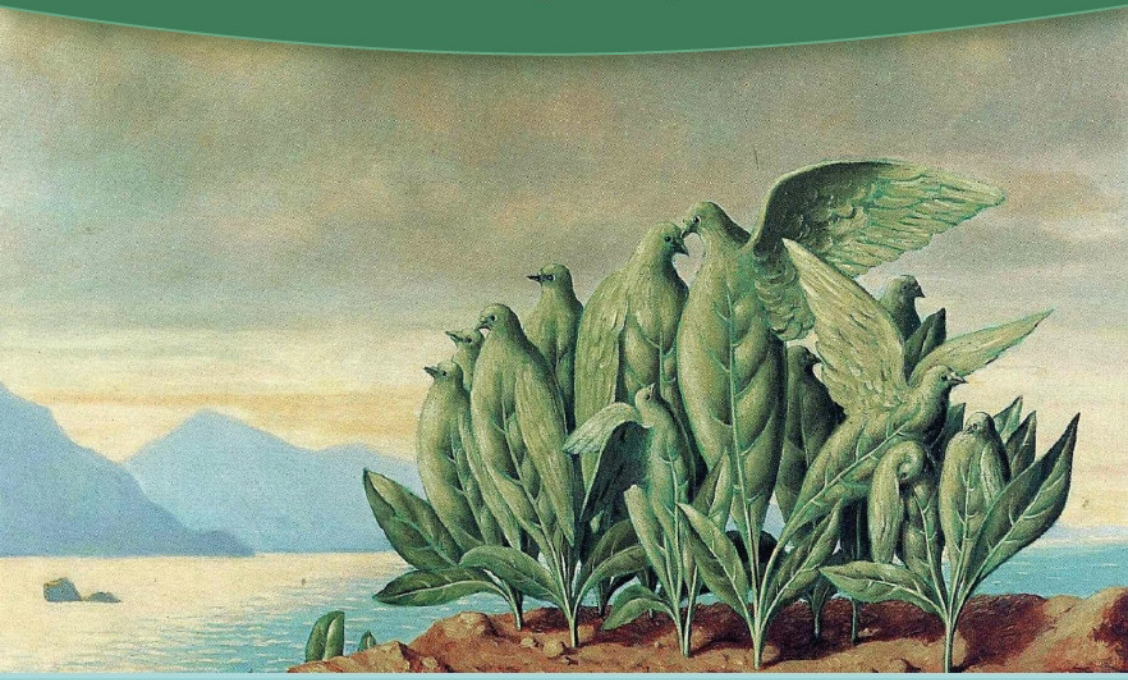
PROTECTION OF ENVIRONMENT: INTERACTION BETWEEN INTERNATIONAL AND NATIONAL LAW

Proceedings of the Roundtable Discussion
XVI Blischenko Congress

Moscow, April 14th, 2018



Moscow
Peoples' Friendship University of Russia
2019

PEOPLES' FRIENDSHIP UNIVERSITY OF RUSSIA
(RUDN UNIVERSITY)
LAW INSTITUTE
Department of International Law

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Edited by
Aslan Abashidze, Natalia Emelyanova, Aleksandr Solntsev

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Материалы представляют собой сборник выступлений участников круглого стола «Защита окружающей среды: взаимодействие международного и национального права», проведённого на английском языке в рамках XVI Международного конгресса «Блищенковские чтения», состоявшегося в РУДН 14 апреля 2018 года. Издание отражает исследования по актуальным международно-правовым проблемам известных и молодых учёных-правоведов, которые будут интересны для преподавателей, научных сотрудников, аспирантов и студентов юридических вузов, практических работников и всех интересующихся актуальными проблемами современного национального и международного экологического права.

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The edition is a collection of papers of the participants of the Roundtable Discussion "Protection of environment: interaction between international and national law" conducted in the framework of the XVI International Congress commemorating professor Igor Blischenko held in the Peoples' Friendship University of Russia (RUDN University) on April 14, 2018. These proceedings contain research works of well-known and young legal scholars on current international legal problems, which will certainly be useful for professors, researchers, students of law schools and Ph.D. students, practitioners and everyone interested in contemporary issues of modern national and international environmental law.

Moscow
2019

FOREWORD

The scientific school of international law of the RUDN University, which is based on the potential of the International Law Department of the Law Institute, is multifaceted like the system of international law itself and covers many branches and fields. Among them stands out the environmental field, the regulation of which by international law is constantly evolving. This area of international legal regulation appeared in its full scope in the curriculum of the international law department of our University in the 1980s in the form of a special course called "international environmental law". A pivotal role in this process was played by prof. Mikhail Nikolaevich Kopylov (1955–2016). Under his leadership, students and graduate students from various regions of the world defended their theses in this area, and today they continue developing science or implement in practice specific environmental projects.

Employees of the department continue to multiply the potential of the scientific school of international law of the RUDN University and expand environmental law research. Particularly, this is confirmed by the publication of a series of textbooks, which include texts of major international environmental acts with comments[1], that are actively used in the educational process and other scientific publications[2].

[1] A.K. Abashidze, A.M. Solntsev, F.I. Sotnikov. International environmental law: Collection of documents. Vol. I. Principal documents of the UN. Moscow: RUDN, 2007. 114 p.; A.K. Abashidze, Y.G. Vasiliev, A.M. Solntsev. International environmental law: Documents and comments. Vol. II. Protection of the environment during armed conflicts. Moscow: RUDN, 2009. 103 p.; A.K. Abashidze, Y.G. Vasiliev, A.M. Solntsev. International environmental law: Documents and comments. Vol. III. Environmental human rights. Moscow: RUDN, 2010. 220 p.; A.K. Abashidze, A.M. Solntsev, A.V.

Today, the department is considered to be one of the centers for the study of international legal aspects in the field of ecology, climate and alternative energy. The department initiated entry of the RUDN University into the Academy of Environmental Law of the International Union for Conservation of Nature, and is now responsible for cooperation between RUDN and the Academy[3]. Collaboration has been established with the European Forum on Environmental Law[4] and the Interest Group of international environmental law of the European Association of International Law[5].

On an ongoing basis, a separate section devoted to the study of international environmental issues works in the framework of the international congress "Blishchenko Congress". The XVI International Congress also was not an exception - its results have been published in five parts. An innovation in 2018 was the fact that the section entitled "Environmental Protection: Interaction of International and National Law" was held in English. Professors, graduate students and students from the Netherlands, USA, Iran, Nigeria, Colombia, Guinea, Bulgaria, Kazakhstan and various cities of Russia (Moscow, St. Petersburg, Saratov, Tambov) took part in this

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Kodolova, D.A. Kruglov, N.A. Petrova. International environmental law: Documents and comments: textbook. Vol. IV: International legal protection of the atmosphere, including the ozone layer and outer space. Moscow: RUDN, 2018. 514 p.

[2] See, for example: A.M. Solntsev. Protection of environmental human rights: textbook. 2nd ed., revised and extended. Moscow: RUDN, 2015. 468 p.; A.M. Solntsev. Modern international law on the protection of the environment and environmental human rights. Monograph. Moscow: Publishing house "LIBROCOM", 2015. 336 p.

[3] https://www.iucnael.org/en/our-members/eastern-europe-a-central-asia/267-peoples-friendship-university-of-russia.

[4] https://www.eelf.info.

[5] https://esil-sedi.eu/interest-groups/environmental-law/.

section. The keynote speaker at the section was Marian Peters, Professor of the University of Maastricht (the Netherlands)[6].

The forum organizers have no doubts about the growing popularity of this section, whose agenda is distinguished by the discussion of topical environmental issues at the international and national level. There is no doubt that this section will be replenished with new participants who are interested in the agenda, but have not yet actively participated in the work of the section.

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[6] A.M. Solntsev. Marian Peters: Modern environmental law: view from the Netherlands. Interview with Marian Peters – Ph.D., professor of environmental policy and law at Maastricht University (Netherlands) // Eurasian Law Journal. 2018. N 7. P. 12–17.

XVI BLISCHENKO CONGRESS

April 14, 2018. Moscow, Russia



Section: Protection of environment: interaction between international and national law

CURRENT STATE AND TASKS OF LEGAL REGULATION OF THE AGRO-INDUSTRIAL COMPLEX OF THE REPUBLIC OF KAZAKHSTAN

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Providing food supplies has long been one of the most important directions of human activity, and with the emergence of the state, the task of food security has become one of the strategic directions of its activities, part of economic security, which is one of the most important components of overall security, along with military, environmental, energy and other spheres of life and activity of mankind.

Despite the development of scientific and technological progress, the development of new land areas for agricultural production, the overall increase in production, the issue of food supply in many regions have not been resolved yet.

As researchers often point out, the first statement in the modern era that all human beings are born with an inalienable right to food is usually attributed to Franklin Roosevelt, President of the United States of America, which he made in his speech in 1941.

Thus, Article 11 of the International Covenant on Economic, Social and Cultural Rights of 1966 recognizes “the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The

States Parties will take appropriate steps to ensure the realization of this right…"[1]

In the second paragraph of the article of this International Covenant it is noted that "The States Parties to the present Covenant, recognizing the fundamental right of everyone to be free from hunger, shall take, individually and through international co-operation, the measures, including specific programmes, which are needed:

a) To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources; and

b) Taking into account the problems of both food-importing and food-exporting countries, to ensure an equitable distribution of world food supplies in relation to need"[2].

Established after the war, the Food and Agriculture Organization (FAO), an international organization under the auspices of the United Nations, which includes virtually all countries of the world, in one of its documents notes that "the global level of food and nutrition security has declined and remains a serious threat to national and international peace and security. Currently, over a billion people suffer from constant hunger, that is, 15% of the world's population. This number includes about 150 million people plunged into the abyss of hunger as a result of a simultaneous sharp rise in food prices and the global financial and economic crisis. However, the magnitude

[1] Implementation of the right to food is the challenge of the XXI century in the field of human rights. - Food and Agriculture Organization of the United Nations (FAO) Viale delle Terme di Caracalla 00153 Rome, Italy. – P.3 // http://un.by/f/file/WFDLeaflet2007R.pdf.

[2] International Covenant on Economic, Social and Cultural Rights (New York, December 19, 1966) // http://www.un.org/ru/documents/decl_conv/conventions/pactecon.shtml

of the famine also grew during periods of low food prices and stable economic growth[3].

At the regional and national levels, considerable efforts are also being made in the sphere of combating hunger and malnutrition, ensuring a decent level of food provision for the population, taking into account its historically established traditions and modern scientific requirements

According to LL.D. A.Abashidze, the head of the International Law Department of the Faculty of Law of RUDN University (Peoples' Friendship University of Russia), Vice-Chairman of the UN Committee on Economic, Social and Cultural Rights, "every year 14 million people die of starvation, including 6 million children; more than 3 million people die annually from water-borne diseases. The reason is the lack of access to clean water for more than 1 billion people"[4].

The right to food implies comprehensive activities of the state to ensure the country's food security, and first of all - to prevent hunger and malnutrition, to provide all the inhabitants of the country with affordable, high-quality food and drinking water.

As it follows from official sources, Kazakhstan occupies the territory of 2 million 724.9 thousand square kilometers, is on the ninth place in terms of area in the world. In the north and west, the republic has common borders with Russia - 7,591 km, in the east with China - 1,783 km, in the south with Kyrgyzstan - 1,242 km, with Uzbekistan - 2,351 km and Turkmenistan - 426 km. Kazakhstan is one of the world's top ten grain exporters and is one of the leading exporters of flour. 70% of arable land in the north is occupied by grain and industrial crops - wheat, barley and millet. Rice, cotton, and tobacco are grown in the south.

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[3] Global Food Safety Management //http://www.fao.org/fileadmin/templates/wsfs/Summit/WSFS_Issues_papers/Issues_papers_RU/WSFS_Global_R__LR.pdf

[4] A.Kh.Abashidze. Acting speech at the meeting of the Academic Council of the Peoples' Friendship University of Russia dedicated to the Day of Russian Science. – February 20, 2012.

Kazakhstan is also famous for its gardens, vineyards and gourds. One of the leading areas of agriculture is livestock[5].

Further success of innovative development in the sphere of agro-industrial complex (AIC) requires coordination and efficient allocation of certain resources at all decision-making levels. However, not all states with low profitability are always able to guarantee the effective functioning of the innovation system[6]. Valuable in the implementation of the innovation system in the AIC is the connection with science and the creation of innovations, their use in production, the organization and modernization of innovative activities in various spheres of management and the formation of the legal mechanism of the innovation process.

Analysis and evaluation of agricultural activities are important, since the implementation of the agrarian innovation complex affects the activities of all agriculture. The traditional indicators of the evaluation of agriculture are growth rates and productivity[7].

In the long-term goal of Kazakhstan on improving the efficiency of the agro-industrial complex, the issues of its intensification on the basis of scientific and technical progress, structural reorganization of the economy of agriculture, expedient forms of management, organization and stimulation of labor take the leading place.

The Road Map program is aimed at developing the export potential of domestic products, as well as ensuring full maintenance of the domestic market. As part of this program, small and

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[5] Republic of Kazakhstan // http://www.akorda.kz/ru/republic_of_kazakhstan/kazakhstan

[6] Philipp Aerni, Karin Nichterlein, Stephen Rudgard,Andrea Sonnino. Making Agricultural Innovation Systems (AIS) Work for Development in Tropical Countries // Sustainability. – 2015. – 7. – P. 831-850.

[7] Spielman D.J., Birner R. How Innovative Is Your Agriculture? Using Innovation Indicators and Benchmarks to Strengthen National Agricultural Innovation System; Agriculture and Rural Development Discussion Paper 41.

medium-sized farms are actively involved in agricultural cooperation, rational use of water resources is promoted, and measures are being taken to develop the trade and logistics infrastructure.

Kazakhstan is one of those countries that can simultaneously guarantee itself and develop the export of agricultural products. Therefore, the improvement of agrarian policy is always the basis of various state programs. The AIC of Kazakhstan is one of the leading reproductive spheres of the state economy, where about a third of the state's income is produced. One of the main tasks of the state is to support the agricultural sector, including the food market. In all developed countries, agriculture is mostly supported by the state.

Following independence, Kazakhstan, like other post-Soviet states, has begun to modernize the economy and reform all areas of the economy. Legal regulation of the AIC in the country is based on laws, Decrees of the Government of the Republic of Kazakhstan, Resolutions of the Ministry of Agriculture of the Republic of Kazakhstan. The main source of regulation of the AIC is the Law of the Republic of Kazakhstan "On State Regulation of the Development of Agro-Industrial Complex and Rural Territories" of July 8, 2005, No. 66-III LRK (as amended and supplemented as of June 15, 2017)[8].

Over twenty years of independence of the Republic of Kazakhstan significant results have been achieved in the AIC of the country:

• labor productivity and performance increased;

• renewal of fixed assets and renewal of infrastructure are carried out;

• self-sufficiency for essential food products is achieved;

[8] Law of the Republic of Kazakhstan "On State Regulation of the Development of Agro-Industrial Complex and Rural Territories" of July 8, 2005, No. 66-III LRK (with amendments as of April 28, 2016 (с изменениями на 28 апреля 2016 года No.506-V).

• the growth in grain export, oilseeds, fishery products increased significantly.

Currently, the Program for the Development of the Agro-Industrial Complex for 2017-2021 is being implemented, which contains a whole system of tools that create conditions for the development of agribusiness in Kazakhstan. These are such instruments of access to financing as guarantee and insurance of loans, investment subsidies and subsidies for interest rates on loans and leasing of agricultural machinery, subsidies in crop production and livestock.

International cooperation in this direction is important for our young independent country, including within the framework of such large international organizations as the WTO (World Trade Organization), interstate regional associations such as the EEU (Eurasian Economic Union), etc., since the natural and climatic characteristics of the countries of the world, their centuries-old experience in the production of a particular type of products, allow them to grow, produce and supply to the market often unique or, on the contrary, already widespread products demanded far beyond these countries.

The AIC of the Republic of Kazakhstan has good prospects for further development: the export positions of the oilseed and meat sectors are increasing, and for grain and flour, Kazakhstan has become one of the leading exporting countries in the world in a short time. Kazakhstan's membership in the EEU and the WTO (World Trade Organization) makes it possible and at the same time makes high demands on competitiveness in both the domestic and foreign markets, and the role of improving the legal regulation of the agro-industrial complex is currently relevant.

Since January 2015, the Eurasian Economic Union (including 5 countries and 182 million people) started functioning, in December of the same year the country became a full 162nd member of the World Trade Organization (WTO). Kazakhstan is already carrying out large-scale work to bring the national legis-

lation and mechanisms for the implementation of trade and economic policy in line with WTO norms.

Truly unlimited possibilities for the whole industry and agriculture of the country are opened with the introduction of a large-scale economic project “One Belt, One Road” initiated by the People’s Republic of China and involving more than 50 states of Asia, Europe and Africa in its orbit with openness for participation of the American continent countries and Australia in it, a project that affects the interests of almost the entire world. Kazakhstan has become a key transit state in transport rail and road transport in the project “Western Europe - Western China”, a third of which (about 3 thousand kilometers) will pass through the territory of our country. The states that come as investors to Kazakhstan, including the agricultural sector, can sell their products almost all over the world. This is quite feasible, because Kazakhstan has created an appropriate legal framework for investors, improves the legal regulation of the agro-industrial complex in accordance with the strategic tasks of the state development and taking into account the norms of international law.

OIL AND GAS EXTRACTION IN THE NIGER DELTA REGION OF NIGERIA: THE SOCIAL AND ENVIRONMENTAL CHALLENGES

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The extra abundant exploitation of petroleum resources from the Niger Delta region of Nigeria is increasing affecting the vast ecological balance of the total area and has created a serious social and environmental problems for the local's inhabitants, oil spillage is one of the major environmental challenges in Nigeria. Since the inception of the first petroleum industry in Nigeria, within the sphere of the Niger Delta. oil and gas extraction by multinational oil companies operating in the region has not only resulted in the destruction of farmlands, fishponds, forests and other natural resources of livelihoods, it has also led to diverse pollution of local sources of drinking waters such as rivers and streams.

Between the 1976 and 2000 a total of 6141 Environmental accidents recorded from oil industry in the region resulted in the spillage of approximately 3, 019, 465, 90 barrels of crude oil into the surrounding environment, rivers and streams, invariably polluting the sources of water for the people. A comparative environmental study carried out on three multinational oil companies operating in the region of the Niger Delta indicate that between 1991 and 2002, 3544 cases of environmental pollution were reported, resulting in the spillage of 355,809 barrels of crude oil into the environment.

Out of these incidents, production factors were responsible for 41.6%, sabotage/theft account for 35% followed by corrosion 19.9%. Other operational factors accounted for 1.7%, engineering related factors accounted for 0.4% and drilling contributed 0.4% of the oil spillage[1]. Sade to say most of these environmental accident emanating from the country oil industries end up gushing crude oil and other industrial effluents into soil and surrounding rivers and streams, upon which the local people depend on for their daily domestic consumptions. This paper will examine the social and environmental issues associated with oil and gas extraction in Nigeria, especially the incessant pollution of farmland and local sources of waters and make appropriate recommendations on how to cube the menace through adequate monitoring and appropriate legal framework.

The Niger Delta has substantial oil and gas reserves and is host to many multinational oil corporations from Europe, Asia and North America. Crude oil extracted from the area accounts for 95% of Nigeria's foreign exchange earnings and about 25% of Gross Domestic Product. The bulk of Nigeria's proven crude oil reserves [2], currently estimated at 37.453million barrels, are located in the region. Beside its great mineral wealth, the Niger Delta also has fertile agricultural land, forests, rivers, creeks and coastal waters teeming with fish and sundry water creatures. Clearly, the Niger Delta, at least for the moment, is the goose that lays Nigeria's golden egg (Okonta and Douglas, 2001). The large-scale exploitation of petroleum resources from the Niger Delta region of Nigeria has completely disrupted the ecological balance of the area and created serious social and economic problems for the local inhabitants. The World Bank (1995a: 81-82, 86) has attributed the social and environmental problems confronting the Niger Delta to three major factors. They include the arrival of the

[1]https://www.academia.edu/2478571/oil_spill_governance_in_the_niger_delta-nigeria_analysis_of_gaps_and_policy_recommendation

[2] http://www.opec.org/opec_web/en/about_us/167.htm

oil industry, population growth and the failure of government policies. The World Bank report argues that these three developments, in combination with other secondary developments they have stimulated, are together largely responsible for the present socio-economic and ecological situation in the Niger Delta.

