UNEP's mandate as approved by its Governing Council covers nearly all areas of environmental interest, whether global or regiona1. It encompasses the atmosphere, oceans, natural resources, including biodiversity, chemicals and hazardous wastes, trade, biotechnology etc.

At the national level in support of technical assistance, on request, the General Assembly authorized UNEP, in resolution 3436 (XXX) of 1975 to assist developing countries. In the 1990s, this mandate was extended to cover countries with economies in transition in what currently is referred to as capacity building activities, including legal, policy and institutional aspects.

Further, following the conclusion of the United Nations Conference on Environment and Development (UNCED) in Rio in June 1992, UNEP was recognized in Chapter 38 of Agenda 21 as the principal United Nations organ to deal with environment and to co-ordinate Environmental Conventions.

As an intergovernmental organ, UNEP works with and is accountable to Governments and reports to the Council, which in turn, reports to the United Nations General Assembly. Governments provide the bulk of the funding. At the moment contributions of varying magnitude come from some 80 Governments, with the Executive Director determined to raise the number to 100 in the near future.

Let me give you UNEP's view on partnerships, why it is becoming increasingly important to our programmes and the different forms of alliances and partnerships we now seek to promote.

We live today in a globalized economy where interdependence between countries and actors is increasing rapidly and where social and economic relations are changing radically. In this dynamic and fast evolving context, sustainable development requires the active participation of all actors - from civil society organizations, private enterprises, local and national governments, and multi-lateral organizations such as the United Nations. The roles and capabilities of each actor differ, but it is an unmistakable fact that

[61] UNEP/GC Decision 1(1)(1973); 19"' UNEP GC Decision 1 (l997); Malmo Declaration, UNEP GCSSVl May 2000.

we must all contribute and work closely together in order to achieve our objective of promoting sustainable development.
As the challenges and opportunities before us become increasingly complex, alliances and partnerships at the international level take on added importance. As many of you may know, the ongoing reform process within the United Nations has already led to much closer integration and collaboration among United Nations agencies. Our work together has allowed us to complement each other and build on our respective strengths to better serve our client-countries.

While most of our partnership building involves efforts to seek complementarities through collaboration with other parties, we also attach great importance to our role as a catalyst or facilitator, if you will, of partnership building among others.

Another important decision of the 27th Session of the General Assembly was in resolution 3004 (XXVII) of 15 December 1972. It led to the establishment for the first time ever of a global agency of the United Nations in the developing world, in Nairobi, Kenya, from January 1973. After New York, Geneva and Vienna, Nairobi is the fourth seat of the United Nations, the Headquarters of the United Nations Habitat as well. It is from this centre that UNEP has been guiding global environmental policy in the last thirty years of its existence - symbolizing the manner, the active involvement and integration of the third world in the global affairs of nations.

4.1 UNEP's focus on global instruments

Prior to the establishment of the UNEP, international efforts toward the management of environmental issues were sporadic, ineffectual and limited mainly to conservation of species considered important to humans. Examples of this are the birds and oceans issues. The pollution based issues were handled under the auspices of Intergovernmental Maritime Consultative Organization (IMCO), now International Maritime Organization (IMO) and fisheries by the FAO and under the auspices of the International Law Commission in the 1958 Geneva Conventions on the Law of the Sea.

Clearly, there were few multilateral instruments. Bilateral agreements, however, were more conspicuous in numbers.

The Stockholm Conference and its aftermath therefore constitute a watershed in concerted and coordinated approach in the evolution of systematically developed environmental law[62].
And of the many players within, and outside the United Nations system, on these issues UNEP has been a reputable and leading player.

UNEP has made a special mark in helping formulate and placing before the international

[62] See Elizabeth Maruma Mrema, "The Role of International Organizations in the Development of International Environmental Law: The Case of UNEP", Paper presented at an International Conference towards an Effective Role of Law in the United Arab Emirates Environment Protection and Development , at Al A in May 1999.

community, soft law instruments in guidelines, principles, codes: in being a fulcrum of binding global instruments; in providing backup support in scientific and technical information to processes outside its direct auspices and in studies that others could use to advance their processes in developing legal and policy instruments. Each of these aspects deserve an explanation.

4.1.1 Soft law instruments

Between 1978 and 2002, UNEP has guided the preparation of well over ten guidelines, principles and codes in areas as diverse as shared natural resources, weather modification, offshore mining and drilling, banned and severely restricted chemicals, marine pollution prevention, hazardous wastes, exchange of information on chemicals in international trade, environmental impact assessment, on biotechnology and compliance and enforcement of Multilateral Environmental Agreements (MEAs).

These soft law instruments are tools available to Governments and organizations for application on a voluntary basis or selectively into binding global or regional legal instruments. For instance the following Conventions and protocols sprang from UNEP guidelines and principles - the Basel Convention on Hazardous Wastes and their Disposal (1989). Convention on Prior Informed Consent (PIC) (Rotterdam, 1998); UNECE Espoo Convention and Bio-safety Protocol, Cartagena, 2000.

An inspiring soft law instrument has been the Global Programme of Action (GPA), for the Implementation of the Marine Environment from Land-Based Activities adopted in Washington DC, in November 1995. This has been an invaluable framework for the implementation of regional seas conventions e.g. The North East Pacific Convention, February 2002, La Antigua, Guatemala, and protocols on land based sources of pollution, for example the Mediterranean, 1996 and the Caribbean, 1999 as well as facilitating UNEP reporting on the implementation on the Law of the Sea Convention, 1982.

The GPA has also been a framework for programmatic development and action[63], generating funding for implementation and reporting to the Governing Council. The guidelines on Compliance and Enforcement of MEAs (2002)[64] have likewise elicited Governing Council monitoring in implementation and are of sufficient interest to Governments to attract funding and request for testing in selective implementation in regions.

UNEP has also assumed the mantle of enshrining of some principles of the Stockholm and Rio Declarations in some Conventions.

These include the Convention on Biodiversity[65] and its Cartagena Protocol on Biosafety

[63] See generally UNEP fIGR/1/9; GCSSVII Decision 6 (SS.VII/6).
[64] See GCSSVII Decision 4(SSVII/4).

[65] Articles 6 and 10.

of January 2000[66] the Rotterdam Convention on Prior Informed Consent 1998[67] and the Stockholm Convention on Persistent Organic Pollutants 2001[68]. The same trend is evident in the General Assembly inspired Conventions in the 1992 UN Framework Convention on Climate Change[69] and the 1994 UN Convention on Combating Desertification.[70]

4.1.2 Fulcrum for binding instruments

As you are aware, UNEP was established in the beginning of 1973. In the same year, a key convention, on International Trade in Endangered Species (Cites)[71] was adopted in Washington DC, providing in article XII (1) that upon entry into force, a secretariat shall be provided by the Executive Director of UNEP. The other Convention, on Migratory Species (CMS)[72] was adopted in Bonn in 1979 and as in the case of Cites, in its article IX, set up a secretariat to be administered by UNEP.

This approach to treaty development was clearly ad hoc. And towards the first decade of UNEP, a systematic approach was ushered in through the first Montevideo ten year Programme for the Development and Periodic Review of Environmental Law adopted in Decision 10/21 of UNEP's Governing Council. The next programme was adopted in Decision 17/25 in 1993, and the third for the first decade this century was adopted in Decision 21/23 of February 2001.

In the said programmes, systematic development of international environmental law, and its implementation have become the focus for UNEP action, spurring significant global Conventions, most of them under the administration of UNEP.

In all, seven are administered by UNEP and an eighth one has UNEP and FAO as joint interim secretariat. Besides Cites and CMS the others are on the protection of the Ozone Layer, Vienna 1985;[73] its Protocol, Montreal 1987;[74] Basel Convention 1989;[75] Convention on Biodiversity 1992;[76]Stockholm Convention 2001[77] and the Rotterdam Prior Informed Consent (PIC) Convention 1998 jointly with FAO.[78] These instruments impact on biodiversity and natural resources, chemicals and wastes, atmosphere and oceans.

UNEP is therefore a primary partner in the formulation, development and implementation of assessment, technical and policy tools and instruments with the Conventions venturing

[66] Articles 1 and 22
[67] Preamble and Article 1.
[68] Preamble and Article 1.
[69] Preamble.
[70] Articles 2 and 5(b).
[71] <http://www.cites.org/eng/disc/text.shtm/>.
[72] <http://www.wcmc.org.uk/cms>.
[73] <http://www.UNEP.org/ozone/treaties.shtml>.
[74] Ibid.

[75] <http://www.baseJ.int/text/texthtml>.
[76] <http://www.biodiv.org/convention/articles.asp>.
[77] <http://www.chern. UNEP.ch/sc/docurnents/convtext/convtext -en. pdf>.
[78] <http://www.pic.int/finale.htrn#convention>.

in *common* areas of endeavor, e.g. the development of protocols and agreements.
Clearly, of environmental global instruments concluded in the 1980s to date, no other UN or non-UN body compares with the performance of UNEP either in binding or non-binding instruments.

4.1.3 Contributing to or influencing development of other instruments

Though UNEP has been established as the environmental focal point in the United Nations system, it has taken on this role even outside the UN family. It has earned for itself a leadership role in environmental law and policy and in the formulation of instruments in situations where UNEP is called upon to provide necessary expertise and information without which the process of negotiations would falter. In two global cases, namely, in the negotiations that led to the United Nations Framework Convention on Climate-Change (UNFCCC)[79] and United Nations Convention to Combat Desertification (UNCCD),[80] UNEP contribution was evident. The consideration of the former started with UNEP and World Meteorological Organization (WMO) until the General Assembly took over the process; its scientific support was provided by the joint mechanism, Inter-governmental Panel on Climate Change (IPCC) and staff support was provided in a Lawyer and a Scientist. In the case of the latter, information and data accumulated over the years since the UN Conference on Desertification Control, 1977 including financial support, were also availed by UNEP.

UNEP's partnership with these two conventions continues. The secretariats of these Conventions and UNEP work together and regularly participate in each other's policy and technical meetings as well as other consultative inter-secretariat consultations and collaboration.

It should be noted that it is not only in global processes that UNEP has been called upon to playa role by Governments and Secretariats but also in regional inter-governmental processes also. The cases of the instrument on the prevention of trans boundary haze pollution in Southeast Asia (2001) developed by Association of Southeast Asian Nations (ASEAN) and the Asian Development Bank (ADB) and the revision of the 1968 Algiers Convention on the Conservation of Nature and Natural Resources come to mind. In both cases UNEP was called upon to provide expertise and support generally. In the latter case, the Organization of African Unity (OAU) requested both UNEP and IUCN to assist in the process, and a draft revised convention is in circulation among African Governments for eventual action through the African Ministerial" Conference on the Environment (AMCEN) and the OAU: Council of Ministers and the Heads of States.

UNEP also carries out studies relevant to Multilateral Environmental Agreements

[79] <http://unfccc.int>.
[80] <http://www.unccd.int/conventionirnenu.php>.

(MEAs) which are tools available to, not only Governments, but to Conferences of the Parties (COPs), to the different MEAs, Secretariats and others. These outcomes including studies often provide a broad framework or basis of in-depth review by UNEP administered Conventions and others as well. For example, several guidelines have been used to draw protocols to global and regional Conventions.

Currently UNEP is addressing the subject of Liability and Compensation and this has attracted considerable interest.[81] To assist the mechanism established by the UN Security Council in resolution 687 (1991) UNEP led in expert review of the liability question, providing the basis of the United Nations Compensation Commission work.[82]

Such studies remain an important potential authoritative source of opinions on environmental developments and issues.

4.2 Regional Environmental Conventions

In all regions UNEP has influenced environmental law and policy developments significantly. In fact at this level UNEP has catalyzed more treaties at regional or sub--regional levels than at the global level although on a narrower range of issues. These include the regional seas action plans, conventions and protocols; conservation in-struments, water, haze, illegal trade and capacity building in sharpening negotiation skills applicable in the case of regional and global instruments.

In the case of regional seas, UNEP intervention started immediately upon its inception in 1973. At that time it was apparent that the negotiations on the Law of the Sea would take a long time to conclude in a comprehensive regime of the law in the subject. It was therefore of the utmost importance to develop cooperative sea regimes around closed, semi-closed seas as well as open seas near shore to safeguard resources and curtail pollution ashore.

From the first session, the UNEP Governing Council called on the Executive Director to initiate work to stimulate regional agreements and this was repeated in several subsequent Governing Council sessions. Starting with the Mediterranean, the Barcelona Convention in 1976; an instrument that brought and bound together traditional antagonists, UNEP, by 2001, had brought together over 140 Governments in 13 regional seas across the globe.

These also celebrated over forty treaties, conventions and protocols, aside from action plans that constituted frameworks for action. These arrangements evolved and helped develop the law of international organizations at regional level and in the host agreements that have evolved in developing (e.g. Seychelles, Cote d'Ivoire, Jamaica, Athens and

[81] http://www.Unep.org/dcpi/implementationJaw.asp>.

[82] Alexandre Timoshenko (ed.), Liability and Compensation for Environmental Damage-Compilation of Documents, Unep, Nairobi, 1998.

Greece) and developed countries, and in Memoranda of Understanding that defined the implementation parameters.

A further important aspect is the UNEP contribution to the implementation of the 1982 Montego Bay Convention of the Law of the Sea, in force since November 1994, whose Part XII Protection and Preservation of the Marine Environment, underlines common work with UNEP. There is a requirement for the Secretary General of the UN to report on the implementation of the treaty and UNEP reporting is buttressed in its extensive work in the implementation of the GPA and the regional seas programme as earlier stated.

The regional seas programme was also a confidence building measure in legal and policy development. In several instances political antagonists found mutual accommodation in tackling and agreeing on a solution to a critical common problem. From such complex situations, UNEP could venture in other uncharted waters.

Other regionally focused issues by UNEP touch on management of shared water resources, combating illegal trade, haze and compliance in implementation of some global treaties at the regional level. Action in these areas demonstrate that UNEP has potential to intervene in an expanding list of issues if regional political/ environmental structures are geared to that end, and are ready to show commitment to capacity building and institution building,

The field of water is an increasingly urgent area for charting dialogue among riparian states in the management of not only the water resources but all adjacent resources and processes. No one doubts the complexity, time-consuming nature and the political sensitivity required in tackling the issue.

UNEP has, over the years and in pursuance of its environmentally sound management of inland waters (EMINW A), embarked on this issue in Africa (several of the over 50 basins including Zambezi, Lake Chad and Nile are in Africa), Asia (Mekong river), South Western Asia (Aral sea, Caspian sea) and Latin America (Lake Titicaca and Orinoco basins). UNEP has also recently adopted a Water Policy. It also has a global international waters assessment programme (GIWA) and a dams development project which seeks to maintain dialogue among different stakeholders. This of course follows the winding up of the World Commission on Dams.

Despite these efforts and the fact that the UN General Assembly in May 1997 adopted a framework Convention on Non-navigational Uses of International Watercourses, a lot remains to be achieved in this area.

On illegal trade in Africa and haze in Asia, UNEP has taken the challenge seriously. The Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in

Wild Fauna and Flora[83] seeks to implement Cites at the regional level. The Lusaka Agreement was adopted in September 1994, and entered into force in December 1996. This treaty arrangement has done very well In a relatively short time, the six parties have taken over the secretariat functions, previously performed by UNEP; are paying their dues and with some donor support, the secretariat is fully operational and effective in its mission. On a personal note the first Director of Lusaka Agreement died in March 2002 while coming from an investigation in Wajir, Kenya. In my view the arrangement can bring more parties on board as they have tested the waters and come of age. The Latin American region was at one time interested in replicating this instrument and as far as I know, UNEP was ready to assist in their endeavour.

The instrument on the prevention of trans-boundary haze pollution in Southeast Asia, with the assistance of UNEP, has been realized. The final session of the Inter-governmental Negotiations Committee (INC) to approve the instrument was held in September 2001 and the text was adopted by the parties in November 2001. UNEP has demonstrated its resilience in moving fast to assist the concerned governments.

Compliance and enforcement are measures that impact on implementation of both global and regional instruments. This important focus, stressed in the current Montevideo Programme, concerns every Region:

. Latin America and the Caribbean region, under the auspices of the UNEP Regional office in Mexico, have developed analysis of the problems and the way ahead in this area.

. Europe too has embarked on this endeavor, with the UNEP Regional Office having carried out two studies to unearth problem areas. The European region, through United Nations Economic Commission for Europe (UNECE), have decided to develop guidelines on Compliance and Enforcement.[84] Europe continues to follow closely UNEP's work on the global guidelines on Compliance and Enforcement which have now been adopted. These will facilitate UNECE and its governments' efforts in this direction.

. Asia and the Pacific have not been left behind. They have undertaken a series of reviews, starting in Maldives, under UNEP and South Asia Cooperative Environment Programme (SACEP) in 1997.

. Africa has focused on MEAs generally and biodiversity related instruments[85] in particular with clear results in training and publications demonstrative of how to solve problems and implement those instruments.

An important feature in Capacity Building in Environmental Law has been that of UNEP's efforts in organizing a series of global training programmes in law and policy (1993,[86]1995,[87] 1997,[88] 1999[89] and 2001[90]) and series of regional workshops prior to

[83] <http://www.ecolex.org>.
[84] <http://www.unece.org>.
[85] UNEP, Handbook on the Implementation of Conventions Related to Biological Diversity in Africa, UNEP/UNDP/Dutch Joint Project in Environmental Law and Institutions in Africa, December, 1999.
[86] UNEP/UNITAR/UNCHS (Habitat) Training Programme in Environmental Law and Policy, Nairobi, November -17 December 1993.
[87]. UNEP/UNITAR/UNCHS (Habitat) Training Programme in Environmental Law and Policy, Nairobi, 27 March - 13 April 1995.
[88] UNEP Training Programme in Environmental Law Policy, Nairobi, 22 September- 9 October 1997.

COPs that address issues on the agenda of COPs as well as prepare regional groups to deal with forthcoming negotiations. These are additional capacity enhancing measures to those facilitative measures in paying travel and daily subsistence allowance (DSA) to developing countries officials to participate in negotiating new treaties and instruments. These are key measures in developing treaties that are eventually ratified and implemented at national level.

4.2.1 Specific regional level activities in Latin America and Caribbean[91]

This region, the Latin American and Caribbean, was first to enjoy a full-fledged Environmental Law Programme, with Ministers of the Environment guiding the process since 1985. A few examples of regional intervention would, therefore, be in order.

UNEP is also assisting in the development and adoption of environmental conventions and support in running the relevant Secretariats in the region. UNEP assisted the relevant governments in the development and negotiation of the Convention for Cooperation in the Protection and Sustainable Development of the Marine and Coastal Environment of the Northeast Pacific and its Plan of Action. After five years of intensive preparation, the Convention was signed on 18 February 2002 by six of the eight countries of the region, at a Conference of Plenipotentiaries convened at the invitation of the Government of the Republic of Guatemala by the Executive Director of UNEP.

In 1981, the governments of the wider Caribbean region, with the assistance of UNEP constituted the Caribbean Environment Programme (CEP) to promote regional cooperation for the protection and development of the marine environment. CEP is one of the Regional seas programmes of UNEP and is administered by the Regional Coordinating Unit (CAR/RCU) in Kingston, Jamaica). The Cartagena Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region and its three protocols (i.e. Protocol Concerning Co-operation in Combating Oil Spills in the Wider Caribbean Region, adopted 1983, in force 1986; Protocol concerning Specially Protected Areas and Wildlife (SPAW), adopted 1990, in force 2000; Protocol on the Prevention, Reduction and Control of Land-based Sources and Activities, adopted 1999) were negotiated under the auspices of UNEP. Article 15 of the Cartagena Convention designates UNEP as responsible for carrying out the secretariat functions for the Convention and its protocols. Thus, UNEP-CAR/RCU serves as the Secretariat to the Cartagena Convention and its protocols.

The Convention for the Protection of the Marine Environment and Coastal Areas of the South-East Pacific (Lima Convention), adopted in 1981 and in force since 1986, as well as its protocols, were also developed and negotiated under the aegis of UNEP in a joint

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[89] UNEP, Fourth Global Training Programme in Environmental Law, Nairobi, 19 November - 7 December, 2001, ISBN: 92-807-1895-9.
[90] With the Printers to be published soon.
[91] Update provided by Legal Officer, Rossana Repetto, UNEP Rolac.

effort with the Permanent Commission of the South Pacific (CPPS).

We-have also been involved in the promotion of synergy between multilateral environmental agreements in Latin America and the Caribbean. A Report and Guidelines on the Implementation of Multilateral Environmental Agreements (MEAs) in the Caribbean was prepared by Rolac in 1999 following a regional workshop on the matter in Mexico City, 29-30 November 1999, with representatives of different sectors and stakeholders involved in MEAs implementation and launched in early 2000. UNEP has also endeavored to involve Parliaments in the work of Rolac Environmental Law Unit.
And finally, Rolac is the Operative Secretariat of the Environment Commission of the Latin American Parliament (parlatino). In 2001 and 2002 the meetings of the Environment Commission have included in their agenda the topic of progress made in national environmental legislation after the UN Conference on Environment and Development in 1992, in particular regarding the implementation of Agenda 21 and the Rio Agreements.

4.3 Influencing national level action

Responsibility for policy development and priority designation and implementation at national level remain the primary concern of each nation and no international organization, except to the extent in consonance with such nation, should advance its agenda. Where a nation perceives such a push, resistance is visible in these countries invoking the notion of sovereignty.

So far, I have focused on global and regional action, with insufficient reference to national level capacity building. This is an important area and includes development of human skills, streamlining of institutions, and drafting of legislative and administrative decisions that embrace policies adopted at the global and regional levels in line with obligations and commitments made, and in harmony with those of other states obligations and commitments as well. This aspect would ensure that collaboration is achieved on basis of key primary principles of effecting co-operation. For example, where offences are committed, the convictions, sentences and fines must be of equal weight and measure. Same should be the case with the incentives as well.
Environmental action must be treated holistically at national level. This is one important lesson we have learnt from the old system of sectoral policies, institutions and legislation. But it is easier said than done. In many countries human resources, expertise, skills, finances and the wherewithal are lacking. These countries are also affected by immense poverty, external debts and other national problems - all competing for very limited resources.

As I had mentioned earlier, one aspect of UNEP's work as per General Assembly resolution 3436 (XXX) is to provide technical assistal1ce, on request, to developing countries and countries whose economies are in transition.

At the time it was adopted, the international community comprised of about one hundred

and thirty odd countries. Now it is one hundred and ninety. Thus the need for assistance, and its challenge is as potent as ever, given the focus on environmental policies at global and regional levels, and the increase in the number of global and regional conventions that require implementation at national level, either in terms of review and harmonization of existing laws and regulations, new legislation and administrative framework, to ensure consistent regular reporting and other obligations and commitments.

In the wake of all this, national level capacity is over-stretched, and many of these countries need to be supported by international organizations, regional organizations and convention secretariats in the formulation of draft bills or regulations.

In the past fly in and fly out international consultants were used to provide such assistance. And they made recommendations after limited presence in the country seeking assistance.

This has now changed, and for the better. In the last decade, after United Nations Conference on Environment and Development (UNCED), UNEP and its partners have worked with national experts, or national officials whose capacity they have enhanced, to prepare basic consultative documents under the guidance of the partners, and to present these at national consensus workshops or seminars with government officials, universities, NGOs, industry, media and to revise the drafts before they are submitted to the executive and the legislative for final review and adoption. This mode is truly building capacity at national level and gives ownership of resulting policies and laws, and institutions to the countries.

Without capacity at national level as well as national institutions working coherently together, global policies, conventions and treaties, reporting, compliance and enforcement will remain wishful thinking. It is therefore of the utmost importance that legal, technical and scientific materials and information are widely available at the national level - universities and institutions, NGOs and not only in limited government circles. These materials should be available not only in hard copies, but also electronically for those governments and institutions that have the capacity to access the Internet. The material, particularly legal in volumes of environmental treaties; national legislation; international and national judgments[92] influence and support harmonization and development of environmental law and policy.

Yet a further measure of capacity building is enhancing public awareness and equipping not only the grassroots but specialized groups that playa crucial role at national level. These include the private sector, trade unions and NGOs of various kinds and specializations. Equally important are those officials - not lawyers that impact on environmental work, management and administration centrally and in the field.

[92] <http://www.UNEP.org/padeliaipublications>.

In the beginning of the 1970's, there were a handful of governments like USA since 1969, with dedicated laws and institutions to coordinate and take a lead in environmental matters. However, with the establishment of UNEP, and increasing environmental awareness, this situation has changed dramatically. Under its technical assistance and cooperation programme, UNEP and its partners (regional commissions, FAO, IUCN to name but a few) have been to over one hundred countries, to some, several times, assisting in developing policy coordination institutions, laws and regulations.

Thus practically all states now have ministries, departments, councils, commissions dedicated to environmental matters and operating under framework or specific administrative and legislative measures. This environmental constituency is expanding in every country, and the civil society including NGOs are a crucial partner in ensuring effectiveness of environmental policies at all levels, provincial, state and regional levels.

For over two decades, the environmental momentum focused on two, out of the three branches of governance at national level, namely the executive and the legislature. The executive drove the process, later seeking to bring the legislative on board as laws needed to be passed in parliaments or ratifications of treaties were desired. There was less reporting to the nation on the state of the environment, leave alone through parliaments. Unfortunately, a key partner at national level, the Judiciary, was left out and yet in most countries, no law is law unless the Judiciary so affirms. From 1996, in Africa, to date six regional Judicial Symposia have been held:

. For Africa, Mombasa, Kenya, October 1996
. For South Asia, Colombo, Sri Lanka, July 1997
. Southeast Asia, Manila, Philippines in 1999
. Latin America, Mexico City, January 2000
. For the Caribbean, St. Lucia, April 2001 and for
. The Pacific Islands, Brisbane, Queensland, Australia, February 2002.