The terrestrial portion of this zone I about 28,000km2 in area, while the surface area of the continental shelf is 46,300km2. Nigeria exercise sovereignty over its territorial sea which has its breadth up to a limit of 12 nautical miles; Nigeria has sovereign right in a 200 nautical mile exclusive economic zone (EEZ) with respect to natural resources and certain economic activities, and exercise jurisdiction over marine science research and environmental protection (UNCLOS, 1982). Nigeria's continental shelve extends from the shore to the b200m depth (CIA World Fact Book, 2005).

The Niger Delta, as now defined officially by the Nigerian government, extends over about 70,000 km2 (27,000 sq. mi) and makes up 7.5% of Nigeria's land mass. Historically and cartographically, it consists of present day Nine South-South State, Bayelsa, Delta, Rivers, Abia, Akwa-Ibom, cross River, Edo, Imo and Ondo States in the region. Some 31 million People of more than 40 ethnic groups including the Annang, Bini, Efik, Esan, Ijaw, Itsekiri, Ibibio, Isoko, Ikwerre, kalabari, Okrika, Ogoni, Oron, Yoruba, Urhobo, Ukwuani, are among the inhabitants of the political Niger delta comprising of about 250 different dialects.[3]

The Niger Delta, The South South geopolitical zone (which contains six of the states in Niger Delta) are two different entities. The Niger Delta separates the Bight of Benin from the Bight of bonny within the larger Gulf of Guinea.

[3] CRS Report for Congress, Nigeria: Current Issues. Updated 30 January 2008.

Figure 1, Map of Niger Delta showing oil and gas fields

The federal Government of Nigeria is, by law, responsible for the formulation of policies concerning the country's oil industry. To gain an insight understanding of what prevails within the oil sector, the policy and regulatory framework governing the oil and gas sector are examined in this section. Implementation practices are also discussed.

The focus of government's direction within the oil industry in Nigeria is outlined as follows:

1 Intensification of exploratory activities, both onshore and offshore, including the Lake Chad Basin

2 Increased oil production

3 Encouragement of gas gathering and utilization

4 Reduction of gas flaring and eventual abolition

5 Promotion of private sector participation, particularly by indigenous companies

To achieve these policy directions, the Nigerian National Petroleum Corporation (NNPC) has called for collaborative efforts between the public and private sectors of the economy. The

Chief Executive Officer has been quoted as saying: "the proper collaborative efforts between the public and private sectors of the economy would ginger up oil and gas exploration in the country, if all hands are on deck" (South-South Express Newspaper, July 30, 2002:5).

The areas identified for investment by the NNPC include domestic pipeline network expansion and the construction of another Liquefied Natural Gas plant. To encourage private sector participation, the Nigerian government has offered several incentives to investors. The incentives include tax holidays granted to oil companies under the Petroleum Profit Tax Act (PPTA). The Nigerian Presidential Adviser on Petroleum and Energy Matters has also stated that the objective of government regarding natural gas in the country is to end gas flaring, capture the economic value of gas, develop domestic markets for the product and address environmental issues associated with it (ibid: 5). The areas identified for gas utilization as part of the process of attaining these objectives are electricity generation, fertilizer blending, cement manufacturing and iron and steel production

The Impacts on the Ecosystem:

In terms of the threats posed by ecological liabilities of petroleum activities, the table indicates that in the states of Rivers, Delta and Bayelsa, significant acreages of the local ecology such as fresh water swamp forest, mangroves forest, and mangrove swamp, have been severely impacted by recurrent cases of oil spills in the region. Being an Eco zone rich in biodiversity with habitats for different life forms, the frequent spill incidents in these places threatens the carrying capacity of these natural systems and the social environment which the local community depend on[4]. Among the impacts within the states and communities,

[4] Ohimain, E. (2004). Environmental Impacts of Dredging In The Niger Delta. Terra et Aqua. 97:9-19.

Bayelsa experienced more oil spills on about 220 acreages of sensitive fresh water swamps and mangrove, followed by 105 in Delta and another 30 acreages of fresh water swamp in Rivers. The damage done by oil spill incidents impedes critical life support functions of these complex ecosystems, natural processes and ecosystem stability necessary for survival in the Niger Delta. Such impairments also occur at the detriment of adjoining communities especially those in the three states with more acreages of local ecosystem under oil spillage. The breakdown among the areas shows both Azuzuma, and Opuekebe in Bayelsa and Delta with 50 acreages of mangrove and barrier forest inland severally threatened while Rumookwurusi saw 20 acreages of its freshwater swamp laced with oil.

Environmental regulatory framework:

Various legal instruments have been enacted to regulate the oil and gas sector activities in Nigeria and their effects on the environment. Some of these laws have been in existence since the colonial era. Prominent among these was the Water Works Act of 1915 and the Public Health Act of 1917. The state government at the time also passed the Forest Law in 1956. With the attainment of independence in 1960, most of these laws ceased to have effect, since they were tied to the British Legal System (Okonta and Douglas, 2001:214). Since independence, some laws enacted that directly or indirectly influence operations within the oil industry are:

Key legislation:

The following are the key major pieces of environmental legislation:-

• National Environmental Standards Regulations and Enforcement Agency (Establishment) Act 2007 (NESREAA) and the 33 Regulations made by the Minister of Environment under

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Anyadiegwu, C.I.C. (2012 August-Dec). Overview of Environmental Impacts of Oil and Gas Projects in Nigeria. AFRREV STECH An International Journal of Science and Technology.1:3:66-80.

section 34 of the Act This statute was created under the 1999 Constitution of the Federal Republic of Nigeria (section 20) and repealed the Federal Environmental Protection Act 1988. The NESREA, the major federal body responsible for protecting Nigeria's environment is responsible for enforcing all environmental laws, regulations, guidelines, and standards. This includes enforcing environmental conventions, treaties and protocols to which Nigeria is a signatory.

- Environmental Impact Assessment Act (Cap E12 LFN 2004). This law sets out the general principles, procedures and methods of environmental impact assessment in various sectors.
- Harmful Waste (Special Criminal Provisions etc) Act (Cap H1 LFN 2004). This law prohibits the carrying, depositing and dumping of harmful waste on land and in territorial waters.
- Endangered Species (Control of International Trade and Traffic) Act (Cap E9 LFN 2004).This provides for the conservation and management of wildlife and the protection of endangered species, as required under certain international treaties.
- National Oil Spill, Detection and Response Agency Act 2006 (NOSDRA). The objective of this law is to put in place machinery for the co-ordination and implementation of the National Oil Spill Contingency Plan for Nigeria to ensure safe, timely, effective and appropriate response to major or disastrous oil pollution.
- National Park Services Act (Cap N65 LFN 2004).This makes provision for the conservation and protection of natural resources and plants in national parks.
- Nigerian Minerals and Mining Act 2007.This repealed the Minerals and Mining Act No. 34 of 1999 and re-enacted the Nigerian Minerals and Mining Act 2007 for the purposes of regulating the exploration of solid minerals, among other purposes.
- Water Resources Act (Cap W2 LFN 2004). This aims at promoting the optimum development, use and protection of water resources.

• Hydrocarbon Oil Refineries Act: The Act is concerned with the licensing and control of refining activities.

• Associated Gas re-injection Act: This law deals with gas flaring activities by oil and gas companies. Prohibits, without lawful permission, any oil and gas company from flaring gas in Nigeria and stipulates the penalty for breach of permit conditions.

• Nuclear Safety and Radiation Protection Act: The Act regulates the use of radioactive substances and equipment emitting and generating ionising radiation. In particular, it enables the making of regulations for protecting the environment from the harmful effects of ionising radiation.

• Oil in Navigable Waters Act: This is concerned with the discharge of oil from ships. It prohibits the discharge of oil from ships into territorial waters or shorelines.

These laws define the basis for obtaining approval to operate in the oil sector, set the standards within which the oil companies are to operate and the penalty and sanction that can be imposed for violating them.[5]

The National Effluent Limitation Regulation (1991), for instance, specifies the need to install anti-pollution equipment in factories, treat effluence before disposal and limit the level of effluence disposal into the environment. Cumulatively, it is observed that there are some 46 instruments regulating the petroleum industry in Nigeria (Civil Liberties Organization, 2001:5).

The key government institutions involved with the issues of oil exploration, production, marketing and social developments are the Federal Ministry of Petroleum resources (Department of Petroleum Resources) and the Nigerian National Petroleum Corporation (NNPC). The Department for Petroleum Resources is responsible for policy formulation within the industry and has an overall supervisory and monitoring role.

[5]https://uk.practicallaw.thomsonreuters.com/w-006-3572?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1

The NNPC is not the only organ of the government involved with oil and gas exploration, but it is the institution that manages the government interest in the oil industry. NNPC owns between 55% and 60% of the shares in all joint ventures partnerships with oil producing companies in the country. It also owns and manage the country's oil resources and joint ventures partnership with various indigenous marketers

NNPC has regulatory functions concerning the distribution and sale of petrol and allied products by issuing licenses, franchises and permits to dealer (Okonta and Douglas, 2001: 60). The Federal Ministry of environment and the Niger Delta Development Commission (NDDC) are indirectly related to the industry. The Federal Ministry of Environment is concerned with ensuring the effective management of the environment through the formulation of appropriate policies. The protection of the environment and other related issues have been clearly defined in various Acts, including the Environmental Impact Assessment Act of 1992.

The NDDC is charged with the responsibility of policy formulation, project planning and implementation, identification of factors inhibiting development in the Niger Delta and tackling ecological problems resulting from the exploration of minerals in the region (part 2 of NDDC Act). For purposes of understanding the effectiveness of policy implementation, it is important to identify other key stakeholders in the Nigerian oil sector.

As observed earlier, the rules governing the operations within the oil sector are based on provisions contained in various legal instruments, regulations and the Nigerian constitution (Okonta and Douglas, 2001). The reality is that most of these laws and regulations have not been adequately enforced. Ross (1999: 110) has observed that "companies and industries have a tendency of growing too large and powerful to the extent that they end up making the rules that they are supposed to obey and government agencies become captives of the very corporations they are supposed to regulate". However, the oil companies have

always maintained that they conform to national laws and policies and that the country benefits greatly from their operations.

They also claim to be performing their corporate social responsibilities in the communities where they operate. A message in one of the companies' website reads: "Nigeria is benefiting from Shell's approach to business. Operationally, it is gaining the latest technology. New techniques such as horizontal drilling, piloted in Oman and the North Sea, are increasing efficiency and decreasing the environmental impact of operations. Investment plans pay particular attention to environmental issues, an area we are committed to continuous improvement. Shell's contribution to sustainable development also includes being open about its performance and having its claims independently verified. The company believes it can play a part in building a better future" (culled from Shell's website). Contrary to the views expressed by Shell, the Group Managing Director of NNPC has revealed that "the lack of break-through in the nation's effort to transfer technology is partly due to the absence of cooperation from the multinational oil companies. The multinational companies domesticate technological know-how within the boundaries of their companies at the expense of the nation" (The Guardian, August 7, 2002: 7). This statement is a reflection of the real situation, which is why some civil society actors have always described the claims by the oil companies as mere public relations gimmicks. Having examined the policies and practices within the Nigerian oil industry, the next chapter will deal with the impact of oil and gas extraction on the people and environment of the Niger Delta.

Conclusion

Government's Inefficiency and Policy Failure:

Besides being guilty of failing to counteract these negative developments through adequate policies, the Nigerian authorities have also directly contributed to the disruption of the ecological balance in the Niger Delta. In the Niger Delta, there has been virtually no government planning of the oil industry and the infrastructure, neither had there been effective enforcement of envi-

ronmental regulations or efficient administration of natural resources. Oil production has generated a tremendous flow of revenue for the Nigerian government, but only a very small fraction of this has been allocated to sustainable socio-economic development of the Niger Delta (World Bank, 1995a: 53).

The Nigerian government has invested in the construction of a large number of dams in the region. However, the electricity these generate is largely used outside the region and the dams themselves have caused serious disruptions of the ecological balance in the Niger Delta. For these reasons, the World Bank has cited policy failures as one of the three primary causes of social and environmental problems in the Niger Delta. The shortcomings of the government, however, cannot be separated from oil and gas production. Firstly, the government has a definite economic interest in smoothening the way for oil production as much as possible. And secondly, important environmental laws enacted by the government are simply ignored by the oil companies. An important example is the Associated Gas Re-injection Decree of 1979, which obliged the oil companies to end gas flaring by 1984 at the latest. From that date, all non-saleable associated gas was to be pumped backed to the oil fields concerned. Because the oil companies refused to comply with this law, it was soon replaced by a paltry levy on each cubic metre of gas flared (Gelder and Moerkamp, 1996)[6].

[6] References: Akpofure, E.A., Efere, M.L. and Ayawei, P., 2000. The Adverse Effects of Crude Oil Spills in the Niger Delta. Urhobo Historical Society. Anonymous. 1999. ―Environmental degradation threatens Nigeria‖. Daily Mail & Guardian (Johannesburg, South Africa), August 12, 1999. Allen, J.R., 1965. Late Quaternary of the Niger Delta, and Adjacent Areas. Sedimentary Environments and Lithofacies. Burn K.A., S.D. Garrity & S,C. Levings, 1993. How many years until Mangrove Ecosystems Recover from Catastrophic Oil Spills? Oyem, A. 2001. Christian call for Action on Nigerian Oil Spill. Sage-Oxford's Christian Environmental Group. Ozekhome, M. 2001. Legislation for Growth in the Niger Delta, Midweek Pioneer GFRN.1999c. National Policy on the Environment, Revised Edition. Federal Environmental Protection Agency SPDC, (1996): People and the Environment. SPDC Annual Report. The Petro-

Involvement and consultation with locals to enhance transparency; greater civic society participation; strengthened systems of environmental laws; improved arrangements for international environmental monitoring and oversight programs; and a higher level of efficiency and equity in translating large national revenues into the improvement for the local, common welfare of the citizens. Empirical evidence suggest that without an effective government policies to protect the eco-system in line with modern best practices there may be no remarkable changes in the future during extraction of oil and gas in Nigeria.

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THE ACCUMULATED ENVIRONMENTAL DAMAGE (AED): RUSSIAN AND INTERNATIONAL EXPERIENCE

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The remedy of the accumulated environmental damage (AED) is an acute problem not only in Russian Federation, but it is an urgent problem all over the world. It is widespread in developed countries with opportunities to finance the elimination of AED more than in the countries of the third world; (many third world countries have lack the economic capacity and flexibility to react in short terms on such a problem instead of reacting to AED the current problems of the existing environmental harm when possible). European countries are more active in this sector. Mostly they have formed a concept of and developed measures to eliminate it, established by implementation in law and consistently put into practice.

Let's study the experience of some countries in this area.

First formulated in 1972 by the Organization for Economic co-Operation and Development "The polluter pays principle" is applied by many countries to current and AED.

The question is in the distribution of general and financial responsibility for the elimination of past environmental damage.

In most legislation of different countries it is reflected that the main responsibility is on the current owner (operator) of the polluted object. But also the law provides the possibility of extending the liability to previous owners or any other person who contributed to the formation of pollution at one or another time.

United Kingdom's legislation determines that initial polluter always pays for AED.

In Denmark the polluter-pays principle is implemented regardless when the pollution has occurred. Thus the law In Denmark became retroactive.

But also in Denmark depending on the type of pollution it may also be assigned to the owner in case of oil and chemical pollution after some period of time (1972 and in other cases after 2001 the liability is on the polluter).

In The Netherlands pay both, the polluter and the current owner. They are required to clean an object and repair the damage.

In USA and in Poland the responsibility is on the actual and real owner. In Belgium – an actual owner, but if an object was purchased after 1995 года, then - on the basis of proven guilt.

In Bulgaria the responsibility is also on the owner but can be lad on manager of the property after privatization. If the AED is established after privatization, the damage is compensated by the state for the period before privatization.

In this regard, the experience of the United States is particularly worth because in accordance with the legislation of USA the company or its successors under any circumstances can not be exempted from liability AED the occurrence of which they even only could contribute.

In Germany the owner and operator of the object are obliged to carry out soil remediation and clean up contaminated areas, including surface waters and groundwater.

Russian legislation (in the Civil Code[1] and in the Land Code[2]) has norms providing compensation of harm by two ways - compensation for damage in money and compensation in kind.

[1] Ст. 1082 ГК РФ от 26.01.1996 № 14-ФЗ // СЗ РФ. 29.01.1996. № 5. Ст. 410.

[2] Ст. 62 ЗК РФ от 25.10.2001 № 136-ФЗ // СЗ РФ. 29.10.2001. № 44. Ст. 4147.

Also compensation for damage within the court's decision in kind may be obliged to perform reclamation work at the owner's or operator's of the object own expense.

Unfortunately Russian legislation doesn't have provisions about reclamation work with surface water and groundwater.

By my opinion, after all the changes in the legislative, the corresponding norm should also be enshrined in Russian law.

On the other hand there are countries with laws determining time before which liability cannot be imposed on current owners, or rules to determine the nature of liability (strict liability or fault-based liability if found guilty), when the situation was almost impossible to foresee. Such legislation is in Denmark and Netherlands.

Regardless of the type of pollution, there are countries where liability is be imposed on the owner, like in Canada, where the refund is current owner's due.

However, in most countries, the transfer of responsibility (in whole or in part) occurs together with the transfer of ownership.

This approach is based on the assumption that the buyer was able to obtain information about AED. Since he purchased the property, he agreed to purchase it in a polluted form, and that did not affect the fact of purchase but could affect or affected only the price of the property, which could be reduced under this transaction.

Real estate transactions in the UK are based on the principle that quality is at the risk of the buyer. This means that the buyer may be held liable for damage caused to the subject matter of the transaction as a result of hazardous activities, unless the subject matter has been thoroughly examined prior to the transfer of ownership. Also the seller and the buyer have the right to determine the responsible person themselves, including it in the sale-contract.

In Germany the person or its legal successor is responsible for the pollution. If the property was transferred to the new own-

er, the former owner was obliged to perform reclamation work at his own expense.

However, transactions may involve retaining responsibility for the seller or a third party paying compensation to limit the buyer's liability.

There is the same rule of law in Russian legislation. The Civil Code of Russian Federation provides an a right and opportunity of the parties of the contract to fix any provision in the contract which are not contradicting the legislation of the Russian Federation[3]. However, in practice such contracts do not contain provisions about the responsibility from AED and concerning objects of AED.

While privatization the state often retains some financial responsibility for damage caused by already closed or restructured industrial facilities in Central European countries. This often happens when the previously used areas in the cities are rebuilding, the government provides financing or guarantees support with AED, hindering the development of the land plots, which represent the public interest.

In Germany under such contracts a compensation may be partial or full.

The environmental protection act of 1990 in UK defines different regimes for the management of polluted areas with a view to identifying and reducing environmental risks associated with harm to human health and the environment to a normative level within the definition of contaminated land. The owner of contaminated land plot is obliged to eliminate the existing pollution at his own expense.

The responsibility for AED is laid on the first polluter, the original one.

Particular attention should be paid to the experience of Germany, where the rehabilitation of abandoned polluted industrial zones has become an integral part of the urban planning pro-

[3] Ст. 1 ГК РФ от 26.01.1996 № 14-ФЗ // СЗ РФ. 29.01.1996. № 5. Ст. 410.

cess, with the state taking a precautionary approach and taking rehabilitation measures in advance, seeking to attract the necessary investment for the re-development of territories. The state can create a public-private partnership with the developer, acting through a local state organization that rehabilitates the object, and then sell it.

There is a law requires those who pollute or may pollute the soil, as well as land owners, to take measures to reduce the risk of pollution, including actions to reduce the concentrations of pollutants in the soil. The law also provides standards aimed at reducing pollution, rational use of land and the elimination of present pollution which is connected with AED.

Russian legislation has laws prescribing to abide environmental legislation to reduce the harmful effects, but this is a general rule[4].

Poland's experience has particular value as an international precedent in economic instrument concerning objects of AED.

If the problem of AED is related to privatized enterprises, which in fact continue to carry out previous activities, applying the same environmental practices, responsibility for AED legally can be assigned (partially or fully) to the current operator or the owner. However, the new owner could radically change the practice or technology, and then, if he prooves it, the responsibility for AED would be divided between the current and the previous owner. Finally, if the AED is linked to an existed situation before the privatization, it refers to a past period and can be considered without any connection with the AED assigned to the current operator.

As in Poland, where the owners of privatized enterprises were given a one-time opportunity within three years after the introduction of the relevant law to apply for exemption from liability for past environmental damage (AED in fact) that had been

[4] Ст. 15 Конституции РФ (принята всенародным голосованием 12.12.1993) // СЗ РФ. 04.08.2014. № 31. Ст. 4398.

occurred before the law came into force. Otherwise, they took responsibility for all past environmental damage caused by objects that are in their ownership after the introduction of the relevant law.

Based on the results of soil analysis, recommendations can be developed on the possible functional use of land plots that have been exposed while economic activity. Soil pollution data are also the basis for measures to protect the rights of land owners or tenants and investors.

But it can be done only in the ratio of adopted legislative acts and other measures of authorities, such as monitoring, registration, entering into registers and others.

Authorities are obliged to carry out an analysis of the soils on which there are signs of presence of pollutants or there is a suspicion that such substances remained after industrial activity. The results of the studies are evaluated for possibility of the subsequent imposition of punishment.

In some countries, for example Germany, if additional studies do not reveal contamination, the legislation provides the possibility of compensation of costs of previous examination.

The results should be collected together in a unified register, thus it would contain all necessary information about the land plot, including its location, size, category of land, land rights, quality of the soil, degree of pollution and the pollutants in the soil, as well as landscape features, the presence of subsoil cavities, characteristics of groundwater.

It is need to know the history of this land plot since its allocation afrom the common land and formation as an individual object, all prior transactions to make conclusions of the site itself and nearby object's features, especially of industrial use, which may affect the ecological situation in the region in hole and the land plot itself especially in correlation to AED.

Such information, combined in a unified state register, should be opened and be in a free access, to ensure its transparency to eliminate the possibility of its doubling and existence of

“black holes” - the lack of information or even the absence of information at all about the land plot (Russian Federation has faced such a problem). The registry should collect federal, regional and municipal information, indicating the category of land, current owner and previous owners of the land plot and the degree of its discharge indicating the contaminants, for the AED could be seen.

Most European countries developed a national information system with the information about territories. And it is considered a mandatory element of any comprehensive government initiative and a starting point for the quantitative assessment and prioritization of practical responses on the ground. May be it is one of the first combined measures for elimination of the AED and further possibility of imposing the sanctions for the AED.

Such registries and lists may take many forms, varying degrees of complexity and practicability.

In the United States, for example, there is a national list of priorities, which relates to a set of normative legal and financial principles, as well as a supporting system of state-level registries. It may be the registration system related to the transfer of land titles, both in the UK or the branch registers.

For example in Germany this system consists of three information subsystems, including the information system for contaminated areas and the information system for soil conditions. The German environmental information network allows users to search all information databases, including the sites of Federal agencies and Federal governments. So in the environmental information network one can see all information about the necessary land plot.

Unfortunately, in the Russian Federation two registers - land and real estate were joined not so long ago and now we have «The unified state register of real estate»[5].

An interesting fact is that in execution of orders of Russian President and the Prime Minister there was a completion of works on carrying out inventory of AED-objects in 2014[6].

According to the Federal law «On environmental protection»[7] the Government of the Russian Federation decided to approve the enclosed rules of maintaining the state register of objects of the AED. It was made in April 2017[8].

The state register of AED-objects is maintained by the Ministry of natural resources and ecology of the Russian Federation on the basis of materials for the identification and assessment of objects.

It is a big plus and a positive practice in maintaining of «The state register of AED-objects». It includes consideration of materials of identification and assessment of objects, making decision on inclusion the objects in the state register or refusal in inclusion of objects in the state register, categorization of objects and updating information.

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[5] Федеральный закон от 21.07.1997 № 122-ФЗ «О государственной регистрации прав на недвижимое имущество и сделок с ним» (утр.силу) // СЗ РФ. 28.07.1997. № 30. Ст. 3594.

[6] Приказ Росприроднадзора от 08.10.2014 № 619 «Об отмене приказа Росприроднадзора от 25.04.2012 № 193». Документ опубликован не был. ПС «Консультант Плюс».

[7] Федеральный закон от 10.01.2002 № 7-ФЗ «Об охране окружающей среды»// СЗ РФ. 14.01.2002. № 2. Ст. 133.

[8] Приказ Минприроды России от 04.08.2017 № 435 «Об утверждении критериев и срока категорирования объектов, накопленный вред окружающей среде на которых подлежит ликвидации в первоочередном порядке». Официальный интернет-портал правовой информации http://www.pravo.gov.ru, 29.11.2017 (дата обращения 17.04.2018 г.);
Постановление Правительства РФ от 13.04.2017 № 445 «Об утверждении Правил ведения государственного реестра объектов накопленного вреда окружающей среде» // СЗ РФ. 24.04.2017. № 17.Ст. 2568.

Obvious disadvantage is that registration of real estate, as well as the creation of the Unified state register of real estate and the unified accounting and registration system (now it is The unified state register of real estate) has no data from The state register of AED-objects and they are not connected. It is a minus for a possible buyer or current owner or other user of the object and in the end – to the state.

So a common feature of international experience in solving the problem of AED is the development of the accounting and ranking system of AED-objects (database), which usually exists in the form of a register of contaminated sites.

A national information system of the territories allows quickly collect, present and analysis data on the use of soils, their quality, degree of pollution and chemicals.

After acquisition of the land plot the responsibility for AED could be assigned to the person who acquired the land plot as this person could and had to check AED-information of the land in information system.

That's why, for example, Germany law establishes responsibility of the relevant Federal authorities for registering, inspecting and assessing the risk of contaminated or abandoned land; there is the right of recovery of costs of survey of territories with individuals whose activities have led to pollution. And it is the basis to decide on the nature and extent of the remediation work on a case-by-case basis, depending on the present and future use of the land as well as on who or what is affected by the pollution.

What else should we do. The financing of remediation (clean up) of contaminated areas has to be laid on the private sector. Thus, we should work out norms, establishing that. State funds should be used only for the rehabilitation of territories whose pollutants are either impossible to identify or insolvent.

In most high-income countries, the government often undertakes the obligation to allocate substantial financial resources for rehabilitation land over a long period. Usually, such funds are used to settle situations where the responsible party is the state

and where there are no real responsible parties (ownerless objects) or in a sector with the society or state interests.

Also it would be a good initiative if a state assumed the initial costs of cleaning up the territory if the situation requires immediate action and then recovered money through a court by a claim and the court's decision on the recovery of funds in recourse.

Also the role of the Federal government in the remediation of such territories should be legislatively limited within the organization of measures to clean up areas of hazardous waste buried until some period of time. Up to my mind for Russian Federation this period should be determined in legislation up to the USSR-historical period, because land had been state property at that period of time. Afterwards the remediation of contaminated areas with AED should be only from the private sector. In the case of the elimination of AED, the liability for the costs of remediation and the applicability of the various laws depends on when the disposal of hazardous (harmful) substances has ceased. Despite this, public authorities have the right to invest in cleaning up the area or to suspend or completely stop work at such facilities and oblige the operator to pay the costs of the territory's remediation.

There is an example of Germany's approach, where the state allocates funding as a means of supporting technological and methodological development, especially in order to assist in the re-development of previously used areas when it become a social objectives in rural areas.

In the countries of Central Europe, the system of financing the elimination of AED is not well developed, but it seems that it is developing in the same direction as in other European countries. In General, they also state that the private sector should fund the work to eliminate the AED for which it is responsible. While recognizing the general acceptance of customary obligations by the state, they do not have a common strategy as in Russian Federation or general funding for the systematic implementa-

tion of rehabilitation measures, although in some cases such examples can be found. One of them is investments, financed by the national property Fund for the purpose of reclamation of the territory of a large chemical plant «Spolana» in Czech Republic[9], because it could cause a serious threat of transboundary pollution on the river Elbe.

By the legislation of most countries (and in Russian Federation) the responsibility in hole can be individual or joint, just the same in particular AED-responsibility that can be shared and individual.

If the share of participation in the violation can be identified the compensation will correspond to the degree of violation, if it is impossible to prove the degree of participation of the person, they are involved in equal shares in monetary compensation for caused damage and AED.

At the same time, if the AED increased after the other person's usage the executive authorities can attract this persons and impose a duty of partial reimbursement or to speed up the reclamation of the territory.

The problems we will face are next. First – criminal action or omission connected with environment are latent and proving the connection between person's action or omission and AED is problematic. Second is to calculate the damage caused by a person and predecessors for the correct imposition of liability for compensation and remedy.

Also Russian legislation should have a rule of law providing that in the absence of the owner, occurred the contamination, the responsibility would go to the current owner or operator (and it is connected with the regulating the waste as a property and the remedy of AED as the ensuing obligation of the owner). If the perpetrators of the pollution were several, the responsibility for eliminating the pollution can be assigned to the one who initiated

[9]http://www.greenpeace.org/belgium/Global/belgium/report/2002/8/corporate-crimes.pdf . P. 53, 55 (18.04.2018).

the dangerous activities. An alternative would be to allocate responsibility among all pollutants.

In conclusion, the AED is one of the market's failures because it has negative external effect of economic activity. It is a failure of the state, because enterprises operate on the basis of state permission for environmental pollution (legislative or silent), because there is no economic development without damaging the environment and AED at last, the activities of the state should be directed to reduce of AED, but the government is afraid of possibility of negative economic development, and because of large financial injections, but they will be environmentally paid off.

In case of liquidation of AED due to the state budget account with a delay in time, its cost is not taken into account in the profitability of a particular enterprise. But the need to eliminate the AED reduces the efficiency of the national economy as a whole, which must be taken into account in macroeconomic calculations. Unfortunately, the introduction of «green» indicators of economic efficiency will compel enterprises to effectively reduce the harmful impact on the environment and will increase environmental efficiency and sustainability of the national economy in the long term afterwards. Therefore there should be an integrated conception on the AED for that.

But there is no integrated conception of the on the AED and its remedy in Russian Federation now. There are individual laws include several legal institutions, but they are not integrated in a unified conception which it only begins to form and still in the process of being formulated.

Instead of that, there is an institute of remedy of the past or AED in Russian legislation, but it doesn't work as it should.

Financial means for the remedy of environmental damages named accumulated damage should therefore be given by the state according to the privatization law and other regulations.

One of the effective ways to make negative affect lower (to reduce it) is effective legislation and to establish good-working

sanctions in legislation. Russian law has a determination of the AED, as most of European countries do, but not third world countries, but it is necessary to consolidate the definition for the further conception and to know what we should protect ourselves from. Also legislation should be divided into laws including particular sector where the damage is caused to determine the extent of the damage, its specificity and secondary legislation, bylaw, consolidating methods of calculation of the AED. In addition, we need to develop laws, prescribing sanctions and a mechanism for imposing liability with ensuring and in accordance with the principles of irreversibility of the punishment, as well as the obligation not only to compensate the damage in full, but also to restore the damaged object. These sanctions should form of high fines being imposed on a violator, but also there should be the mechanism providing not decelerating but the real imposition of sanctions for the violator been really punished.

THE ENVIRONMENTAL IMPACT ASSESSMENT (EIA) IN ANTARCTICA: INTERNATIONAL LEGAL ASPECTS

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The 2001 review of legislation implementing the EIA procedure by 25 Consultative parties to the Antarctic Treaty concluded that most countries (19 per cent or more than 75 per cent) had adopted some form of legislation to implement Annex I . At the same time, legislation implementing the Protocol has not yet entered into force in several States. The review noted significant differences in how the provisions of Annex I were implemented in different national legal systems: «on the one hand, some States have transposed the provisions of the Protocol (EIA) verbatim or without significant changes in their national legislation. On the other hand, a number of other States have adopted ad hoc provisional (or possibly semi-permanent) procedures». Ad hoc EIA procedures are in some cases based on existing national EIA legislation and applied by national Antarctic authorities. This has led some States (e.g., Italy) to apply EIA in the absence of legislation on the implementation of the Protocol.

For Contracting parties that have adopted comprehensive legislation to implement Annex I at the national level, the EIA process differs from state to state.

In accordance with recent decisions of the Antarctic Treaty Consultative meeting (ATCM), the information exchange system has become centralized. Instead of exchanging information between Contracting parties, States parties should now load the

necessary information into databases maintained by the Secretariat. Resolution 1 of 2005 established additional requirements for the dissemination of information on the EIA procedure. Thus, governments are required to provide the Secretariat with a list of Initial environmental assessments and Comprehensive environmental assessments prepared by them or submitted by them to the ATCM between 1 April of the previous year and 31 March of the current year.

It is obvious that since 1991 (the year of signing the Protocol) there has been a regular increase in the number of EIA processes that have been conducted annually since 1991. The average number of EIA processes per year doubled from almost 20 during the period 1991-1997 to over 40 during 1998-2005.

Some Antarctic values, such as aesthetic values and in relation to primeval nature, are usually considered rather superficially in EIA. However, historical values do not usually fall within the scope of the EIA procedure. This situation is quite surprising, given the richness of the Antarctic cultural heritage.

The lack of attention to the actual or potential cultural heritage of the region in the EIA procedure leads to the risk of damage or even disappearance, for example, in waste management activities. In these cases, the Antarctic EIA procedure would be essentially inattentive to the historical value of the region.

However, in some cases, domestic legislation provides additional protection for the cultural heritage of Antarctica, and this has also been reflected in the EIA procedure.

Some aspects of the EIA process, such as mitigation measures and monitoring, may take place in Antarctica itself. However, Antarctic activities usually take place in remote locations and can only be known to the proponent. Subsequent reports are therefore useful for providing this information. Resolution 2 of 1997 sets out the reporting requirements for a Comprehensive environmental assessment. The Resolution adopted a follow-up process to the Comprehensive environmental assessment, including an analysis of whether and how activities, regardless of the

application of mitigation measures, had been carried out, and whether the results of those activities had been projected. In addition, the resolution recommended that Parties «record any changes in the activities defined by the Comprehensive environmental assessment, the causes of the changes and the environmental consequences of such changes».

However, there is insufficient information on how the EIA process continues after the EIA document has been submitted.

In the absence of subsequent Initial and Comprehensive environmental assessment reports, official inspection reports provide an indirect means of assessing the practical aspects of compliance with the EIA process during these activities. Article VII of the Antarctic Treaty and article 14 of the Protocol allow the Antarctic Treaty Consultative parties to carry out inspections to promote the objectives and ensure compliance with the provisions of the Antarctic Treaty and its Protocol.

On the one hand, the ANTARCTIC EIA system demonstrates similarities with other EIA systems (existing or under development). Thus, for example, the purpose of the EIA procedure is similar, the EIA requirements apply to both governmental and non - governmental activities, and the boundary of the obligation to conduct a Comprehensive environmental assessment is «more than a minor or temporary» impact. The latter terminology stems from the term «significant impact». Furthermore, the requirements for the content of a Comprehensive environmental assessment are similar to those for EIA under the Espoo Convention and other EIA systems.

On the other hand, however, the Antarctic EIA system shows some interesting characteristics that differ significantly from other systems. Let's start with the fact that EIA is required for all activities covered by the Protocol, there were three levels of EIA: initial and comprehensive. Rather than operate on an exclusive or indicative list of activities that may have more than minor or temporary (significant) effects, any activity should be evaluated on a case-by-case basis.

The ANTARCTIC EIA procedure is unique not only in theory but also in practice. Most Contracting parties to the Protocol are making serious efforts to incorporate the provisions of the EIA procedure into their domestic legal systems. Although States have adopted different approaches in this implementation process, there is considerable EIA practice for activities in Antarctica. Since the adoption of the Protocol, more than 400 Initial environmental assessments and 21 Comprehensive environmental assessments have been prepared, mainly for research, logistics and tourism.

However, as in other EIA systems, the Antarctic EIA is in the process of learning. The notion of «minor or temporary impact» remains elusive: there seems to be no political will to define it further, meaning that decisions on the level of the EIA procedure are made on a case-by-case basis and remain at the discretion of the state conducting the EIA. There are still differences in the degree of EIA required by different States for certain activities. In some cases, the level of the required EIA procedure has decreased, so that, for example, the permanent infrastructure has been assessed as having no more than «minor or temporary impact». As a result, the number of Comprehensive environmental assessments prepared so far is very low, and therefore certain activities are not covered by the necessary international control under which they could or should have fallen.

Initiatives may be developed in the future to improve the quality of the EIA procedure and to promote some degree of harmonization or compatibility of state practice. For example, the ATCM could adopt more detailed guidelines for the EIA procedure on some issues, based on comparative studies of EIA practice and taking into account the conclusions on EIA in inspection reports. In parallel with the consultations on the draft Comprehensive environmental assessment, Contracting parties could also facilitate the exchange of best practices on the Preliminary stage and Initial environmental assessment, for example, through the newly established informal discussion forum for Antarctic com-

petent authorities. Such informal discussions and sharing of best practices would also be useful in addressing some EIA issues that are currently receiving limited attention. Examples of such issues include the assessment of the impact of proposed activities on aesthetic and historical values as well as the values of primordial nature, the assessment of cumulative impacts, knowledge gaps and the application of the EIA procedure in Antarctic tourism. Improvements on these issues should take into account the positive and proactive approach of Contracting parties, The Committee on environmental protection and the ATCM with regard to the EIA procedure.

ENVIRONMENTAL IMPACT ASSESSMENT PROCESSES FOR OIL AND GAS PROJECTS IN NIGERIA'S NIGER DELTA

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The essence of this article is to examine the legislation and practice affecting the Environmental Impact Assessment (EIA) processes for oil and gas activities in Nigeria's Niger Delta. It expresses how EIAs have become a standard legal requirement for all oil and gas project in the Niger Delta region. This article also argues that not much has achieved in regards to managing environmental impacts resulting from oil and gas activities in the Niger Delta.

Introduction

Oil and gas exploration and exploitation has been ongoing since 1956 when crude oil was discovered in Oloibiri, Niger Delta region of Nigeria. Even though proceeds from crude oil has immensely increased the revenue of Nigeria and made her the biggest economy in Africa, the consequences of unsustainable oil and gas activities in the Niger Delta region have been catastrophic to the environment.

The Significance of Crude Oil and Gas to Nigeria's Economy

As of 2016, oil and gas exports generated more than 90% of export earnings and about 80% of federal government of Nigeria's revenue, as well as generating more than 10% of its GDP. It also accounts for more than 85% of foreign exchange earnings, and about 65% of government budgetary revenues. Nigeria's

proven crude oil reserves according to OPEC in 2016 is over 37 million barrels. These proven reserves make Nigeria one of the most petroleum-rich countries in the world. Nigeria's crude oil production averages around 1,900,000 in barrels per day in 2012 and has dropped to about 1,500,000 barrels per day in 2016.

Environmental Issues in the Niger-Delta

The Niger Delta region of Nigeria has been used frequently used as a case study when deliberating the effects of oil and gas activities on the Nigerian environment because all most all of Nigeria's oil deposits are located in the region often termed the "pride of Nigeria", and also, several oil exploration activities are been carried out in the area. With a population of approximately 30 million people clustered into several distinct tribes and ethnic groups, amongst which are Ijaw, Benin, Urhobo, Ogoni, Ibibio and several others. Particularly, people in this region rely on the ecosystem and its services for survival. Conversely, it is pitiful to state that in spite of enormous amounts of oil-generated income from the region, it is one of the most undeveloped and environmentally deteriorating regions in the world." Over fifty years of oil exploration and exploitation activities have left the Niger Delta's ecosystem severely contaminated. Although there is abundance of natural resource in the region, there hasn't been much positive health, social and economic impacts on the indigenous people dueling in the region. The Niger Delta has been characterized by multiple oil spills.

Oil Spills

It is estimated that in the past five decades about 9 million-13 million (1.5 million tons) of oil has been spilled into the Niger Delta ecosystem. In 2008 alone it was reported by Amnesty International that a total of over 100,000 barrels of crude oil was spilled in Bode, a community in Niger Delta region, even though Shell Petroleum Development Company (SPDC) put the figure at just 1600 barrels. Again, Amnesty International argued that even though figures on the website of SPDC had shown that between 2007 and 2014, an estimated 1693 incidences of spill occurred

and more than 350,000 barrels of crude oil spilled into the region, the actual volume of crude spilled was underestimated. The majority of the spill incidences in the Niger Delta occur on land, swamp, farmland, etc. And cause severe hardship to the inhabitants.