These regional symposia have been followed up at national level with national judicial officers sensitization, national litigating and defending lawyers workshops and seminars, thus bringing on board key players that influence legal developments and interpretation as well as bridging the gap between policy at the global level and its implementation at the national level.

Presently a global symposium embracing all regions is planned for Johannesburg, Republic of South Africa, on 18-20 August 2002. This will also make an input to the World Summit on Sustainable Development.

Starting alone on this crucial judicial venture, UNEP has now eminent organizations supporting and joining in this effort, including UNDP, United Nations University (UNU), The World Bank, IUCN, Foundations like Ford, Hans Seidal Foundation, The Commonwealth Secretariat, European Union (EU), International Network for

Environmental Compliance and Enforcement (INECE) and key governments.

4.3.1 Examples of national level activities in the Region[93]

Let me also mention that UNEP and its regional office, Rolac, have been closely involved with enhancing the role of environmental law at national level in the region. In fact UNEP first initiated an environmental law programme in the region in 1985, with Asia and the Pacific following in the 1990s. I shall mention some recent examples in a few countries in the region. We have been involved in providing technical assistance for the formulation and strengthening of environmental legislation. In 1999 and 2000 a Memorandum of Understanding (MOU) between Rolac and the *Instituto de Investigaciones de la Amazonia Peruana* was implemented. The main objective of the MOU was the formulation of a draft regulations to the law for the Conservation and Sustainable Use of Biological Diversity of Peru. In April 2000, UNEP/Rolac carried out a technical assistance mission on institutional strengthening of bio safety in Peru in response to a request made by the Government.
UNEP provided legal technical assistance to the Chilean Environmental Commission (Conama) and the Ad Hoc Consultative Committee in charge of the revision of the national Framework Environmental Law (December 2000). In early February 2002 in order to respond to a technical assistance request made by the Ministry of Labour, Technological Development and Environment of Suriname, Rolac undertook a mission in the field of institutional capacity as an initial contribution to improve environmental management in the country. Again in February this year, assistance was provided to the Ministry of Environment and Natural Resources of Mexico to organize the First Meeting of Likeminded Megadiverse Countries (Cancun, Mexico, 16-18 February 2002) by elaborating working papers of conservation and sharing of benefits, biotechnology and bioprospecting, intellectual property and access to genetic resources, and legislative experiences for the conservation and sustainable use of biodiversity.

Over the years some other countries have been assisted in the formulation of law and policy. These include: Barbados, Bolivia, St. Lucia, Colombia, Costa Rica, Honduras, Nicaragua, Panama and Paraguay. In training in law and policy, practically all countries in the region have participated.

UNEP /Rolac is one of the implementing agencies of the GEF project on the Consolidation of the Mesoamerican Biological Corridor. A major component of this project is the harmonization of policies and legislation in the sub-region (i.e. Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua and Panama). Various activities are currently under implementation in the sub-region within the framework of this project, including the formulation of a sub-regional biodiversity strategy, the harmonization of legislation on protected areas, the creation of a database of environmental legislation of countries in the sub-region, a study on the environmental implications of economic reforms and liberalization etc.

[93] Again an update by Rossana Repetto, UNEP Rolac.

4.4 Concluding remarks

In thirty years UNEP has made its mark in environmental law, both at the international (global and regional) and at national level. Indeed in the thirty years no other public law has established itself to the same extent as environmental law. The law has developed with coherence, rapidly and with flexibility. Science, in some instances, has prompted change or adjustment of international commitments and provisions, such as in the case of the Ozone Montreal Protocol. The administration of the law has also been strengthened in institutional mechanisms that have been incorporated in environmental treaties in Conferences of the Parties; in scientific and technical panels; in Secretariats that service those mechanisms, in providing for financial means and periodic meetings and informing of global fora like the General Assembly of the United Nations.

The last thirty years have seen not only the development of environmental law but also its implementation at global, regional and national levels. This has resulted in capacity building; institutional streamlining and engagement of all branches of Government, private sector, NGO's and the public. Sectoralism has given way to multi-sectoralism, enhanced coordination and acknowledgement of environmental concerns as an important aspect in sustainable development efforts. There is no secure future for humanity without an assurance of a healthy environment that is equally secured for present and future generations.

Perhaps it is worth mentioning that this great Nation, Brazil and the Continent I come from share cultural ties and aspirations, which in the spirit of south south cooperation could bring forth wonderful results. This nation and five African states share language, past and legal approaches. Such a common background could be facilitative of resources management and could be enriched in capacity building, in training, exchange of scientific, technical and legal publications; printing of bills and laws; international treaties of common concern and other relevant skills.

For me it was a pleasure to be invited to this important Conference and to witness, first hand, the tremendous advances made in the development and consolidation of environmental law in Brazil and in the Region.

I have always learnt a lot from these conferences and I want to keep on learning. So I invite you to offer your ideas and comments to me, not only here at this conference but throughout the year.

Thank you all; thank you Professor Antonio H. Benjamin, for politely insisting that I should come all the way to participate in this great event.

CHAPTER FIVE
THE GENERAL PRINCIPLES OF ENVIRONMENTAL LAW INCLUDING ACCESS TO JUSTICE, INFORMATION, AND PUBLIC PARTICIPATION, ON THE PRECAUTIONALY PRINCIPLE, POLLUTER PAYS, INTERGENERATIONAL EQUITY AND THE DOCTRINE OF PUBLIC TRUST[94]

5.0 Introduction

Where are we coming from?

This topic is assigned two separate sessions but considering the interrelationship of the issues to raise, it is best to present one paper on the topic(s). Of course the topics cover vast ground and in the time available we can hardly be exhaustive. Rather we have time to raise issues leaving the participants to pursue aspects of their interest.

At the outset I underline that a lot has been written on these topics by learned authors in text books and articles. Equally governments have developed these principles in treaties, protocols, and national statutes while international organizations, both intergovernmental and nongovernmental, including the scientific community, have promoted dialogue in these matters in a variety of tasks in respective mandates. Such include in formulation of their own programmes, and in adoption of decisions in soft law instruments such action plans, principles, guidelines, declarations and resolutions. Some instruments are referred to as charter, for example the World Charter for Nature adopted by the United Nations General Assembly[95] or covenant such as the one developed by the IUCN on sustainable development. In deed since the 1972 Stockholm human environment conference[96] landmark developments have taken place in environmental law and policy at global, regional and national levels.

A full discussion of the topic would necessarily embrace international, regional and national levels. Of course such a discussion would be rather vast. Accordingly only general remarks and observations would be made at the global level with deliberate bias at regional level to Africa and close home to the three East African States.

5.1 Sources and Approaches

The title depicts two broad themes namely:-

- The basis, premise and root of environmental law. At national law one would look at nuisance, negligence and the development of tort law and the impact of the

[94] Donald Kaniaru. Mr. Donald Kaniaru is an advocate, Kaniaru & Kaniaru Advocates and Special Adviser UNEP. Paper presented at Judicial Symposium on Environmental law at Imperial Resort Beach Hotel Entebbe, Uganda. 11th -13th September 2005.
[95] UNGA res. 37/7
[96] UN/CONF 48/14 Rev.1.

Common law, and statutes[97]. At international law one would look at the off-shoot of sources of law as articulated in article 38 (1) of the ICJ Statute, below.

- General principles. Since the examples given by the organizers of such principles derive from the Stockholm and Rio declarations of June 1972 and 1992[98] of twenty six principles and twenty seven principles respectively, it is clearly intended that focus be based on these complementary set of principles.

Needless to say general principles are not only contained in the two declarations mentioned. A lot of soft law instruments have been agreed in forms of the charter, covenant, guidelines and principles which we cannot address in the time available. Suffice it to say that these have influenced the development of the resulting environmental law and policy.[99]

It should be noted that environmental law is part of public law and at international level if one wishes to look at the sources of international law, it is appropriate to refer to the UN Charter particularly article 38 (1) of the Statute of the International Court of Justice. The four primary sources are:-

a) International conventions whether general or particular…..
b) International custom as evidence of general practice accepted as law……
c) the general principles of law…..
d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations……

These sources underline the development of international environmental law as part of public law. Incidentally the UN charter does not explicitly address the environment. However, it does focus on human rights in the articles under the Economic and Social Council (ECOSOC), whose subsidiary bodies like the Commission on Human Rights have done splendid work on the subject over the years. Action on human rights started early. The universal declaration on human rights was developed and adopted by the United Nations General Assembly in 1948[100] and subsequently inspired numerous global human rights conventions as well national constitutional provisions on bill of rights making international human rights law a leading component of public law. This is not the only aspect that ECOSOC and the United Nations General Assembly have spearheaded in elaborating specific aspects of the sources of law.

In 1947 the General Assembly established the International Law Commission (ILC)[101] with the express mandate to promote the codification and progressive development of international law. The commission, in over 50 years, did some splendid work in this

[97] See paper by Prof. Charles Okidi, Judicial Colloquium, Mombasa 2-4 June, 2004.
[98] UNCED Doc. A/CONF.151/26 (Vol. I)
[99] paper on the Role of UNEP in the Development of Environmental Law by Donald Kaniaru presented as key note speech at the 6th International Conference on Environmental Law, Sao Paulo, Brazil 3-6 June
[100] UNGA res. 217 - A (III) of December, 1948. UN Doc. A/810, pp 71 – 77.
[101] Statute of the ILC, UN Doc. A/CN.4/4 Rev. 2.

respect. Notable in the area of the environment was its seminal draft articles tabled at the first UN Conference on the Law of the Sea held in Geneva in 1958 in which four conventions on territorial sea and the contiguous zone, on the high seas, on the high Seas, on fisheries and living resources and the continental shelf were adopted. The commission was and is seized with environmental topics[102] but clearly the importance, urgency and interest of states does from time to time dictate that they take charge of negotiations of key environmental issues in and under the General Assembly or in UN Programmes so directed, or in the context of a particular specialized agency of the United Nations.

In the decades of the sixties and thereafter, for example, the process of the third law of the sea conference was taken over by the General Assembly. In that period the United Nations conference on the law of the sea concluded the Convention on the Law of the Sea at Montego Bay, Jamaica in 1982 after over a decade of complex negotiations in the most important global convention as a constitution of the oceans law. It took another twelve years for the convention to enter into force on 16 November 1994.

More Conventions were to follow this trend with the General Assembly also taking up the process, among others, of the United Nations Framework Convention on Climate Change, 1992 and United Nations Convention on Desertification Control 1994. Also worth mentioning in passing is the General Assembly negotiations on important declarations such as on sovereignty over natural resources 1962 and 1972 for developing countries and the declaration on the new international economic order, among others.

In parallel to the above general developments other bodies were established both within the United Nations generally or outside the United Nations framework but cooperating with the United Nations. Of the former are UN programmes and offices for example: UNEP, regional economic commissions and specialized agencies: all destined to play a crucial role in environmental matters. Such specialized agencies include FAO, IMO, UNESCO, WHO, ILO, the World Bank. Outside the United Nations regional organizations also emerged, for example, the Organisation of African Unity currently African Union, European Union, Council of Europe and others. Nongovernmental organizations dealing with specific issues also emerged e.g. the IUCN established in 1948 to deal with conservation of natural resources issues. Others are specialized institutions of a scientific nature such as the international council of scientific unions (ICSU).

All these bodies and others were and still are players in international environmental law evolution. In Marine Pollution and Shipping matters, IMO concluded the earliest instrument on marine pollution: the convention of 1954, later building up several such instruments in subsequent decades. Before the 1960s and into the 70s such activities were carried out on an ad hoc basis. Virtually no consultations among all the interested parties,

[102] See Professor Stephen C. McCaffrey "The fifty-Sixth Session of the ILC", in Environmental Policy and Law, 35/3 [2005]. He points to relevant environmental work already done as the four 1958 Geneva Convention on the Law of the Sea and the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, and the two still on the agenda of the Commission, viz International liability for Injurious consequences arising out Acts not prohibited by international law, from 1978 and shared natural resources, from 2002.

both at national and international levels, took place. The initiation of dialogue on Oceans by Malta in 1967[103] and on the degradation of the human environment by Sweden in 1968[104] and the subsequent action on the two issues prompted the UN system and governments to work closely together on such issues of considerable complexity. Two international processes on these matters were set in motion: on the law of the Sea negotiations for over one decade, and on the human environment, Stockholm, 1972 agreeing Plan of Action, 109 recommendations, the Declaration of Principles, and institutional and financial arrangements that form the basis of UNEP. [105]

The emergence of practice of states addressing issues together and acting consistently in the field of the environment emerged and is actively alive today. For example at the start of the preparation of the Stockholm process there were a handful of states with clear policy and law in environmental matters. These were Sweden, the United States of America and Japan. After Stockholm 1972 the situation dramatically changed and environmental ministries, commissions, councils have been established by over 150 states. National environmental laws have been developed by practically all states and internal consultation and cooperation are in effect generally even though they are not without difficulties and challenges.[106]

As stated at the opening environmental discussions on policy and law at all levels is a given in most universities and scientific bodies. Environmental law has become an important discipline of law, and generally and widely accepted as a mover of environmental law development and implementation. Thus several instruments are science-driven, e.g. the Ozone and Climate treaties. As also stated during the opening session, the judiciary is fully embraced as this national symposium, which is one of several held in Uganda, demonstrates.

5.2 General Principles

The Stockholm and Rio Declarations have provided the engine of environmental law development at global, regional and national levels. The concepts and principles of sustainable development wrap up several principles, in fact a third of them into the totality of the concept of sustainable development.[107] The Brundtland commission of 1987 publication, Our Common Future,[108] popularized the principle, which it defined as "development that meets the needs of the present generation without compromising the ability of future generations to meet their needs." This is stated verbatim in Cap 153, The National Environment Act, 1995 of Uganda. The same is the case in Kenya's

[103] The basis of the principle of common heritage of mankind.
[104] UNGA resolutions between the 23rd & 27th Sessions namely res.2398 (XXIII) of 3rd December 1968; res. 2581 (XXIV) of December 1969; res. 2857 (XXVI) and res. 2997 (XXVII) of 15th December 1972.
[105] Established by UNGA res. 2997(XXVII) of 15 December 1972.
[106] In Africa all states able to do so have environmental machineries: Ministries, Departments, Commissions and Councils as well as constitutional or statutory provisions. The exception are those countries that have been, or are in conflict, e.g. Somalia.
[107] In the time available focus is on the principles selected by the Organisers.
[108] Oxford University Press, 1987.

Environmental Management and Coordination Act (EMCA) number 8 of December 1999 and Tanzanian Mainland Act The Environmental Management of November 2004 both of which add to that definition by maintaining the carrying capacity of the ecosystems.
In these laws the topics of this discussion are embraced in sustainable development namely the Principle of Public participation, The Polluter Pays Principle, the Precautionary Principle and that of Intergenerational Equity. These and other Rio principles are expressly recognized in national laws of many countries including the East African one. The broad sustainable development principle naturally has possibility of development by national courts because its precise content and its what I may call, constructive vagueness, would allow judges to give local application taking into account the prevailing circumstances and needs in a given country. A lot is written on these principles and of more interest is attention given or to be given to them in their implementation and enforcement.

5.2.1 Rio Principle 10

This principle embraces Access to Environmental Justice, Information, Public Participation. This is one of the most intensely discussed and legislated principles at all levels. The three pillars it underlines are access to environmental justice, access to information and access to public participation in decision making. Its core aspects are environmental awareness, enhancement and empowerment. Everyone must be able to enjoy his or her clean environment. They must be able to protect, unhindered their and others interests, in courts, tribunals and judicial processes. The pillars are briefly touched on below.

- Access to justice. This means that issues of locus standi should not stand in their way to Courts and Tribunals dealing with environmental issues. Traditionally the common law approach required that to pursue a matter in Court, a plaintiff had to show he/she had a legal interest in the matter or had suffered personal injury, otherwise one was shut out in Courts. This rigidity was exercised by the Kenya High Court again and again; for example in the **Wangari Maathai** cases. Nigerian Courts followed similar approaches even as the UK relaxed the application of the same and as the Indian Supreme Court quit such rigidity. In this respect the laws of Uganda,[109] Kenya and Tanzania have opened the way for all. Environment is not static: it is interdependent and no wall can be built to deter links between environment on one side and the other. For the courts the issue of costs of filing a suit, the cost of counsel to assist, the fear of being saddled with the costs of the suit if one loses are all integral to the access to justice aspect. If these are prohibitive, access would be illusory. Happily most national statutes are providing for waivers in these respects save for clearly frivolous interventions and abuse. So far there have been no problems in the East African countries.

[109] Advocate K. Kakuru points out that taken together, The Constitution of Uganda, article 50 and the National Environment Act, Cap 153 sections 4(4); 68, 72 also relax the locus standi rule, and the Courts should apply the law the straight forward way allowed in Kenyan and Tanzanian Acts.

- Access to information is of course, crucial. Information is said to be power. Consequently its denial to whoever may be interested or the public means denial of discussion and contribution to a pertinent issue and its resolution. It is of paramount significance that environmental information be broadly available on a timely basis and the culture of secrecy built over time by public authorities must give way save in limited and clearly defined areas such as security or bona fide personal or proprietary information.

- Public Participation in decision making. This is, of course, again critical. Those decisions that affect the public must also be subject to scrutiny by the public. This is an aspect in the environmental impact process that is subject to contest when information is not broadly shared or issues raised on a timely basis to enable whoever may be interested to comment, question and intervene. At international level this principle has found expression in legally binding instruments while at national level it is a principle to be found in recent national constitutions and statutes. Uganda has this in its law and Kenya has it both in its draft constitution and its EMCA. The same is true in most (about 40) African countries laws.

At international level mention could be made of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environment Matters, concluded in June 1998[110] under the auspices of the UN Economic Commission for Europe. This convention, though regional, is open for accession by states outside the jurisdiction of the UNECE. In fact I understand that Uganda and Mexico have decided to follow the accession process permitted by article 19 (3).

5.2.2 Principles 15 and 16

The Precautionary Principle (PP 15) and The Polluter Pays Principle (PPP 16) respectively state: In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation. (PP 15).

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear cost of pollution, with due regard to the public interest and without distorting international trade and investment. (PPP 16).

These two principles are integral part of national laws of Uganda, Kenya and Tanzania per their statutes earlier referred to.[111]They are applied in other developing countries quite prominently. The Indian Supreme Court has applied them in its numerous decisions.

[110] UNEP, 2005 – Selected Texts of Legal Instruments in International Environmental Law, Section III – Regional Agreements; pages 549 – 561.
[111] Uganda, Cap 153, 1995; Kenya – EMCA, No. of 1999; Tanzania, Act of 2004.

For example in Vellore Citizens Welfare Forum[112] vs. Union of India Supreme Court in the 1996 case where the Vellore citizens petitioned it to stop tanneries in Tamil Nadu from discharging untreated effluent into agricultural fields, open lands and waterways. The Supreme Court held that the sustainable development and in particular the Polluter Pays Principle and the Precautionary Principle have become a part of customary international law. It ordered the central government to establish an authority to deal with the situation created by the tanneries and other polluting industries in Tamil Nadu "This authority shall implement the Precautionary Principle and the Polluter Pays Principle", the Court ordered.

It should also be noted that South Asian Courts have followed the example and lead of the Supreme Court of India. [Bangladesh, Pakistan, Sri Lanka, Nepal.]. The application of the principles at national will remain topical in establishing applicability in Courts. In PP 15, full scientific certainty may be far fetched in developing countries, and the shift of the burden of proof from plaintiff to respondents will be a matter to argue. The same is true on remedies, levels of compensation and restoration in PPP 16.

Of the two principles the Precautionary one is the more controversial. The US in particular is apprehensive in its use and prefers approach to principle. This is also reflected in the use of principle and approach in the title and body of the principle. The Polluter Pays Principle is much older in Europe having been developed by the OECD countries in the 1970s. This principle has been in reservedly embraced in developing countries, and certainly in Africa.

5.2.3 Principle 17

Environmental Impact Assessment (EIA) Process: Principle 17 states that "[EIA], as a national instrument, shall be undertaken for proposed activities that are likely to have a significant impact on the environment and are subject to a decision of a competent national authority." Again the statutes from the three East African countries contain the thrust of this principle followed by regulations that underline the steps to be taken in the process whose examination by an expert or experts would determine whether or not a programme, activity or a project would have any adverse impact on environment. Both Uganda and Kenya have EIA regulations in place and a proponent of a project of a given magnitude has to fulfill the requirements per Act and regulations. The experts are registered by the pertinent authorities. Additionally Uganda has A Guide to the Environmental Impact Assessment Process in Uganda.[113]The steps include:

- Screening to determine whether a certain project should be subject to EIA;
- Scoping to decide which impacts should be taken into account by EIA;
- Impact analysis to evaluate the type of likely environmental impacts;
- Mitigation and impact management to develop measures to avoid, reduce or compensate for negative environmental effects;

[112] Environmental Law Case Book for Practitioners and Judicial Officers [Greenwatch/UNEP, Sept 2005] pp. 347 – 369.
[113] Kenneth Kakuru and Others, Sustainable Development Series number 1 (September 2001).

- Reporting to catalogue and track the results of EIA for decision makers and other interested parties, including the public;
- Review of EIA quality to examine whether the EIA report includes all the information required by decision makers and the public;
- Decision making to approve or reject project proposals and, if needed, to set the terms and conditions under which a certain project can proceed; and,
- Implementation and follow-up to ascertain whether the project is proceeding as planned, monitor the effects of the project, and take actions to mitigate problems that arise during the course of the project.[114]

In the statutes of the East African countries, the environmental authorities established under respective Acts are charged with responsibility on deciding on the EIAs to be and undertaken as audits and monitoring. The decisions taken are subject to appeals in case of Uganda administratively as provided and supervision of the High Court.[115] For a full discussion of the EIA law and procedures in Uganda, attention is drawn to interested readers to a comprehensive and erudite paper titled The Environmental Impact Assessment by **Hon. Rubby Aweri Opio**, Judge of the High Court, Uganda.[116] In the case of Kenya[117] and Tanzania[118] Mainland appeals are made to the national environment or appeals tribunal.

The looming problem is whether the decision making process is good or fast enough for investors with the claim that decisions are taking too long. This in itself is already raising political overtones. In Kenya the Minister of Planning is on record expressing dissatisfaction with the performance of National Environment Management Authority (NEMA) and I am aware of murmurs in the same direction. The point is that people including investors have come from a background where there was no intervention of any kind whatsoever by the authorities. Consequently the changes in the law, welcome as they are, are construed as constraints.

EIA is essentially a national procedural tool fairly widely used in Africa and beyond. However, UNEP in 1987 developed environmental impact assessment guidelines which UNECE subsequently developed into the Convention on Environmental Impact Assessment in Transboundary Context popularly known as "Espoo Convention"[119] in force since 1997. This instrument is currently backed up by a protocol on strategic environmental assessment of 2003 which, though open to all UN member states, is yet to come into force.

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[114] From upcoming UNEP Training Manual….2005.

[115] During the Judicial Symposium, Entebbe, 11 – 13 September 2005, it was indicted appeal(s) are beginning to trickle to the Court of Appeal. No decision has been reached and no case is in the Supreme Court.

[116] Presented to the Mombasa Colloquium on 2-4 June 05.

[117] Part XII of EMCA.

[118] Part XVII of the Environmental Management Act, Tanzania.

[119] UNEP, 2005 - Selected Texts of Legal Instruments in International Environmental Law, Section III – Regional Agreements; pg. 455 – 468.

Nearer home in East Africa, environmental impact assessment is known not only in national statutes as earlier stated but in the treaty for the establishment of the East African Community[120] in its chapter 19 titled Cooperation in Environment and Natural Resources Management article 111, paragraph 1 (d) which provides:

> "The Partner States recognize that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a prerequisite for sustainable development. "
>
> (d) "Shall provide prior and timely notification and relevant information to each other on natural and human activities that may or are likely to have significant trans-boundary environmental impacts and shall consult with each other at an early stage".

It should be noted also that article 112 on management of the environment paragraph 2 in acknowledging paragraph 1 covering five agreements by the partner states to develop a common environmental policy, to develop special environmental strategies, to take measures to control transboundary air, water and land pollution, to take necessary disaster preparedness, management protection and mitigation measures and to integrate environmental management and conservation measures in all development activities provides that partner states undertake to develop special environment management strategies to manage fragile ecosystems, terrestrial and marine resources, noxious emissions and toxic and hazardous chemicals. Thus, EIA is a fundamental aspect in the facilitation of environmental and sustainable development in the region. The treaty also acknowledges the EIA in a Memorandum of Understanding (MoU) between the three countries for cooperation on environment prepared under the auspices of PADELIA and two protocols for Environment and Natural Resources Management and for Sustainable Development of Lake Victoria Basin.

5.2.4 Inter & Intra-generational Equity

Several Rio principles, notably 1, 3 as well as several treaties and declarations refer to the responsibility to protect and improve the environment for present and future generations. Principle 1; the natural resources of the earth must be safeguarded for the benefit of the present and future generations. The thrust of Principles 3 and 5 as well as several other international efforts springing from 1987 Brundtland report, Our Common Future, which balanced the interests of present and future generations in the definition already stated. Of course the concern of this principle is not only inter - but intra-generational equity as well. It is the core of sustainable development.

The best and widely known national judgment on this matter is the **Oposa[121] and Others vs Factoran and Another** issued by the entire Supreme Court of the Philippines. The

[120] Of 30th November 1999 which entered into force in 7th July 2000

[121] Environmental Law Case Book for Practitioners and Judicial Officers; pp 281 – 297; UNEP Compendium of Judicial Decisions on Matters Related to Environment – National Decisions; Vol. 1 Pages 22 – 36.