Gas Flaring

Flaring of gas is another environmental challenge experienced in the area. Gas has been flared in Nigeria's Niger Delta since the beginning of exploitation and exploration of crude oil in the 1950s. It has been recorded that Nigeria flares about 40% natural gas while more than 10% is been re-injected to enhance the recovery of oil. The estimated quantity of natural gas flared in Niger Delta is about 17.6 billion m^3 per year, this volume is approximately equivalent to a quarter of the current power consumption need of the whole of Africa.

	1995	2000	2005	2010
Angola	4.51	5.94	4.72	4.08
Cameroon	1.15	1.19	0.97	0.92
Chad	0.00	0.00	0.09	0.05
Congo	1.08	2.02	1.79	1.88
Côte d'Ivoire	0.06	0.09	0.04	0.09
DRC	0.53	0.43	0.44	0.39
Eq. Guinea	0.61	1.21	1.36	0.39
Gabon	2.15	2.54	2.36	1.68
Ghana	0.00	0.00	0.01	0.02
Nigeria	**20.09**	**18.19**	**17.25**	**15.18**
South Africa	0.06	0.13	0.14	0.10
Global	154.97	164.90	171.65	133.90

Units in billion cubic meters Source: NOAA (2011)

These ruinous practices by oil and gas companies operating in the region have diffused highly toxic gasses into the atmosphere in Niger Delta. The concentration of these toxicants have caused acid rain, which has resulted to loss of soil fertility, de-

struction of vegetation and devastation of buildings by corrugation of roofs. While numerous respiratory and reproductive health challenges have also been reported.

Environmental Policy and Enforcement

The underpinning of environmental regulations, guidelines and policies in Nigeria is embodied in the 1999 Constitution of the Federal Republic of Nigeria. In accordance with section 20 of the Constitution, the State is authorized to safeguard and advance the environment and protect the water, air and land, forest and wildlife of Nigeria. Also, section 2 of the Environmental Impact Assessment Act of 1992 (EIA Act) indicates that the public or private sector of the economy shall not commence or embark on or authorize projects or activities devoid of prior thoughtfulness of the effect on the environment.

- The Federal Government of Nigeria has made some proclamations on several laws and Regulations to protect the Nigerian environment. These include:
- Federal Environmental Protection Agency Act of 1988 (FEPAAct). The following Regulations were made pursuant to the FEPAAct:
    - National Environmental Protection (Effluent Limitation) Regulations:
    - National Environmental Protection (Pollution Abatement in Industries and Facilities Generating Wastes) Regulations; and
    - National Environmental Protection (Management of Solid and Hazardous Wastes) Regulations.
- Environmental Impact Assessment Act of 1992 (EIA Act).
- Harmful Wastes (Special Criminal Provisions etc.) Act of 1988 (Harmful Wastes Act). The Federal Ministry of Environment (FME) is responsible for the administration and enforcement of environmental laws in the land. These responsibilities were given to the FME in 1999 from the Federal Environmental Protection Agency (FEPA), which was

established under the FEPA Act. The Federal Ministry of Environment has issued numerous procedures for the administration of the FEPA and EIA Acts and guidelines for appraising environmental impact assessment reports (EIA Reports). Other regulatory bodies with inattention over distinct industries have also published strategies to regulate the impact of such firms on the environment such as the Environmental Guidelines and Standards for the Petroleum Industry in Nigeria (EGASPIN) 2002, issued by the Department of Petroleum Resources (DPR

Environmental Permit

The diverse fragments of legislation on the protection of the environment encompass provisions for giving out environmental licenses. Such permits are obligatory for all prospective environmentally susceptible activities and are characteristically given by the FME and the appropriate State governmental agencies. Particularized ratification on permits include the Radioactive Waste Management Regulations 2006 which expounds that any one breeding or handling radioactive waste is compulsorily required to apply for and acquire a permit from the Nigerian Nuclear Regulatory Authority; the FEPA Act and the regulations made thereunder.

Conclusion

These impacts are not limited to the ecosystem but also extends to the social order. Socio-environmental problems influence and affect people's livelihood and unvaryingly leads to loss of economic gains, especially for the local dwellers whose livelihood depend on the ecosystem services for survival. Consequently, forced migration and displacements have frequently occurred. All these environmental challenges stressed above are reasons why there is a need for appropriate environmental planning in proposing or situating oil and gas development projects in Niger Delta region. Fundamental environmental planning can be conducted through an Environmental Impact Assessment (EIA) process. An EIA process would equip policy-makers with pertinent

information about the likely environmental ramifications of a project. Utilizing EIA as a tool should aid in averting or minimizing the environmental impacts of intended oil and gas activities. The effects of these environmental challenges identified above could have been curtailed if such projects had gone through a thorough EIA process, which would have assisted in ascertaining and considering the impacts of such intended projects on the environs and on indigenous people the Niger Delta living within the region. EIA can be considered as a proactive and inhibitory tool for environmental supervision and protection[1].

[1] Africa Development Bank (AfDB), OECD (Organization of Economic Co-operation and Development) and UNDP (United Nations Development Programme) (2016), African Economic Outlook 2016: Sustainable Cities and Structural Transformation, OECD Publishing, Paris. Ajugwo Anselem O. (2013) "Negetive Effects of Gas Flaring: The Nigerian Experience." Journal of Environmental Pollution and Human 1.1: pp 6-8. DOI: 10.12691/jephh-1-1-2. Amnesty International October 2015, Clean It Up: Shell's False Claims About Oil Spill Response In The Niger Delta, INDEX: AFR 44/2746/2015. Available at: file:///C:/Users/Samsung/Downloads/AFR4427462015ENGLISH%20(2).PDF (accessed 8 October 2017). Braimah, Ehi. (2017). Bouncing Back From The Economic Recession. Press Reader. Available at: https://www.pressreader.com/nigeria/thisday/20170306/281565175552262 (accessed 5 October 2017). CENTRAL BANK OF NIGERIA (2016) Annual Report National Financial Inclusion Strategy Implementation Available on line http://www.cbn.gov.ng/Out/2017/CCD/2016%20Annual%20Report%20on%20NFIS%20Implementation.pdf (accessed 20 April 2018). Department of Petroleum Resources (DPR), (2015). Oil and Gas Annual Report. Available online at: https://dpr.gov.ng/index/wp-content/uploads/2015/01/2015-Oil-Gas-Industry-Annual-Report.pdf (accessed 05 April 2018) Fasina, Omolola Anuoluwapo, "Environmental Impact Assessment for Oil and Gas Projects: A Comparative Evaluation of Canadian and Nigerian Laws" (2016). Electronic Thesis and Dissertation Repository. 4333. https://ir.lib.uwo.ca/etd/4333 (accessed 18. 04. 2018) Nigerian National Petroleum Corporation (NNPC) (2017). Oil production. Available on: http://www.nnpcgroup.com/nnpcbusiness/upstreamventures/oilproduction.aspx (accessed 10 April 24, 2018) NOAA (2011) Global/Country Results 1994-2010, Boulder: National Geophyiscal Data Center, National Oceanic and Atmospheric Administration. Available at www.ngdc.noaa.gov/dmsp/interest/gas_flares.html (accessed on 8 of December 2017). Oil peak (2014). Major companies supplying the world oil market. Available at http://www.endofcrudeoil.com/2014/02/major-companies-supplying world-oil.html> assessed on 3rd February, 2018. Onyekonwu, M. (2008) "Best practices and policies- the Nigerian oil and gas industry policy problems." Port Harcourt petroleum review, vol.1 No1 14pp. OPEC (2017) Organization of the Petroleum Exporting Countries: Annual Statistical Bulletin. ISSN 0475-0608. Available at: http://www.opec.org/opec_web/static_files_project/media/downloads/publications/ASB2017_13062017.pdf (accessed 13 December 2017). Ovuakporaye, S. I., Aloamaka, C. P., Ojieh, A. E., Ejebe, D. E. and Mordi, J. C,.(2012) "Effects of gas flaring on lung function among residents of ib Gas flaring community in Delta State, Nigeria," Res. J. Env. Earth Sci. 4(5). pp 525-528. World Bank (2017). Nigeria's Flaring Reduction Target: 2020. Available online at: http://www.worldbank.org/en/news/feature/2017/03/10/nigerias-flaring-reduction-target-2020(acessed 09 April 2018)

CHALLENGES FOR INTERNATIONAL ENVIRONMENTAL LAW IN THE TRANSITION TO A LOW-CARBON AND ENERGY-EFFICIENT ECONOMY

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The challenges facing the international environmental law are particularly important within the process of transformation towards a low-carbon and energy efficient economy. There is a different terminology in the theory of a green or low-carbon economy, such as low-carbon economy (LCE) and low-fossil-fuel economy (LFFE) or decarbonised economy. This is an indicator both for the development of the doctrine and for the presence of specific elements constituting the low carbon economy. Among the attempts to define a low-carbon economy, the following understanding stands out, namely "... concept of the **low carbon economy**, the focus is specifically on greenhouse gas (GHG) emissions. The concept of the resource-efficient low carbon economy has also been used. The concept emphasises the central role of resource-efficiency and energy efficiency for the economy. The low carbon economy has generally been understood as "an economy that produces minimal GHG emissions" (Regions for Sustainable Change 2013)"[1].

[1] Low-Carbon Economy Policy and Project Review, Background Paper I, EFFECT – Dialogue Platform and Resource Efficiency in the Baltic Sea Region, Stockholm, September, 2013, p. 4

A central focal point is placed on the reduction of the gases emitted into the atmosphere leading to the greenhouse effect. Reducing greenhouse gas emissions is a challenge to the international environmental law, but it needs to establish flexible international law and technical assistance to the more advanced and developed countries to support technological implementation in the states that are the biggest polluters and are lagging behind in this area. International Environmental Law is one of the specific sectors of public international law in which cooperation and interaction should be of the utmost importance if we strive for a full protection of the environment. In fact, this is the realm that could at least be argued with political or principled differences, because the climatic and adverse effects do not stop at the borders of one or another state but affect all subjects of the system of international law without exception. In this sense, the actions of the United States' President Donald Trump, related to his country's withdrawal from the Paris Agreement (United Nations Framework Convention on Climate Change), which is one of the most ambitious and important international treaties in the struggle with climate warming, cannot be accepted. Without solid arguments, Trump stops US participation in 2017 and thus hinders full cooperation, reaching even farther, calling the Paris deal a "bad deal"[2]. The United Nations framework conventions are unacceptable in such an important sphere as the fight against global warming and climate change to be refracted through the prism of corporate interests because, first, it is not a good example of the largest economy and next, the opportunity to bring to the forefront the most important, even vital, determinant interests of the world, which will not be exaggerated to say, its survival depends on.

[2] Тръмп: САЩ излизат от Парижкото споразумение за климата (Trump: USA out of the Paris Agreement on climate), available at: https://www.vesti.bg/sviat/amerika/trymp-sasht-izlizat-ot-sporazumenieto-za-klimata-6069858

Apart from the international level, environmental problems and the search for new economic models in transformation are developing successfully and with sustainable dynamics within the European Union, which has adopted a number of programming documents, the most important of which are:

- 2020 climate and energy package[3]
- 2030 climate and energy framework[4]
- 2050 low-carbon economy[5].

Switching to a high-tech economy with low emission levels is a medium-term process requiring a number of preparatory actions and measures. It is of particular importance to work in the following sectors generating the highest levels of pollution:

- Transport;
- Construction and
- Industry.

Among the ambitious targets are by 2050: the EU should reduce its harmful emissions with 80 percent compared to 1990 levels. The rapidly growing distribution of renewable electricity is an effective measure. Another good practice in the field of transport is to increase the use of cars, including freight with hybrid or electrical capacities, combining both the reduction of harmful gases and the lower and efficient consumption of petroleum products which are from the category of non-renewable energy sources[6].

In this respect, a measure with noticeable application in the Republic of Bulgaria, which as a full member of the EU has been able to develop a National Program for energy efficiency of multifamily residential buildings with a large scope, which is

[3]For further information, see: https://ec.europa.eu/clima/policies/strategies/2020_en
[4] See: https://ec.europa.eu/clima/policies/strategies/2030_en
[5] https://ec.europa.eu/clima/policies/strategies/2050_en
[6] Ibid.

provided with EU funds and with national co-financing, deserves attention. Among the expected results of the program are:

• Reduce heating costs for households;

• Improved housing infrastructure and change in the appearance of cities;

• Cleaner environment - saved greenhouse gas emissions (CO2, etc.);

• Extend the life of the building, which will also have a higher price[7].

At present, about 2 billion BGN or just over 1 billion euros have been financed under this program. In addition to improving the level of environmental protection, the program also has a positive social impact on society.

Finally, the development of international legal cooperation in the field of environmental protection should be strongly supported at various forums at both international, regional and national levels. Today, more than ever, the international community needs effective legal instruments, which, however, in order to succeed in changing the negative trends and effects, require time and well-grounded scientific arguments. International organizations must be clear about the unconditional implementation of the United Nations Framework Convention on Climate Change, as no corporate interests or interests related to economic growth based on environmental pollution should be tolerated because if we miss the next few decades, then it will not only be late, but it will probably take much more money and effort to normalize the levels of normal and environmental performance. Obviously, working measures, mechanisms, and programs should be implemented with active support, including financial aid in the developing countries too, which, if not supported, regardless of how successful and progressive the measures are, there will be a partial effect.

[7] See http://www.mrrb.government.bg/bg/energijna-efektivnost/nacionalna-programa-za-ee-na-mnogofamilni-jilistni-sgradi/

LEGAL REGULATION OF THE USE OF GENETICALLY MODIFIED ORGANISMS IN THE FIELD OF EXPORT AND IMPORT OF AGRICULTURAL PRODUCTS IN THE CIS: INTERNATIONAL AND NATIONAL ASPECTS

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About 40 years ago, purposeful research in the field of creating genetically modified organisms (GMOs) began.

In the agricultural area, the introduction of gene sections of one product into the cell of another one has been widely used since the mid-1990s.

Currently, around 50 genetically modified varieties and hybrids of maize, soybean, sugar beet, tomato and other crops are used in the world. Transgenic plants are grown on an area of 80-85 million hectares in 17 countries. Transgenic products produced in the world are estimated at 4.5-5 billion US dollars. The USA, Canada, India, Brazil and Argentina are leading in cultivation of transgenic varieties of agricultural crops.

Patents for more than 90% of all GMO seeds belong to three giants:

- «Monsanto» (USA),
- «Syngenta» (Switzerland),
- «Wauer» (Germany).

There is growing evidence that genetically modified organisms can have both short-term and long-term negative effects on human health and the environment.

At present, it is impossible to foresee the scale of the social, economic and environmental consequences of the GMOs impact, however, they can be very significant.

Cartagena Protocol on Biosafety to the Convention on Biological Diversity in 2003 entered into force. This document is establishing procedures for the export and import of modern biotechnology products.

To date, majority of the CIS member states recognized the Cartagena Protocol as compulsory:

- Republic of Azerbaijan,
- Republic of Armenia,
- Republic of Belarus,
- Republic of Kazakhstan,
- Kyrgyz Republic,
- Republic of Moldova,
- Republic of Tajikistan.

After the Cartagena Protocol entered into force, a need emerged for a more stringent legislative regulation of safety during:

- handling;
- packaging;
- transport of GMOs.

The policy of the majority of the CIS member states regarding GMOs is mainly restrained and aims to regulate and monitor the distribution and use of GMOs.

Analysis of the legislative acts of the CIS member states shows that many problems in this area are not yet legally resolved:

- in many CIS countries there is no comprehensive regulation covering the turnover of genetically modified organisms and products;

- in some CIS countries, the types of products, for which the content of GMOs is forbidden, are not legally defined;

- there is no effective monitoring mechanism aimed at minimizing the potential risks of adverse effects of the modified organisms on human health and the environment.

The policy of the CIS countries regarding GMOs.

The Russian Federation. In comparison with many others CIS countries, Russia adheres to an assertive position on GMOs, which is to prohibit the production of GMOs in the country. Russia does not participate in the Cartagena Protocol.

In 2013, with the adoption of Government Decree No. 839 of September 23, 2013 «On the State Registration of Genetically Engineered Organisms Intended for Release into the Environment, as well as Products Obtained Using Such Organisms or Containing Such Organisms», an attempt was made to establish state regulation of the products in which GMOs are used. Entry into force of this decision was postponed first until July 1, 2014, and then the moratorium was extended until July 1, 2017. Due to the introduction of changes into the legislation on genetic engineering in 2016, the concerned decree in its original form never entered into force.

In July 2016, Federal Law No. 358-FZ of July 3, 2016 «On Amendments to Certain Legislative Acts of the Russian Federation with regard to Improvement of the State Regulation in the Field of Genetic Engineering Activities» was enacted, which further tightened the use of GM plants and animals for food production in Russia. Now the use of GMOs is only possible for scientific purposes. In addition, it is allowed to import food products with GMOs.

Russia can not refuse from GMOs completely because of the WTO requirements, so the legislative ban extends to the cultivation of GM plants and the breeding of animals, but it remains possible to import food with GMOs.

The Republic of Azerbaijan. Following Russia, it legally banned the production of grain products derived from genetically modified organisms (GMOs).

On July 22, 2016, the official press published amendments to Law "On the grain."

Legislative amendments prohibit the production and turnover in Azerbaijan of grain products obtained from GMOs or using plant materials created by modern methods of genetic engineering

In addition, it is prohibited to import to Azerbaijan grain products made from GMOs or using plant materials created by modern methods of genetic engineering.

Other CIS countries are also actively discussing the ban on the production and import of GMOs.

Currently, draft laws on banning the production of agricultural products with GMOs and banning import of products with GMOs are developed in:

- the Republic of Armenia,
- the Kyrgyz Republic.

Thus, there has been a trend towards a change in the policies of the CIS countries regarding GMOs: from the regulation of production, exports and imports to a total ban.

It is necessary to adopt an international treaty at the CIS level regarding the distribution and use of GMOs in agricultural products, but to date, the policy of the CIS member states with respect to GMOs is different and does not allow the development of such document.

In order to ensure safety in the trade of agricultural products containing GMOs, it is extremely important to identify specific mechanisms at the national level that can solve the issues of legal regulation envisaged by international law, which will improve the effectiveness of the implementation of interstate agreements.

Adoption of national legislation becomes more important if effective mechanisms of safety assurance in the field of export and import of agricultural products containing GMOs are not established in international agreements. Harmonization of the legislation of the CIS countries will help to avoid the conflicts between the parties. At the same time, the model legislation of the

CIS can serve as a standard for harmonization - recommendatory documents that can be taken as a basis for the development of legislative acts by the CIS member states.

Resolution of the Interparliamentary Assembly of the CIS Member States No. 44-8 of May 20, 2016 adopted a model law «On the Distribution and Use of Genetically Modified Organisms in the Field of Export of Agricultural Products» aimed at convergence of the legislation of the CIS countries in the field under consideration.

Model law as well as Cartagena protocol bases on precautionary principle.

The precautionary principle says that in some cases— particularly where the costs of action are low and the risks of inaction are high— preventive action should be taken, even without full scientific certainty about the problem being addressed.

The model law consists of the following main provisions:

1). The legal regime of exported GMOs differs depending on the purpose of their use:

- GMOs intended for direct use as food or animal feed, as well as for further processing;
- GMOs intended for use in closed systems;
- GMOs intended for intentional introduction into the environment.

2). The export of agricultural products containing GMOs should be preceded by the "advance informed agreement" procedure applied prior to the first intentional transboundary movement of living modified organisms destined for intentional introduction into the environment of the importing country.

3). Requirements are established for the content of support export documentation for agricultural products containing GMOs.

4). Measures are envisaged for agricultural products containing GMOs: with regard to its processing, packaging, marking and transportation in compliance with safety requirements, the relevant international rules and regulations aimed at preventing

adverse effects on biological diversity are taken into account with consideration of risks for human health.

5). There is a mandatory state registration of agricultural products containing GMOs, which are intended for introduction into the environment.

THE CONCEPT OF «COMMON HERITAGE OF MANKIND» IN INTERNATIONAL LAW: FUTURE POSSIBLE SPHERES OF APPLICATION

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The common heritage of mankind takes a prominent place in the law of the sea and international space law. Given the gap between the developing and developed countries in the current era, and the increasing trend of using and destroying rare resources of the earth and outer space, the necessity of using the common heritage of mankind as a rescuer was felt. The success of this concept in the seabed (Part XI of the United Nations Convention on the Law of the Sea) and steps taken in outer space to implement it (the 1979 Moon Treaty), inspired us to use it in some new spheres that seem to be in danger. These new spheres are Antarctica, the Geostationary Orbit, and Biodiversity Resources. By determining the new proposed cases of the common heritage of mankind, it is possible to use them as an instrument to filling the gap between developing and developed countries and guarantee justice among all nations.

1. Introduction

The common heritage of mankind takes a prominent place in the law of the sea and international space law and so far, according to the 1994 Agreement relating to the implementation of Part XI of the United Nations Convention on the Law of the Sea has been successfully applied to the seabed, despite unsuccessful experience in the Moon Treaty. Given the gap between the devel-

oping and developed countries in the current era, and the increasing trend of using and destroying rare resources of the earth and outer space, the necessity of using the common heritage of humanity as a rescuer was felt. The success of this concept in the seabed and steps taken in outer space to implement it, inspired us to use it in some new spheres that seem to be in danger. These new spheres are Human Genome, the Fossil Aquifers, and Cultural Heritage which all of these items need to be scrutinized exclusively, but this paper aimed to highlight the importance of them as much as possible and find a solution to include them in the inclusion circle of the common heritage of mankind. Sometimes these items are mentioned in the agreements and documents; however, they are not discussed in practice and in the framework of the principles of the common heritage of mankind.

2. Methodology

In this article, we use international law resources, rely on international documents about the common heritage of mankind principle, deploy argumentative, deductive and analytical discussions, employ deduction, induction and analogy, make use of library sources, and utilize valid procedures related to the research topic to research at our best.

3. Discussion

3.1. Definition of the Common Heritage of Mankind

When Poly metallic nodules found in deep seabed in the end of 19th century, and became abundant, scientific and technical methods were applied to establish legal regime of common heritage of mankind. Arvid Pardo suggested common heritage of mankind concept in 1 November 1967, in the United Nations General Assembly. He said that the seabed and ocean floor and subsoil are not assets of any country and belong to all human who lived on earth. His view caused to start negotiations on the United Nations Convention on the Law of the Sea. Agreement Governing the Activities of States on the Moon and Other Celestial Bod-

ies was an article that approved in 1979 and stated that the moon and its resources belong to all of human[1].

3.2. Principles of Common Heritage of Mankind

The concept of the common heritage of mankind can be considered to consist of four distinguishable but intertwined principles. The main principles making up the concept are the following: (1) The requirement that areas outside the limits of national jurisdiction may be used for peaceful purposes only; (2) The requirement that areas beyond the limits of national jurisdiction may not be subjected to sovereignty; (3) The requirement that the use of such areas as well as the exploration and exploitation of their resources have to be carried out for the benefit of all mankind; (4) And the requirement that some type of international machinery is necessary in order to regulate and supervise the use of the areas and their resources[2].

3.3. The Current Spheres of Common Heritage of Mankind

The common heritage of mankind, at this time, has been applied to the spheres of International Law of the Sea and International Space Law.

In the sphere of Law of the Sea, this concept has been applied to the seabed and declared it as the "Area" according to the eleventh chapter of 1982 United Nations Convention for the Law of the Sea[3]. But because of some disagreements about entering the common heritage of mankind in the Convention, it was entered into force only after a special agreement was reached in

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[1] Mirzaee, Siavash, Abashidze, Aslan Khuseinovich, and Solntsev, Alexander Mikhailovich. "The Concept of Common Heritage of Mankind in the Advisory Opinion of 1 February 2011 by the International Tribunal for the Law of the Sea." Journal of Advanced Research in Law and Economics 8.2 (2017): p. 506

[2] Mirzaee, Siavash "Outer Space and Common Heritage of Mankind: Challenges and Solutions." RUDN Journal of Law 21.1 (2017): p. 104

[3] Holmila, E. "Common Heritage of Mankind in the Law of the Sea." Acta Societatis Martensis 1 (2005): p. 188

1994 in relation to the deep seabed[4]. Due to the fact that the eleventh Chapter of the Convention and the 1994 Agreement were not transparent enough for the States to support the entities interested in operating in the Area, the International Tribunal for the law of the Sea issued an advisory opinion to clarify the legal status of the Area. The current status of this concept in the sphere of law of the sea after deliverance of this Advisory Opinion, shows that applying this concept in this domain has been associated with positive results and exploitation rate in the Area has been increased dramatically under the supervision of the Authority[5].

In the International Space Law, this concept has been applied to the Moon and other Celestial Bodies according to the Article Six of the 1979 Moon Treaty[6]. In this field, the story is a bit different. Developed countries are not interested in to accept the common heritage of mankind's principles in the space area. This opposition is rooted in political, economic and military reasons. At current time, the 1979 Moon Treaty has been accepted just by eighteen States and none of them are among the space powers. To increase the acceptance of the common heritage of mankind among space powers, these solutions are essential to pave the way for this concept in the field of space: first, Amendment in the Moon Treaty; second, Founding the Authority of Outer Space; and third, Explanation of the Common Heritage of Mankind's Principles[7].

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[4] Oxman, B. H. "The 1994 Agreement and the Convention." American Journal of International Law 88.4 (1994): p. 687

[5] Statement Secretary□General, Mr Nii A Odunton, "International Seabed Authority at the Launching of UK Seabed Resources." (2013) Retrieved from https://www.isa.org/jmfilesdocumentsENSG-StatsNAO-Statement.pdf (Last visited 27.01.2016)

[6] Ervin, S. "Law in a Vacuum: The Common Heritage Doctrine in Outer Space Law." Boston College International and Comparative Law Review 7(2) (1984): p. 420

[7] Mirzaee, Siavash "Outer Space and Common Heritage of Mankind: Challenges and Solutions." RUDN Journal of Law 21.1 (2017): p. 109

3.4. The Future Possible Spheres of the Common Heritage of Mankind

In this part, other cases with the capacity to be identified as the common heritage of mankind are proposed, such as: Antarctica, Geostationary Orbit, and Biodiversity Resources.

The first proposed sphere is the Antarctica. Currently, Antarctica is governed by the 1959 Antarctic Treaty and the 1991 Madrid Protocol. The Madrid Protocol that its objective is 'comprehensive protection of the Antarctic environment', imposes a ban on all mineral and fossil fuel prospecting, exploration and development[8]. This ban is comprehensive, but can be reviewed after fifty years. Since Antarctica is an exclusive sphere for the Antarctic Treaty Consultative Parties, a number of developing countries outside the Antarctic Treaty System began to pay close attention to the Antarctica. They suggested that the concept of common heritage of mankind be applied to the Antarctica, particularly to its resources[9].

If political willingness existed amongst Antarctic Treaty Consultative Parties to make Antarctica part of the common heritage of mankind, then theoretically there would be nothing to prevent them from doing so. The Principle of Peaceful Use is completely consistent with the Antarctic Treaty System because of the stipulation in the Article 1 of the Antarctic Treaty[10]. The Principle of Non-Exclusive Use, despite the fact that there are seven claims of sovereignty over parts of Antarctica, is consistent with the Antarctic Treaty System. Because at the current time

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[8] French, D. "Sustainable Development and the 1991 Madrid Protocol to the 1959 Antarctic Treaty: the Primacy of Protection in a Particularly Sensitive Environment." Journal of International Wildlife Law and Policy 2.3 (1999): p. 291

[9] Keyuan, Z. "The Common Heritage of Mankind and the Antarctic Treaty System." Netherlands International Law Review 38.02 (1991): p. 179

[10] Loan, J. "The Common Heritage of Mankind in Antarctica: An Analysis in Light of the Threats Posed by Climate Change." New Zealand Yearbook of International Law, The 1 (2004): p. 175

there is no exclusive control over resources[11]. For the Principle of Benefit Sharing, there is no clear regulations in the Antarctic Treaty System. There are these valuable benefits in Antarctica: krill stocks, fresh water in the icebergs, and results of research conducted in the Antarctica. Each of these benefits alone can be considered the subject of common heritage and a special authority can be established to manage each of them. The Principle of International Management, was applied within the framework of the Antarctic Treaty System. At present, 45 countries participate in the management of Antarctica. Although just Antarctic Treaty Consultative Parties have the right to vote, but it's not a problem. Because there is no requirement in the common heritage of mankind that the entire international community would participate in the resources management. It can be entrusted to an Authority like International Seabed Authority[12].

The second proposed sphere is the Geostationary Orbit. This is a circular orbit above the earth's equator at an altitude of approximately 36,000 kilometers[13]. This orbit is not covered by the Moon Treaty and accordingly is not in the domain of the common heritage of mankind. Since the utilization capacity of this orbit is limited, some developing countries became afraid of taking possession of this orbit by the developed countries[14], and this fear led to the 1976 Bogota Declaration. According to Bogota Declaration, eight tropical countries which located under the geostationary orbit, raised claims of ownership on some parts of this orbit above their land territory[15]. This Declaration was rejected by

[11] Loan, op.cit. p. 172
[12] Loan, op.cit. p. 174
[13] Talaie, F. "Legal Issues concerning the Radio Frequency Spectrum and the Geostationary Satellite Orbit." Austl. Int'l LJ (1998): p. 31
[14] Wihlborg, C. G., & Wijkman, P. M. "Outer Space Resources in Efficient and Equitable Use: New Frontiers for Old Principles." The Journal of Law and Economics 24.1 (1981): p. 26
[15] Tronchetti, F. "The Exploitation of Natural Resources of the Moon and Other Celestial Bodies." Brill (2009): p. 177

most of developed and developing countries in general due to poor argument of the declarants.

This orbit is entirely consistent with the principles of the common heritage of mankind. Due to the occurring of this orbit in outer space, the principles of the 1967 Outer Space Treaty can be applied to this orbit[16]. The Principles of Peaceful Use and Non-Exclusive Use are in the same category. Regarding the Principle of Benefits Sharing, the developed countries due to having advanced facilities, earn the largest share of the revenue from the radio bands and the developing countries do not take any share from this. The existence of a stewardship authority can help to fairly share the benefits of this resource[17]. In the same manner, by establishing this Authority, it is possible to apply the Principle of International Management to manage the allocation process of slots.

The third proposed sphere is the Biodiversity Resources. Biodiversity resources, encompasses all components of the living world. Biodiversity is traditionally divided into three levels: Genetic Diversity, Species Diversity, and Ecosystem Diversity. The amount of biodiversity varies enormously between countries. The 'megadiverse' countries, are thought to house between 50 percent and 80 percent of the global species diversity. These countries mostly located in the south hemisphere like: Brazil, Colombia, Ecuador, Peru, Mexico, Zaire, Madagascar, Australia, China, India, and Indonesia. In contrast to the megadiverse countries, the proportion of Europe is probably zero percent. In the United States, it is about 5 percent, compared to a worldwide average of

[16] Baslar, K. "The Concept of the Common Heritage of Mankind in International Law." Vol. 30. Martinus Nijhoff Publishers (1998): p. 7

[17] Stone, C. D. "The Gnat is Older than Man: Global Environment and Human Agenda " Princeton University Press (1995): p. 211

39 percent. It seems necessary that these resources should be accessible to all without any restrictions[18].

The 1983 International Undertaking on Plant Genetic Resources took the position that all plant genetic resources were to be treated as the "common heritage of mankind." Under this agreement these commercial plant varieties would be freely accessible to farmers and plant breeders around the world[19]. But because of disagreement between the North and the South countries regarding access to the resources, as well as sharing of benefits derived from them, the 1992 Convention on Biological Diversity, declared that these resources are "common concern of mankind". It seems that by taking into account the demands and needs of megadiverse countries, it will be possible to consider these kind of resources as the common heritage of mankind[20].

4. Conclusion

Since the common heritage of mankind takes its basis from natural law, States and Positivists consider this concept as a political aspiration and do not agree this concept to become a legal principle through treaties and procedures. The common heritage of mankind is in the category of the collective rights as a part of the third generation of human rights. Therefore, the international resources which are based on State's consent, such as international customary law and law of treaties are significant barriers against realization of this concept. For common heritage of mankind to become a legal principle, new methods are required. Positive results of applying this concept in seabed reveals that no country is opposing the essential of this concept. Common heritage of mankind can form a new branch of international law and

[18] Shine, C., Kohona, P. T. "The Convention on Biological Diversity: Bridging the gap between conservation and development." Review of European, Comparative & International Environmental Law 1.3 (1992): p. 278

[19] Aoki, K., & Luvai, K. "Reclaiming Common Heritage Treatment in the International Plant Genetic Resources Regime Complex." Mich. St. L. Rev. (2007): p. 43

its title can be ‘The Law of International Resources’, which addresses issues about existing resources in the earth and outer space. The first step for complete and accurate implementation of this concept is to set a scientific framework to enhance its foundations[21].

[21] References: Aoki, K., & Luvai, K. "Reclaiming Common Heritage Treatment in the International Plant Genetic Resources Regime Complex." Mich. St. L. Rev. (2007): p. 43. Baslar, K. "The Concept of the Common Heritage of Mankind in International Law." Vol. 30. Martinus Nijhoff Publishers (1998): p. 7. Ervin, S. "Law in a Vacuum: The Common Heritage Doctrine in Outer Space Law." Boston College International and Comparative Law Review 7(2) (1984): p. 420. French, D. "Sustainable Development and the 1991 Madrid Protocol to the 1959 Antarctic Treaty: the Primacy of Protection in a Particularly Sensitive Environment." Journal of International Wildlife Law and Policy 2.3 (1999): p. 291. Holmila, E. "Common Heritage of Mankind in the Law of the Sea." Acta Societatis Martensis 1 (2005): p. 188. Keyuan, Z. "The Common Heritage of Mankind and the Antarctic Treaty System." Netherlands International Law Review 38.02 (1991): p. 179. Loan, J. "The Common Heritage of Mankind in Antarctica: An Analysis in Light of the Threats Posed by Climate Change." New Zealand Yearbook of International Law, The 1 (2004): p. 175. Mirzaee, Siavash "Outer Space and Common Heritage of Mankind: Challenges and Solutions." RUDN Journal of Law 21.1 (2017): p. 104. Mirzaee, Siavash, Abashidze, Aslan Khuseinovich, and Solntsev, Alexander Mikhailovich. "The Concept of Common Heritage of Mankind in the Advisory Opinion of 1 February 2011 by the International Tribunal for the Law of the Sea." Journal of Advanced Research in Law and Economics 8.2 (2017): p. 506. Oxman, B. H. "The 1994 Agreement and the Convention." American Journal of International Law 88.4 (1994): p. 687. Shine, C., Kohona, P. T. "The Convention on Biological Diversity: Bridging the gap between conservation and development." Review of European, Comparative & International Environmental Law 1.3 (1992): p. 278. Statement Secretary‐General, Mr Nii A Odunton, "International Seabed Authority at the Launching of UK Seabed Resources." (2013) Retrieved from https://www.isa.org/jmfilesdocumentsENSG-StatsNAO-Statement.pdf (Last visited 27.01.2016). Stone, C. D. "The Gnat is Older than Man: Global Environment and Human Agenda " Princeton University Press (1995): p. 211. Talaie, F. "Legal Issues concerning the Radio Frequency Spectrum and the Geostationary Satellite Orbit." Austl. Int'l LJ (1998): p. 31. Tronchetti, F. "The Exploitation of Natural Resources of the Moon and Other Celestial Bodies." Brill (2009): p. 177. Wihlborg, C. G., & Wijkman, P. M. "Outer Space Resources in Efficient and Equitable Use: New Frontiers for Old Principles." The Journal of Law and Economics 24.1 (1981): p. 26.

ABOUT SILENT OBJECTS AND BARKING WATCHDOGS: THE ROLE AND ACCOUNTABILITY OF ENVIRONMENTAL NGOS[1]

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1 INTRODUCTION

Within environmental law, private actors, such as individual citizens but particularly also Environmental NGOs, often enjoy special procedural rights in order to influence the environmental decision-making by governments. This is truly the case at the European continent, where the Aarhus Convention enables citizens and NGOs to influence the development of environmental regulation and its implementation[2]. The background to the idea of strengthening civil society by providing 'green' procedural rights, such as access to environmental information and participation to governmental decision-making, complemented with the right to address the court in order to enforce those rights, is to give a voice to the environment. It is believed that granting such proce-

[1] Article was first published in "European Public Law" journal in 2018. Peeters, Marjan. 'About Silent Objects and Barking Watchdogs: The Role and Accountability of Environmental NGOs'. European Public Law 24, no. 3 (2018): 449–472.

[2] Convention on Access to information, public participation in decision-making and access to justice in environmental matters, Aarhus, Denmark, 25 June 1998, into force: 30 Oct. 2001.

dural rights ensures that environmental concerns will be better represented in governmental decision-making[3].

Environmental problems are however often very complex, with multiple and long-term, far-reaching effects. Such problems surpass the individual level and are often too multifarious for one single person to fight against. In view of this, members of civil society have established Environmental NGOs with the aim of having a more effective strategy for promoting environmental protection. Environmental NGOs are in this sense a specific form of private actors: they are established by citizens to serve a public interest, in this case the interest of a sound environment. The specific aim of such an NGO is to be decided by the establishers of the NGO, and can be general (a sound environment), but may also concern the protection of specific species (such as the protection of bees), a specific sector (such as environmental consequences of transport) or a specific regulatory instrument (such as critically following the emissions trading instrument)[4]. Indeed, since civil society is free to decide whether or not to set up an NGO, and, subsequently, to decide on its specific aim, a rich variety of NGOs has emerged in Europe, with often mutually reinforcing aims, but possibly also with contrasting points of view (such as climate activists supporting wind-energy opposed to nature activists pointing at potential negative effects of windturbines for certain species such as migrating birds).

Meanwhile, case law has shown that NGOs can indeed be very powerful, not only with regard to the enforcement of the access to environmental information right, but also with regard to

[3] See the normative statements in the preamble of the Aarhus Convention, such as 'Recognizing that, in the field of the environment, improved access to information and public participation in decision- making enhance the quality and the implementation of decisions'.

[4] As examples serve, respectively the World Wildlife Fund, de Bijenstichting (an association aiming at the protection of bees, active in The Netherlands but also a party to Case C-442/14 which will be discussed in s. 3 of this paper), Transport & Environment, and Carbon Market Watch.

enforcing actions which are more ambitious than those foreseen by governmental action[5]. In this sense, NGOs are indeed to be seen as important private actors in environmental law since they serve the public interest of a sound environment[6]. Also the European Commission recognizes that NGOs 'exercise a public interest advocacy role'[7]. In principle, through their activities a more effective fulfilment of the public tasks as codified in Article 37 of the Charter of Fundamental Rights of the European Union, Article 3 of the TEU and Article 191 of the TFEU may be the case[8]. Hence, this contribution aims at looking at how private actors – particularly Environmental NGOs – are indeed able to contribute to achieving the public interest goal of the protection of the environment, and which challenges exist when NGOs act in the pursuance of this public interest. Core focus will go to the right of access to environmental information as being currently provided in law. This right of access to environmental information forms the basis for any further influential actions, such as ensuring effective participation in decision-making and addressing courts

[5] See for instance Urgenda Foundation and 886 Citizens v. The State of The Netherlands, [2015] C/09/ 456689/HA ZA 13–1396 ('Urgenda') (appeal pending). For an English translation of the decision, see http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196 (accessed 6 July 2018).

[6] See in this respect also the recognition of ENGOs as representing the environmental interest in CJEU case law as discussed by Jan Darpö (2017), On the bright side (of the EU's Janus Face). The EU Commission's Notice on Access to Justice in Environmental Matters, (2017)14 J. Eur. Envtl. & Plan. L. 373–398 (2017), e.g. at 390.

[7] European Commission, Communication from the Commission of 28 Apr. 2017, Commission Notice on Access to Justice in Environmental Matters, Brussels, 28 Apr. 2017, C(2017) 2616 final, at 9, and stating that 'Environmental NGOs play an important role in ensuring compliance with the obligations of EU environmental law and enjoy a broad right to protect the environment which national courts need to uphold'. (at 13).