Petitioners, a group of minors brought the action on their own behalf and on behalf of generations unborn through their parents together with Philippine Ecological Network Incorporated. They protested the imminent total destruction of the country's forest resources to the detriment of their interests. The Supreme Court recognized that the case raised the right of the people of the Philippines to a balanced ecology and the concept of the intergenerational responsibility and inter-generational justice. The Supreme Court upheld the action and in part stated:-

> "The Petitioners had the right to sue on behalf of succeeding generations because every generation has a responsibility to the next to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthful ecology."

Although this right was incorporated in article 16 of the country's Constitution, the Supreme Court observed:

> "As a matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers that unless the rights to balanced and healthful ecology and to health are mandated as state policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come, generations which stand to inherit nothing but parched earth incapable of sustaining life."

The United Nations Environment Programme, in updating a 1997 Training Manual will shortly provide a new Manual[122] embracing generally and specifically the above principles as well as an entire discussion on global, regional and national themes covering no less than 26 chapters of environmental current concerns. The principles discussed or raised above are covered as follows:

1. Principle 10 on access to justice, information and public participation in chapter 7 of the manual;
2. Precautionary and Polluter Pays Principle and Intergenerational Equity in chapter 3 of the same manual and
3. EIA in chapter 21of the same.

This publication is obviously recommended for all interested in the scope of environmental law globally with relevant sampling of examples at regional and national levels.

[122] Under print.

5.2.5 Doctrine of Public Trust[123]

This I will touch briefly. It has its beginnings in Roman Law but obviously in other traditional and customary laws where no benefit of writing is in evidence, for example, amongst our African societies. Of course the common law knows the doctrine and the UK, US evidence this in several judicial decisions whose discussions of the doctrine are in more limited areas than, I believe, our countries would endorse. The Indian Supreme Court has discussed this doctrine in the late 1990s and I recall here the case of **M. C. Mehta vs. Kamal Nath[124] and Others of 1997**. In this matter the Court took notice of an article appearing in a newspaper spotting the family of Kamal Nath, former Environment Minister in India where some motel had encroached on additional area of land adjoining the authorized place and used earth movers and bulldozers to turn the cause of the river to create a new channel and divert the river's flow to prevent future floods destroying the motel. The Supreme Court addressed the issue of Public Trust Doctrine under which the government is the trustee of all natural resources which are by nature meant for public use and enjoyment.

The Court reviewed public trust cases from the United States and noted that: "under English common law this doctrine extended only to traditional uses such as navigation, commerce and fishing but the doctrine is now being extended to all ecologically important lands, including freshwater, wetlands and riparian forests. The Court relied on these cases to rule that the government committed patent breach of public trust by leasing this ecologically fragile land to Span Motels when it was purely for commercial use."

The principle is inherent in the management of public and community goods through governments and local authorities. In many developing countries, these inherent interventions are expressly provided for in national constitutions,[125] statutes[126] and in customary practices.

5.2.6 Environmental Treaties and Players

I know the subject of treaties will be addressed later by another speaker. Nevertheless I will make a quick observation. In two recent interventions two professors have addressed this subject. In the judicial colloquium for East African countries and the East African Court of Justice based at Arusha, held in Mombasa on 2- 4 June, facilitated by **Prof. Charles Okidi** of the University of Nairobi, he presented a paper on "the concept, structure and function of environmental law"[127] which may have already been shared with some of you by the many judges from Uganda who took part in the symposium. In the event it was not shared, I leave a copy with the organizers to avail to the participants of the meeting. In part VI title "Treaty Law on the Environment" **Okidi** underlines a

[123] Handbook on Environmental Law in Uganda 2nd Edition 2005…Section 3.3 and 3.3.1, pages 24 – 28.
[124] UNEP National Decisions on Compendium of Judicial Decisions on Matters Related to Environment Vol. I pages 259 – 274.
[125] Uganda and Ghana Constitutions articles 237 (2) (b) and 257 (2) respectively.
[126] For example Uganda Land Act, Cap 227, section 44. In several Countries the law on this subject has been abused.
[127] See footnote number 3. The paper has national sources as well as international ones.

number of global and regional treaties of relevance to the Africa region. These are part of the compilation of the text of treaties that UNEP has compiled over the years in its treaty series[128] volumes 1 and 2 as well as its recent compilation titles "Selected Text of Legal Instruments in International Law". In the paper **Prof. Okidi** reviews the evolution of environmental law at both national and international arenas.

The other presentation titled "An Introduction to the Resources Principles and Regimes of International Environmental Law" by **Prof. Marc Pallemaerts** of University of Libre de Bruxelles and Vrije University Brussel, was done on 24th August 2004.[129] In that note under treaties the Professor gives an interesting analysis of multilateral environmental treaties or agreements that form most significant development in environmental law. In this respect this article and that of Professor Okidi are complementary. He sums up the different faces and outputs in similar fashion to **Prof. Okidi** but giving precise numbers of treaties concluded in the different phases. Prior to 1960 some 42 MEAs mainly in the management of the natural resources area. After the Stockholm Conference, in the 70s he cites another adoption of 75 new MEAs. In the 1980s, another 40 additional MEAs. In the 1990s, another 75 MEAs. Thus summed up the number of environmental treaties is conservative.

Different authors give the number at 500; some even as many between 900 and 1000 global and regional treaties. The differences come in as a result of what each author characterizes as environment and sustainable development. I will also leave the copy of each of the papers to share because these two papers are illuminating. There are other interesting materials to read from the same meeting in August 2004[130]that is shared with organizers for the participants.

The recent publication titled "Making Law Work" edited by **Durwood Zaelke**, **Donald Kaniaru** and **Eva Kruzikova**[131] is well worth reading because its focus on implementation is responsive to the 2002 World Summit for Sustainable Development[132]focus on Implementation as well as UNEP's Montevideo III of the current ten year period of review and development of environmental law which gives priority to Implementation and Enforcement as well as Capacity Building. Again I will avail the two volumes to the organizers for their Library.

With respect to treaties, I mentioned at the outset that many players and partners have responded to this subject more comprehensively and cooperatively in initial stages of the

[128] Selected Multilateral Treaties in the Field of the Environment, UNEP 1983 edited by Alexandre C. Kiss; UNEP Reference Series 3. This is Volume 1. Selected Multilateral Treaties in the Field of the Environment, Volume 2: Cambridge Grotius Publications Ltd, UNEP 1991, edited by Iwona Rummel-Buska and Seth Osafo. UNEP, 2005 – Selected Texts of Legal Instruments in International Environmental Law.
[129] The first University of Joensuu UNEP Course on International Environmental Law-Making and Diplomacy Review.
[130] Donald Kaniaru a paper on "The Concept of Sustainable Development: From Theory to Practice"- International Environmental Law-making and Diplomacy Review – University of Joensuu – UNEP Course Series 1 , 2004.
[131] published in 2005 by Cameron May
[132] www.un.org/esa/sust.dev/documents/wssd-PoI -PD/English/PoI Toc.htm.

1950s and 1960s. The players and partners in the process have been many but UNEP has played its major part in over 40 global and regional agreements since its establishment following the Stockholm Conference. Even for the conventions that others played a lead role UNEP was a partner in many cases at the global and regional levels.[133] That was certainly the case in the negotiations of those conventions like the Climate Change 1992 and the Desertification Convention 1994 where it provided personnel and scientific support in the case of the former and scientific information and support to developing countries in negotiations in the case of the latter. The same is true in several regional agreements for Africa and Asia and Europe.

From 1981 UNEP also established a ten year programme starting with the Montevideo I for the 80s, II for the 90s and III for the current decade.[134] These were and are geared to systematic, rather than the ad hoc intervention that prevailed before, in the development of the international environmental law and its Implementation at national level and in Capacity Building programmes to developing countries and countries whose economies are in transition.

5.3 Concluding Remarks

Broadly the above highlights, albeit without extensive discussion, the concerns and theme that the organizers asked that I share during this symposium. Before concluding and opening the floor for discussion it may be necessary to underline a few points which I do below:

- Focus on role of the judiciary already was referred to during the opening and no doubt Uganda is aware of the programme that UNEP is carrying out globally, regionally and at national level for judiciaries and legal fraternity.

- The three East African countries, individually and together, have been significant players in the field of environment in the past three decades. I have witnessed Uganda's active participation in this matter at the UN General Assembly in the law of the Sea negotiations during the 3rd Law of the Sea Conference, in the UNEP Governing Council and its Committee of Permanent Representatives, at its national or East African Environmental activities held in Uganda from 1976 when the first national conference was held and subsequently as mentioned in administering a project that gave initial capacity those years to Uganda and in the PADELIA which has held no less than four meetings in Uganda. From the project's inception I was and still am associated with it as its chairman of the steering committee to date.

- This symposium is one of many from 1996 that I have taken part in. I have mentioned that in East Africa, Uganda took the lead in the enactment of its chapter 153 in 1995 and it may be contemplating amending it to strengthen it or to bring it in line with the more current developments during the one decade its Act has been in force and to attune the law to the needs and evolving circumstances of

[133] See footnote number 5 above.
[134] 10/21; 17/25 and 21/23. GC decisions.

Uganda. It should be noted that any adjustment in the law should be to strengthen, rather than weaken it; this approach should not be negotiable. Elsewhere I have mentioned the Kenyan Act and the Tanzanian Mainland Act which is the youngest having been adopted in late 2004 and come into force in February 2005. Making such Acts operational does take time, and the Tanzanian case is no exception. The three laws have significant approaches to the development of environmental jurisprudence. Let me underline or comment on this. Ugandan Act calls for challenges to decisions taken by the institutions created to be appealed administratively and for the High Court to supervise such. In deed already a number of cases have been before the High Court. I am not aware whether if a party is further dissatisfied can, under normal procedures, appeal to the higher Courts, and have not seen a case form either the Court of Appeal or the Supreme Court.[135] In this respect Uganda has taken a different path and it is not surprising that a comment was made that Uganda revisits this aspect to approximate what is happening in the other two countries or taking into account what is happening elsewhere in the commonwealth. On the other hand, Ugandan superior Courts may interpret the current law in such a way that they do not feel inhibited in the development of environmental law. Such an approach would be great. The route taken by the two countries is briefly mentioned hereunder.

- The situation is Kenya's EMCA came into effect in January 2000. The organs[136]established under the Act did not, however, take off until 2002. Nevertheless, there have been discussions of making amendments to the Act to clarify some points and to streamline the Act. The current draft Constitution envisages the establishment of an environmental commission with defined responsibilities[137] It also envisages the enactment of an Act of parliament to implement the different aspects. If the new Constitution is ratified through the referendum scheduled for November 21 any amendment to the Environment Coordination Act could usefully implement what is anticipated. Be that as it may, EMCA establishes a National Environment Tribunal (NET), among other institutions, e.g. the National Environment Council (NEC); the Public Complaints Committee (PCC), and NEMA, to hear appeals and to be able to give opinions in matters referred to it. The tribunal is chaired by a chairman nominated by the judicial service commission and qualified to be appointed a judge of the High Court. Two other members are senior lawyers and the other two are senior scientists. It has dealt with one appeal and is hearing another three. Indications are that it is in business. Another Act of parliament " The Forest Act" adopted this year and yet to be assented by the President mandates the tribunal to hear appeals arising from the decisions of the organs established under that Act. Appeals from the tribunal go to the High Court; one judge sitting on the matter and whose decision is final. It does not indicate whether the appeal is on a point of law only. Consequently the appeal can be on both facts and law. The one ruling so far made is subject to

[135] See footnote number 21 above
[136] NEC, NEMA, PCC, NET etc.
[137] Article 92. See Chapter Eight, articles 87-93; the right to environment, article 67.

appeal. The members of the tribunal including the chairman are gazetted for a 3 year period that may be renewed by the Minister for the time being responsible of the Environment.

- The Tanzanian appeals tribunal is different from Kenya's in the significant respect both to the appointment of the chairman and the handling of appeals. The chairman qualified to be a judge is appointed by the President of the Republic. The appeals go to the High Court for final determination by a Court constituted by three High Court judges. The administrator of the Tribunal is a registrar named by the Chief Justice. These features are certainly an improvement on Kenya which could find itself with an appeal going to the High Court for final decision from the tribunal and yet a parallel appeal from a matter that may first have gone to the High Court which has unlimited jurisdiction and which matter was not at the time rerouted to the national environment tribunal. Such a matter would, of course, be appealable to the Court of Appeal or higher to the Supreme Court should the new Constitution come into force. Thus, this matter needs to be clarified on the Kenyan side.

- Of course Uganda does not need to only look at the two East African countries. There are several developing countries with such structures in place. Nor does Kenya only need to look at the Tanzania example. There are also developed commonwealth countries with different structures, for example, New Zealand and Australia. In the latter the New South Wales Land and Environment Court is the oldest and best known and whose judges rank as the High Court judges. Let me refer to three other developing countries. One in Africa and two in the Caribbean. Mauritius is the case in Africa which follows the example of Kenya more or less. It cannot therefore be the best example for Uganda. Then two other cases are Guyana and Trinidad and Tobago. In the former, its Act is of 1996 and Trinidad and Tobago Act[138] is of 2000. The two correspond to each other. The Appeals tribunal in Guyana and the Commission in Trinidad and Tobago are superior Courts of record and the judges are High Court Judges. The appeals go to the respective Courts Appeal and other provisions are similar to those of judges of superior courts with secure tenure, salaries and remuneration, some members full time or part time as the case may be and so on.

- Quite clearly then, the development of environmental jurisprudence in East Africa is a matter that does deserve attention by the relevant authorities if harmony is to be achieved at both the national level and at the East Africa Court of Justice level in environmental matters.

- These unsolicited comments have been given in the interest and spirit of further developments and cohesive attention that the important issue of environmental jurisprudence in the context of sustainable development should receive in its consistent future growth.

[138] Guyana, Act No. 11 of 1996, Environmental Protection Act. Trinidad & Tobago, Act No. 3 of 2000, Environmental Management Act.

CHAPTER SIX
ACCESS TO ENVIRONMENTAL JUSTICE, THE ROLE OF THE JUDICIARY AND LEGAL PRACTITIONERS; EXPERIENCES AND LESSONS LEARNED.[139]

6.0 Introduction:

Environmental law is a comparatively new branch of domestic and international law. Unlike older areas of law which have already acquired fairly defined concepts, principles and procedures, it is still in the process of being moulded. In this process of moulding, the Judiciary and the legal practitioners have a vital role to play. For the above reasons it is important for the Judiciary and the legal practitioners to have a clear understanding of environmental problems and creative vision of how the law can deal with them.

Much of what I will discuss will be based on how our Courts have been responding to environmental issues and the level of development of environmental jurisprudence. The paper will also tackle limitations to access to justice and way forward. **In** my view what the organizers of this workshop want is an inventory of what the bench and the bar have done in relation to environmental issues affecting our regime and the challenges they have to go through.

I will start with definition of some terms and general background.

The Term Access to environmental justice:-

According to UNEP access to justice in reference to environment means judicial and administrative procedures available to a person aggrieved or likely to be aggrieved by an environmental issue.

6.1 The Scope of Environmental Justice:-

According to Friends of the World Special briefing No.7 of November 2001, the concept of environmental justice is based on two basic premises - the first one is that everyone should have the right and be able to live in a healthy environment with access to enough environmental resources for a healthy life, and that it is predominantly the poorest and least powerful people who are missing those conditions.

Secondly, environmental justice also implies environmental responsibilities and these responsibilities are on the current generation to ensure that a healthy environment exists

[139] Hon. Justice Rubby Aweri Opio. Hon Justice Aweri Opio is a judge of the High Court of Kampala, Uganda. Paper presented at the magistrates training workshop in environmental law fro 14th-17th August 2005, Sunset Hotel, Jinja.

for the future generations, and or countries, organizations and individuals in this generation to ensure that development does not create environmental problems or distribute environmental resources in ways which damage other people's health.

The above concept is globally known as the principle of sustainable development which was conceived in 1992 during the Earth Summit in Rio De Janeiro, Brazil.

In Uganda sustainable development is defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs.

It is development which uses land, water, plant animal and genetic resources in environmentally friendly and non-degrading, technically appropriate, economically viable and in a socially acceptable manner.

Man derives life from the environment. One of the oldest books of civilization, the Bible states that God created environment first and from that material created man by blowing the sprit of life. I am told scientists are at advanced stages of creating human beings using life in the environment and DNA cells. What I want to emphasize is that man and environment are not separatable. Man derives all his survival from environment.

These are: food, security, leisure, tools for survival, transport, water, medicine, fuel, shelter, spiritual**.**

Despite all that we gain from the environment, man has not been living on this planet earth responsibly. Thus about a hundred years ago, ANTON CHEKHOY, a renowned Russian Dramatist and story writer, warned mankind against environmental degradation:

> "Human beings have been endowed with reason and a creative power so that they can add to what they have been given. But until now they have been not creative, but destructive. Forests are disappearing, rivers are drying up, wildlife is becoming extinct, the climate is being ruined and every passing day the earth is becoming poorer and uglier."

Those wise words are still relevant to this day. The media is full of concern about our environmental degradation.

Because of the importance of the environment to mankind, the need to use law to protect the environment and sustainable development becomes crucial, hence the role of the judiciary and Legal Practitioners. As was expressed by the **UNEP Executive Director** during the Global Judges symposium in Johannesburg South Africa, 18th August 2002:

> "Law is the most prevalent and enduring foundation for orderly responses to global, regional and national environmental problems……..At the national level, law remains the most effective means of translating sustainable development policies into action. A Judiciary well informed of the rapid expanding boundaries of environmental law and in the field of sustainable development, and sensitive **to**

> their role and responsibilities in promoting the rule of law in regard to Environmentally Friendly Development, can playa critical role in the vindication of the public interest in a healthy and secure environment through the interpretation, enhancement and enforcement of environmental law".

Last year the **Deputy chief Justice** in a similar workshop like this one, held the same view and it is worth quoting:

> "Solid legal framework and institutions are therefore essential in achieving sustainable development and effective nature resource management, whether the focus is food security, water quality, agricultural production, land use and management; well designed Laws and functioning legal system have a crucial role to play in developing countries like ours. These laws and institutions help to build foundations for good governance, resolve conflict and as a result maintain peace and security of the person and property. They protect rights and define responsibilities. They enable meaningful participation of all types of stakeholders from Central Government to rural communities. These laws when appropriate, fair and predictable encourage investment and facilitate the operations of markets. They also set norms for environmentally responsible behavior".

As a matter of emphasis, at the end of the above symposium, the Global judges formulated principles, the **Johannesburg principles** which should guide the judiciary in promoting the goals to sustainable development through the application of the rule of law and democratic process. Those principles were based on the following considerations:

- An independent judiciary and judicial process is vital for the implementation, development and enforcement of environmental law and that members of the judiciary as well as those contributing to the judicial process at the national, regional and global levels are crucial partners for promoting compliance with, and implementation and enforcement of international and national environmental law.

- The rapid evolution of multilateral environmental agreements, national constitutions and statutes concerning the protection of environmental increasingly requires the Courts to interpret and apply new legal instruments in keeping with the principles of sustainable development.

- The fragile state of the global environment requires the judiciary as a guardian of the rule of law, boldly and fearlessly to implement and enforce applicable international and national laws, which will assist in alleviating poverty and sustaining and ensuring that the present generation will enjoy and improve the quality of life of all peoples, while also ensuring that the inherent rights and interests of succeeding generations are not compromised.

- The judiciary has a key role in integrating Human Values set in the United Nations Millennium Declaration: Tolerance, Respect for nature and shared responsibility into contemporary global civilization by translating these shared values into action

through strengthening respect for the rule of law both internationally and nationally.

- The Judiciary, well informed of the rapidly expanding boundaries of environmental law and aware of its role and responsibilities in promoting the implementation, development and enforcement of laws, regulations and international agreements relating to sustainable development, plays a critical role in the enhancement of public interest in a healthy and secure environment.

- The importance of ensuring that environmental law and law in the field of sustainable development feature prominently in academic curricula, legal studies and training at all levels, in particular among judges and others engaged in the judicial process.
- The Deficiency in the knowledge, relevant skills and information in regard to environmental law is one of the principal causes that contribute to lack of effective implementation, development and enforcement of environmental law.

- The need to strengthen the capacity of judges, prosecutors, legislators and all persons who playa critical role at national level in the process of implementation, development and enforcement of environmental law.

- The people most affected by environmental degradation are the poor and that, therefore, there is an urgent need to strengthen t he capacity of the poor and their representatives to defend environmental rights, so as to ensure that the weaker sections of society are not prejudiced by environmental degradation and are enabled to enjoy their right to live in a social and physical environment that respects and promotes their dignity.

In a nutshell, what can be derived from the **Johannesburg principles** is that since **the Rio Declaration in 1992** the issue of access to environmental justice has taken a global and national dimensions.

Mandate:

The key prayers in the administration of justice are the judiciary and the Bar. The Courts of Uganda derive judicial power from the constitution. Article 126 (1) of the constitution provides that judicial power is derived from the people and shall be exercised by the Courts in the name of the people and in conformity with the law and with the values, norms and aspirations of the people.

The same further provides that:

(a) Justice shall be done to all irrespective of their social or economic status;
(b) Justice shall not be delayed;
(c) Adequate compensation shall be awarded to victims of wrongs;
(d) Reconciliation between parties shall be promoted; and

(e) Substantive justice shall be administered without undue regard to technicalities.

The constitution further guarantees independence of the judiciary. Access to justice is therefore a constitutional guarantee.

In Uganda, jurisdiction to hear matters with regard to the enforcement of constitutional and other laws related to the environment lies with the Magistrates' Court and the High Court. In cases of the decision of NEMA on environment impact assessment no appeal shall lie to any Court but High Court shall have supervisory powers.

6.2 Need for access: -

A number of environmental issues are provided for under Article 245 (a) (b) and (c) of the Constitution; The National Environment Act (NEA) and the land Act and many other Acts and regulations. All those revolve around the following:

(a) The right to protect and preserve the environment from abuse; pollution and degradation;

Pollutions of:

(i) Water - drinking water, water supply, beaches, marine life; inland water, industrial affluent.
(ii) Air - motor vehicles, industrial emission and smoke etc.
(iii) Land - forest, soil pollution, soil erosion, conservation, protection, exploitation of mineral resources, agriculture.
(iv) Noise - motor vehicles, aircraft, industrial noise prayers, discos, etc.
(v) Waste - waste management, disposal, packaging and recycling.
(vi) Hazardous substances - chemicals, radio active and nuclear materials, chemicals, genetically engineered organisms, etc.
(vii) Other pollutions - Odors, tobacco smoke, pesticides, oil litter, vibration.

(b) Protection of wild life;
(c) Protection of flora/vegetation;
(d) Industrial compliance - Licenses and permits; (e) Poverty;
(1) Good governance.
(g) Sustainable development.
(h) Environmental awareness.

6.3 <u>Benchmark indicators of Access to Justice:</u>

I. Legal and administrative framework.

(i) The 1995 constitution of Uganda.

The constitution provides for environmental protection and conservation in a holistic manner right from its national objectives and directive principles of state policy. It

provides that the state shall promote sustainable development and public awareness of the need to manage land, air, water and resources in a balanced and sustainable manner for the present and future generations. It also provides for the protection of important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of all the people of Uganda.

It further provides that the utilization of natural resources are to be managed in such a way as to meet the development and environmental needs of present and future generations; and in particular the state is required to take all possible measures to prevent or minimize damage and destruction to land, air, water resources due to pollution or other causes.

Article 39 of the constitution provides for the right to a clean and healthy environment. That article is supported by Article 50 which gives any person locus standi to take judicial action to redress the breach of a fundamental right, irrespective whether the breach affects him directly or not.

Article 245 of the constitution empowered parliament to provide for measures intended to:

(a) protect and preserve the environment from abuse, pollution and degradation.
(b) to manage the environment for sustainable development, and
(c) to promote environmental awareness.

As a result of the above, numerous statutes were enacted as we shall see shortly.

(ii) National Environment Act Cap. 153 Laws of the Republic of Uganda Revised Editions, 2000 volume VII.

The above law commenced operation for sustainable management of the environment. The Act sets out major principles of environment management, namely:

- The right to a healthy environment.
- Public participation.
- Sustainable development.
- Polluter pays principle.
- Environmental awareness.
- Environmental assessments of proposed projects. Environmental co-operation.
- Access to justice etc.

The Act also established the National Environment Management Authority. Its functions are provided under section 6 of the Act.

The Act grants powers to the District to manage the environment: See Section 14. In doing that they have powers to make bye-laws. A number of districts have come up with such bye-laws e.g. Masindi District.

The Act makes it mandatory for certain projects to have environmental impact assessment before they are undertaken. See part V of the Act.

The Act provides for offences under part XIII of the Act i.e. section 95-102. The act also provides for the remedies that Court can award:

(i) an environmental restoration order.
(ii) forfeiture of the substance, equipment and appliance to be borne by the accused.
(iii) the cancellation of any license, permits or other authorization given under the Act.
(iv) that in addition to any fine, the accused does community work that promotes the protection of the environment.
(v) the issuance of restoration order against the accused.
(vi) Imprisonment or fine ranging from three months to 36 months, shs.300,000/=, shs.300,000/= respectively.

Other legislations:-

The following are other legislations that contain principles relating to access to environmental justice:

- The Local Government Act 1997 volume X, Laws of Uganda 2000 Revised Edition. (Principles of public participation).
- Water Act Cap.152 Laws of the Republic of Uganda 2000 Revised Edition Vol. VII. (deals with sustainable use of water and public participation).
- The land Act Vol. IX Laws of the Republic of Uganda 2000 Revised Edition. (Sustainable use of resources and public trust doctrine).
- The National Environment (control of smoking in public places) Regulations 2004.