[8] Also Art. 3 TEU and Art. 191 TFEU refer, in different language, to the protection and improvement of the environment. Furthermore, such aim can also be found in other articles, such as Art. 114 TFEU.

either for imposing more ambitious actions than that of the public authorities or for blocking environmentally harmful activities. In view of the potential great power of NGOs, this contribution will also shed light on the question of accountability of the NGOs themselves, and the ways how they may be confronted with legal procedures against their informational activities.

The structure of this article is as follows. Section 2 discusses insights from international politics and academic literature on the need for giving a voice to the environment and explains how this has been realized by the Aarhus Convention by giving a specific role to private actors, the NGOs. Section 3 delves into the implementation of the Aarhus Convention in EU law and shows how case law has strengthened the right of access to environmental information, but will also point at some limits to this right. Section 4 discusses the responsibility and accountability of NGOs with regard to publishing information that aims to share malpractice, or even illegality, with the wider public. Section 5 concludes.

2 ENABLING PRIVATE ORGANIZATIONS TO DEFEND THE VOICELESS ENVIRONMENT

2.1 THE EMERGENCE OF ENVIRONMENTAL PROCEDURAL RIGHTS

Particularly since the emergence of environmental problems in the 1960s and 1970s, civil society has established many informal and formal organizations aiming at the protection and the improvement of the environment. WWF, Greenpeace, and Friends of the Earth are examples of NGOs widely known by the public. For example, in 1961 it was decided to establish the World Wildlife Fund which has now, after more than fifty years of existence, become a leading nature conservation tion[9].Greenpeace and Friends of the Earth both exist for more

[9] Interestingly, the reason for enacting the WWF stems from financial needs, therefore it was decided to establish ‘an international fundraising organization to work in collaboration with existing conservation groups and bring substan-

than forty-five years[10], and problem specific initiatives have emerged such as the 'Climate Action Network' which is 'a network of NGOs working on climate change from around the world'[11]. Along the rise of such organizations, academic literature has built supportive arguments for the establishment of representatives for the environment. The most appealing call for providing a legal representation for the voiceless environment is made by Christopher D Stone, in 1972, in his seminal article 'Should trees have standing? Towards legal rights for natural objects'[12]. Stone argued that law should provide that the environment be represented by establishing guardians for nature. In his view, this would not be an unfamiliar construct, as the creation of representation for entities or people who cannot speak for themselves, such as children and mentally disabled people, is already part of the law. Corporations cannot speak either, and are represented by a board as arranged in corporate law. Equally, there should be a voice for the environment. Hence, while environmental movements emerged in society, the cause for giving them some legal force was argued in literature[13]. According to Stone, NGOs could

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tial financial support to the conservation movement on a worldwide scale'. https://www.worldwildlife.org/about/history (accessed 12 Nov. 2017).

[10] Historical background information can be found at: http://www.greenpeace.org/international/en/ news/Blogs/makingwaves/40-years-of-inspiring-action/blog/36808/ and http://www.foei.org/ about-foei/history (accessed 12 Nov. 2017).

[11] See: http://www.climatenetwork.org/about/can-charter (accessed 12 Nov. 2017).

[12] Published in the S. Cal. L. Rev. 45, 450–501 (1972), https://iseethics.files.wordpress.com/2013/02/ stone-christopher-d-should-trees-have-standing.pdf. (accessed 6 July 2018).

[13] See for his later views, basically confirming his earlier arguments: Christopher D. Stone, Should Trees Have Standing? Law, Morality, and The Environment (3d ed., Oxford University Press 2010). The legal construct by identifying guardians for nature would according to Stone not imply an absolute protection for the environment: at 53 – and see also his thoughts on irreparable damage, at 20.

be enabled to apply to the court to be appointed as a guardian, for instance, of a certain piece of land in order to protect its ecological balance against certain industrial (mining) activities[14]. Such guardians then could be empowered with rights of inspection or visitation to determine the condition of a land or water, including monitoring environmental conditions such as checking the effluent of waters, and representing the natural objects in legislative and administrative procedures[15]. Most importantly, the guardian could represent the environment (the specific environmental object) in court without the need to demonstrate that the rights of the members of the NGO were affected[16]. At the same time, Stone does not uphold that such a strong procedural right conferred on NGOs is a solution for everything, nor that the rights for the environment would have an absolute character[17]. Particularly with climate change, he points at the fact that the political questions of how much to reduce greenhouse gases are ill-suited for courts[18].

Next to this seminal academic plea for constructing legal rights for representing the environment, international political developments, such as declarations adopted by the United Nations, have placed emphasis on strengthening environmental policies and law. The argument made by Stone was published in the same year as the first UN Declaration of the United Nations Conference on the Environment, also known as the Stockholm Decla-

[14] Stone, supra n. 13, at 9.
[15] Ibid., at 9.
[16] This is then 'a suit in the objects own name' Stone, supra n. 13, at xii & 3, fn. 26: Stone limits his argumentation to natural objects; this may raise questions on how to defend then the ecosystem, including the (relationship and balance of) many different elements, including flora and fauna.
[17] Stone, supra n. 13, at 4: 'Thus, to say that the environment should have rights is not to say that it should have every right we can imagine, or even the same body of rights as human beings have'.
[18] Stone, supra n. 13, at 34; this view has of course to be situated in the specific jurisdictional context of the US.

ration, was agreed on[19]. However, it was only twenty years later, in the United Nations Rio Declaration on Environment and Development, that the importance of procedural rights was recognized[20]. This Declaration stipulates in its principle X that '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'. It also stressed the necessity of effective access to judicial and administrative proceedings, since, without that, procedural rights would be toothless. Interestingly, however, the Rio Declaration did not yet refer to the role that organized groups (such as ENGOs) can play[21]. For Europe, this gap is filled by the Aarhus Convention which has been developed under the auspices of the United Nations Economic Commission for Europe (UNECE)[22].

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[19] Available at: http://www.un-documents.net/unchedec.htm (accessed 12 Dec. 2017).

[20] Available at: http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm (accessed 12 Dec. 2017).

[21] This is also not (explicitly) the case in the World Charter for Nature, adopted by the United Nations General Assembly on 28 Oct. 1982, no A/RES/37/7. However, in a resolution adopted on 14 Dec. 1990 (A/RES/45/94) the UNGA 'calls upon Member States and intergovernmental and non- governmental organizations dealing with environmental questions to enhance their efforts towards ensuring a better and healthier environment'. The First European Charter on Environment and Health, adopted by the Ministers of the Environment and Health of European countries and by the Commission of the European Communities on 8 Dec. 1989, only states that 'Non-governmental organizations also play an important role in disseminating information to the public and promoting public awareness and response' and hence does not foresee any legal position for ENGOs.

[22] Meanwhile, UNECE includes fifty-six Member States in Europe, North America and Asia. All interested United Nations Member States may participate in the work of UNECE, see further: https://www.unece.org/mission.html

2.2 THE Aarhus Convention: a special avenue for environmental NGOs

While there does not yet exist a global treaty on procedural environmental rights, the Aarhus Convention has a pan-European reach, and it may even evolve into a global treaty providing environmental procedural rights since countries from other continents may become a party as well[23]. However, thus far, there is not much appetite for making use of this opportunity. Procedural rights are hence scattered across national legal systems around the world. But also within other legal frame- works on the European continent there are relevant developments, such as the recognition of for instance the duty the inform citizens about environmental risks as established by the European Court of Human Rights[24], and are appearing into international environmental treaties too, albeit often only weakly provided[25].

The Aarhus Convention deliberately strengthens the legal position of NGOs, particularly by providing that they can participate to governmental decision- making, notably also where it concerns specific projects that may have a significant effect on

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(accessed 27 Dec. 2017). There are 47 parties to the Aarhus Convention as of 16 Oct. 2017.

[23] Art. 19(3) AC: Accession is possible for any UN member with the approval of the meeting of the Parties.

[24] See further: Jonathan Verschuuren, Contribution of the Case Law of the European Court of Human Rights to Sustainable Development in Europe, in Regional Environmental Law 363–385 (Werner Scholtz & Jonathan Verschuuren eds, Edward Elgar 2015).

[25] For instance, Art. 6 of the UNFCCC obliges Parties to the convention to promote and facilitate – within their respective capacity – 'public access to information on climate change and its effects', next to 'Public participation in addressing climate change and its effects and developing adequate responses'. Sometimes more specific provisions can be found e.g. Art. 23 of Cartagena Protocol on Biosafety to the Convention on Biological Diversity. In both instances, the acts of the parties should be in accordance with their national laws. As far as is known by this author, there is not yet any systematic study on the appearance, design and enforceability of environmental procedural rights in multilateral environmental agreements.

the environment[26]. This right can be enforced before a court of law and/or another independent and impartial body established by law[27]. Next to this, NGOs enjoy the right of access to environmental information, which is a right belonging to the public at large (actio popularis). While access to information is also possible for citizens, the role of NGOs in collecting environmental information is crucial for holding governments to account[28]. Information about environmental problems, and about governmental policies and decisions related to that, is often very complex and specific, so that specialized organizations are needed in order to effectively understand it, and, from that perspective, and if needed, criticize governments (and companies) about short falling or detrimental action[29]. Therefore, the Aarhus Convention bestowed upon private actors – especially NGOs – procedural rights so that they can support the achievement of the public interest of having a sound environment. Hence, the main aim of NGOs, which is to protect and improve the environment, aligns with the public task of governments, including EU institutions, to conduct sufficiently ambitious environ- mental policies as codified in the Charter of Fundamental Rights of the European Union and as codified in various national constitutions. In essence, one could say that if governments fall short of their task to protect and improve the environment, NGOs may step in in order to try to uphold this

[26] Art. 6 AC jo Art. 2(5) AC, stipulating that 'non-governmental organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest', thereby providing that ENGO's enjoy the same rights as 'the public concerned'.

[27] Art. 9(2) AC.

[28] In this respect, Gerd Winter already argued that environmental information is very often not only of individual but of collective interest: Gerd Winter, Freedom of Environmental Information, in European Environmental Law 87 (Gerd Winter ed., Darthmouth Publishing company 1996).

[29] Of course, this presumes that ENGOs have sufficient capacity and expertise for collecting and understanding this information, which is a point of concern. Nonetheless, collective action through ENGO seems anyway often more efficient than individual citizen action.

public interest concern[30]. The specific role that NGOs envision to play, being a watchdog in order to ensure compliance with set standards, and, moreover, to achieve more ambitious standards to protect and improve the environment, is particularly important in case of short- falling governmental action. Non-compliance is unfortunately omnipresent in environmental law, and watchdogs are in this respect needed in order to ensure that the public task of the protection of the environment is sufficiently fulfilled[31].

2.3 THE SCOPE OF WHAT SHOULD BE PROTECTED

Basically, Stone proposed that 'natural objects would have standing in their own right, through a guardian'[32]. Obviously, the protection of the environment is broader than only the protection of natural objects: it includes also species and, in a wider sense, the quality of the whole ecosystem matters. For instance, in terms of the Convention on Biological Diversity, protection should be given to 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species, and of ecosystems'[33]. Moreover, the protection of the ecosystems in such a wide sense benefits future generations, at least if we assume that they will also prefer a sound environment, including beautiful rivers, forests, landscapes, etc. In this vein, the Aarhus Conven-

[30] Particularly also addressing non-compliance with environmental legislation is seen as a task for Environmental ENGOs, and, in this respect, there is much discussion of how to improve access to justice that NGOs can address non-compliance by governments and private actors, See Darpö, supra n. 6 discussing Art. 9(3) of the Aarhus Convention.

[31] In this respect, the identification of fraud with emission devices in cars was detected by a technician connected to a not-for-profit organization dedicated to reducing vehicle emissions, see: Harry Kretchmer, The Man Who Discovered the Volkswagen Emissions Scandal (13 Oct. 2015), http://www.bbc.com/news/business-34519184 (accessed 16 Jan. 2018).

[32] Stone, supra n. 13, at 17–18.

[33] Convention of Biological Diversity, Art. 2 jo Art. 1.

tion emphasizes in its preamble 'the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'. Legal scholarship argued that such a construct (to represent future generations in court) would not be unfamiliar to current law, at least not US law: Daniel Farber stated that 'the law has for many, many years allowed appointment of lawyers to represent future individuals'[34]. He points at a civil law provision that is used in estate or trust cases when there is a conflict of interest between existing beneficiaries and future ones; such a construct could be provided, in analogy, for future generations that have the right to a sound environment. Meanwhile, in various jurisdictions, case law has already accepted that the right of future generations may be defended before court[35]. Moreover, it is also allowed in some cases that children may defend this future concern, such as in the seminal decision of the Supreme Court of the Philippines laid down already in 1993, granting children standing for protecting their right to a sound environment, with which they also can ensure the protection of that right for the generations to come[36]. In this vein, specific NGOs can specifically focus on present and future generations, such as 'Our Children's Trust' that aims to elevate 'the voice of youth to secure the legal right to a stable climate and healthy atmosphere for the benefit of all present and

[34] Dan Farber, Appointing Guardians to Represent Future Generations (9 May 2016), http://legal-planet.org/ 2016/05/09/appointing-guardians-to-represent-future-generations/ (accessed 15 Dec. 2017).

[35] As has been done in the Urgenda court decision, supra n. 5, at paras 4.76, 4.89 & 4.91–2.

[36] Supreme Court Decision of the Philippines, Minors Oposa v. Secretary of the Department of Environment and Natural Resources, 30 July 1993, 33 I.L.M., at 173–206 (1994): http://www.crin.org/en/library/ legal-database/minors-oposa-v-secretary-department-environmental-and-natural-resources. (accessed 6 July 2018) The court stated inter alia 'the minors' assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come'.

future generations'[37]. This US-based group cooperates with social movements in other jurisdictions, and has for instance supported the claim by a Pakistan girl of seven years old contesting the operation of coal and other polluting fossil fuel activities[38]. The Pakistan Supreme Court has decided to hear this claim, that aims to protect the concern of present and future generations. In sum, in view of the development of serious environmental problems, such as the problem of climate change that may have long-term effects, NGOs also take up the role of defending the stake of future generations for a sound environment.

2.4 THE MULTIFORM EXISTENCE OF ENVIRONMENTAL NGOs

The terms of reference of NGOs can vary widely, and, as discussed above, can even include the aim of defending the right of future generations to live in a sound environment. Indeed, Stone emphasized that there is no monolithic environmental movement, and that NGOs can have conflicting goals; it would even be unreason- able to expect unity within the environmental social movements[39]. In his words, 'environmentalism is full of other sides'[40]. Hence, providing procedural rights to NGOs may lead to manifold and unpredictable actions. However, the diversity among NGOs can be qualified as a strength rather than a weakness in view of reaching a smart mix of regulation – in order to effectively protect public interests – as discussed by Gunning-

[37] See: https://www.ourchildrenstrust.org/mission-statement/ (accessed 6 July 2018) The terms of reference point at the specific focus of a healthy climate – this serious problem with possible serious long-term effects is very fit for a discussion whether future generations should be represented in the courts. However, we recall the opinion of Stone pointing at the question whether courts are suited to deal with the (largely) political questions.

[38] See: https://elaw.org/children-making-case-climate (accessed 6 July 2018).

[39] Stone, supra n. 13,, at 143.

[40] Ibid., at 144.

ham, Sinclair and Grabosky[41]. In their study, they focus on how an optimal mix of regulatory approaches for an effective environmental protection can be designed, which includes a discussion of the various roles that can be played by governments, polluters, and third parties such as NGOs. In this vein, they assert various roles to environmental groups, such as fulfilling a watchdog role based on collecting and disseminating information, which is particularly relevant in case governments fall short in taking care of their public task to protect the environment. In their view, access to environmental information can play an important supportive role to other regulatory approaches[42]. However, whether and how the available procedural rights will be used is unpredictable and depends on the terms of reference NGOs have, the strategies they wish to employ, and their capacities, next to the specific way in which, in a specific jurisdiction, the right has been provided.

3 ACCESS TO ENVIRONMENTAL INFORMATION IN EU LAW

3.1 IMPLEMENTATION IN EU law

In EU law, the right to environmental information is regulated in secondary legislation implementing the Aarhus Convention[43]. This right has been provided at two levels: first, it is made applicable to information held by EU institutions and EU bodies, and secondly, to information held by public authorities of Mem-

[41] Neil Gunningham Neil, Darren Sinclair, with contributions from Peter Grabosky, Instruments for Environmental Protection, Ch. 2, to: Neil Gunningham & Peter Grabosky, Smart Regulation. Designing Environmental Policy, 94 (Clarendon Press Oxford 1998).

[42] Gunningham, Sinclair & Grabosky, ibid., at 65 (and, from the same book, at 427–428 – concluding chapter by Gunningham & Sinclair). See for a discussion of advantages and disadvantages of the right to access environmental information: Winter, supra n. 28.

[43] See for the approval of the AC: Council Decision 2005/370/EC of 17 Feb. 2005 on the conclusion of the Convention on access to information, public participation in decision-making and access to justice in environmental matters (OJ L 124, 17 May 2005, at 1–3).

ber States[44]. The implementation of the Aarhus Convention in EU law provides some specific guarantees that add to the general right to information as provided to EU citizens and representative groups[45].

The right to request environmental information held by the government can be used by anyone. There is no legal requirement to state an interest, so there is no issue of standing[46]. However, to be able to file a lawsuit before the Court of Justice of the EU in case an EU institution or body refuses to disclose requested environmental information, legal personality is required (see Article 263, fourth paragraph TFEU). In this sense, informal NGOs are not able to start a lawsuit in order to check the legality of for instance a decision of the European Commission to refuse to disclose requested environmental information[47]. This could as such

[44] See respectively Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 Sept. 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, [2006] O.J. L 264/13, and Directive 2003/4/EC of the European Parliament and of the Council of 28 Jan. 2003 on public access to environmental informa- tion and repealing Council Directive 90/313/EEC [2003] O.J. L 41/26 (hereafter Directive 2003/4/ EC).

[45] Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ L 145, 31 May 2001, at 43–48). Moreover, Art. 11 TEU calls for an open and transparent dialogue with representative associations and civil society, and Art. 15 TFEU provides any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, the right of access to documents of the Union's institutions, bodies, offices and agencies. Art. 42 of the Charter of Fundamental Rights of the European Union also lays down the right of access to documents of the institutions.

[46] See for instance Art. 3 jo Art. 2(5) Directive 2003/4/EC: 'Applicant' shall mean any natural or legal person requesting environmental information.

[47] See about a case where an ENGO was not found admissible to start a legal procedure before the CJEU: T-168/13, European Platform Against Windfarms (EPAW) v. European Commission, discussed by Thirza Moolenaar & Sandra

be solved in a pragmatic way if one member of the informal NGO would be willing to take up such a legal procedure.

Furthermore, and in line with the Aarhus Convention, a wide and non- exhaustive approach is adopted with regard to what is to be understood by 'environmental information'[48]. The information can be requested from 'public authorities', and also private entities may be covered by this definition in case they exercise public authority or perform a public function[49]. The environmental information to be released by governments can even find its origin in information submitted by industries to governmental authorities, such as emission reports showing the performance of an industrial installation, or results of laboratory tests examining possible effects on the environment coming from new products or chemicals. However, in such a case, it lays within the discretion of the public authority to refuse to fulfil the request for disclosure in case the confidentiality of commercial and industrial information is protected by law in order to protect a legitimate economic interest[50]. Nonetheless, according to the Aarhus Convention, information on emissions which is relevant for the pro-

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Nobrega, Access to Justice: Environmental Non-Governmental Organizations According to the Aarhus Regulation, 2016(2) ELNI Rev. 76–84 (2016).

[48] See for instance Art. 2(1) Directive 2003/4/EC.

[49] Juliana Zuluaga Madrid, Access to Environmental Information from Private Entities: A Rights-Based Approach, 26(1) Rev. Eur. Community & Int'l Envtl. L. 38–53, 38 (2017).

[50] This is at least the case according the Aarhus Convention. In the EU secondary legislation applicable to EU institutions, a more restrictive approach is taken meaning that some information has to be refused, unless there is an overriding public interest in disclosure (Art. 4(2) Regulation 1049/2001). According to Art. 6 of Regulation 1367/2006, an overriding public interest shall be deemed to exist where the information requested relates to emissions into the environment. Winter, supra n. 28 points at the possibility that industries may be willing to declare information as secret (at 84), and that authorities may use discretion for using a ground to refuse in a way that a wide application of the exemption is taken (at 86).

tection of the environment shall be disclosed[51]. Also other grounds for refusal apply, such as those related to information in the sphere of 'international relations, national defence or public security'. It is in principle for the discretion of the public authority to which the request of information is submitted whether to make use of these grounds, although a restrictive interpretation is prescribed[52]. However, and importantly, in case of a full or partial refusal to disclose requested information, the applicant should have the opportunity to address a court[53]. Meanwhile, various court decisions have been laid down by the CJEU regarding the right to access environmental information, some of which turned out to be supportive for the NGOs[54].

3.2 TENDENCY TOWARDS ENVIRONMENTAL FRIENDLY CASE LAW (BUT HARD TO ACHIEVE)

While the Aarhus Convention requires that the grounds for refusal have to be interpreted in a restrictive way, thereby not on-

[51] See Art. 4(4)(d) of the AC (implemented differently in EU secondary legislation, see footnote above). See in this respect also the Declaration by the European Community with respect to certain provisions on access to information attached to Council Decision 2005/370/EC of 17 Feb. 2005 (mentioned above).

[52] The ground for refusal are provided in Art. 4, paras 3 and 4 of the AC.

[53] Art. 6, Directive 2003/4 formulates this as follows: 'a court of law or another independent and impartial body established by law'.

[54] See particularly C-442/14, Bayer CropScience SA-NV and Stichting De Bijenstichting v. College voor de toelating van gewasbeschermingsmiddelen en biociden [23 Nov. 2016], and C-673/13, European Commission v. Stichting Greenpeace Nederland and Pesticide Action Network Europe [23 Nov. 2017], to be discussed in the next session, but for instance also C-279/12, Fish Legal and Emily Shirley v. Information Commissioner and Others 19 Dec. 2013]; C-515/11, Deutsche Umwelthilfe eV v. Bundesrepublik Deutschland, [18 July 2013] and C-615/13, Client Earth and Pesticide Action Network v. EFSA [16 July 2015]. See for some problems with exercising the right to access to environmental information in the field of climate change: Marjan Peeters & Sandra Nóbrega, Climate Change-Related Aarhus Conflicts: How Successful Are Procedural Rights in EU Climate Law?, 23(3) Rev. Eur. Community & Int'l Envtl. L. 354–366 (2014).

ly taking into account the 'public interest' served by disclosure, but also 'whether the information requested relates to emissions into the environment', these decisive terms remain undefined in the Convention[55]. This uncertainty is also the case with regard to the protection of confidential business information, which is not applicable in case of 'information on emissions which is relevant for the protection of the environment'. Such information has to be disclosed[56]. Hence, while the Convention aims to provide strong protection of disclosure of information on emissions into or relevant for the protection of the environment, legal uncertainty rests with the interpretation of these terms. Particularly where the request concerns information submitted to governments by private operators, one can imagine that these operators argue for specific explanations, thereby trying to prevent disclosure of 'their' information to the public. Indeed, in this respect one can see a clash between the interests of the companies against those of NGOs willing to protect the environment, for which knowledge on potential harmful effects is crucial[57]. It is precisely on this issue that the Court of Justice of the EU has developed an important inter-

[55] Art. 4(4) AC, and, in EU secondary law, Art. 4(2) Directive 2003/4/EC: 'Member States may not (...) provide for a request to be refused where the request relates to information on emissions into the environment'; Art. 6(1) Regulation (EC) 1367/2006: 'an overriding public interest in disclosure shall be deemed to exist where the information requested relates to emissions into the environment'. (see in this respect also Art. 4(2) Regulation 1049/2001).

[56] Art. 4(4)(d) AC: Disclosure may be refused if this would adversely affect 'The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed'.

[57] This is only one of the serious complexities when governments have the task to provide transparency; see for a comprehensive discussion of the complexities with regard to transparency Fisher (noting that 'While transparency may be a truism in regards to public administration, its operation is profoundly complex': E. Fisher, Transparency and Administrative Law: A Critical Evaluation, 63 Current Legal Probs. 272, 272–314 (2010).

pretation, which happened in a preliminary ruling in a case that was started by two NGOs before a national court[58]. The CJEU clarified the terminology used in Directive 2003/4/ EC in a transparency-friendly way, so for the benefit of the NGOs[59]. The 'environment-friendly' interpretation by the court can be illustrated by the fact that it moved to an even wider interpretation than explicitly foreseen by the Implementing Guide to the Aarhus Convention published on the UNECE website[60]. This guide developed by experts (who often are well-known environ- mental law experts, and of which some are or were members to the Compliance Committee to the Convention) provides an elaborated explanation of the meaning and application of the Aarhus Convention provisions, and can at least not be qualified as a document arguing for a restrictive interpretation of the provisions of the Convention. According to the CJEU, this Guide has no legal status, although it may be taken into consideration, next to other relevant material[61]. The liberal interpretation of the Court rests on

[58] C-442/14, supra n. 54, originating from a request from a Dutch NGO aiming at the protection of bees for disclosure of documents submitted by Bayer during procedures for the authorization of the placing on the Dutch market of certain plant protection products and biocides.

[59] Moreover, in an earlier verdict, the CJEU ruled that for applying this ground, assessments have to be carried out in each individual case, see C-266/09 Stichting Natuur en Milieu and Others v. College voor de toelating van gewasbeschermingsmiddelen en biociden [16 Dec. 2010].

[60] 'Environmental friendly' is here to be understood as friendly towards the right to access to environ- mental information. The second edition of this Implementation Guide is available at http://www.unece.org/fileadmin/DAM/env/pp/Publications/Aarhus_Implementation_Guide_interactive_eng. pdf. (accessed 6 July 2018) See for the narrow interpretation in the Implementation Guide, para. 69 of the Court decision; in the following paragraphs the Court moves to a wider interpretation of emissions than restricting it to 'emissions emanating from certain industrial installations'. See in this line the opinion related to the interpretation of 'emissions', particularly the paras 58 and 78.

[61] See about the legal status para. 70 of the Court decision. The introduction to the Implementation Guide (at 9) also explains its non-legal binding character,

the fact that the term 'emissions' does not only cover emissions from industrial installations, for instance to water or air, but also 'the release into the environment of products or substances such as plant protection products or biocides and substances contained in those products, to the extent that that release is actual or foreseeable under normal or realistic conditions of use'[62]. Hence, the Court interpreted the definition in such a way that it also covers products of substances that are brought into the environment. While the Implementation Guide also favours a wide approach (stating that 'a case can be made that all information on emissions is relevant to the protection of the environment'), it only gave an example related to emissions coming from installations[63]. Moreover, information on emissions into the environment is also widely interpreted, since it:

– covers information concerning the nature, composition, quantity, date and place of the 'emissions into the environment' of those products or substances, and data concerning the medium to long-term consequences of those emissions on the environment, in particular information relating to residues in the environment following application of the product in question and studies on the measurement of the substance's drift during that application, whether the data comes from studies performed entirely or in part in the field, or from laboratory or translocation studies[64].

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but also explains that it inter alia draws on 'other international law instruments in the area of the environment and human rights, decisions adopted by the Meeting of the Parties to the Aarhus Convention, findings of the Aarhus Convention Compliance Committee'. In this sense, it aims to provide normative guidance.

[62] C-442/14, supra n. 54, verdict under (2). See about the relationship between different secondary acts on the confidentiality of information part 1 of the verdict.

[63] Implementation Guide, supra n. 60, at 88.

[64] However, the Court also provided a restriction, meaning that 'only relevant data which may be extracted from the source of information concerning emissions into the environment must be disclosed where it is possible to separate

As a kind of ultimate limit, the Court considers that (only) purely hypothetical emissions are not covered[65]. With these wide interpretations, the Court gave a broad meaning to the right to access environmental information.

The Court confirmed the broad interpretation of 'emissions in the environment' in a second judgment, laid down on the same day, related to a decision adopted by the European Commission to refuse information contained in documents about glyphosate, which had been annulled by the General Court[66]. However, the European Commission argued for a restrictive interpretation of the exception to the protection of confidential business information, meaning that information on emissions into the environment shall be deemed as an over- riding public interest[67]. In this vein, it pointed at the duty of EU-officials to respect the obligation of professional secrecy, in particular concerning information about undertakings, as codified in Article 339 TFEU[68]. The Court stressed that the purpose of access to information is to promote more effective public participation, thereby increasing the accountability of decision-making[69]. Nonetheless, the Court argued

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those data from the other information contained in that source, which is for the referring court to assess'.

[65] C-442/14, supra n. 54, para. 80.

[66] C-673/13, supra n. 54. In this case, the information was provided by a German authority to the European Commission; the German authority refused disclosure by the Commission. It is also important to understand that for this Commission decision, Regulation 1367/2006 applies instead of Directive 2003/4. The text of the Regulation (read in combination with Regulation 1049/2001) is more protective towards confidential business information compared to Directive 2003/4/EC.

[67] The General Court considered that this is the case if there 'is a "sufficiently direct" link between the information concerned and emissions into the environment', se C-673/13, supra n. 54, para. 44. According to the Commission, this has no legal basis, and the vague nature of that criterion raises serious problems in terms of legal certainty.

[68] C-673/13, supra n. 54, para. 39.

[69] Ibid., para. 80.

that there should still be some possibility for the authorities to consider whether or not to disclose information based on the ground that such a refusal would have an adverse effect on the protection of the commercial interests. In this sense, according to the CJEU, the General Court took a too superficial approach by stating that it is sufficient that information relates, in a sufficiently direct manner, to emissions into the environment[70]. The CJEU also explicitly points at the fact that upholding the (environmental friendly) approach of the General Court would 'constitute a disproportionate interference with the protection of business secrecy' as is ensured by Article 339 TFEU[71]. Consequently, there is still uncertainty, for instance with regard to what can be understood as 'information [which] relates to emissions into the environment', which is for the General Court to decide in this specific case. This also illustrates the long time that is needed for settling the legal dispute: the appeal before the CJEU was initiated on 17 December 2013, and the decision came almost three years later, on 23 November 2016. While the General Court decided for the benefit of the NGOs, the European Commission was successful in its appeal, after which the case continues before the General Court. Obviously, such a procedure requires much capacity and endurance from NGOs, which assumedly are less equipped for delivering this compared to the authorities and the companies. So, while access to information is necessary to restore the unbalanced distribution of knowledge among the ones who pollute, and the ones that try to protect the environment against pollution, enforcing this right may still mean a high, perhaps sometimes too high burden for NGOs[72]. So, while access to information is a necessary prerequisite for NGOs to fulfil the watchdog role for ensuring the public interest of a sound environment, the costs and

[70] Ibid., para. 81–82.
[71] Ibid., para. 81.
[72] More empirical research would be required as to the practical limits to ENGOs for enforcing the right to access to information.

lengths of court procedures might entail a serious limitation to carry out these tasks effectively.

3.3 CLARIFYING THE LIMITS

Further case law is needed to clarify the possibilities but also the legitimate limits to the right of access to environmental information. For instance, it has yet to be crystallized to what extent information can be disclosed by authorities in cases of (presumed) non-compliance by operators, for which administrative and criminal prosecutions take place. One may expect that Environmental NGOs have a special interest in detecting non-compliance, and in sharing (potential) non-compliance with the wider public with the aim of achieving more environmental friendly behaviour by the polluters. Moreover, NGOs can play a role for encouraging administrative enforcement, and, in this vein, getting information concerning inspection and other enforcement activities remains crucial[73]. While illegal waste dumping or activities damaging nature (such as chopping trees) may be detected on the spot (and could for instance be filmed by NGOs), many other illegal activities cannot be easily identified by NGOs, such as the release of carbon dioxide or other substances. Asking for information related to inspection and other enforcement activities by governments has understandably its limits, necessary to protect the legitimate concerns of operators, and necessary to protect an effective administrative and criminal prosecution. Also here, one may expect that companies will hire expert lawyers to defend their interests, which may turn out in an unbalanced power position vis-à-vis the NGOs.

[73] Gunningham, Sinclair & Grabosky, supra n. 41, at 96 (referring to John Braithwaite).

4 DEALING WITH INFORMATION: RESPONSIBILITY AND ACCOUNTABILITY OF ENVIRONMENTAL NGO'S

4.1 CONSTRUCTING AND PUBLISHING ENVIRONMENTAL INFORMATION

The Aarhus Convention, although important, has also its limits: it only enables to request information held by the government[74]. Having no access to information held by private actors is particularly a sincere limit in case a shift takes place from governmental to private regulation[75]. The public, including NGOs, is then dependent on the extent of which private regulatory approaches contain transparency provisions[76]. Moreover, there is no legal right provided in the Aarhus Convention for the public to request directly with the polluters information held by them[77]. So, while governments traditionally enjoy the right to monitor industrial activities and inspect industrial sites in order to check the compliance behaviour of those who are regulated, NGOs may

[74] Also some justifications for holding information confidential are provided See Art. 4, para. 4 of the Aarhus Convention; one of the grounds for refusing information is if disclosure would adversely affect international relations. Also, in case law, decisions not to disclose (immediately) information have been found valid, see for instance C-612/13, Client Earth v. European Commission [16 July 2015]; CFI joined Cases T-424/14 and T 425/14 (under appeal) Client Earth v. European Commission [13 Nov. 2015] and C-524/09, Ville de Lyon/Caisse des dépôts et consignations [22 Dec. 2010].

[75] See for such a shift Marjan Peeters, Inspection and Market-Based Regulation Through Emissions Trading, The Striking Reliance on Self-Monitoring, Self-Reporting and Verification, 2(1) Utrecht L. Rev. 177–195 (2006).

[76] S. Romppanen, New Governance in Context Evaluating the EU Biofuels Regime, Dissertation, Publications of the University of Eastern Finland, 49 and 106 ff (2015), http://epublications.uef.fi/pub/urn_isbn_978-952-61- 1763-8/urn_isbn_978-952-61-1763-8.pdfRomppanenhttp://epublications.uef.fi/pub/urn_isbn_978-952- 61-1763-8/urn_isbn_978-952-61-1763-8.pdf (accessed 6 July 2018) (pointing at the weak legislative and non-binding provisions as regards to the transparency related to the certification regime for biofuels).

[77] See on this issue Madrid, supra n. 49.

face severe limits for retrieving information relevant for identifying non-compliant behaviour[78].

The Aarhus Convention only provides that Parties 'shall encourage opera- tors' to inform the public regularly of the environmental impact of their activities and products[79]. Hence, NGOs may feel the need to 'construct' environmental information, thereby filling in remaining gaps in the factual information on a certain matter, and to provide value judgments on it, even amounting to qualifying the behaviour as malpractice, or as illegal[80]. NGOs may also engage into alternative approaches such as direct filming of certain activities[81]. Subsequently, NGOs may wish to use traditional and modern media to share this information with the wider public, in order to try to influence the behaviour of polluters to more environmental-friendly action, or to influence governments to take action. Instead, challenging directly to court illegality is, if any way possible, not always the most effective or efficient option: there can be uncertainty related to the potential success, but also such procedures may take a long time and many costs. For that reason, NGOs may chose for faster and perhaps even more effective avenues, such as bringing information on malpractice or illegality by an authority or a com-

[78] The ECtHR has ruled that based on Art. 8 ECHR, governments have a positive obligation to provide citizens with information which could enable them to assess whether or not the emissions of a plant could adversely affect their lives and home, see Guerra and others v. Italy, App no 14967/89 (ECHR 19 Feb. 1998), as discussed by Birgit Peters, Unpacking the Diversity of Procedural Environmental Rights: The European Convention on Human Rights and the Aarhus Convention, 2017(0) J. Envtl. L. 1–27 (2017).

[79] Art. 5(6) AC.

[80] See e.g. two ECtHR decisions: VAK (Vides Aizsardzības Klubs) v. Latvia, application No 57829/00, 27 May 2009, and Steel and Morris v. the United Kingdom, Application no. 68416/01, 15 Feb. 2005.

[81] Fiona Donson, Libel Cases and Public Debate – Some Reflections on Whether Europe Should be Concerned About SLAPPS, 19(1) Rev. Eur. Community & Int'l Envtl. L. 83–94 (2010), discusses (at 87) the Protection of Harassment Act that may be invoked by the companies.

pany to the 'court of opinion' of the public[82]. Particularly with the existence of internet and social media, NGOs can inform society quickly. Through their own websites, NGOs can cast doubt on the sustainability of a certain activity, and can urge for stopping or altering the behaviour. Of course, traditional media (TV news programmes, newspapers) and modern social media can pick up such messages and give more weight to it.

The sharing of information with the wider public by NGOs may also concern information disclosed by governments upon request. The Aarhus Convention does not regulate what NGOs may do with such acquired environmental information. For instance, may NGOs publicly shame companies based on the information that is disclosed to them? What will happen in case an NGO does not interpret the given information in the correct way? Indeed, if information is disclosed, it is not certain that the received information is understood correctly, or that the value judgments given to it are legitimate[83]. Misinformation of the public by NGOs may imply reputational damage to the industry that is reported on[84]. For instance, it is suggested in literature that distribution of information 'can directly influence the price of a firm's stock, serving to reward good environmental performers

[82] Of course, outside the field of environmental policy and law, the question of how to deal with (false) accusations is of utmost relevance, such as in the '#metoo' development. See for a discussion a special issue of Law and Contemporary Problems: The Court of Public Opinion: The Practice and Ethics of Trying Cases in the Media, 71(4) (Autumn 2008), https://scholarship.law.duke.edu/lcp/vol71/iss4/. (accessed on 6 July 2018)

[83] Fisher, supra n. 57, at 294. See also Gunningham, Sinclair & Grabosky, supra n. 41, about the fear of companies that the public can misunderstand information (at 65).

[84] See for an apology of an ENGO for any reputational damage it may have caused to the specific industry on which it was reporting: https://sandbag.org.uk/2011/11/17/note-of-correction-to-thys senkrupp-figures-in-sandbags-klimagoldesel (accessed 28 Nov. 2017).

and punish the bad'[85]. While publishing information can be very influential, this power seemingly also implies that a certain responsibility rests on NGOs to ensure that the information, including interpretations of the collected information, is correct[86]. If not, they may be accused of causing reputational damage, and may be held accountable for the economic damage that may occur as a result of the accusations made. However, the issue of how to deal in a responsible way with acquired information is not regulated by the Aarhus Convention, and questions of liability of NGOs are covered by other legal frameworks, such as national tort law.

4.2 HOLDING ENVIRONMENTAL NGOS TO ACCOUNT VERSUS FREEDOM OF EXPRESSION

One way of holding NGOs to account is that the ones who feel damaged, being 'blamed' or 'shamed' by informational actions by NGOs, undertake legal actions to, for instance, prevent further information disclosure, or to claim correction of published information or compensation of economic damage. This strategy – taking NGOs to court – is called SLAPPs, which stands for: Strategic Lawsuits Against Public Participation[87]. A SLAPP is a civil complaint against an NGO with the purpose to silence the criticism[88]. Since already the threat of a legal action has the aim

[85] Gunningham, Sinclair & Grabosky, supra n. 41, at 64. Of course, this may also happen if the government would publish information on for instance illegal behaviour of an industry.

[86] See for a discussion of the dilemma how to develop statements having a sufficient scientific basis Patrick Moore, Confessions of a Greenpeace Dropout. The Making of a Sensible Environmentalist (Beatty Street Publishing Inc. 2010).

[87] RECIEL published a special issue on SLAPPS: vol 19(1) (2010). See also Gunningham, Sinclair & Grabowsky, supra n. 41, at 130. SLAPPS are not unique for environmental issues, but may happen as well in other areas, such as food safety.

[88] Donson, supra n. 81, at 84.

of silencing NGOs, it remains unclear to what extent this approach has already had an effect in practice[89].