The above law provides that every person has the right to clean and healthy environment and the right to be protected from exposure to second hand smoke. It also provides that every person has a duty to observe measures to safeguard the health of non-smokers. It further provides that every head of family is responsible for creating a climate for children to be free of second hand smoke: Regulation 3.

Under Regulation 4 there are public places where smoking is prohibited. They are:

- Offices, office buildings and work places including individual offices, public areas, corridors, lounges, eating areas, reception areas, lifts, escalators, foyers, stairwells, toilets, laundries, amenity areas;
- Court buildings;
- Factories;
- Hospitals, clinics and other health institutions;

- Educational institutions of all levels;
- Premises in which children are cared for;
- Public places of worship;
- Prisons;
- Police cells;
- Public service vehicles and other means of public transport terminals, including airports and airfields;
- Retail establishments including markets and shopping malls;
- Cinemas and theatrical performance halls;
- Sports stadia.

Under Regulation 5 there are places where smoking is restricted by providing designate rooms in which smoking can take place. These are:

- Public paces of lodging;
- Bars;
- Restaurants;
- Discotheques.

Regulation 13 provides for penalties.

6.4 II. Experiences and Lessons learned

In light of the above provision there has been an increase in environmental jurisprudence especially in the field of public interest litigation which can be demonstrated by a growing number of cases. One of the leading cases on the various aspects of access to environmental justice is the case of **Greenwatch Vs. Attorney General & another, Miscellaneous Cause No. 140/2002** where Ag. Justice Lameck N. Mukasa made several landmark pronouncements on several aspects of access to environmental justice.

In that case, Greenwatch which is a Non-governmental organization registered and incorporated as a Company Limited by guarantee with the objectives of "watching" on issues and problems of environmental management sued the Attorney General and the National environmental management Authority (NEMA) seeking the following orders and declarations:

i) A declaration that manufacture, distribution, use, sale, disposal of plastic bags, plastic containers, all other forms of plastic commonly known and referred to as "kavera" violates the rights of citizens of Uganda to a clean and healthy environment.

ii) An order banning the manufacturer, use, distribution and sale of plastic bags and plastic containers of less than 100 microns.

iii) An order directing the second respondent to issue regulations for the proper use and disposal of all other plastics whose thickness is more than 100 microns

including regulations and directions as to recycling re-use of all other plastics.

iv) An environmental restoration order be issued against both respondents directing them to restore the environment to the state which it was before the menace caused by plastics.

v) An order directing the importers, manufacturers, distributors of plastics to pay for the costs of environmental restoration.

vi) No order be made as to costs.

When the matter came for hearing, the State Attorney who represented the Attorney General raised three preliminary points of objection:

The first one was that the application did not disclose a cause of Action against the Attorney General;

The Second one was that the application was not proper before Court in that it was brought by the Applicant on behalf of other Ugandans who had not authorized the Applicant to do so and without leave of Court as legally required under order 1 rule 8 of the Civil Procedure Rules before filing a representative suit.

Thirdly that the application is supported by defective affidavits which should be rejected. I shall not dwell on this objection in this paper.

On the first objection it was contended for the Respondents that the application did not satisfy the three elements to support a cause of action as was set out in **Auto Garage V s Motokov (No.3) 1971 EA 514** that:

(i) the Plaintiff (Applicant) enjoyed a right;
(ii) that the right has been violated;
(iii) and the defendant (Respondent(s) is liable.

The Learned Judge observed that since the Applicant was a Ugandan company it was entitled to a right to a clean and a healthy environment under Article 39 of the Constitution and Section 4 (1) of the National Environment Statute, Statute 4/95 which provides that every Ugandan has a right to a clean and healthy environment.

The Learned Judge held further that the Applicant's right and cause of action was based on the allegation that the uncontrolled and indiscriminate use and disposal of plastics had caused harm to the environment and the plastics used as carrier bags, containers were dangerous to human health and life.

The Learned Judge made further references to:

Article 20 (2) of the Constitution which provides:

> "The rights and freedom of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of the

Government and by all persons.

Article 245 of the Constitution which provides:

"Parliament shall, by law, provide for measures intended-
(a) to protect and preserve the environment from abuse, pollution and degradation.
(b) to manage the environment for sustainable development; and
(c) to promote environmental awareness;

The Constitution under the National Objectives and Directive Principles of State Policy Objective XXVII provides:-

"The Environment"

(i) The State shall promote sustainable development and public awareness of the need to manage land, air, water resources in a balanced and sustainable manner for the present and future generations.
(ii) The state shall promote and implement energy policies that will ensure that peoples' basic needs and those of environmental preservation are met".

On the cause of action against t he Attorney General, the Learned Judge concluded as follows:

> "I have studied the application and the two affidavits filed in support and found them pointing a finger at the State that it has failed or neglected its duty towards the promotion or preservation of the environment. The State owes this duty to all Ugandans. By so failing or neglecting the government is in breach of its duty towards the citizens of Uganda. Any concerned Ugandan has a right of action against the Government of the Republic of Uganda, for that matter against the Attorney General in his representative capacity, to seek the enforcement of the failed or neglected duty of the State"

On the cause of action against the National Environmental Management Authority, the Learned Judge observed that NEMA had a statutory duty under Section 3 of the NEMA Statute to ensure that the principles of environmental Management were observed i.e.

a) to assure all people living in the country the fundamental rights to an environment adequate for their health and well being

b) to establish adequate environmental protection standards and to monitor changes in environmental quality;

c) to require prior environmental assessment of proposed projects which may significantly affect the environment or use of natural resources.

d) to ensure that the true and total costs of environmental pollution are borne by the

polluter.

Other functions as stipulated in Section 7 of the Statute.

The Learned Judge considered the above duties and functions of the 2nd Respondent and concluded that it had failed in its Statutory duty to ensure that the principles of Environmental Management were observed, which duty it owed to the citizens of Uganda. Hence there was a cause of action against it.

On the second leg of the objection that the Applicant had no locus before the Court in that it did not comply with the provisions of Order 1 rule 8 of the Civil Procedure Rules, the Learned Judge followed the decision of the Principal Judge in the case of **the Environmental Action Network Ltd Vs The Attorney General and National Environmental Management; Miscellaneous Application No. 39/2001** where he stated

> "--------the State Attorney failed, in his preliminary objection, to distinguish between actions brought in a representative capacity pursuant to Order 1 rule 8 of the Civil Procedure Rules, and what are called Public interest litigation which are the concern of Article 50 of the Constitution and S1 26 of 1992. The two actions are distinguishable by the wording of the enactments or instruments pursuant to which they are instituted. Order 1 rule 8 of the Civil Procedure Rules governs actions by or against the parties (i.e. Plaintiff or defendant) together with parties that they seek to represent and they must have similar interest in the suit.
>
> On the other hand, Article 50 of the Constitution does not require that the Applicant must have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought".

The Learned Judge accordingly concluded that the wording of Clause 2 of Article 50 grants locus to any concerned person or organization to bring a public interest action on behalf of groups or individual members of the country even if that group or individual is not aware that his fundamental rights or freedom are being violated.

On Public awareness, the Learned Judge observed:

> "There is Limited Public Awareness of the fundamental rights or freedom provided for in the Constitution, let alone legal rights and how the same can be enforced. Such illiteracy of legal rights is even evident among the elites. Our situation is not much different from that in Tanzania where Justice Rukangira, in the case of Rev. Christopher Mtikilla Vs The Attorney General, High Court Civil case No.5 of 1995, stated:
>
> "Given all these and other circumstances, if there should spring up a public spirited individual and seek the Court's intervention against legislation or actions that prevent the Constitution the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise up to the occasion and grant

him standing"

In conclusion I find the above case very pertinent on the following aspects of access to environmental justice:

- Procedural issues;
- Cause of action.
- Locus Standi; and
- Public awareness.

The above authorities not only demand but provoke the bench and the bar to stand for those who cannot speak for themselves as a matter of Constitutional duty.

6.5 Other cases on access to environmental justice

❖ **Greenwatch & another Vs. Golf Course Holdings HCCS No. 834/2000.**

The above suit was brought under Section 72 of the NEMA Statute, Statute 4/9.5.,.-- The Plaintiffs, renown public litigants claimed that the Defendant was constructing a hotel on a wetland and green areas in Kampala against the law on sustainable Development.

❖ **National Association of Professional Environmentalists (NAPE) Vs. AES Nile Power Ltd, High court Miscellaneous Cause No. 286/99.**

The above case is on the controversial AES Nile Power project at Bujagali. The Applicants took an action to restrain the respondent from concluding a power purchase agreement with the Government of Uganda until NEMA had approved an Environmental Impact Assessment (EIA) on the project as required by Section 72 of the NEA. It was contended that a protective measure with the project could invoke as part and parcel of accessing the constitutional guarantee of the right to a clean and a healthy environment and therefore avoiding compliance was directed at the NEMA statute hence the Constitutional Regime of environmental rights in Uganda. Hon. Justice Okumu held among other things that Section 72 of the NEMA Statute was an enactment of a class actions and public interest litigation and abolishes the restrictive standing to sue on locus standi doctrine by stating that a Plaintiff need not show a right or interest in the action.

❖ **The Environmental action Network Ltd vs. The Attorney General and NEMA Miscellaneous Cause No. 39/2001.**

The above case is on a right to clean environment. The Hon. The Principal Judge held *inter alia* that the applications brought under Article 50 of the Constitution are governed by the fundamental rights and freedoms (enforcement procedure) Rules S1 No. 26/92. Hence no need for notice of intention to sue, that being public interest litigation.

- **Greenwatch Vs. Hima Cement 1994 Ltd.**

  This was on the right against pollution. Hima Cement Factory was found to be emitting over 80 tons of cement dust into the atmosphere from its factory. The same was causing harm and damage to people, animals, crops and the general environment. The Plaintiff took an action as a public litigant to stop the cement factory from polluting the environment, seeking pollution and environmental restoration order. The matter was however resolved amicably.

- **Greenwatch Vs. The Attorney General and Uganda Electricity Distribution Company Ltd.**

  The above case illustrates the point that access to environmental justice requires access to information as provided by Article 41 of the Constitution.

- **Greenwatch Vs. Uganda Wildlife Authority and Attorney General Miscellaneous Application No.92/2004 (Arising from Miscellaneous Application No.I5 of 2004).**

  The Applicant whose objectives include among others protection of the environment, including but not limited to flora and fauna, increasing public participation in the management of the environment and natural resources, enhancing public participation in the enforcement of their right to a healthy and clean environment brought an action against the Respondent for a temporary injunction restraining them from exporting, transporting, removing, relocating any chimpanzee from Uganda to the Peoples' Republic of China, or any other place or country in the world until the hearing and determination of the main application.

The main grounds of the application were set in paragraph 9-18 of the Affidavit in Support of the application:

9. That by removing chimpanzees from their natural habita1 and exporting them to China the Respondents would violate the Applicant's right to a clean and healthy environment as enshrined in the Constitution.

10. That the Constitution demands that the state and all its such organs protect the natural resources of Uganda including flora and fauna and as the decision to export chimpanzees from Uganda contravenes this directive principle of state policy.

11. That the decision to export chimpanzee is null and void as it was made ultravires the powers of the Respondents.

12. That the law empowers the Respondents to protect flora and fauna where they are and have no powers to alter the environment or move flora and fauna in away that is not in the best interest of the environment.

13. That the decision to export chimpanzees contravenes the Constitution directive principle of state policies that requires the state to ensure conservation on all natural resources.

14. That it is the duty of all the people of Uganda including the Applicants to uphold and defend t he Constitution and that this application is made in that spirit.

15. That Applicants, and all other citizens of Uganda cannot enjoy a clean and healthy environment unless it had all its amenities, to wit air, water, land and mineral resources, energy including solar energy and all plant and animal life.

16. That the Applicant would therefore be aggrieved by the decision and the action of the Respondents in exporting chimpanzees from Uganda, which action subtracts an essential ingredient of their environment.

17. That it is estimated that there are only 5000 chimpanzees left in Uganda and therefore any further reduction in this number significantly affects the fauna component of the environment in Uganda.

18. That chimpanzees are not goods or chattels, they do not belong to the Government of Uganda but are natural heritage, and a gift from God and the Respondents are only protecting them as trustees of the people of Uganda. "

When the matter came for hearing, Learned Counsel for the Respondent, Dr. Byamugisha raised a preliminary objection and submitted that the application was bad in law for want of a statutory notice against the Respondents. Mr. Kenneth Kakuru who appeared for the Applicants contended that the requirement for Statutory notice obtains only in ordinary suits but not where suits are brought under Article 50 of the Constitution to redress violation of Constitutional rights. He relied on the case of **Dr J.W. Rwanyarare and others Vs Attorney General: Miscellaneous Application No.85/93** where it **was** held that in matters concerning enforcement of human rights under the Constitution no statutory notice was required because to do so would result in absurdity as the effect of it would be to condemn the violation of the right and deny the applicant the remedy. He argued further that the Rules (under Statutory Instrument 26 of 1992) are specific for the enforcement of the rights which does not require Statutory Notice.

The court held that in matters concerning enforcement of human rights and freedom under the Constitution, no statutory notice would be required as to do so would condemn them to infringement of their rights and freedoms.

The above case is a clear illustration of how courts in Uganda have promoted easy access to environmental justice: See also **The environmental Network Ltd Vs The Attorney General and NEMA H.C. Miscellaneous Application No. 13/2001. J.H. Ntabgoba, PJ (as he then was).**

- **Advocates Coalition for Development and Environment Vs Attorney General. Misc. Application No 100/2004**

  The Attorney General was sued for allegedly granting Kakira Sugar Works Ltd permit/license to change land use in Butamira Forest Reserve in violation of the public trust doctrine and without carrying out proper environmental impact assessment. It was held that the alleged granting of permit/license to Kakira Sugar Works Ltd was illegal for contravening the public trust doctrine and also no environmental impact assessment was carried out contrary to the National Environment Act

6.6 Limitations to access to environmental Justice

1. Cost of Litigation:

It is a fact that access to justice involves fairness and impartially and that justice should never be a "high horse" inaccessible to the ordinary man. The Courts of Law should be cheap, easy and quick to access. Environmental matters normally involve the interest of very poor people who can hardly afford Court fees and or Lawyers fees. These are people who cannot afford to pay costs of litigation. Being a matter of constitutional importance government should come up with a separate Court fees structures in the interest of sustainable development. The question which is asked is why pay fees for the interest of the public?

2. Security for costs:

Since environmental justice is a matter of public interest as it promotes sustainable development how do we consider the issue of security of costs?
Sometime back, a High Court circuit at Nakawa slammed security for costs in the tune of Shs.50 million against **Greenwatch and Advocates Coalition for development in the case of Greenwatch and another Vs. Golf Course Holdings HCCS No. 834/2000**. In that case Greenwatch and Advocates Coalition for development (ACFODE) had sued Golf Course holding of constructing a hotel on a wetland and green areas and of carrying out an illegal Environmental Impact Assessment to justify their development on the plot. The Plaintiffs sought among other things, a permanent injunction to restrain further development on the plot, a declaration that the Environmental Impact Assessment carried out by Golf Course was illegal and a declaration that the said land was a wetland and t hat an environmental restoration order b e issued against the Golf Course holdings. The Learned Counsel for the Defendant applied for security for costs on the ground that the Plaintiffs were likely to loose the case and fail to pay costs since the Defendant had acquired proper lease from Kampala City Council. The Court granted the application but reduced the amount of costs claimed from 300 million to 50 million, which was to be paid within 30 days before the case could take off. One would challenge the above order on two grounds:

(a) Access to justice is a constitutional right especially of the poor. Demanding

security for costs would tantamount to shutting them from their rights.

(b) Access to justice is about sustainable development, which demands that one should use his property in a manner, which will not affect others. It is not a question of ownership but a question of sustainable use of property.
Therefore demanding security for costs on such a premise would be watering down the law to protect the environment and sustainable development.

3. <u>Adjudicating capacity:</u>

One of the greatest limitations to access to environmental justice is lack of technical training in environmental law. Environmental jurisprudence as a green movement is just developing. Most Judges and Lawyers on the bar graduated some decades before environmental law was being offered. Most of them get difficulties in understanding and applying basic principles of environmental law such as sustainable development and other environmental considerations. In most cases they merely get entangled on the common law principles of nuisance, negligence and trespass. There are cases to illustrate the above scenario:

(i) Byabazaire Grace Thaddeus Vs Mukwano Industries Miscellaneous Application No. 90912000 (arising from Civil suit No. 40612000).

The Plaintiff who had a home near the Defendant's factory sued the Defendant claiming that the defendant's factory was emitting smoke which was obnoxious, poisonous, repelling and a health hazards to the community around and to the plaintiff in particular who was already affected in health. The plaint was struck out on the ground that it did not disclose a cause of action and that the plaintiff did not have locus standi in that matter should only have been taken to Court by NEMA and not by the Plaintiff.

In light of what I have discussed above it is very clear that both the Court and the lawyers involved did not apply the relevant laws properly. The Plaintiff had locus standi under Article 50 of the Constitution. The issue of Locus Standi has now been resolved in the case of Greenwatch **Vs Attorney General** (supra) by Justice Lameck Mukasa.

(ii) Greenwatch (D) Ltd and another Vs Golf Course Holdings (supra).

The brief facts of this case are as set above. The Applicants sought for an injunction but the same was dismissed on the ground that the Applicants had failed to satisfy the condition for the grant of a temporary injunction i.e. proof of prima facie case, proof of irreparable damages and the balance of convenience. The Court held that the Applicants had not proved a prima facie case against the Respondent because the Respondent had land title to the property in question. It is important to note that environmental justice is not about ownership of property but on sustainable use of such property, creating a Constitutional right to health. Therefore the Court should have applied the principle of sustainable development rather than the rigid common

law principles mentioned above.

(iii**) NAPE Vs AES Nile Power Ltd (supra).**

In that case the Applicant sought an injunction to stop the Respondent from signing a power purchase agreement with Government of Uganda before Environmental Impact Assessment (EIA) was carried out. The injunction was denied. The Court held, rightly in my view, that an Environmental Impact Assessment was required as a guiding environmental regulation model for implementation of certain projects (which included the instant one). The Court further held that it was a Criminal Offence for any person to fail to prepare an EIA contrary to Section 2 0 of the A ct. In denying the injunction the Learned Judge had this to say:

> "Although the Applicant cited the Section and contended that the Respondent is likely to harm the environment he has not prayed for an order to restore the environment. What he has sought is an injunction to stop signing of the agreement and declaration. An injunction of this nature cannot be given in my view since the agreement perse does not alter the environment though the execution thereof places the respondent in a position so as to be able to alter the environment by commencing works. I would conclude here that if this is correct then the order sought relates to matter that by itself is not proximate to environmental damage as such though the signed agreement could be evidence of a reasonable likelihood of possible harm about to be done on the environment".

It is the statutory duty of NEMA to see that the law on sustainable Development is enforced to the last letter. One of the tools for enforcing the same is through EIA. The letter and sprit of the law makes it a Criminal offence for anyone who fails to prepare a proper EIA. Those were the findings of the Court. The Court further found that executing the agreement before EIA could place the Respondent in a position as to be able to alter the environment by commencing works. In light of the above status quo one would certainly contend that an injunction sought was very proximate to the environmental concerns of the Applicant thereby concluding that the Court did not apply proper principles of environmental law.

(iv) **Buganda Road Cr. Case No. 73512001 Uganda Vs. Ddungu:**

> Although Environmental offences by nature appear to be of strict or vicarious liability, the Statutes do not expressly state so. This is likely to cause controversy. A case in point is Uganda Vs Ddungu Buganda Road Cr. Case No. 73512001.
>
> That case involves NEMA and a Company called COIN Ltd. Mr. Ddungu was taken to Court as one of the directors of COIN Ltd for constructing a structure on a wetland and failure to carry out an Environmental improvement order, among other things. Those allegations were supposed to have occurred between March 2000 and January 2001 at COIN Ltd
> The Court found that the alleged crimes had been committed but held that it had

not been proved that it was the accused (Ddungu) who had committed the same personally or under his instructions since COIN Ltd had more than one director. However after the acquittal the Court went ahead to make restoration order against the management COIN Ltd on the basis that the Accused was part of the management. There is therefore need for clear predictability of the law.

(v) **Rev. Grace Erisa Sentongo Vs. Yakubu Tanzanza. Nakawa Misc. Application No 8/2003(Lvdia Mugambe Magistrate Grade I)**

The defendant was sued for nuisance in the main suit for constructing abattoir adjacent to the plaintiff's residence at Lweza Zone. The suit was for a declaration that the construction of the abattoir was a violation of right to a clean and healthy environment under article 39 of the constitution. The matter was dismissed on a preliminary objection that Magistrates Court have no jurisdiction to entertain matters brought under article 50 of the constitution. This case will help in streamlining the jurisdiction of the Magistrates Court in environmental cases.

4. Delays:

Another drawback to access to environmental justice is delays of justice. Justice delayed is no doubt justice denied. The Constitution of the Republic of Uganda in Article 126 (2) (b) provides that justice shall not be delayed. Environmental justice ism ore crucial than ordinary justice as it is aimed at protecting human health and the environment for posterity. Environmental jurisprudence in Uganda has shown that our courts are not quick in redressing environmental matters expeditiously. A case in point is Greenwatch (D) Ltd and another Vs Golf course Holdings Ltd (supra).

That case has not been resolved and yet the hotel has now been completed and is now in operation. The case is unlikely to take off in view of an order for security for costs against the Applicants which I have indicated earlier.

5. Public Participation:

The Constitution of Uganda provides for public participation in the administration of justice. However in environmental justice, public participation is very poor. This may be due to the fact that the majority of the citizens are ignorant of their environmental rights. Associated to this is an element of poor leadership. For example the issue of high power tariffs have failed to be resolved and yet parliament had made a resolution to have it reduced.

A greater proportion of our citizenry are also oblivious of environmental damages surrounding them more especially when the damage is caused by intangible processes. For instance when Lt General Tinyefuza raised an issue of noise from a nearby mosque which was affecting his environment very few people showed concern about the damage.
Public participation is a function of access to information which is guaranteed under

Article 41 of the Constitution. Access to information is an indicator of transparency and accountability in public affairs. There is a saying that "an ignorant or ill informed or misinformed populace is prone to manipulation or exploitation as it does not know its rights.

Section 85 of the National Environment Act gives freedom of access to environmental information. However, our jurisprudence shows that in certain cases and for unknown reasons Government is not willing to grant its citizen access to information as a Constitutional right. An example is the case of Greenwatch Vs. The Attorney General and Uganda Electricity Distribution Company Ltd (supra).

6. Poor Government policy:

There is contention that Government is interested in attracting investors at the expense of sustainable development and when such investors are challenged they seek protection from the executive. Challenging such investors become a political risk and very few Lawyers would be willing to take up such cases. This may explain the reason why cases of public interest litigation are being pursued by very few firms of Advocates.

7. Corruption attributed to the enforcement agencies:

8. Advocates' Act and Law Council:

Access to Environmental Justice is a Constitutional right. This is naturally supported by access to information. Recently however, the Law Council came out with a directive under the Advocates Act stopping Advocates from expressing their opinions publicly on Legal and Constitutional issues. Considering the fact that a right to healthy environment is a fundamental right granted by the Constitution, how tenable is that directive? My personal view is that writing an article on a legal and a Constitutional matter does not constitute touting except that it should not offend the rule of subjudice.

Our citizens should be informed of the Legal and Constitutional issues governing them. I would go by the practice in the United States where Advocates are allowed to advertise and tout for business. After all when I get a poor lawyer I am the one to pay costs. Why is it that the same law does not allow me room for choice?

9. General fear of Litigation:

Poor access is also due to the fact that generally people fear litigation for various reasons:-

- lack of resources and familiarity with legal institutions
- lack of knowledge of how to go to Court
- lack of knowledge and trust of remedies available to them. People associate Court with imprisonment

10. Procedural constraints:

Another drawback to access to justice is how a dispute over alleged or threatened degradation may reach a court of justice.

In Uganda like other common law jurisdictions a court is seized with jurisdiction only after a formal pleading in filed. Other jurisdictions have however departed from the above orthodox rule. The best example is the Indian Supreme Court as seen in the case of **SUDIP MAZUNDAR Vs STATE OF MADYA PRADESH (1994) SUPP 2** Supreme Court cases 327.

In that case the court gave an order on the basis of a letter addressed to the Chief Justice by a journalist. In that letter the journalist alleged that the safety precautions in the Indian Army's ammunition test firing range in Madya Pradesh were inadequate, with the result that villagers in the vicinity, who tended to stray into the range, were either killed or injured. After hearing the respondents the court gave an order requiring the state government to take adequate precautions. The court also laid down a time frame within which the order was to be complied with.

In another case of **M.C. Mehta Vs Kamal Nath and others (1996) Supp 10 S.C.R. 12** the court acted in a news item which appeared in a newspaper and stated that "a private motel in which the respondent's family had direct link, had floated a club at the bank of River Beas by encroaching land including substantial forest land which was later regularized and leased out to the company when the respondent was a Minister in the Central Government. It was stated that the motel used bulldozers and earth movers to turn the course of the river. The bulldozers created a new channel by diverting the flow of the river.

According to the news item, three private companies were engaged to reclaim vast tracts of land around the motel. The course of the river was being diverted to save the motel from future floods. The court took notice of the news item because the facts disclosed therein, if true, would be a serious act of environmental degradation on the part of the motel"

In its landmark judgment the court said:

> "The Public Trust Doctrine primarily rest on the principle that certain resources like air, sea, waters and forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. They should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon the Government to protect the resources for the enjoyment of the general public rather than to permit their use for private ownership or commercial purposes."

Barnabas Samatta, the Chief Justice of Tanzania in his comments on the above cases had this to say:

> "There can be no doubt that the dramatic change which the Supreme Court of India has effected on the manner in which courts may be reached in matters of public interest has considerably widened access to justice in that country. So far, as far as I know, no other jurisdiction has been so radical as that in its approach on access to courts. Should the East African courts follow the importance of protection of natural environment dictate that the question be answered in the affirmative? It is unlikely that there will be unanimity of judicial opinion on the correct answers to these questions."

I want to pose the above questions to the participants. Personally I am of the view that the Indian jurisprudence on access to justice is a better approach.

Another approach would be to adopt the methods applied by lay Magistrates in drafting claims on behalf of litigants. The aim is to move away from Orthodox style of litigation.

11. <u>Courts located far from poor people:</u>

The administration of justice in Uganda was established to strengthen colonial administration. To make it coercive it was established in isolated areas too far from the local people. In most cases one has to travel between 20 - 30 miles in order to access justice. Court location is to that extent a great disincentive to access to justice. This is coupled with abject poverty. Good governance requires that services should be taken nearer to the people. Courts which serve the greatest bulk of our society should therefore be established nearest to the people i.e. the Magistrates' courts.

As for the High Court, efforts have recently been made to increase the number of High Court Circuits by creating new circuits of Arua, Masindi, Soroti and Kabale: See Statutory instruments 2004 No. 20.

However the above efforts should b e supported by manpower. If there are no judges to man those stations their creation would not have much impact.

12. <u>Lack of Judicial activism:</u>

The bench and the bar should break off from Orthodox methods of litigation by being creative in order to realize the dynamic nature of the law. The words of **<u>Dr G.L. Peiris in his book. Towards Equity page 273-274</u>** is pertinent here:

> "A judge is not there simply to discover a body of rules then to apply those rules mechanically to situations that arise in litigation where he is called upon to adjudicate. There is a creative role for the judge to discharge, in the sense that he must evaluate for himself the rationale of the rules that he is called upon to apply. It is only then that the law becomes a living mechanism, virile, vibrant, productive and of use to the community. Otherwise it becomes arid and sterile."

As a matter of fact judicial activism is provided in the 1995 Constitution under Article

126(1) where it is provided that judicial power should be exercised by court is the name of the people and in conformity with law and with values, norms and aspirations of the people. As to how far our courts have lived up to the above expectations is up to the participants to evaluate.

13. Poor funding:

To offer an adequate service you must have the relevant resources. A good judiciary must have a well-equipped library and modem information technology. It must also have a well motivated staff. All these need adequate funding. Without requisite resources, the judiciary is rendered weak. This reminds me of Amini's regime where courts could not sit because of lack of stationery. In fact litigants were required to provide stationery before their causes could move. Lack of adequate funding is therefore a crucial bottleneck to access to justice.

14. Political Will:

For there to be access to justice the public must have confidence in the judiciary. This can only be realized if whatever is done by the judiciary is supported by the executive at least constructively. There must not be arms twisting between the three arms of Government.

All should support and compliment each.

15. Enforcement constraints:

There is no doubt that some of the environmental legislations are very difficult to enforce. For instance I see a lot of difficulties in enforcing a ban on smoking in public places. For instance how easy is it to enforce non-smoking in sports stadia and cinema and theatrical halls? Those places should have been restricted places but not prohibited places. The same should have been with airports and airfields. They should have been made restricted places for smoking.

Other enforcement constraints relate to lack of staff and resources to enhance sound environmental management at national and district level.

16. Other limitations:

These include unfriendly court environment, Lack of understanding of language of the law and court procedure by the majority of court users.

ROAD MAP

1. Open up to allow advocates to speak freely and express their views on legal land Constitution matters on behalf of the disadvantaged or marginalized groups.
2. Our development partners like TEAN, Greenwatch, NAPE, NEMA, ACODE, ELI and UNEP are doing a lot of support in capacity building. These organizations have committed their resources in training lawyers and judicial officers. Some of them are also doing public litigation cases as a service to the nation.
3. Need for constant training for the bench and the bar.

4. The need to create environmental and human rights department of the High court. A leaf can be borrowed from India which has developed a special "Green Bench" following the case of **VELLORE CITIZEN'S WELFARE.**
5. There is need to publicize and circulate environmental case laws and materials. Prof. Okidi, John Ntabirweki, UNEP, ELI, ACFODE, NEMA and their officers should be commended for their contributions in terms of books and other resource materials on environmental law.
6. Possibility of creating environmental tribunals.
7. The need for judicial activism.
8. Explore the possibility of making environmental education gain foundation from primary up to tertiary institutions. The same should be made compulsory in law schools.
9. All the environment enforcement agents and friends should be effectively supported and strengthened.
10. There must be political will in support of environmental protection. Government must be transparent and accountable in all matters concerning sustainable development.
11. Access to environmental justice should be incorporated in chainlink initiative to create public awareness and accountability.
12. Substantive justice should be the basis rather than technicalities.
    Courts should administer substantial and sustainable justice, justice which can stand the test of time like the case of Donoghue vs. Stevenson
13. Need for an effective, efficient and independent Judiciary which is well informed of environmental issues. The Judiciary and its members must be well funded and motivated with adequate remuneration otherwise their conscience would be compromised. The adage that whoever controls your subsistence also controls your conscience is not a recent truth. Equally important is that the method of recruitment to the Judiciary should not leave room for the appointment of officers who would be sympathetic to the political agenda of the day. I would say that the current system of an independent Judicial service commission and Parliamentary approval appears to satisfy the above goal.

Conclusion

Character, Sir Thomas More in Robert Bolt's A **MAN FOR ALL SEASONS** had this to say: *in the thickets of the law, I am a forester.* It is my sincere hope that after this workshop you will become foresters in the thickets of environmental law and practice

CHAPTER SEVEN
ACCESS TO ENVIRONMENTAL JUSTICE- EXPERIENCE FROM THE BENCH[140]

7.0 Introduction

There are many definitions of the term "Environment' which are of common knowledge and usage. First, environment means a place where people live and work, including all the physical conditions that affect them. For instance, the following expressions are not uncommon:
(a) "We need to create a safe working environment for all our employees".
(b) "He grew up in a harsh urban environment".
(c) "A dirty environment is a breeding ground for germs" etc.

Secondly, "environment" may mean the conditions and influences in which people carry on a particular activity. We usually talk about a "competitive environment" where a business needs to be flexible or that "there is an environment of fear" in a political climate or organization's operation.

All the above and many other expressions mean "environment". However, the environment that is the centre of our discussion to day is that environment that is "the natural world", including the land, air, plants and animals, especially considered as something that is affected by human activity. In short, environment is the natural world and the effect that human activity has on it.

By virtue of the above definitions therefore, environment is natural, universal and ubiquitous, no matter wherever one lives on this planet earth. We tend to be tempted to think that environment is a recent concept when we say that environmental law is relatively recent. That is far from it. As long as the world has been and the human being has lived on it, so also has environment been. And wherever man has lived in a community, disputes have been and will continue to arise. So long as there are bound to be disagreements and disharmony where human beings live and interact, there must be and have been mechanisms for resolving the disputes. In conclusion, since environment is a communal and common commodity, disputes over it are inevitable. Hence the talk about environmental justice. It is pertinent to say that before the advent of modem courts to resolve disputes, including environmental disputes, there were customary or traditional tribunals to which aggrieved persons resorted in case of conflicts.

[140] Hon Justice J H Ntabgoba. Justice Ntabgoba is a consultant with Kampala Associated. Paper presented at the judicial symposium on environmental law, September 11-13th 25 at Imperial Resort Beach Hotel, Entebbe, Uganda.

It is because of the above conclusions that there is a corollary conclusion that environmental law has always existed in the world, never mind that in some countries, more particularly the under developed countries like ours, environment and environmental law were not known beyond mere saying them. It would therefore be escapism to say that the law is novel when, like all laws, it can be accessed in law reports and text books of developed countries. Most of the law reports and law books that we read are replete with environmental dispute resolutions clothed in literature and jurisprudence. I do agree that very few environmental disputes have been coming to our courts but this is because the would be disputants are ignorant about the world they live in- their environment. And we, in courts, did not take the trouble to look up for the law through precedents because cases were not brought before us.

How can we say that environmental law in Uganda is new when a look at the environmental legislation shows that some of the laws existed even before our attainment of independence? Take the Act whose commencement date is 1st April, 1951. How about the Plant Protection Act with a commencement date of 15th July, 1939? We are, however correct if we say that environmental law has not been taught in our Universities and other institutions of learning. It is also true that most environmental laws we have to-day are relatively based on the National Environment Act which commenced its operation on 19th May, 1995. But even then, we have not been actively litigious in environmental matters. We must, nevertheless, not lament and say that we are short of reference material while administering environmental justice. We have not been taught law only but more especially how to look for it.

I must emphatically say that there is a great need for environmental education for the general public as there is a greater need for intensive education for the judges and magistrates in environmental law. We should not forget that legal practitioners equally require to be taught the law if there must be a balance in the administration of environmental law for the task of our courts will be rendered easier if the Bench and the Bar are balanced in their understanding of the law. It behoves NEMA, the Judicial Training Committee and the University Faculties of Law to step up training in environmental laws in order to inculcate environmental culture. NEMA will have to ensure general education of environmental matters as environmental law will have a meaning if it is buttressed on environmental general knowledge. It is then that people who feel environmentally wronged will know when to resort to court for redress.

I must underline, as I have always done, that environmental matters are of a concerted concern for the public. That therefore means that more and more public interest litigation will be necessary. That will have to be matched with greater judicial concerns, aware of the fact that safe and healthy environment means meaningful life for us all. NEMA will inevitably initiate and support much litigation in the interest of indigent members of the public. More and more public spirited lawyers and environmental activist organizations like Green watch will have to pick the bill to finance the campaign.

7.1 Court Jurisdiction in Environmental adjudication

In the presentations I have made in the past, I expressed the concern that environmental offences have been portrayed as predominantly petty cases which must be tried by the magistrates' courts. That has led to the petty penalties awardable by environmental legislations. It is high time that the legislator took special care to assign penalties according to the gravity and public interest the offences engender, as well as the mitigating circumstances involved .If that legislative approach were adopted, a number of environmental cases would be downloaded from magistrates to judges. Judicial pronouncements are necessary in these environmental cases, and litigants and readers of court decisions are more likely to take seriously pronouncements of a court of record rather than a pronouncement of a magistrate. Needless to say, judgments and other court decisions are of invariable effect in environmental legal education and awareness campaign.

While emphasizing the need for involving more and more of higher jurisdictions in environmental dispute resolutions, I cited a case of a serial poacher of elephants who also was notorious in trafficking in ivory or elephant tusks. The case was handled by an inexperience Grade One magistrate fresh from the Law Development Centre who awarded a caution as the sentence! Since it is common knowledge that elephants in this country are few and endangered species, which could be rendered extinct through poaching and trafficking in ivory being a very serious offence, that case should have been heard by a senior member of the Bench who would have taken into consideration factors other than mere legalese. Besides, most elephant poachers are notorious criminals who would stop at nothing in inducing the poor magistrate into taking bribes to compromise the course of justice. Such serious cases should be heard by the High Court which would employ confidence and be less likely to be influenced by corrupt tendencies.

Other cases which should be handled by the High Court, as opposed to the magistrates courts are the cases which arise out of degradation of the environment. Here I am particularly referring to high profile environmental degradation committed by rich land developers or strong and influential politicians who are likely to use their influential muscle and money to interfere with the course of justice. An experienced and confident judge is less likely to succumb to bribery or pander to influence peddling from strong politicians. Other environmental matters stem from alleged violations of the provisions of the Constitution such as breach of Articles under Chapter 4 of the Constitution and Article 50 of the same, which is about the enforcement of rights and freedoms by the courts. Such cases are known to involve preliminary points which call for citation of Article 137 of the Constitution. In the case of The Environmental Action Network Vrs The Attorney General and NEMA, a number of preliminary objections were raised which I doubt whether a magistrate would have answered the way they were answered by the High Court. The following were some of those objections:-

a) That the High Court has no jurisdiction to decide whether or not smoking in public places contravenes the provisions of Article 50(!) of the Constitution. It was argued that only the Constitutional Court has the power to interpret the Constitution under

Article 137 thereof.

b) That the' manner in which the case was filed was wrong. It was argued that the case should have been filed by a representative suit pursuant to rule 8 of Order 1 of the Civil Procedure Rules which provides for a suit by many persons who have the same interest in the suit.

c) That since the Attorney General was a co-defendant in the suit, he should have been issued with a 45 days notice of intention to sue.

The case had been brought by The Environmental Action Network against the Attorney General of Uganda jointly with the National Environmental Management Authority (NEMA).It sought the High Court's declaration that smoking in public places deprive the public of a clean and healthy environment and that it therefore contravened Article 50(1) of the Constitution.

The Court, after a lot of delays by the representative of the Attorney General, overruled all the three preliminary objections. To the second objection court drew a distinction between a representative suit which must be filed by one or more persons on behalf of persons with the same interest in the suit, and a public interest litigation brought by public spirited individuals or groups of individuals who may not necessarily share the same interest in the suit with those they represent, let alone know them.. To the first objection, court read the provisions of rule of Statutory Instrument No. 26 of 1992 and decided cases, including Tanzanian cases on similar provisions and similar objections, and came to the conclusion that the High Court was the court vested with the jurisdiction to entertain applications brought under Article 50 of the Constitution.. For the claim that the Attorney General should have been issued with a 45 days notice of the intended suit the court, after reading relevant authorities, including those from the Indian Courts on similar matters, decided that, since violations of human rights cannot be allowed to continue even for a short time, courts cannot wait for them to be violated for 45 days. Court overruled the preliminary objection

You will agree with me that a magistrate grade one would have found it difficult, if not impossible, to make the above rather complicated decisions, or similar ones, some of which, inevitably, involve what is referred to as *judicial activism.* Added to that is the likely intimidation from the environmental offenders who are most likely to be big business land developers or influentially connected politicians. Besides, a magistrate would experience difficulty in tussling it out with some of the senior advocates who tend to cite irrelevant and, at times, misleading authorities which, for lack of law literature, for the magistrate at the magistrate cannot access. The situation would be made worse to the magistrate at the upcountry station who cannot come to Kampala for references at the High Court without being blamed for occasioning delays.

It is for the above and other reasons that I think that the legislature should ensure that there is in place a legislation that ensures that serious environmental cases are handled by the High Court. Of course the usual argument would be raised that the higher Benches

lack a sufficient number of judges to cope with environmental adjudications. Such argument has been raised with regard to defilement and corruption cases, not to forget land disputes, all of which have been ridiculously relegated to tribunals. I use the word 'ridiculous' because if a set of cases are regarded as difficult and involving public interest, one would be doing more harm than good to assign them to legally half-baked and some ignorant tribunals. Seriousness dictates that more judges and magistrates are appointed, adequately remunerated and constantly trained so as to solve the judicial stagnation.

7.2 Constant Judicial Training.

I have always advocated constant training of the judicial officers as well as the other officers of the court, both public and private. Such training should be spread over all legal disciplines, including environmental law and procedures. The training should go hand in hand with general sensitization of the public about environment, its degradation and its protection. That will make easy the task of the courts in the adjudication of environmental disputes, as it will create general awareness among the public about the environment and what to do if they feel aggrieved.

7.3 The Courts and the big Environmental Violators.

In my opinion, there are two categories of environmental violators. There are those who commit the wrong either because of necessity or because they do not know that what they are doing is wrong. These include poor peasants who violate the environment out of necessity. For instance, they cut down the forests to get fire wood or building materials. There are also those who bum charcoal to earn a living.

The second category comprises rich people, usually inconsiderate, who, for instance, build houses in wet lands. The majority of them know very well that what they are doing is wrong. There are also those who cut down the forests to get timber for commercial purposes. Violation actually takes many forms. The fact is that some violations are not necessarily culpable. Yet a number of statutes make violation criminal no matter the intention of the perpetrators. In my humble view, when sentencing the culprit, the court should take into consideration the lack of criminal intent as a mitigating factor and the blatant violation as an aggravating factor.

7.4 The role of the Courts vis –a- vis Environmental Violators.

A question has always been asked whether courts should make sweeping consideration while adjudicating environmental degradation cases, no matter whether or not the culprit willingly or unwittingly committed the environmental offence. Some people argue that where the law provides for strict liability, the gravity of the offence as a mitigating or an aggravating fact is immaterial. As I have said in the immediately proceeding paragraph, my view is different. Each case should be treated on its own merit, bearing in mind, of course, the general principles of law. If, for instance, an environmental degrader is a poor peasant who, out of sheer necessity, or out of ignorance that he is committing an offence, commits that offence, court should take into account that circumstance in its sentencing

If, on the other hand, the accused is a person found to have had the knowledge that he was doing wrong, or if he committed the offence in contempt of the law, that should be an aggravating circumstance while the court is awarding the sentence. That, in my view, is the true justice. There is a dimension as to what goes on when trial is imminent or while the trial is taking place. One may not be inherently corrupt but my opinion is that the poorer the judicial officer and the more junior he or she is could be a factor in the inducement to him or her to succumb to corrupt influence.

7.5 Proposal for Jurisdiction

Arguments have always been advanced in favour of trials of criminal environmental cases by magistrates in preference to judges. One of the arguments is that most violations take place in rural areas where justice before judges is inaccessible because there are few judges to cover the whole country, and yet justice should be taken nearer to the people. With these arguments and many others, the legislators have tended to make in the legislation generalised provisions which have assigned powers of sentencing to magistrates. The approach has watered down the fact that some environmental cases are so serious that they need to be tried by a higher court which is the one with the appropriate jurisdiction to hand down the appropriately deterrent remedy. Consequently, the sentences that have been handed down are so ridiculously low that offenders have tended to commit the offences again and again, knowing very well that the punishment will not hurt them. In other words the punishments have not been deterrent enough to discourage the committing of the crime. All this is because there are, it is said, no sufficient funds to recruit the requisite number of judges to take justice nearer to the rural dwellers! Surely, those who advance the argument should know that environment, being life, cannot be compared with the sufficiency or insufficiency of funds. The funds should be found if life must be maintained. Government should select its priorities according to the peoples' needs. There are areas of governance which could be shelved for the sake of saving the environment which is our lifeline. My suggestion is that, instead of the generalised irrational environmental jurisdiction, some selective legislation is necessary, which will ensure rational distribution of jurisdiction between the lower and the higher Benches.

Finally I take this opportunity yet again to express my sincere thanks and appreciation to the organisers of this workshop and to those who facilitated it, financially and otherwise. I very much appreciate your having selected me among those few who are making humble contributions to this very worthy cause. I thank you all for listening to me.

CHAPTER EIGHT

THE CONCEPT OF SUSTAINABLE DEVELOPMENT: FROM THEORY TO PRACTICE[141]

8.0 Introductory Remarks

The concept of sustainable development and its translation into concrete actions must obviously be of concern to all countries, whether developed or developing. There can be no debate about whether it should be more of a concern to one group of countries rather than to the other. This concern, however, must still be perceived in historical terms. Developed countries reached their current level of development at a considerable cost and not always sensitive to the rate at which resources within their reach were used. Resources, both renewable and non-renewable, were used voraciously and that previous industrial development may have used up more than its fair share of global common resources. Indeed, that pattern of development may also have produced more than its fair share of wastes, dumping these in so-called global common sinks.

Thus, it is in order to ask the following questions: when, by whom and how was the risk of global warming created? How did we deplete the global ozone layer that protects us all from damaging ultra violet rays? The purpose of raising such questions and concerns is not to point an accusing finger, far from it. This would, in fact, clearly be counter-productive. On the other hand, I cannot argue that developing countries now pursue development patterns similar to those of the past, ignoring the grave consequences that would surely result for all of us. I believe it was Mahatma Gandhi who said 'If India should aspire to the same pattern of development as Britain, there will need to be the resources of thousands of Britain's.'

What I am suggesting, therefore, is that the concept of sustainable development is now able to provide a common agenda for both developed and developing countries. Indeed, it provides the only feasible basis for assured common development. This pattern has been concisely encapsulated in the international debate on development by the phrase: Common agenda with differentiated responsibilities. The alternative, i.e. the patterns of development of traditional Western societies, could, if followed and emulated now by developing countries, only result in mutually assured under-development, perhaps even mutual destruction.

Sustainable development has thus given rise to a new pattern of internationalism. This pattern in t urn gave rise to new impetus in t he field 0 f international environmental law. The two, sustainable development and international environmental law, have created a symbiosis. In the United Nations Environment Programme (UNEP), prior to the full development of the concept of sustainable development, the international environmental

[141] Donald Kaniaru. Mr Donald Kaniaru is a special senior Legal Advisor to the Executive Director, UNEP; former Director , Division of Enviroment Policy Implementation,UNEP. This paper is based on a lecture given by the author on 24 August 2004

law programme was embryonic. With the consolidation of the sustainable development, it has grown and is still growing to new levels of Importance.[142]

The concept offers different connotations depending on the expertise of the speaker: whether it is law, economics, sociology, ecology, politics, and so on. Many academics have given it much attention in the form of philosophical analysis and criticism. Every learned presentation begins with the definition offered in Our Common Future: 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'[143]

This broad understanding denotes development, equity, fairness, and growth in a world of so many poor across the globe. Estimates of people living in poverty range from between one-quarter and one-third of the global population of seven billion, the worst affected regions being in the developing world. In such a situation it is quite a challenge to realize sustainable development at the local, national, regional and global levels. However, the phrase still underlines all the right words and intentions. The Brundtland Report further acknowledged that

> *In essence, sustainable development, addressed in its broadest context of social, economic and environmental spheres, is a process of change in which the exploitation of resources, the direction of investments, the orientation of technological development and institutional change are all in harmony and enhance both current and future potential to meet human needs and aspiration.*

As Hunter, Salzman and Zaelke comment, 'The Brundtland Commission did not invent the term sustainable development, but it popularized the term and placed it squarely in the centre of international policy-making'.[144] They add that partly because of its brilliant ambiguity the concept has received nearly universal acceptance among every sector of international society.

The concept itself and principles arising from it, having been endorsed by heads of state and government during the United Nations Conference on Environment and Development (UNCED) and thereafter in all major global and regional parleys, have become rallying points for all who address environment and development issues and efforts at their integration in decision-making, planning, development and management processes abound. UNCED additionally gave the concept political legitimacy[145]and unrivalled momentum through the 27 Principles of the Rio Declaration,[146] with no less

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[142] Observation by Naigzy Gebremedhin, former UNEP senior staff member

[143] World Commission on Environment and Development (WCED), *Our Common Future* (Oxford University Press, 1987), UN Doc. A/42/47 (I 987) (The Brundtland Report).

[144] David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (2nd ed., University Casebook Series: New York Foundation Press, 2002) at 180.

[145] Elizabeth Dowdeswell, 'Preface', *UNEP's New Way Forward: Environmental Law and Sustainable Development*, (UNEP, 1995), at x.

[146] Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 314 June 1992, UN Doc. A/CONF. I51/26 (Vol. I), www.un.org/documents/ga/conf151/aconfI5126-1annex1.htm.

than ten of them expressly mentioning sustainable development, Agenda 21,[147] the Declaration's companion blueprint document, the Forest Principles, [148] the Convention on Biological Diversity,[149] and United Nations Framework Convention on Climate Change.[150]

Some 17 years since the Brundtland Report defined the concept, however imprecisely, it is time to be pragmatic rather than theoretical or academic in approach in our dialogue, and I have assumed this posture in my remarks herein. Where, then, does this broadly undefined concept come from, and where does it find expression after 1987 - 1992? The following quick review w ill focus on selected milestones before 1987 and after 1992. It is recognized that in articulating the concept of sustainable development, each commentator in this area could place different emphasis on and draw attention to different nuances in the selected references.

8.1 Before 1987 - selected milestones:

Although the Stockholm Declaration[151] did not expressly mention the term sustainable development, in a t I east one third of its 26 Principles it anticipated or implied the concept, in a visionary way, thus generally promoting future action on the subject. In value and vision, many academics applaud the Stockholm Declaration over the Rio Declaration. A series of expert discussions elaborating on relationships between the environment and development culminated in the Founex Report,[152] which sought to reconcile environment and development.

In the 1974 Cocoyoc Declaration[153] UNEP and the United Nations Conference on Trade and Development (UNCT AD) focused on poverty alleviation and held a series of regional meetings on consumption patterns. The point to be made here, however, is that the Cocoyoc outcomes were not followed up; a fate that has tended to befall many recommendations of global and regional fora.
As noted by HE Judge Christopher G. Weeramantry, Vice-President of the International Court of Justice (ICJ), sustainable development is not a new concept. This position was

[147] *Agenda* 21: *Environment and Development Agenda,* UN Doc. A/CONF.151/26, www.un.org/esa/sustdev/documents/agenda21/index.htm.

[148] Non legally Binding Authoritative Statement of principles for Global consensus on the Management ,conservation, AND Sustainable Development of all Types of Forests , Rio De Janeiro,3-14 june 1992, UN
[149] Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in force 29 December 1993, 31 *International Legal Materials* (1992) 822, www.biodiv.org/doc/legal/cbd-en.pdf.
[150] United Nations Framework Convention on Climate Change, New York, 9 May 1992, in force 21 March 1994, 31 *International Legal Materials* (1992) 849,
unfccc.int/ files*l* essential background/background publications htmlpdf/application/pdf/ conveng.pdf:
[151] Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, www.unep.org/Documents/Default.asp?DocumentID=97 &ArticleID= 1503.
[152] *The Founex Report on Development and Environment* (1971), www.southcentre.org/publications/conundrum/conundrum-04 .htm#P266 67285
[153] The Cocoyoc Declaration, Cocoyoc, Mexico,
www.southcentre.org/publications/conundrum/conundrum 06.htm#P719 166711.

made clear in his keynote address, Sustainable Development: An Ancient Concept Recently Revived, given at the Regional Symposium on the Role of the Judiciary in Promoting the Rule of Law in the area of Sustainable Development, held in Colombo in July 1997, to which UNEP had invited him. In September 1997, barely two months later, in the *Gabcikovo-Nagymaros* case,[154] in a Separate Opinion the Judge stated that 'sustainable development is thus not merely a principle of modern international law. It is one of the most ancient of ideas in human heritage. Fortified by the rich insights that can be gained from millennia of human experience, it has an important part to play in the service of international law.'[155]

The Judge reviewed various dimensions of the appreciation of the concept already thousands of years ago in Africa, in Australia among the Aborigines, in Asia and Sri Lanka, as well as among North American Indians. He observed, quite rightly, that 'the human family has learnt to live in harmony with the environment for thousands of years and has achieved this in a very successful manner. If we fail to look at the past for its traditional wisdom in facing our environmental problems, we may be depriving ourselves of this very important source of wisdom. '

In Mostafa K. Tolba's *Sustainable Development Constraints and Opportunities,*[156] which contains his statements from the period 1982 - 1986, the interlinkage of 'environment and development', 'environmentally sound development' and 'sustainable development' emerge. His preface, dated February 1987, noted that 'taken together the main thread binding all my statements presented is the fact that long-term development can only be achieved through sound environmental management, that is, sustainable development.' Commenting on the relationship between the environment and development since the 1960s, he noted that past practices and beliefs had changed dramatically: 'It is now clear that without environmental protection, it is not possible to have sustained development, and without development, it is not possible to have a high quality of our environment and an improved quality of life for all the world's citizens. Thus, what we need is sustainable development, that is, development that can be sustainable over the long term by explicitly considering the various environmental factors on which the very process of development is based.'

8.2 Some milestones after 1992

Today, literature on sustainable development is prolific and each of us could provide an ample list. A few sources are mentioned below. Chapter one of Mostafa K. Tolba's,

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[154] *Gabcikovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports* (1997) 7 (separate opinion of Vice - President Weeramantry) 88, www.icj-cii.org/icjwww/idocket/ihs/ihsiudgement/his_iudgment 970925 frame.htm.

[155] Cited in Hunter, Salzman, and Durwood, *International Environmental Law*, *supra* note 5, at 346.

[156] Mostafa K. Tolba, *Sustainable Development Constraints and Opportunities* (Butterworths: London, 1987).

Commitment to the Future - Sustainable Development and Environmental Protection,[157] focuses on the compatibility between environment and development. The author recalls the Founex Report, the Stockholm Declaration 1972, *Choosing Options*[158] *and* the International Development Strategy for the 3rd UN Development Decade.[159]

Several global and regional conferences - within and without the United Nations system - have taken place since 1992. These include the 1994 Barbados Global Conference on the Sustainable Development of Small Island Developing States; the 1994 Cairo United Nations International Conference on Population and Development, the 1995 Copenhagen World Summit on Social Development. Also noteworthy are the five and ten year reviews of UNCED by the 1997 19th UN General Assembly Special Session and by the 2002 World Summit on Sustainable Development (WSSD), respectively. In both these reviews of Agenda 21, concern on the lack of progress in the implementation of the Rio blueprint was conspicuous. Indeed, at WSSD new emphasis was predictably placed on implementation.

A few leading authors and publicists of academic books and publications also deserve mention: these include previously cited Hunter, Salzman and Durwood as well as Philippe Sands, prolific author of, for example, *Environmental Protection in the* 21'1 *Century: Sustainable Development and International Law.*[160] A few key publications by institutions and organizations can also be singled out: UNEP's three *Global Environment Outlook* (GEO) reports;[161] *UNEP's New Way Forward;*[162] and IUCN's 1995 International Covenant on Environment and Development, revised in 2003, which is an umbrella global instrument on sustainable development.

The ICJ also provided some legal clarification of the principle of sustainable development through the Separate Opinion of Vice-President Weeramantry.[163] Moreover, judicial sensitization has been addressed at regional, sub-regional and global symposia on the Role of the Judiciary in Promoting the Rule 0 f Law in the Area of Sustainable Development, which have taken place in virtually all regions[164]

It should be noted that earlier global and regional conferences and efforts mostly involved only the executive branch of governments; to some extent parliaments where involved in voting resources for global and regional parleys and ratifying conventions

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[157] Mostafa K. Tolba, *A Commitment to the Future - Sustainable Development and Environmental Protection* (UNEP, 1992).
[158] Mostafa Tolba, *Choosing Options* (1980).
[159] International Development Strategy for the Third United Nations Development Decade, GA Res. 35/56, 5 December 1980, www.un.org/documents/ga/res/35/a35r56e.pdf.
[160] Philippe Sands, 'Environmental Protection in the 21st Century: Sustainable Development and International Law', in Richard L. Revesz, Phillippe Sands and Richard B. Stewart (eds), *Environmental Law, the Economy and Sustainable Development: the United States, the European Union and the International Community* (Cambridge University Press, 2000).
[161] See www.unev.org/Geo/index.htm.
[162] Dowdeswell, New Way Forward, supra note 6.
[163] *Gabcikovo-Nagymaros Project, supra* note 15.

[164] See section on 'Judicial Input' below

and involvement in the governing bodies of intergovernmental organizations. It was not until late 1996 that the judiciary at the regional and global levels became deliberately sensitized to environmental matters - primarily to the credit of UNEP. Since this period a lot of national judicial activity has taken place in many countries and in all regions, followed by the extensive sharing of law reports and guidelines for use by the judiciary and legal practitioners at the national level.

8.3 In Practice: Sustainable Development Applied

The levels of discussion and negotiation of the concept of sustainable development have been myriad. The concept has been addressed globally in academic circles, by diplomats at conferences and other intergovernmental fora and within global and regional non-governmental organizations *(NGOs);* at the national level it has been addressed in integrating decision-making, in institutional review and restructuring and in law-making and application. The high watermark, however, was the overwhelming global endorsement in Rio by over 100 heads of state and government of the sustainable development menu, and its subsequent reinforcement in various fora and instruments, both binding and non-binding. These are summarized below.

8.3.1Global treaties and negotiations

Sustainable development principles find expression in the preamble(s) and in the operative articles of numerous global, regional and sub-regional conventions, treaties and protocols. In some instruments, reference is made in the preamble to the entire Rio Declaration without specifying a particular aspect of the Declaration. For example, Recital 2 of the Preamble of the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade[165] recalls 'the pertinent provisions of the Rio Declaration.' In other treaties, sustainable development principles are not only recognized in preambles but in one or more articles. Examples of this may be found in Artic1es 2 and 3 of the United Nations Framework Convention on Climate Change,[166] in the Preamble and Articles 1 and 10 of the Convention on Biological Diversity,[167] and in the Preamble and Article 9(1) of the United Nations Convention to Combat Desertification.[168]

As mentioned above, no less than ten principles are themselves integral to sustainable development, and these find, individually or severally, express reference and endorsement in many treaties. These include the polluter pays principle; the precautionary principle or approach; international co-operation; inter-generational equity, etc., all adding to due recognition and endorsement of the broader principle of sustainable

[165] Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Rotterdam, 11 September 1998, in force 24 February 2004, 38 *International Legal Materials* (1999) 1, www.pic.int/en/ViewPage.asp?id=104.
[166] Climate Change Convention, *supra* note 11.
[167] Biodiversity Convention, *supra* note 10.
[168] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 *International Legal Materials* (1994) 1309, www.unccd.int/convention/menu.php.

development.

8.3.2 Regional treaties

The Rio Principles are also applied in legally-binding regional instruments including in the Preamble of the North America Free Trade Agreement,[169] in Article 2 of the Treaty on European Union,[170] and in the African Union's 2003 African Convention on the Conservation of Nature and Natural Resources,[171] which updated the 1968 Algiers Convention[172] on the same subject, making the revised convention the most comprehensive regional biodiversity convention.

There has also been the elaboration of specific instruments based on specific Rio Principles. For example, Principle 10 has been developed in the Aarhus Convention.[173] Although this instrument is essentially designed for the United Nations Economic Commission for Europe (UNECE) region, per Article 19(3), it is also open to states outside the UNECE region, and an informed expert, Professor Marc Pallemaerts is firmly of the opinion that states from other regions can currently be accommodated straightforwardly through accession. Two states, Uganda and Mexico, may be among the first from outside the UNECE region to become parties.

Principle 10 is, however, widely applied elsewhere through strategy and policy documents by the Inter-American Development Bank, for example, as well as across all regions through other legally-binding regional and sub-regional conventions. Upon adoption, the Convention was shared with regional commissions by UNECE' s Executive Secretary as well as by UNEP's Executive Director whose unit, Infoterra, was fully involved in the discussions leading to the Convention as well as during its negotiation. In fact, in 1999 the Executive Director brought the Convention to the attention of the Governing Council which was not enthusiastic about moving in the direction of a global convention on Principle 10. It did, however, encourage UNEP to review the practice of different countries and regions. This led to a report to the Council in 2001. UNEP also invited the Director 0 f UNECE, Kaj Barlund, former Finnish Minister of the Environment, to the Southeast Asia Judges Symposium held in Manila in 1999, to discuss the instrument, which the meeting subsequently embraced and commended. In Africa, the Southern Africa Development Community (SADC), with financing by Ireland, studied the Aarhus approach during the Aarhus negotiations themselves, and thereafter in

[169] North American Free Trade Agreement, 8 and 17 December 1992, Washington D.C., 11 and 17 December 1992, Ottawa, 14 and 17 December 1992, Mexico City, in force 1 January 1994,32 *International Legal Materials* (1993) 1480, www.nafta-sec-alena.org/DefaultSite/index_e.aspx?DetailID=78.

[170] Consolidated Version of the Treaty on European Union, *OJ* 2002 No. C325, www.europa.eu.int/eur-lex/Lex/en/treaties/index.htm.

[171] African Convention on the Conservation of Nature and Natural Resources (Revised Version), Maputo, II July 2003, not yet in force, www.africa-union.orgJhome/Welcome.htm.

[172] African Convention on the Conservation of Nature and Natural Resources, Algiers, IS September 1968, in force 16 June 1969, 1001 *United Nations Treaty Series* 4, www.africaunion.orgLhome/We1come.htm.

[173] Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters, Aarhus, 25 June 1998, in force 30 October 2001, 38 *International Legal Materials* (1999) 517, www.unece.org/env/pp/documents/cep43e.pdf

Gaborone in December 1998. At the national level, about 38 African states have incorporated Principle 10 in national statutes or constitutional provisions.[174]

8.3.3 Judicial input

In the *Gabcikovo-Naygmaros* case,[175] the ICJ lost an opportunity to elaborate on and apply the principle of sustainable development; it only mentioned the matter in paragraph 140. However, the Vice-President of the Court, Christopher Weeramantry, took the opportunity to elaborate on the content of the principle in a Separate Opinion. This is bound to open new avenues and horizons for regional and national jurisdictions to expound the principle judicially.

There have been no less than ten judicial symposia - one global and the rest regional in which judges have taken up or will take up the challenge of applying the set of sustainable development principles. Africa led the way with the first symposium being held in Mombasa, Kenya. Further symposia have been held in South Asia, Southeast Asia, Australia and other regions. The symposia were first spearheaded by UNEP. Other organizations, independently or with UNEP, have since then carried out or have planned symposia with a focus on environmental law in the context of sustainable development and on the role and rule of law.[176]

Regional courts have played a role in applying the principle of sustainable development as well. Discernible judicial efforts can also be seen at the national level in all regions in countries such as India, Pakistan, the Philippines, Australia, New Zealand, Uganda, Malawi, South Africa, Canada, Italy, etc. Judicial handbooks as well as casebooks and reports are available from or are under preparation by UNEP, and Uganda and other countries. These include: *Judges Handbook on Environmental Law;*[177] *Compendium of Judicial Decisions on Matters Related to Environment;*[178] volumes I & II of *Reports of Global Judges Symposium on Sustainable Development and the Role of Law.*[179] National publications include: *Casebook on Environmental Law in Uganda* as well as *Handbook on the Practice of Environmental Law in Uganda,* Volume I, both published in 2003.

8.3.4 Application at the national level

Policy instruments are widespread, and include national Agenda 21 documents, derived from the UNCED Agenda 21, and National Action Plans and Sustainable Development strategies as in the United Kingdom and Canada, to name but a few countries. Policy

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[174] see UNEP-PADELIA, *COMPENDIUM OF Enviromental Laws Of African Countries* www.unep.org/padelia/publications/laws.html;and forthcoming UNEP-PADELIA *Compedium of Enviromental Provisions in Africa Constitutions*

[175] Gabcikovo-Nagymaros Project, supra note 15.

[176] Symposia have been held in Mombasa in 1996; in Colombo in 1997; in Manila in 1999; in Mexico in 2000; in Johannesburg in 2002 with a follow-up in London the same year; in Kuwait in 2002; in Kiev in 2003; in Nairobi in 2003; in Cairo in 2004; and in Washington D.C. in 2004.

[177] Judges Handbook on Environmental Law, UNEP, forthcoming.

[178] *compedium of judicial decisions on Matters Related to Environmental, international Decisions ;volume1(1998) ;National Decisions ;volume 1(1998) volumes 11-111(2001),UNEPIUNDP*

[179] *Reports of Global Judges Symposium on Sustainable Development and the Role of Law,* Volumes I - II (UNEP, 2002).

dialogue vis-a-vis policy action, or inaction, is often taken up by the media and NGOs to put pressure on governments to take action to ratify or accede to conventions, or to institute administrative and legal measures, for example. Institutional reviews and restructuring also take place as a means of implementing law and policy.

Many national constitutions such as those in Uganda and South Africa, or in the draft Constitution of Kenya, include legal provisions surrounding sustainable development principles. Specific statutes are also often found in framework legislation in developing countries. Examples include the Ugandan National Environment Act;[180] the South African National Environment Management Act;[181] and the Kenyan Environmental Management and Co-ordination Act, No 8, of 1999, which came into effect in 2000. In the case of Kenya, sustainable development is defined similarly to Uganda, but Section 3 of the Act pools together several principles into one sustainable development principle. The six that shall guide the High Court in exercising jurisdiction conferred upon under subsection (5) are:

a) *the principle of public participation in the development of policies, plans and processes for the management of the environment;*
b) *the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repungnant to justice and morality or inconsistent with any written law;*
c) *the principle of international co-operation in the management of environmental resources shared by two or more states;*
d) *the principles of inter generational and intergenerational equity;*
e) *the polluter-pays principle; and*
f) *the precautionary principle.*[182]

Many other framework laws with which UNEP has provided assistance have followed this trend.

8.3.5 Application by international institutions

The goals of sustainable development have been accepted and championed in the programmes and efforts of both the UN and non-UN organizations within their respective global, regional and national mandates, where they are primary players. Within the UN family these include the UN and organs such and the United Nations Development Programme (UNDP), the United Nations Environment Programme (UNEP), the United Nations Industrial Development Organization (UNIDO), the United Nations Conference

[180] Chapter 153, National Environment Act, Republic of Uganda: Environmental Legislation of Uganda, Volume 1 5 -I.
[181] South African National Environmental Management Act 107 of 1998, www.polity.org.za/html/govdocs/legislation/I998/act98-107.html.
[182] Section 3(5), Kenyan Environmental Management and Co-ordination Act, No.8 of 1999 (emphasis added).

on Trade and Development (UNCTAD), etc. UN specialized agencies to take up this challenge include the Food and Agricultural Organization (FAO), the United Nations Educational, Scientific and Cultural Organization (UNESCO), The World Bank Group, regional development banks, and UN Regional Economic and Social Commissions. Non-UN organizations which have taken up this challenge include the IUCN and regional organizations like the European Union and the African Union.[183]

8.4 Conclusion

The content and definition of sustainable development is not closed and will not close in the foreseeable future. The principle and concept can be said to be vague; 'brilliantly vague.' This permits the definition and application of sustainable development to be tailored to specific situations and circumstances. At the local level the state of knowledge, experience and resources will always be key, and local cultural and social values should be integrated into sustainable development legislation. Further insight can be gained from local experience of centuries of sustainable living in tough desert environments, for example. Vagueness in interpretation will therefore remain a positive attribute of the concept, giving it life in different situations and circumstances.

The concept has been widely embraced and championed worldwide and its application or implementation should be monitored and experiences should be shared. Despite their best endeavors, no country can claim to be a role model and an ideal example of sustainable development in practice. None can claim total harmony in the integration and application of sustainable development in development, planning and decision-making. In fact, no society has yet reached its apex in its understanding and application of the concept despite the fact that aspirations to the concept abound and are held by many. In this regard all have a contribution to make to translate these sentiments into action.

At the 6th UNEP Global Training Programme on Environmental Policy and Law, held in Nairobi in November 2003, Professor Alexander Kiss presented 'legal tools implementing the policies adopted for enhancing sustainable development.' These are international conventions; constitutional rules; framework laws; laws concerning basic services such as water and sanitation, energy, transport, health care, town and country planning, etc.; laws concerning specific environmental sectors such as water, sea, air and biodiversity and specific sources of environmental deterioration such as polluting substances, wastes, nuclear material, etc.; regulations adopted at different levels - national, regional, sub regional - following the principle of subsidiary, and implementing of such laws or framing economic instruments; and judicial decisions.

Work at the national level should heed the sound advice given by such an experienced environmental lawyer as Professor Kiss. These challenges an opportunities should be

[183] Formerly the Organization of African Unity.

addressed; each of the over thirty countries represented at the UNEP - University of Joensuu Course has a golden chance of playing their full part in actualizing sustainable development.

CHAPTER NINE
ENFORCING ENVIRONMENTAL LAWS.[184]

9.0 Introduction

Uganda like many other countries is taking action to protect the environment from degradation and to restore and protect its natural resources. The country has developed laws and regulations and management strategies to do this. Most environmental management strategies involve legal requirements that must be met by individuals and facilities that cause degradation or harm to the environment natural resources. These requirements are an essential foundation for environmental and natural resource protection, but they are only the first step. The second essential step is *compliance-getting* the groups that are regulated to fully implement the requirements. Without compliance, environmental requirements will not achieve the desired results. Compliance does not happen automatically once requirements are issued. Achieving compliance involves efforts to encourage and compel the behavior changes needed to achieve compliance.

Successful implementation of environmental requirements requires significant effort and forethought. Changes in behavior have always been difficult to accomplish on both a societal and personal level. There is no magic formula for achieving compliance. There is merely trial, evaluation, and response to what works and does not work in a particular setting. Nevertheless, a reliable framework for designing enforcement programs has emerged based on the experience of countries such as the United States, the Netherlands, Canada. Norway, Sweden, and others.

9.1 What Is Compliance?

Compliance is the full implementation of environmental legal requirements. Compliance occurs when legal requirements are met and desired changes are achieved, e.g., processes or raw materials are changed, work practices are changed so that, for example, encroachment on forest reserves is stopped, reclaiming forests ceases, reduction in pollution, good management of solid wastes and soil erosion control.

The legal requirements are well-designed, then compliance will achieve the desired environmental results. If the requirements are poorly designed, then achieving compliance and/or the desired results will likely be difficult.

9.2 Enforcement[185]

Enforcement is the set of actions that governments or its agencies and other stakeholders

[184] Mr. Kenneth Kakuru. Mr. Kenneth Kakuru is an Advocate in Private practice and a Director of Greenwatch. Paper presented at a training workshop for Police officers, investigators and State Prosecutors to enhance enforcement of environmental laws.

[185] Extra Materials sourced from International Network for Environmental Compliance and Enforcement (INECE)http://inece.org/africa/prosecutors/

Take to achieve compliance within the regulated community and to correct or halt situations that endanger the environment or public health. Enforcement by the government usually includes:

- **Inspections** to determine the compliance status of the regulated community and to detect violations.
- **Negotiations** with individuals or facility managers who are out of compliance to develop mutually agreeable schedules and approaches for achieving compliance.
- **Legal action**, where necessary, to compel compliance and to impose some consequence for violating the law or posing a threat to public health or environmental quality.

Enforcement may also include:

- **Compliance promotion** (e.g., educational programs, technical assistance, subsidies) to encourage voluntary compliance.

Nongovernmental groups may also become involved in enforcement by detecting noncompliance, negotiating with violators, commenting on government enforcement actions, and where the law allows, taking legal action against a violator for noncompliance or against the government for not enforcing the requirements. In addition, certain industries such as the banking and insurance industries may be indirectly involved in enforcement by requiring assurance of compliance with environmental requirements before they will issue a loan or insurance policy to a facility.

In some countries, societal norms of compliance have been a powerful force compelling compliance with any form of legal requirement. A system that relies on social norms for enforcement may not be effective in every situation and may become vulnerable to abuse if societal norms break down over time. This possibility has stimulated new consideration internationally of the need for dedicated enforcement programs within government and nongovernmental organization. In Uganda, this is known as enforcing environmental law.

9.3 Why Are Compliance And Enforcement Important.

An effective compliance strategy and enforcement program brings many benefits to the public. First, and most important, is the improved environmental quality and public health that results when environmental requirements are complied with. Second, compliance with environmental requirements reinforces the credibility of environmental protection efforts and the legal systems that support them. Third, an effective enforcement program helps ensure fairness for those who willingly comply with environmental requirements. Finally, compliance can bring economic benefits to individual facilities and to the general public.

9.3.1 Components Of A Successful Enforcement Program

An effective enforcement legal program involves several components:

- Creating requirements that are enforceable.

- Knowing who is subject to the requirements and setting program priorities.
- Promoting compliance in the regulated community.
- Monitoring compliance.
- Responding to violations.
- Clarifying roles and responsibilities.
- Evaluating the success of the program and holding program personnel accountable for its success.
- Public participation
- Access to information
- Access to justice

These components form a framework within which to consider issues pertinent to any enforcement program, no matter what its stage of development. The response to these issues may differ depending on the nature and extent of the problem. Important to the success of all programs, however, is the need to address all elements of the framework. Each element is part of an interconnected whole and thus can influence the success of the whole program.

9.3.2 Why Environmental Enforcement Programs Are Important

- To Protect Environmental Quality and Natural resources. Compliance is essential to achieving the goals of protecting the environmental natural resources envisioned by environmental laws. Natural resources and the environment will be protected only if environmental requirements get results. Enforcement programs are essential to get these results.

- To Build and Strengthen the Credibility of Environmental Requirements. To get results, environmental requirements and the government agencies that implement them must be taken seriously. Enforcement is essential to build credibility for environmental requirements and institutions. Once credibility is established, continued enforcement is essential to maintain credibility. Credibility means that society perceives its environmental legal requirements as necessary and meaningful and the institutions that implement them as strong and effective. Credibility encourages compliance by facilities that would be unlikely to comply if environmental requirements and institutions are perceived as weak. The more credible the law, the greater the likelihood of compliance, and the likelihood that other government efforts to protect the environment will be taken seriously. The greater the public participation in enforcement.

- To Ensure Fairness. Without enforcement, facilities that violate environmental requirements will benefit compared to facilities that voluntarily choose to comply. A consistent and effective enforcement program helps ensure that all parties affected by environmental requirements are treated fairly. The people will be more likely to comply if they perceive that they will not be economically disadvantaged by doing so. E.g. Solid waste disposal, noise and air pollution control and treatment of effluents.

- To Reduce Costs and Liability. Though compliance is often costly in the short-term, it can have significant long-term economic benefits to both society and the complying facility. The healthier environment created by compliance reduces public health and medical costs, as well as the long-term cost to society of cleaning up the environment. Compliance benefits industry by reducing its liability and long-term clean up costs. Industry may also realize immediate economic benefits if compliance involves recycling valuable materials or increasing the efficiency of its processes. A strong enforcement program may also encourage facilities to comply by preventing pollution and **minimizing_**waste, rather than installing expensive pollution control and monitoring equipment.

- Another major goal of an enforcement program is to correct any immediate and serious threat to public health or the environment posed by pollution (e.g., a chemical spill that is contaminating a drinking water supply, discovery of toxic or explosive chemical wastes in an area accessible to the public).

- Create a culture of compliance through public participation.
- Enhance environmental democracy.

9.4 How programs may evolve in Different Cultures and Countries

Anyone involved in designing an enforcement program will face certain issues: How should a program begin? What elements are most important? How can the full range of responsibilities be handled with limited program resources? How should the program evolve over time as the program moves to new stages, as policymakers evaluate the success of previous strategies, and as technological and economic developments suggest new solutions? There are no standard answers. Each program must answer these questions for itself based on program resources and culture. This text provides a broad range of possibilities for the different elements of an enforcement program. Policymakers can select from these possibilities to design or modify a program so that it best serves the desired goals within the available resources.

Resources often limit choices. For example, ideally inspectors would be well-trained before they start to inspect. Due to limited resources and/or program priorities, many programs rely initially, if not predominantly, on on-the-job training. The challenge for every program is to make the most effective use of the resources that are available. This text presents many ideas for leveraging program resources to achieve broad results.

Finally, the effectiveness of an enforcement program will depend in part on the degree to which environmental quality is a national, regional, and local priority. Achieving compliance sometimes requires hard economic choices. Public and government concern for environmental quality provide an important foundation for enforcement programs.

9.5 Clarifying roles and responsibilities

As already noted above, enforcement frequently involves many different groups,

including government agencies, citizens groups and nongovernment organizations, and industry associations. A key element in any enforcement strategy is defining the roles and responsibilities of the various groups involved.

- How should responsibilities for enforcement be divided among the various levels of government (national, regional, provincial, and local)? To what extent should a program be centralized (i.e., run at a national government level) versus decentralized (i.e., run at local government levels)?
- Which government agencies will be involved, e.g., environmental agencies, health agencies?
- Should there be separate enforcement programs for different environmental media (e.g., air, water, land) or one or more integrated programs covering several media?
- To what extent should a program make use of citizens and other nongovernment resources?
- To what extent should technical program staff and lawyers be integrated within a single organization?

9.5.1 Dividing responsibilities among Government Levels

A basic issue in developing enforcement programs is to what extent to centralize responsibilities for enforcement at the national level or decentralize them at more local levels. There are advantages and disadvantages to both centralization and decentralization. A national presence in enforcement helps ensure that at least minimum standards for environmental requirements are met; that the program is consistent and fair throughout the country; and that national resources are available to support enforcement programs. Involvement of provincial and local governments in enforcement is important because these levels are closest to the actual environmental problems and best able to efficiently identify and correct them.

Most environmental enforcement programs in different countries are decentralized to take advantage of (1) local knowledge of facilities and their operations, and (2) the greater information and knowledge about the problem available at the local level. Despite this bias toward decentralization, some programs are centralized because of a clear need for national involvement, e.g., to handle transboundary pollution problems, or where local competition to create favorable conditions for industry may lead to lax enforcement at the local level or where unique expertise concentrated at the national level is needed to implement the program. E.g. forest resources.

Roles and relationships between the central government and local governments can develop in many different ways, ranging from decentralization to centralization to various combinations of both approaches.

Parallel Responsibility with the Primary Role Delegated

Most environmental programs in Uganda establish a relationship between the central and local governments. Usually, the central government formally approves the local

environmental laws as meeting established standards for implementation. From this point on, the local government has the primary role for implementing the enforcement program, but the central government retains parallel authority and responsibility and can intervene if the state program is not meeting certain criteria, laws do not allow the national government to delegate responsibility to the states.

Advantages of parallel system

This system of parallel responsibility with the primary role delegated has several advantages:

- **Program Quality.** The system maintains a continuous national presence. This helps ensure that certain minimum program standards are met across the country regardless of the resources and capabilities of the individual districts.

- **Technical Capabilities.** Because it is a national government agency, NEMA can often provide districts with technical capabilities that are not available at the district level.

- **National Consistency.** Involvement at the national level helps ensure that enforcement is practiced fairly and consistently across the country.

- **Deterrence.** Knowledge that the central government can and does become involved in certain enforcement actions helps contribute to deterrence.

- **Fostering Competition.** The central government routinely monitors and reports on progress and success in individual districts through State of Environment Reports published every two years. Results in individual states can easily be compared. This has resulted in a healthy sense of competition among some districts that has improved program success. Improved Program Effectiveness. Those closest to a problem are most likely to spot the problem and correct it in a timely manner. Shifting the primary responsibility for compliance monitoring and enforcement from the central to a more local district level helps improve program effectiveness. Sharing the Financial Burden. Delegating to district and local governments also relieves the government of substantial financial burden for enforcement programs.

Disadvantages

- Parallel authority may lead to duplication of effort and confusion of roles.

Clarifying Roles and Responsibilities

In order to avoid this, NEMA has to have a clear criteria for evaluating performance of its own and districts. Most programs must:

- Clearly identify the regulated community and establish priorities for enforcement.
- Have clear enforceable requirements.
- Monitor compliance accurately and reliably.

- Maintain high or improving rates of compliance.
- Respond in a timely and appropriate way to violations.
- Use penalties and other sanctions appropriately to create deterrence.
- Maintain accurate records and provide accurate reports.
- Have sound overall program management.

9.5.2 Role of other Government Institutions

Several government institutions can have significant impact on the design and operation of enforcement programs. Most significant are the legislative (lawmaking), executive (management and budget), and judicial (legal) institutions, as well as any agencies that have programs in areas related to the environment The particular institutions and the nature of their impact will depend on the governmental infrastructure of each country. Institutions with an impact will be those that:

- Identify the need for legislation.
- Create environmental laws.
- Determine budgets.
- Track program progress and success.
- Bring legal action.
- Oversee activities related to environmental management.
- Identify violators of the laws.

Legislative Institutions

The legislative institutions probably have the greatest impact on program development. They create the laws that define the environmental goals to be met, the authority and flexibility to meet those goals, and the level of funding. Legislative institutions can become involved in policy and implementation decisions by issuing amendments to laws that impose certain duties on the executive institutions. The legislative institution can impose deadlines that executive institution must meet.

Executive Institutions

The executive institutions are often responsible for identifying the need for legislation and for enforcing the legislation once it has been enacted. The executive institution is usually the environmental agency of the country or region. This agency may have its own administrative law judges. They provide an internal mechanism for enforcing administrative orders and appealing agency actions.

An executive institution may also supply the lawyers responsible for taking legal action against violators. If this institution is not the environmental agency itself, an interagency agreement can be important to define the conditions for services between the two executive institutions.

Judicial Institutions

The judiciary is the institution responsible for interpreting the laws. They may also impose requirements on the executive, for example, by requiring that it use certain rulemaking procedures if it wants those rules to be upheld in court. Courts provide a forum for taking enforcement action, for prosecution, and for enforcing administrative orders (if the court is so authorized). Courts can also playa significant role in assessing sanctions.

Agencies with jurisdiction in Areas Related to Environmental Management

Many government agencies may have authority in areas that affect or will be affected by environmental management. These include:

- Health-related agencies responsible for food safety, occupational health and safety, consumer
  products, pesticide use, etc.
- Natural resource management agencies, responsible for water, energy, minerals, forests, etc. Development of these resources can significantly effect pollution abatement.
- Land use planning agencies, responsible for community development, industrial siting, transportation, etc.
- Agencies that regulate industry and commerce.
- Agricultural agencies.
- Criminal investigation and enforcement agencies.
- Customs. (For example, in the Netherlands, Rwanda, the Customs Department is helping the Environmental Inspectorate by watching for and taking samples from imported materials that may violate the law such as prohibiting use of cadmium as a pigment or stabilizing agent in plastic.

Competition or conflict between two government agencies because of overlapping authorities can dilute the impact of both programs. Conversely, constructive cooperation can strengthen both programs through increased efficiency and by identifying gaps in regulatory programs. Approaches to achieving integration among related agencies include;

- Ad hoc joint efforts such as joint research programs.
- Formal review of each agency's proposals by the other.
- Review of proposals by reference.
- Establishing special councils that are independent of each agency.
- Establish an independent government entity or commission.

Police

The police and other government personnel involved in identifying and apprehending criminals can be a valuable resource for detecting violations of environmental laws. The

local police are serving as the inspection and enforcement arm of enforcement programs. To serve in this role, the police must be appropriately trained, provided with the necessary sampling equipment and have the technical support of environmental specialists as needed. The police should be responsible for surveillance and, in the case of simple environmental crimes, investigation. They can also play an important role in containing and fighting more serious environmental crimes, including organized environmental crime. Use of local police as inspectors has been very successful: the number of prosecutions has increased substantially in recent years, and the public image of the police has substantially improved.

9.5.3 Role of Non Government Groups

Several private organizations can have a critical influence on program success and efficiency. These groups may directly or indirectly influence enforcement. These groups can be valuable allies in efforts to improve environmental quality. Government enforcement programs will benefit by working with these groups wherever possible and appropriate.

Industry Associations

Industry or trade associations such as UMA and National Chamber of Commerce and small scale industries track and publicize developments that may affect their members. They may try to influence environmental legislation or programs as they are being developed. They may also serve as valuable channels for disseminating information on requirements, methods of complying, and compliance activities. Their dissemination channels include newsletters, journals, databases, and conferences. Associations of firms that make pollution monitoring equipment or control devices have strong economic incentives to disseminate information about environmental requirements.

Associations of Government Officials

These associations are nongovernment entities that provide a forum for government officials (e.g., mayors, governors) to work together in solving issues of mutual concern. Like industry associations, these groups track and publicize developments that may affect their members. These associations provide a resource for disseminating information and a forum for comment and recommendations concerning environmental management programs.

Professional and Technical Societies

Specialized professionals advise both government officials and the regulated communities on compliance issues. Their societies therefore have a strong incentive to track and disseminate information on regulatory developments. They may also try to influence regulatory decisions and compliance strategies they disagree with. In the United States, some of these societies independently develop industry standards.

Trade Unions and Workers' Councils

Enforcement programs can have substantial impact on workers. For example, workers are generally members of the local community and would benefit by the improved environmental quality that may result from enforcement actions. Conversely, enforcement actions that result in substantial process changes or shut down of an operation may result in some unemployment. Consequently, workers will have strong feelings and opinions in some enforcement situations. Most countries have associations or groups that represent the interests of workers. The participation of Workers' Councils or other groups that represent workers at a particular facility will be important to success of enforcement actions at that facility. Trade unions or other organizations that represent workers at a regional or national level may become involved in development of requirements and policy for enforcement. Individual workers may also report violations by their facilities to authorities.

Universities

Some universities are important centers for environmental professionals and may function much like the professional societies described above in supporting and influencing enforcement programs.

Insurance Companies

In many countries, private citizens can sue industry for personal injury or property damage caused by certain types of environmentally related activities. In theory, insurance companies that end up paying the cost of the suit should have an incentive to educate their clients about environmental requirements and assist them in compliance. These companies are therefore a potential ally for government agencies running enforcement programs.

Public Interest Groups

Citizens can playa major role in shaping and implementing environmental enforcement programs. With a stake in environmental quality, citizens may seek to influence environmental legislation and enforcement programs through lobbying efforts. Usually these efforts are coordinated by public interest groups. These groups may collect and publicize data on environmental quality and compliance levels in an effort to influence program priorities. If monitoring data collected by the program are made publicly available, these groups may track the data and, if the law allows, file citizen suits against the environmental agency for not doing its job, and/or against individual violators for violating the law.

Public interest groups also play an important role in disseminating information to regulated communities and to citizens who are concerned about environmental quality. Citizens may also play an important role as environmental watchdogs, spotting violations

occurring on a local level that may escape notice by enforcement officials. Public interest groups can be an important means of enlisting citizen involvement.

Use of Independent Contractors to Supplement Government Personnel

Private firms may be able to provide more faster and cost-effective services than government agencies. Enforcement officials may therefore contract some of their responsibilities to private firms. One issue in using contractors is ensuring the quality of their Work.

Private companies have proven to be a valuable resource for inspection in the Netherlands during personnel shortages and work backlogs. Clear agreements are made about how the activities are to be carried out and how violations will be reported and responded to. Any official action in response to a violation is taken by authorized government inspectors. This combined public/private approach has often been effective, and efficient, and can produce faster results than a solely public approach. Dutch government officials have been careful to provide adequate, competent leadership and to clearly define the "private" inspectors' authority. This approach is also used in many U.S. programs.

9.6 The basis for Compliance and Enforcement

One of the primary goals of an environmental enforcement program is to change human behavior so that environmental requirements are complied with. Achieving this goal involves motivating the regulated community to comply, removing barriers that prevent compliance, and overcoming existing factors that encourage noncompliance.

Many factors listed and described below, affect compliance. Which factors are operating in any particular regulatory situation will vary substantially depending on the economic circumstances of the regulated community, on cultural norms within the community and nation as a whole, and sometimes on the individual personalities and values of managers within the regulated community.

In any environmental situation several of the factors described below will influence the behavior of the regulated community. For this reason, environmental enforcement programs generally will be most effective if they include a range of approaches to changing human behavior. The approaches described in this text fall into two categories: (1) promoting compliance through education and incentives, and (2) identifying and taking action to bring violators into compliance. In some cultures, these two approaches are referred to as "carrot" and "stick." Different programs will place different emphasis on these two approaches depending on the culture and the particular regulatory situation. However, experience with enforcement programs does suggest that some form of enforcement response may ultimately be essential to achieve widespread compliance.

9.7 Factors affecting compliance

Deterrence

In any regulatory situation some people will comply voluntarily, some will not comply, and some will comply only if they see that others receive a sanction for noncompliance. This phenomenon - that people will change their behavior to avoid a sanction - is called *deterrence.* Enforcement deters detected violators from violating again, and it deters other potential violators by sending a message that they too may experience adverse consequences for noncompliance. This multiplier or leverage effect makes enforcement a powerful tool for achieving widespread compliance. Studies of and experience with enforcement show that four factors are critical to deterrence:

- There is a good chance violations will be detected.
- The response to violations will be swift and predictable.
- The response will include an appropriate sanction.
- Those subject to req1rirements perceive that the first three factors are present.

These factors are interrelated. For example, to create an appropriate level of deterrence, a more severe sanction may be needed for violations that are unlikely to be detected Conversely, a less severe sanction[186] may be sufficient if violations are likely to be detected and response can therefore be relatively swift.

Because perception is so important in creating deterrence, *how* enforcement actions are taken is just as important as the fact that they are taken. History has many stories of small armies that successfully beat larger forces by giving the impression that they were a formidable fighting force. Similarly, enforcement actions can have significant effects far beyond bringing a single violator into compliance if they are well placed and well publicized.

9.7.1 Factors motivating compliance

Barriers to Compliance And Factors Encouraging non compliance

Economic

- Desire to avoid a penalty.
- Desire to avoid future liability.
- Desire to save money by using more cost-efficient and environmentally sound practices.
- Lack of funds.
- Greed/desire to achieve competitive advantage.
- Competing demands for resources.

[186] *Sanction* is used in this text to mean any adverse consequence imposed on a violator.

Social/Moral

- Moral and social values for environmental quality.
- Societal respect for the law.
- Clear government will to enforce environmental laws.
- Lack of social respect for the law.
- Lack of public support for environmental concerns.
- Lack of government willingness to enforce.

Personal

- .Positive personal relationships between program personnel and facility managers.
- Desire, on the part of the facility manager, to avoid legal process.
- Desire to avoid jail, the stigma of enforcement, and adverse publicity.
- Fear of change.
- Inertia.
- Ignorance about requirements.
- Ignorance about bow to meet requirements.

Management

- Jobs and training dedicated to compliance.
- Bonuses or salary increases based on environmental compliance.
- .Lack of internal accountability for compliance.
- Lack of management systems for compliance.
- Lack of compliance training for personnel.

Technological

- Availability of affordable technologies.
- Political will and commitment
- Inability to meet requirements due to lack of appropriate technology.
- Lack of political will.
- Technologies that are unreliable or
- Political interference.

Change may also be motivated by economic considerations. The regulated community may be more likely to comply in cases where enforcement officials can demonstrate that compliance will save money (e.g., achieving compliance by recycling valuable materials instead of discharging them to the environment may yield a net profit), or when the government provides some form of subsidy for compliance. Conversely, the higher the cost of compliance, the greater may be the resistance to compliance in the regulated community. Some facility managers that may want to comply might not do so if they feel that the cost of compliance would be an economic burden to their operations.

To remove economic incentives to violate the law, the monetary penalty for a violation would, ideally, at least equal the amount a facility would save by not complying. This deters deliberate economic decisions not to comply, and it helps treat compliers and noncompliers equally.

9.7.1.1Institutional Credibility

Each country has its own social norms concerning compliance. These norms derive largely from the credibility of the laws and the institutions responsible for implementing those laws. For example, the social norm may be noncompliance in countries where laws have historical1y not been enforced, either because the law is unenforceable or because the institutions responsible for enforcement have lacked the political power or resources to enforce. There may also be a resistance to enforcement in countries where recent regimes have imposed laws against the will of the citizens. It may take longer for enforcement programs to build credibility in these countries.

Strategies to build credibility will vary. In some cultures, aggressive enforcement will provide credibility. In others, it may be important to have an initial period of promotion and encouragement to create a spirit of cooperation, followed by a well-publicized shift to more aggressive enforcement to signal that there will be consequences for noncompliance. In other cultures, a mixed approach at the outset may be most successful.

The government's will to enforce environmental laws - that is, to affirmatively promote voluntary compliance and identify and impose legal consequences on those who do not comply voluntarily - indicates and influences social values. Not enforcing a law tends to express a value that compliance is not important. A goal on the part of the government to bring a majority of the regulated community into compliance sends a message that compliance is important and helps build a social norm of compliance.

9.7.1.2 Social Factors

Personal and social relationships also influence behavior. Moral and social values may inspire or inhibit compliance. For example, in some situations, facilities may voluntarily comply with requirements out of a genuine desire to improve environmental quality. They may also comply out of a desire to be a "good citizen" and maintain the good will of their local communities or their clients. Facility managers may also fear a loss of prestige that can result if information about noncompliance is made public. Conversely, compliance will likely be low in countries where there has been little or no social disapproval associated with breaking laws and/or damaging the environment.

Successful personal relationships between enforcement program personnel and managers of regulated facilities may also provide an incentive to comply. On the other hand, a desire to avoid confrontation may prevent program personnel from pursuing the full range of enforcement actions they may need to take to ensure compliance. Also, an enforcement official's objectivity may be compromised if he or she becomes too familiar

with the facility's personnel and operations. Oversight visits by an independent enforcement official can help monitor for and prevent this potential problem. The relationship factor can be incorporated into a compliance strategy through such means as providing technical support to regulated groups and enhancing the interpersonal skills of compliance personnel. Social respect for environmental requirements can be improved by finding industry leaders who agree to set a well-publicized example of compliance, and by firm and visible enforcement of environmental requirements (particularly if the initial focus is to correct noncompliance that is posing significant and clear risks to the environment and/or public health).

9.7.1.3 Psychological Factors

Several psychological factors, common to human nature, may affect compliance rates. One of these is fear of change - the belief that familiar ways of operating are safe and new ways are risky. Closely related to this is inertia. Many people tend to naturally resist change because of the perceived effort it will require to enact the change. Both promotional efforts to publicize the benefits of compliance and the perception and reality of consequence for noncompliance play an important role in overcoming inertia.

9.7.1.4 Knowledge and Technical Feasibility

Besides being motivated to comply, regulated groups must have the *ability* to comply. This means they must know they are subject to requirements, they must understand what steps to take to create compliance, they must have access to the necessary technology to prevent, monitor, control, or clean up pollution, and they must know how to operate it correctly. A lack of knowledge or technology can be a significant barrier to compliance. This barrier can be removed by providing education, outreach, and technical assistance.

9.8 Impact On Program Design

As mentioned earlier, which of the factors described above will influence behavior in a particular environmental situation will depend on the culture and situation. An environmental enforcement program will be most effective if its design is based on an understanding of the factors that are operating. Such understanding will enable policymakers to determine the optimal strategy to motivate and enable compliance, and to discourage noncompliance. For example, in cultures where there is a tendency to ignore both requirements and requests for voluntary behavior changes, creating deterrence may be the most important component of program design. Conversely, in countries where there is a social norm of compliance, activities to promote voluntary compliance may be very effective. In situations where financial constraints are the main barrier to compliance, some form of economic support or advantage to the regulated community would likely have great impact.

Whatever factors are influencing behavior, they will almost certainly change over time. Thus, flexibility to review and revise the program design is key to long-term effectiveness.

CHAPTER TEN

THE CHALLENGES IN MONITORING AND ENFORCEMENT OF ENVIRONMENTAL LAWS IN UGANDA[187]

10.0 INTRODUCTION

Uganda has high natural resource potential on which more than 90% of the country's population depends directly for their livelihood. Likewise, the country's development process and opportunities mainly depend on the natural resource base. With a GDP growth rate of about 6% and a population growth rate of 62.7% (World Bank – World Development Indicators Database April 2002), natural resource exploitation will continue to form the basis for livelihoods of the majority in the foreseeable future. However, the resources are facing tremendous pressures from the rapidly expanding population, economic activities and in some cases outright abuse by users.

Uganda has continued to experience environmental degradation manifested by different forms of problems some of which are directly linked to the health and well being of wetlands and water resources. The major forms of land degradation with direct bearing on the state of the wetland and water resources include encroachment into wetland areas, land and vegetation degradation with associated loss of biodiversity, land and water pollution, and poor land management, among others.
The Government of Uganda accord high priority in the protection of natural resources. This is reflected in the Constitution, the Land Act, the Local Government Act, the Water Act and the National Environment Acts and the Regulations there under.

The National Environment Management Authority (NEMA) was established under the National Environment Statute, 1995, now an Act, as the principal agency responsible for monitoring, supervising and coordinating all activities in the field of environmental management in Uganda. In order to improve the capacity of Government in ensuring sustainable use of natural resources, Government through NEMA put in place a number of Environmental Regulations. The Implementation of the Regulations including monitoring an enforcement, is the responsibility of the District Authorities and relevant Lead Agencies while NEMA's role is to provide oversight on enforcement of the Regulations. It should also be emphasized that local communities and resource users have a key role to play in the protection and sustainable use of natural resources.

10.1 Principals of Environmental Enforcement

The Government of Uganda has taken stringent actions to protect public health from environmental pollution & protect the quality of the natural environment. Among the interventions has been the development of management strategies to prevent or control

[187] Mr. George Lubega Matovu. Mr. George Lubega is a Natural Resources Management Specialist working with NEMA. Paper presented at a training workshop for Police officers, investigators and State Prosecutors to enhance enforcement of environmental laws.

pollution. Most of these strategies also involve legal requirements that must be met by individuals and facilities.
These requirements are an essential foundation for environmental and public health protection **but they are only the first step**. The **second step is compliance** – getting the groups that are regulated to fully implement the regulations. Compliance doesn't happen automatically – achieving it usually involves efforts to encourage & compel behaviour change that is **enforcement.**

One of the primary goals of environmental enforcement program is to change human behaviour so that environmental requirements are complied with. Achieving this goal involves motivating the regulated community to comply, removing barriers that prevent compliance, and overcoming existing factors that encourage non-compliance

Two broad approaches are used to change human behaviour:
- Promoting compliance thru education & incentives
- Identifying and taking action to bring violators into compliance

What is Compliance?

Compliance is the full implementation of environmental requirements. It occurs when requirements and desired changes are achieved e.g. processes or raw materials are changed so that for example hazardous waste is disposed of at approved sites

What is Enforcement?

Is a set of actions that governments or others take to achieve compliance within the regulated community and to correct and halt situations that endanger the environment or public health.

Enforcement by NEMA usually includes:
(i) **Inspections** to determine compliance status of regulated community and to detect violations
(ii) **Negotiations** with individuals or facility managers who are out of compliance to develop mutually agreed schedules and approaches for achieving compliance – *compliance agreement*
(iii) **Legal action** where necessary to compel compliance and impose some consequence for violating the law or posing a threat to human health or environmental quality
(iv) Enforcement may also include compliance promotion e.g. via
- **Educational programmes**
- **Technical assistance and subsidies**

10.2 Importance of Compliance and Enforcement

(i) **To protect environmental quality & public health** - this only becomes a reality only if environmental requirements get results

(ii) **To build & strengthen the credibility of environmental requirements (including laws and institutions)** – to get results, environmental requirements and the govt agencies that implement them must be taken seriously. Enforcement is therefore essential to build credibility meaning society perceives its environmental requirements 7 the institutions that implement them as strong & effective

(iii) **To ensure fairness** – without enforcement, facilities that violate environmental requirements will benefit compared to facilities that voluntarily choose to comply

(iv) **To reduce costs & liability** – an overall healthier environment created by compliance reduces public health and medical costs as well as long term cost to society of cleaning up the environment

10.3 Components of a good enforcement programme

(a) Creating requirements that are enforceable
(b) Knowing who is subject to the requirements and setting programme priorities
(c) Promoting compliance in the regulated community
(d) Monitoring compliance
(e) Responding to violations
(f) Clarifying roles and responsibilities
(g) Evaluating the success of the program and holding program personnel accountable for success

10.4 Strategies For Compliance/Enforcement

(i) Developing Laws and Regulations that can be enforced

- Interpreting broad environmental laws with specific regulations
- EIA Regulations; Wetlands, Riverbanks and Lakeshores Mgt; Hilly and Mountainous areas Mgt; etc
- Providing feed back to legislatures to revise laws that are unenforceable

(ii) Identifying the Regulated Community

- Clearly understand who is required to meet what requirements
- Set priorities based on degree of environmental consequences
- Likely require inventory & information management system to keep track

(iii) Promoting Compliance

- Disseminating information about environmental requirements
- Providing cleaner production information, education and technical assistance to regulated community
- Building public awareness and support
- Publicising success stories
- Providing economic incentives & facilitating access to financial resources

(iv) Permitting & Licensing Facilities

- A permitting system enables environmental requirements to be tailored to the circumstances of specific facilities
- Requires the development of permit application procedures, processing of applications, issuing in coordination with other lead agencies

(v) Monitoring Compliance

- Inspections by NEMA & LA's/Gazetted inspectors
- Self monitoring, record-keeping and reporting to NEMA/Lead Agency
- Community monitoring and citizen complaints
- Sampling of environmental conditions (air, water, soil) in vicinity of facility

(v) Timely Responding to Violations

- Every compliance & enforcement programme must develop a hierarchy of enforcement responses consistent with its social-economic & cultural situation
- May involve taking administrative, civil, criminal actions meant to achieve:
    - Return violators to compliance
    - Impose sanction
    - Remove the economic benefit of non-compliance
    - Correct environmental damages
    - Correct internal facility management problems
- Various types of enforcement responses: issuing administrative & legal notices; closing down facility or particular operation; revoking a permit; seeking compensation; fining; prison

(vi) Gazettement and equipping of Environmental inspectors

- Section 80 of the NES 1995
- 178 Inspectors currently Gazetted for two years
- Some Inspectors are now equipped with portable equipments that are able to detect changes in environment

(vii) Using the existing structures in the enforcement and technical assistance

- Local Governments
- Government Departments (DWD, WID, etc)
- Police

viii) Development of Technical tools for the implementation of the laws and regulations

- Manuals
- Guidelines

10.5 Enforcement mechanism and implementation tools

10.5.1 Category A - The Precautionary Principle Implementation Tools

- Environmental Planning

- Environmental Monitoring and Impact Assessment
- Environmental Audit
- Environment Standard Setting and Licensing
- Public Awareness and Participation
- Environmental Easements
- The Use of Economic and Social Incentives

(i) **Environmental Planning**

NEMA is enjoined to prepare a National Environment Action Plan to be reviewed after every five years or less (S. 17(1)). The plan shall cover all matters affecting the environment in Uganda (S.18 (2) (a)). Environmental planning ensures that development activities are harmonized with the need to protect the environment in accordance with established standards.

(ii) Environmental Monitoring and Impact Assessment

Under the Environmental Impact Assessment Guidelines two systems of monitoring are specified as:- Self monitoring whereby the developers themselves are encouraged to monitor the impact of their activities and; enforcement monitoring done by government agencies such as NEMA through environmental inspectors (S. 23(2))

(iii) Environmental Audit

Audits occur after the project has commenced and may lead to prosecution of offenders. Audits may also lead to the redesign of a project or the remodeling of its operations. NEMA carries out continuous audits (S. 22) with the help of inspectors, to ensure that industries comply with the requirements of the Environment Act. The problem, however, is that many industries were set up before the Act was enacted and environmental standards were not a key feature then.

(iv) Environment Standard Setting and Licensing

Some activities require specific permits. In order to control the environmental effects of these substances the law requires their classification and labeling. Standard setting ensures that licences and permits are issued as a measure to control activities that may have deleterious or beneficial effects on the environment. This requires that the licensing authorities should be environmentally conscious to avoid emphasizing the revenue collection aspect at the expense of environmental concerns.

(v) Environment Standards and Regulations

- The Environmental Impact Assessment Regulations No. 13 of 1998.
- The National Environment (Standards for Discharge of Effluent into Water or on Land) Regulations No. 5 of 1999.
- The National Environment (Waste Management) Regulations No. 52 of 1999.

- The National Environment (Hilly and Mountainous Areas Management) Regulations No. 2 of 2000.
- The National Environment (Wetlands, Riverbanks and Lakeshore Management) Regulations No. 3 of 2000.
- The National Environment (Minimum Standards for Management of Soil Quality) Regulations No. 59 of 2001.
- The National Environment (Management of Ozone Depleting Substances and Products) Regulations No. 63 of 2001.
- The National Environment (Control of Smoking in Public Places) Regulations No. 12 of 2004.
- The National Environment (Access to Genetic Resources and Benefit Sharing) Regulations No. 30 of 2005.

(vii) Public Awareness and Participation

The need for popular awareness is a key requirement for enforcement of legislation. NEMA is given the mandate to carry out education and awareness campaigns to ensure that the public participates in environmental decision making and enforcement.

(viii) The Use of Easements and Incentives

An environmental easement may be enforced by any body who finds it necessary to protect a segment of the environment although he may not own property in the proximity to the property subject to the easement. The Act clearly provides that management measures should be carried out in conjunction with the application of social and economic incentives including taxation measures.

10.5.2 Category B - The Polluter Pays Principle Implementation Tools

- Performance Bonds
- Environment Restoration Orders
- Record Keeping and Inspections
- The Use of Criminal Law
- Community Service Orders

(**a) Performance Bonds**

Industrial plants that produce highly dangerous or toxic substances & therefore have significant adverse impacts on the environment may be required to deposit bonds as security for good environmental practice.

(b) Environmental Improvement Notice

Improvement Notices may be issued by environmental inspectors under section 80(1)(i) of Cap. 153 to require a person to cease activities deleterious to the environment.

(c) Environmental Restoration Orders

Restoration Orders are issued under section 67 of Cap. 153 requiring a person to restore the environment, or to prevent a person from harming the environment. They may award compensation for harm done to the environment or/and levy a charge for restoration undertaken. Restoration Orders are issued by NEMA or a court giving the person a minimum of 21 days to restore what he has destroyed.

Under Section 70(i) of the National Environment Act Cap 153, "where a person on whom an Environmental Restoration Order has been served fails, neglects or refuses to take action required by the Order, the Authority (NEMA) may with all the necessary workers and other officers, enter or authorize any other person to enter any land under the control of the person on whom that order has been served and take all the necessary action in respect of the activity to which that order relates and otherwise to enforce that order as may deem fit."

(d) Record Keeping and Inspections

Persons whose activities are likely to have a significant impact on the environment are required to keep records of the amount of wastes and by products generated by their activities and as to how far they are complying with the provision of the Act. Inspections are carried out by gazetted inspectors who have very wide powers under the Act e.g. to take samples, seize any plant equipment or substance and close any facility or issue improvement notices.

(e) The Use of Criminal Law & Community Service Orders

Criminal law remains a veritable instrument for the control of behavior because of the natural tendency of people to fear the infection of pain, isolation or economic loss. Therefore, the Act provides for serious penalties for infraction of its provisions. As an alternative to imprisonment and fines, persons committing environmental wrongs may be required to perform duties in the community as a reparation to the community for the wrong done.

10.6 Challenges In Monitoring And Enforcement

(i) First, there is the problem arising from **failures at different institutional linkages for environmental management.** Whereas for example wetlands are held in trust by Central Government or local Government for the common good of the people of Uganda, recent examples of wetland abuse have included cases where Local Authorities have been the very violators of these constitutional and legal provisions. Where this has happened, local authorities have indicated that they converted wetlands for the sake of providing their communities with economic growth opportunities and for fighting poverty. It is therefore a dilemma that the very institutions entrusted with the protection of wetlands have in some cases not assisted the crusade for their conservation.

(ii) Issuance of Land Title in wetland areas by the Central and Local Governments

Where as it is a constitutional and legal requirement that areas such are wetlands, riverbanks, lakeshores are held in trust by Government and Local Government for the common good of all the citizens of Uganda, there are incidences where the very institutions that are charged with this responsibility are the very ones who alienate these wetlands and even issued land titles.

(iii). There is the problem of enforcement of the legal requirements for protection of the environment and public health. Whereas it is now largely accepted that environment is important worth protecting, and whereas enforcement of environment regulations, is expected to be done through a hierarchy of enforcement levels from national (NEMA), Districts down to community levels, the enforcement capacity available at all these levels appears not to be able to match the widespread nature of the problem of environment degradation. In addition, while the responsibility for environment management has been vested under the local authorities, cases of local authority intervention on environmental management are still few, implying that even where local authority intervention would have been enough to stop abuses, such cases still continue to be referred to NEMA. It should be stressed that this state of affairs for a dispersed resource such as wetlands requires an enforcement and intervention mechanisms that is closer as possible to the community level if tangible results are to achieved.

(iii). The "anonymous", "holiday" and "awkward hour" dumping syndrome and noise pollution

Without an effective grassroots enforcement mechanism, it has been extremely difficult to control indiscriminate dumping of materials in wetlands along the roads and other remote areas by anonymous individuals such as truck drivers who probably view wetlands as "good" open space to dump in rather than drive long distances to designated dumping sites. Time and again, people living in and around wetland areas where marrum and waste dumping has taken place have indicated that the dumping is done by unknown truck drivers at awkward hours.

In addition to the above, there has also been a problem of wetland filling during holidays and awkward hours when those dumping probably have full knowledge that enforcement staff are not on duty. It remains an uphill task to prosecute these cases, and the affected wetlands can hardly recover their original state even if the culprits are required to restore them.

(iv). How to transfer management and enforcement responsibility to local authorities and to resource users level.

With the expansion of Central Government enforcement machinery not likely to happen in the foreseeable near future, it is plausible to believe that increased local

authority and local community role on matters of wetland management, planning and enforcement, including stopping wetland abuse through community policing could be a more sustainable way to stem further degradation. However, there still remains a fundamental weakness in the sense that local authorities have not translated the authority vested under them for natural resources management into meaningful action as far as wetland resources are concerned. The approach adopted by the Wetlands Inspection Division for community wetland management planning is worthy support in this regard. However, lessons learnt from this approach are yet to be popularized to other communities.

(v). Need to harmonize urban planning and land–use in general with modern wetland conservation goals.

Until now, NEMA continues to receive development proposal on wetland areas that have been demarcated as plots by planning authorities. This apparently continues to send wrong signals to other wetland users who seem to perceive a sense of no action being taken in especially urban areas where wetland encroachment continues. In Kampala District, most of the wetlands which served as flood relief areas were allocated for industrial and residential developments and this trend has not been halted completely yet. Worth mentioning is the difficulty of enforcing planning requirements in peri-urban flood prone areas where the urban poor communities have massively and indiscriminately encroached into the wetlands, such as is the case in Bwaise and Bukoto areas.

(vi). Poverty and wetland resources use relationship

Over the recent years, there appears to be increasing cases of activities being implemented in wetlands in the name of fighting against poverty. While some of these activities are out-rightly not compatible with wetland conservation nor wise use goals, their promoters have vigorously defended them as intended to assist in the fight against poverty. Activities such as brick making in wetlands which are done for economic gains have tended to give no regard at all to conservation nor restoration of the affected wetlands. It is probable that this attitude stems from the old perception that wetlands in their natural state are wasted land.

CHAPTER ELEVEN

THE CONDUCT OF INVESTIGATIONS / CRIMINAL PROCEDURE[188]

11.0 Introduction

In order to successfully prosecute an environmental criminal case, the government has to prove, beyond a reasonable doubt, that a corporation or person knowingly violated an environmental Act containing criminal sanctions.

The objective of this paper is to give general guidance on criminal investigations.
For purposes of this discussion, we will consider the following definitions.

"Criminal investigation" means the deliberate examination or inquiry of available evidence aimed at a finding of whether or not and by whom a crime has been committed.

"Evidence" denotes the means by which any alleged matter of fact , the truth of which is submitted to investigation, is proved or disproved and includes statements by accused persons , admissions, judicial notices, presumptions of law, and ocular observations by the court in its judicial capacity.

11.1 Conduct of Investigations

An investigation, in the context of these guidelines, is a means to establish the correctness of suspected abuses of environmental laws. If the evidence warrants, an investigation can also lead to entering into compliance agreements or a possible prosecution. The conduct, management and control of investigations must be in compliance with policies regulating criminal investigations, keeping in mind the duty to act fairly, the public interest and the promotion of the integrity of the environment.

Investigators at all levels, whether in NEMA, Local Councils, the Uganda Police, or other lead agencies are responsible for conducting investigations seeking assistance or guidance where necessary, and reporting findings of such investigations within the policy regulating criminal investigations.

In investigating environmental crimes, the environmental inspector plays a key role gathering scientific and technical evidence and also in making the necessary reports. Environmental inspectors and other competent personnel play the role of expert witnesses in court proceedings. Even when the Police handle the investigations, environmental inspectors still play a crucial role in the chain of evidence. The experience, wisdom, and concerns of both legal and technical staff involved in enforcement are important. Since environmental matters are sometimes a question of visual impression, the use of proper photographs can be used in proving a case of violation.

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11.1.1 Investigative steps

The investigation of a suspected environmental crime is initiated with the reporting or discovery of a possible offence. It proceeds through the data-gathering and evaluative steps of:

- acquiring the initial report and all relevant data from eye witnesses or observers;
- surveying the site, evidence gathering and collecting data and samples;
- the storage/forwarding of samples for analysis;
- Analysis and interpretation of data and the results of sample analysis;
- Reporting the results of the analysis; and
- Follow-up investigations and initiating other actions.

Reporting the Crime

The Police or environmental inspector may act on his or her own initiative or may act on information received from the public, a district environment officer, any lead agency, NEMA, or any government official.

Receipt of initial reports/information

On receipt of the initial report or information regarding a suspected environmental crime, the investigation officer shall file the case and give it a police reference number or a designated form. The investigation officer is expected to obtain the following key information:

- Physical location of scene of the alleged crime/environmental incident(s)
- Date and time of the incident(s).
- Details regarding notification of the incident(s)
- Parties involved.
- Noticeable impact on the environment/ecosystem

The investigator must also document information encompassing his or her observations and actions at the crime scene. Information includes locations, appearances, and conditions of all persons and items noted, and should communicate scene conditions, statements and comments made by victims, suspects and statements and comments made by witnesses and the actions of other personnel.

Dealing with the Suspected Offender.

A statement should be recorded from the suspected offender as soon as he in the custody of the investigator, if he has been intercepted or from any person reporting the offence. Statements should be taken quickly because for environmental offences, evidence may dissipate very quickly.

All environmental offenders are arrestable by virtue of the fact that breach of environmental laws means commission of an offence. However, discretion would be allowed to arresting officers depending on the nature of the offence committed. The gravity of the offence committed will determine whether or not the suspected offender

shall be detained or released, and if he is released, the conditions for his release. A suspect may be released unconditionally, on caution or on Police Bond.

NB: While criminal procedures would normally apply to environmental offences, by their very nature and depending on the gravity of the offence committed or its impact on the environment, environmental offenders need not be handled as criminal suspects particularly in terms of questioning techniques and incarceration.

11.2 Evidence

Evidence gathering and preservation is a critical step in prosecuting any case and environmental cases are no exception. it is the burden of the government to prove that any evidence presented in court is authentic.

These steps include where necessary sampling, exhibit identification, transportation, physical and chemical analysis, and exhibit storage. If care is not taken to properly preserve evidence and maintain the chain of custody in every step of the investigative process, then the evidence may be inadmissible at trial.

Gathering Evidence

There are three types of evidence: physical, human, (obtained through witness statements or interviews) and documentary (including photographic media). Physical evidence may include solids, liquids, or gases. Documentary evidence includes all documentation developed by the investigator. Evidence gathered at a crime site will typically involve interviews, visual observations, measurements, samples, paper documents and records.

The investigative file should contain records of interviews, photographs, video-recordings, sketches, correspondence, field notes, chain-of-custody records and other pertinent records such as calibration records and laboratory test reports.

Witnesses

i. Ascertain and obtain valid identification from potential witnesses and separate identified witnesses from each other and from others present.
ii. Document witness identification(s).

Preservation of Evidence

Preserving and controlling evidence are essential to the integrity and credibility of the investigation. Security and custody of evidence are necessary to prevent its alteration or loss and to establish the accuracy and validity of all evidence collected. The point of contact is responsible for assuring that a chain of custody is established for all evidence.

For physical evidence to be truly useful its integrity needs to be preserved and the investigator, before moving anything should record the exact location of the evidence at the scene, its time of collection and its status using measurements, sketches, photographs or videography where appropriate.

Collected evidence needs to be stored and to maintain its integrity after collection.

Search Warrants

Search warrants allow investigators to go onto private property to investigate further suspected illegal activity and to obtain samples of evidence of the degraded environment. However, before a search warrant can be issued, probable cause that a crime has been committed and that evidence exists in the place to be searched must be shown. Investigators should show probable cause through information they have developed during the investigation, as well as other supporting exhibits, such as photographs and public complaints.

11.3 Conclusion.

Managing the Investigation - Points to Note

1. When established procedures are used to collect evidence, it is often easier to defend the scientific reliability and legal acceptability of the procedures.

2. Witness interviews should be recorded along with other field activities such as sampling and environmental measurements.

3. When assisting in the execution of a search warrant, the investigative team should ensure that the evidence collected is authorized by that warrant. Each person collecting evidence could ultimately be called as a witness later.

4. Marking, labeling, preservation (if appropriate) of exhibits should all be part of the permanent record of the crime scene visit.

5. Chain-of-custody records should include a standard form documenting the delivery and the receipt of each exhibit. Personnel handling the exhibits are recorded from the initial contact at the crime scene through each exhibit transfer until the exhibits are received in the laboratory. Under chain-of-custody procedures, exhibits are to be under the control of the investigative team at all times. The location of each exhibits from the time of collection through the time of laboratory analysis, should be documented.

CHAPTER TWELVE

EVIDENTIAL DIFFICULTIES IN PROSECUTION OF ENVIRONMENTAL CRIMES[189]

12.0 Introduction:

Evidence gathering and preservation is a critical step in prosecuting any case and environmental cases are no exception. It is the burden of the government to prove that any evidence presented in court is authentic.

However, it is not always easy to gather evidence in the investigation of Environmental crimes. Sometimes, the evidence is not always obvious. This is because by their nature, the evidence in environmental crimes is not always typical.

12.1 Hereunder is an enumeration of the **common difficulties** that may be experienced in the process of evidence gathering in investigating environmental crimes which the investigator should be aware of and prepare for.

1. Delicate nature of the evidence,

Evidence required to proves environmental crimes is often delicate and hard to preserve or store. e.g. noise pollution offences.

2. Transient nature of the offence

Most environmental crimes are of a continuous nature and therefore the difficulty comes in identifying at which particular point in time that evidence applies?

3. Defining the ingredients of the offences

On account of the transient nature of the offence, identifying the ingredients may be cumbersome. In addition, determining whether the degree of destruction is a factor in the commission of the offence may present difficulty in that in the event that there is no apparent destruction, it may be hard to conclude that an environmental crime has been committed.

4. Socio- economic / socio cultural aspects of environmental offences and thus "what is the public interest?"

Most environmental offences are committed ion the pursuit of "daily bread'. The difficulty here is considering the public interest, is it worthwhile investigating and prosecuting the offence? In addition, the exhibits required in the proof if the crime may actually be the source of livelihood of the offender, e.g., the papyrus mats, firewood, etc.

[189] Ms. Doris Akol. Ms. Doris Akol is a consultant with the Environmental Law Resources Centre. Paper Presented at a training workshop for Police officers, investigators and State Prosecutors on enforcement of environmental law

5. Chain of custody issues

The rudimentary nature of our systems ensures that the most probable way that the evidence will be stored will compromise the chain of custody. The threat posed by lack of integrity cannot be underscored.

6. Unavailability of technology to analyse environmental evidence

The unavailability of up to date and complex equipment that is required in the analysis of environmental evidence seriously compromises our ability to gather, preserve and use some evidence in prosecution of environmental crimes. E.g. level of air pollution.

7. Proving intention and wilfulness for non strict liability offences e.g. S 99(g) of the NEA

8. Dearth of experts to testify as to the commission of an environmental offence vis a vis accepted levels e.g. for air / noise pollution

Many of the concepts in environmental enforcement are new to us. As a result we still suffer form a serious shortage or presence of experts who can make conclusions on evidence gathered or who can present expert evidence in courts.

9. Relatively low knowledge base in enforcement agencies and JLOS institutions of environmental laws and offences created thereunder in addition to the relatively low priority attached to environmental offences as opposed to e.g. crimes such as theft, rape, obtaining money by false pretences, embezzlement etc

10. Standard of proof of beyond reasonable doubt is difficult to meet to obtain a conviction.

11. Inadequate evidence laws.

The existing version of the Evidence Act is seriously deficient in allowing the submission of certain types of evidence. E.g. Amendment of Evidence Act is crucial to allow certain evidence e.g. electronic evidence that shows certain pollution limits have been exceeded may currently be inadmissible.

12.2 Recommended Strategies

The conduct of a needs assessment and enhancement for targeted persons in investigations and prosecutions of environmental crimes on the following issues;

1. frequent exposure to the different sectoral environmental laws and offences created by those laws
2. various environmental sectoral standards to improve recognition of when an offence has been committed

3. Analysis of evidence for those in the laboratories

4. Sampling techniques for the crime scene

5. Evidence gathering and preservation technologies

6. Improving the availability of photographic equipment to facilitate photography and videography in evidence gathering

7. Inclusion of environmental law and offences in the Uganda Police Training Syllabus

CHAPTER THIRTEEN

MAINSTREAMING ENVIRONMENTAL CONCERNS INTO THE POLICIES, PLANS AND PROGRAMMES OF THE UGANDA POLICE FORCE[190]

13.0 Introduction

Not long ago, police and environment personnel were regarded as strange bedfellows, not only in this country but the world over. With police handling violent crimes such as murders, robberies and rapes, while environment agencies such as NEMA are busy solving environmental problems. This is attributed to the different cultures, priorities, limited sharing of information between the two institutions among other factors. You will probably agree with me that times have changed and it has been increasingly realized that environmental crime is a threat to public safety and security.

Therefore, the Police as the institution mandated to maintain law and order and in particular the CID, the principle agency responsible for investigating all criminal cases in the country including those of environmental nature, has a central role to play in containing environmental crimes. To effectively play this role environmental concerns must be fully mainstreamed into the policies, plans and programmes of the Uganda Police Force.

13.1 What is environmental mainstreaming?

Environmental Mainstreaming occurs when conservation and the sustainable use of environment and natural resources is integrated into different levels of government, institutional or establishment legislations, policies, plans and programmes and relevant actions are taken at the national, sectoral, local and community levels to support their implementation.

Therefore environmental mainstreaming in the Police implies incorporating environmental concerns in the planning process, policy formulation and programmes of the police and taking relevant action including budget to support their implementation. To the Police Force it implies understanding the public safety-environmental implications of not taking the right actions and adapting the core activities of the police force with the realities of those issues.

13.2 Roles and Responsibilities of the Police in Environment Management

- Detection and investigation and causing prosecution of environmental crimes in courts of law;

[190] Mr. Kaggwa Ronald. Mr. Ronald Kaggwa is an Environmental Economist, NEMA. Paper presented at a training workshop for police officers, investigators and State Prosecutors on enforcement of environmental law.

- Monitoring and enforcement of compliance to environmental laws, regulations and standards such as effecting evictions from sensitive ecosystems like wetlands, river banks and lake shores;
- Developing enforcement strategies against environmental crimes;
- Arresting of environmental offenders, just like other criminals;
- Increasing awareness of environmental crimes in the country and their threat to public peace and security;
- Sensitizing and raising the awareness of all the Uganda Police staff on general environmental issues including environmental crime as a threat to public safety;
- Strengthening National and International linkages in Environment and Natural Resource Management and exchanging information with NEMA, the Directorate of Public Prosecution (DPP), and other partner organizations;
- Mainstreaming environmental concerns in the planning process, policy formulation and implementation of the Uganda Police Force programs;
- Developing guidelines for investigation and prosecution of environmental crimes

13.3 Key Principals of Mainstreaming

(i) Understanding / being aware of the impact of environmental crimes on public safety and security and the development process in general;
(ii) Identifying focused entry points;
(iii) Working within existing structures and strategies;
(iv) Working to your comparative advantages;
(v) Identifying and working through strategic partnerships; i.e. NEMA, NGOs, Local authorities, Communities, the public etc.
(vi) Developing environmental specific plans (what is the environmental plan of the police force?);
(vii) Identify resource requirements; and
(viii) Mobilize resources and implement planned activities

13.3.1 Key questions to ask in mainstreaming environmental concerns in Police

To help the Police Force to determine how and where environmental issues should be addressed in her policies, plans and programmes, the following key questions have been raised;

(i) What is the relationship between environment and public peace, safety and security?
(ii) How does this relationship affect the maintenance of law and order?
(iii) Is this relationship understood and addressed at all levels of activity in the police force?
(iv) What is the current environmental performance of the Uganda Police?
(v) What are the main environmental impacts of Police activities in the country?
(vi) What are the environmental impacts of not acting?
(vii) How can the environmental impacts of the Police activities be taken into account?

(viii) What opportunities exist within the Police framework to enhance sustainable environmental management?

(ix) How might the ignoring of environmental concerns undermine the vision, objectives and the targets of the Uganda Police (maintenance of law and order)?

(x) What are the environmental impacts of the current policies, plans and programmes of the Police Force?

Appropriately addressing these questions will give a way forward to the challenge of maintaining a safe and secure environment in an integrated and sustainable manner to serve the needs of the present and future generations in the Police Force.

13.4 Way forward

While we recognize that there are differences in our mandates (NEMA, Greenwatch and the Police) we also realize that we have so many common concerns regarding threats to the environment, public safety and security and thus shared goals. It is therefore important that we work more closely together in defining problems, identifying solutions and implementing joint initiatives.

- We need to develop an integrated plan of action in order to ensure that social, economic, environmental and technical dimensions are taken into account in the maintenance of public safety and security and investigation of crimes.

- Need to develop a sustainable surveillance and monitoring system in the field of environmental management. Monitoring indicators should be developed and popularized to track changes and to assess the effectiveness of our interventions. We should therefore intensify our efforts to gather environmental crime related data, exchange and share information.

- It has become widely accepted that 'indicators of enforcement' will play a key role in ensuring that the management of the environment is sustainable. Therefore, it is of critical importance that you strengthen the environmental information management system (storing, processing and dissemination of data to all users).

- Need to integrate environmental concerns in the plans and policy formulation of the Police. We also need to regularly review these policies, plans and institutional frameworks to ensure relevance and adherence to our shared goals.

- In your crime investigation function you need to keep abreast with best environmental practices. To tackle the specifically environment-related grievances, the preparedness and capacity of the police force to fight environment specific violations and crimes need to be developed.

- The curricula of the Police Training Colleges need to be expanded to include environmental concerns.

Indicators of Environmental Mainstreaming into the Uganda Police Force

The extent of environmental mainstreaming can be assessed basing on the following monitoring indicators;

- Curriculum in the Police training colleges having environmental concerns/issues;
- Percentage of the Police budget allocation to environmental concerns;
- Police personnel specifically designated to handle environmental concerns;
- Creation of specialized units in the Police force handling environmental issues e.g. environmental squad, environmental desk etc;
- Number of environmental crimes reported to police, investigated and prosecuted in courts of law;
- Number of Police Officers who have attended environmental awareness and capacity building workshops and seminars;
- Number of environmental management capacity building initiatives organized by the Police;
- Creation of an environmental data bank in the Police.
- Environmental concerns being incorporated into the Police training

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About Greenwatch.

Greenwatch is an environmental rights advocacy organization established in 1995 with the aim of enhancing public participation in the sustainable use, management and protection of the environment and natural resources and in the enforcement of the right to a clean and healthy environment.

At Greenwatch, we advocate for the enforcement of and compliance with environmental laws and principles through training which results in increased environmental awareness. We review and analyze Environment Impact Assessments (EIAs) of development projects with a likelihood of impacting on the environment negatively; a process which aims at influencing policy making for improved environmental governance in Uganda.

We support community initiatives through dissemination of information on environmental rights and laws for effective participation in decision making; conduct research and training for the public as well as government enforcement officers on access rights: access to information, access to justice and public participation in the governance of natural resources.

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