While publicly made accusations of detrimental or even illegal behaviour may amount to negative reputation to companies or authorities before even a court has ruled on the question whether any wrong-doing has occurred, Environmental NGOs have still some room for making allegations of malpractice or illegal behaviour. This can be derived from two cases related to Article 10 ECHR which guarantees the right to freedom of expression. The ECtHR acknowledges that NGOs acting as watchdogs are essential in a democratic society[90], and that 'a certain degree of hyperbole and exaggeration could be tolerated, and even expected'[91]. However, this freedom of expression is according to the ECtHR not unlimited: firstly, a principle of 'good faith in order to provide accurate and reliable information' applies, and, secondly, it is acknowledged that commercial actors can protect their interests, not only for the benefit of their shareholders and employees, but also 'for the wider economic good'[92]. Of course, the core question whether an ENGO has sufficient arguments for making the accusation of environmentally harming, or even illegal behaviour is to be determined on a case-by case basis by a court. This implies that there is some (or even substantial) 'up front' legal uncertainty at the side of Environmental NGOs. In this respect, it is of utmost relevance that the ECtHR has emphasized that there should be, in view of Article 6§1 ECHR,

[89] Hugh Wilkins, Editorial, 19(1) Rev. Eur. Community & Int'l Env. L. 1 (2010). Interestingly, it seems that in Canada and the US more reports of SLAPPS are made in literature compared to the European continent, although a systematic analysis would be needed to understand the reality. See about the different legal cultures in the US and Europe: Donson, supra n. 81.

[90] See the Information Note on the Court's Case-law No. 64 (summary by the registry) of VAK v. Latvia (refer supra n. 80), May 2004.

[91] Steel and Morris v. the United Kingdom (Press release issued by the Registrar).

[92] Ibid.

equality of arms in case a company (in this case, McDonalds) sues environmental activists (two individuals connected to a local, informal environ- mental group who distributed leaflets with accusations related to McDonalds' behaviour)[93]. Legally seen, there was no possibility for McDonalds to sue the NGO since it had no legal personality, so, instead, the citizens working within the informal group were sued[94]. In this specific case, the two individuals had to defend themselves against a libel claim, and the procedure took 313 court days, involving 40,000 pages of documentary evidence and 130 oral witnesses. Since, according to the ECtHR, also small and informal campaign groups need to carry out their activities effectively, protection is given not only for the freedom of expression, but also for the right of the individuals to get legal aid needed to defend the case properly in court[95].

In sum, according to the ECtHR, NGOs enjoy freedom of expression, through which they can fulfil their watchdog role, but this freedom is not unlimited. Basically, NGOs have freedom to make accusations of unwished or illegal behaviour of public and private actors as long as they are able to substantiate the allegation[96]. Given the fact that bringing information to the public court of opinion may be very influential, some control on this power is necessary in order not only to protect the legitimate interests of businesses, but ultimately also to ensure that the public is well-informed. The two ECtHR cases show as such a balanced approach between on the one hand the freedom of expression, including providing equality of arms to environmental activists against a multinational, and on the other hand the protection of the interests of the accused ones. Nonetheless, it seems to be unavoidable that NGOs will face some legal uncertainty if they seek the wider public with accusations of malpractice and illegal be-

[93] Steel and Morris v. the United Kingdom.
[94] Donson, supra n. 81, at 85.
[95] See for further discussion of libel cases: Donson, supra n. 81.
[96] Verschuuren, supra n. 24, at 372, referring to VAK v. Latvia.

haviour. In this respect, public authorities are of course usually better equipped to address illegal behaviour by polluters, thereby using competences to revoke or to amend permits, and competences to monitor, inspect, and to impose sanctions. The legality of such governmental activities can of course be contested by industries before the court, and also here governments are usually better equipped than NGOs, having capacity and expertise to defend the legality of the governmental decision-making in court.

4.3 ACCESS TO INFORMATION HELD BY PRIVATE ACTORS AND PROTECTION OF WHISTLEBLOWERS

As long as NGOs face limits to collecting information, since the Aarhus Convention only provides that they can address governments, and, moreover, since grounds for refusal apply, a more progressive approach would be the adoption of a provision entailing that requests for information can be submitted by NGOs to companies. In fact, in several jurisdictions outside the EU (such as Colombia and South Africa) citizens have already the right to request information from companies if such information is needed for the protection of their individual human rights[97]. As such, the protection of an individual right has a different scope compared to the argument made by Stone, who argued for a strong representation of natural objects in law. Nonetheless, providing a right to access environmental information that has an impact on the enjoyment of individual rights, such as the right to

[97] Madrid, supra n. 49, at 43 – see also her discussion of the argument of the Colombian Constitutional Court about the necessity to compensate power asymmetries in society. See also the need to guarantee access to information in the possession of the defendant or a third party: Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/9 from 29 Sept. 2017, Elements for the draft legally binding instrument on Transnational Corporations and other business enterprises with respect to human rights, at 10–11, (accessed on 6 July 2018:) http://www.ohchr.org/Documents/ HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf

enjoy private life, but also the right to life as enshrined in the ECHR, could amount to a meaningful new instrument in environmental law that not only protects individuals, but, to some extent, also ensures better environmental protection. And, in such cases, the individuals can be supported by NGOs offering their expertise and capacity for arguing the claims[98].

EU law does not provide a general right for citizens to request environmental rights from industries, nor does the Aarhus Convention. Alternatively, under the Aarhus Convention, a Protocol is adopted through which inventories of pollution from industrial sites (and other sources) are made available to the public (this is the 'Kiev Protocol on Pollutant Release and Transfer Registers' which became binding on 8 October 2009, further referred to as the PRTR Protocol)[99]. The scope of the Protocol basically follows the EU Industrial Emissions Directive, broadened with some activities (such as some diffuse sources) and substances[100].

The aim of the PRTR Protocol is clearly to enhance public access to information through the establishment of coherent, inte-

[98] For instance, Friends of the Earth has supported Nigerian family in a claim against Shell: see https:// milieudefensie.nl/english/shell/courtcase/our-courtcase-against-shell (accessed 4 Jan. 2018). Part of the claim is to force Shell to make public some internal documents. See Jesse & Verschuuren (2011), at 160.

[99] The EU is a party to this protocol, see Council Decision of 2 Dec. 2005 on the conclusion, on behalf of the European Community, of the UN-ECE Protocol on Pollutant Release and Transfer Registers; OJ L32 of 04 Feb. 2006, see for further information: http://ec.europa.eu/world/agreements/ prepareCreateTreaties-Workspace/treatiesGeneralData.do?step=0&redirect=true&treatyId=6681. (accessed on 6 July 2018).

[100] See the Guidance on Implementation of the Protocol on Pollutant Release and Transfer Registers, 17 (2008), published on the UNECE website, https://www.unece.org/fileadmin/DAM/env/pp/prtr/ guidance/PRTR_May_2008_for_CD.pdf (accessed 3 Jan. 2018); see also the explanation on the website of the European Commission, http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l28149&from=EN (accessed on 3 Jan. 2018).

grated, nationwide pollutant release and transfer registers also covering individual industrial facilities[101]. The mechanism is based on reporting obligations of operators towards competent authorities in Member States, and this information has to be collected in a registry that has to be made available to the public[102]. At the same time, the PRTR Protocol also has a confidentiality clause largely resembling the confidentiality clause of the Aarhus Convention. For instance, if the disclosure of information would adversely affect 'The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature', the requested information may be refused[103].

Compliance with the PRTR Protocol means basically that environmental information that has to be reported by industries to authorities will become trans- parent to the public. Consequently, the UNECE website mentions that 'no company will want to be identified as among the biggest polluters'[104]. Moreover, the PRTR Protocol provides protection to members of the public meaning that each Party 'shall take the necessary measures to require that employees of a facility and members of the public who report a violation by a facility of national laws implementing this Protocol to public authorities are not penalized, persecuted or

[101] See for the objective Art. 1 PRTR.

[102] See in this respect the EU Regulation Art. 5: Regulation (EC) 166/2006 of the European Parliament and of the Council of 18 Jan. 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC (Text with EEA relevance).

[103] PRTR Art. 12.

[104] https://www.unece.org/env/pp/prtr.html (accessed on 3 Jan. 2018). This is repeated on the website of the EU Commission: 'the Protocol is expected to contribute promoting a downward trend of pollution, as no company will want to be identified as among the biggest polluters', published at http://ec.europa.eu/environment/industry/stationary/eper/legislation.htm (accessed 3 Jan. 2018).

harassed by that facility or public authorities for their actions in reporting the violation'[105].

How this provision has been implemented, and how it can be applied vis-à-vis protection that courts may be willing to give to businesses defending their economic interests particularly in case of false accusations, has yet to be examined[106]. Moreover, the scope of this provision is limited, since it only covers violations of national laws implementing the Protocol[107]. Environmental NGOs may have a much broader interest in collecting information, such as getting knowledge of laboratory tests within companies, or getting knowledge on safety procedures as employed in companies with a view of preventing environmental accidents. Anyway, within the EU, there is no specific provision for the protection of employees or members of the public reporting a violation included in the Regulation implementing the PRTR Protocol[108]. In fact, the protection of whistle-blowers is yet

[105] PRTR Art. 3(3). Environmental Non_Governmental Organizations belong to members of the public, see Art. 1(3). See for a clause protecting persons making use of the rights provided in the Aarhus Convention article 3(8), stating that each party shall ensure that persons exercising their rights in conformity with the Convention shall not be penalized, persecuted or harassed in any way for their involvement.

[106] The Guidance on Implementation of the Protocol on Pollutant Release and Transfer Registers, 2008, published on the UNECE website https://www.unece.org/fileadmin/DAM/env/pp/prtr/guidance/PRTR_May_2008_for_CD.pdf (accessed 3 Jan. 2018) gives only a very short explanation on this matter (at 12).

[107] As prescribed in Art. 3(3) PRTR.

[108] Regulation (EC) 166/2006 of the European Parliament and of the Council of 18 Jan. 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/C (Text with EEA relevance). The UNECE website does not list an implementation report by the EU. Only reports from a number of Member States have been published, such as from Germany. This report mentions, shortly, that Art. 3(3) of the PRTR Protocol has been implemented (but its explanation of this implementation only relates only to employees). See https://www.unece.org/fileadmin/DAM/env/pp/prtr/PRTR_NIRs/PRTR_

to be developed within EU law. One particular issue is to clarify which legal basis (if any) can be used for adopting legislation on this matter[109].

In sum, within EU law there is no provision enabling Environmental NGOs to request information from private actors in relation to their activities that could potentially damage the environment. To some extent the PRTR Protocol may be helpful since it obliges companies to report environmental data to competent authorities, which information has to be disclosed in a publicly available registry. Within this limited scope, there exists an international obligation to protect members of the public, including Environmental NGOs, who report a violation by a facility of the laws implementing the Protocol[110]. This specific provision has however not been provided in the implementing EU regulation[111].

NIRs_2014/Germany_PRTR_NIR_2014_Deutsch.pdf (accessed 3 Jan. 2018). Also the implementation report of the Flemish Region of Belgium explains shortly the implementation of Art. 3(3) PRTR Protocol, thereby referring to constitutional rights related to freedom of expression, and, to cut it short, the right to enjoy a sound environment.

[109] Kafteranis discusses the protection of whistle-blowers at EU level: Dimitrios Kafteranis, Protection of Whistleblowers in the European Union: The Promising Parliament Resolution and the Challenge for the European Commission, blog University of Oxford, Faculty of Law (14 Dec. 2017), https://www.law.ox.ac.uk/business-law-blog/blog/2017/12/protection-whistleblowers-european-union-promising- parliament (accessed 3 Jan. 2018). Moreover, a distinction can made between the protection of employees, and the protection of third persons 'necessary in a democratic society' such as NGOs. Kafteranis refers to case law of the ECtHR, stating that 'the whistleblower should, in the first place, raise concerns internally, and if this is not possible, he should address himself to the competent authorities. Only as a last resort should he address himself to the public'.

[110] Meanwhile, the 'adoption of protective measures to avoid the use of "chilling effect"' strategies 'by transnational corporations and other business enterprises to "discourage individual or collective claims against them"' is recognized as an element for a draft legally binding instrument with respect to human rights, see note from the Chairmanship of the OEIGWG established by HRC Res. A/HRC/RES/26/ 9 from 29 Sept. 2017, Elements for the Draft Legally Binding Instrument on Transnational Corporations and Other Business

5 CONCLUSION

Particularly when governments fall short in their public task to protect the environment, and/or when industries or other polluters do not take sufficient responsibility for taking care of the environment, private actors – either as individuals or represented by NGOs -will be crucial to defend the public interest of a sound environment. In this respect, the ability of NGOs to acquire relevant information is a necessity for carrying out effective strategies. The Aarhus Convention has strengthened the toolbox of NGOs by establishing the right to request environmental information held by the government[112]. However, industries may ask the governments to keep information confidential, and, in this respect, governments may decide to withhold certain information from the public. Nonetheless, the CJEU has laid down a decision that is supportive towards achieving transparency in the environmental domain by stretching the wording of what is to be understood by information on 'emissions'. Still, many barriers may be faced by NGOs, such as the costs of procedures, remaining legal uncertainty but also the threat of being sued by the ones who are subjected to the informational activities of the NGOs. While the ECtHR recognizes the importance of NGOs as watchdogs in a democratic society, the freedom of expression is not unlimited. The extent of which allegations made by private parties such as Environmental NGOs have to be substantiated is not clear, and

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Enterprises with Respect to Human Rights 10, http://www.ohchr.org/Documents/ HRBodies/HRCouncil/WGTransCorp/Session3/LegallyBindingInstrumentTNCs_OBEs.pdf (accessed 6 July 2018)

[111] In the course of developing this article, no evidence could be found explaining this gap. One reason may be the lack of, or sensitivity around the competence for regulating this matter.

[112] As indicated before, this right can be used by anyone, but given the complexity that may go beyond the capacity of a single individual, and the often general interest character of environmental informa- tion, Environmental NGOs play an important role.

shall be determined on a case-by-case basis by a court. In this sense, the environmental watchdogs are still con- fronted with up-front legal uncertainty about their room of manoeuvre when using information as a tool to protect the environment, particularly if they do so by explicitly addressing the behaviour of authorities and companies. The PRTR Protocol interestingly prescribes that members of the public who notify a violation should be protected, but this is limited to the laws needed for implementing this Protocol and hence has thus a very restrictive scope. Moreover, this provision has not been provided in the EU regulation implementing the Protocol.

If we want to take the possibility that NGOs help to serve the public interest of a sound interest seriously, it could be considered to broaden their capabilities. Evidently, the capabilities of NGOs are still limited since both the Aarhus Convention and the PRTR Protocol do not include a right for private parties wishing to take care of the public interest of a sound environment to request information directly from industries. Of course, when discussing (and, perhaps, legislating) such a right, the interest of industries to have a private sphere for making their business decisions, and for operating their installations, has to be respected. Furthermore, an increased strengthening of the legal position and rights of NGOs may necessitate attention to the way how these private parties make use of their green power, and to the legal limits for shaming and blaming polluters. At the same time, the environment needs to have sufficient representation in law, and the collection and distribution of environmental information is an important tool for promoting environmental protection. Ultimately, however, the difficulty of finding the balance between these perspectives should not delay the debate about empowering NGOs in such a way that they can effectively contribute to taking care of the public interest of a sound environment.

ISSUES OF IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL LAW IN THE NATIONAL LEGAL SYSTEMS OF AFRICAN STATES

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The theme of the implementation of environmental protection standards is not new. On the contrary, it goes back to the aftermath of independence, with the African countries becoming aware of environmental concerns, which was manifested either by their accession to previous conventions on Protection of the environment, or by the adoption of new conventions on the subject. However, the ecological movement touched Africa much later, after the Stockholm Conference of 1972 and especially in the approach of the Rio Conference of 1992.

Despite this rapid commitment to a common regulation of environmental protection policies and tools, the very notion of environmental law is still very abstract.

"Environmental law in most African countries is characterized by the abundance and diversity of environmental protection principles and rules. However, this normative proliferation contrasts with the reality of environmental protection, with most of these environmental standards not being applied."[1] As Vincent Zakane Minister Delegate for Regional Cooperation of Burkina Faso pointed out.

[1] Contemporary aspects of environmental law in West and Central Africa – Laurent Garnier - 2008 – p15

In this essay, by glossing over certain economic aspects, we will conduct an analysis of the legal-institutional factors that impede the effective implementation of international environmental law in Africa.

To do so, after a brief analysis of the stat of international Environmental law in Africa, we will examine the institutional weaknesses in its implementation, before concluding with the difficulties of its Incorporation into the internal legal order of African States.

The Situation of Africa in Environmental Law

Environmental issues in the general legal framework of the AU

The Constitutive Act of the African Union, which was adopted in Lomé, Togo in 2000, stipulates in Article 13 that the Executive Council shall coordinate and take decisions on policies in areas of common interest to Member States. This includes foreign trade; energy, industry and mineral resources; food, agricultural and animal resources; animal production and forestry; water resources and irrigation; and the environment and its protection[2].

The AU charter and regional conventions

Chapter VIII of the treaty establishing the African Economic Community of 1994, contains provisions on food and agriculture and provides for cooperation between Member States. States Parties are required to ensure the development within their borders of certain basic industries that are considered conducive to collective self-reliance and modernization, and to ensure the appropriate application of science and technology. States have an obligation to coordinate and harmonize their policies and programs in the field of energy and natural resources, and to promote new and renewable forms of energy. The Treaty requires the Member States to take appropriate measures to prohibit the import and dumping of hazardous wastes within their territory, and

[2] Article 13 of the Constitutive Act of the African Union, relating to the powers of the Executive Council of the AU

to cooperate with each other in the transboundary movement, management and treatment of such wastes, where these emanate from a Member State.

The African Charter on Human and Peoples' Rights has gradually taken up the issue of environmental protection by explicitly incorporating a human right to the environment (Article 24), a third-generation human right.

Regional conventions on the environment

The African Convention on the Conservation of Nature and Natural Resources, 1968

The 1968 African Convention on the Conservation of Nature and Natural Resources (also called the Convention on African Nature or the Algiers Convention), and the forerunner of the 2003 revised Algiers Convention, is arguably the centerpiece of the environmental texts of the AU[3].

The Revised Convention (Algiers) on the Conservation of Nature and Natural Resources, 2003

The Algiers Convention was revised in 2003 (Maputo) to take into account recent developments on African environmental and natural resource scenes, while bringing the Convention to the level and standard of current multilateral environmental agreements. the revised Convention, adopted by the African Union in Mozambique in July 2003, has been described as "the most modern and comprehensive of all agreements on natural resources".

Bamako Convention on the Prohibition of Imports into Africa and the Control of Transboundary Movements and Hazardous Waste Management in Africa

The Convention was adopted in Bamako (Mali) on 30 January 1991 and entered into force on 22 April 1998. In September 2015, it had 35 signatories, 25 of which had ratified the Convention.

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[3] Environmental Law And Policy In Namibia: Towards Making Africa The Tree Of Life (Third Edition)- Oliver C. Ruppel
https://www.enviro-awareness.org.na/environmental-law/chapter-6.php

Other conventions:

The Maritime Transport Charters; The Phyto-Sanitary Convention for Africa; The African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa; The African Union's Judicial System and the Consideration of Environmental Rights.

International environmental engagement of African countries:

Africa was at the origin of important initiatives, the least of which is not the world charter of nature. It was the president of Zaire, Mobutu Sese Seko, who in 1975, during the General Assembly of the Union for the Conservation of Nature (IUCN) held in Kinshasa, launched the idea for the first time as a challenge[4].

In addition, the Basel Conference for the Development of a Global Convention on the Control of Transboundary Movements of Hazardous Wastes, held from 20 to 22 March 1989 in Basel, Switzerland, was another important opportunity for Africa to measuring its increased interest in the environment.

Stockholm 1972:

On December 3, 1968, the UN General Assembly, by a resolution, called for the convening of a world conference on the human environment. This one is held in Stockholm in 1972.

But as paradoxical as it may seem, some countries did not show interest in the proposal. On the other hand, most developing countries in general, and Africans in particular79, saw a threat in the conference.

Indeed, the fear, quite understandably, of African countries had, inter alia, three main reasons:

First, they feared that the priority given to environmental problems would diminish the resources allocated to development assistance by developed countries. Secondly, developing countries, but also some developed countries, feared that environmen-

[4] WOLGANG BURHENE and W.A. IRWIN, World charter of nature, Berlin, Erich Schmitt Verlag Gmblt, 1983, P. 14.

tal expenditures would increase production costs. Finally, and this is the most plausible reason, for African countries, environmental safeguards could constitute non-tariff barriers to exporting their products to developed countries.

From Bale to Johannesburg, via RIO, and Stockholm, until COP 21, It will be remembered, moreover, that the cohesion of the African states, allowed them to present themselves in a united front, and undeniably paid and marked these lectures[5].

The weakness of regional and international institutional frameworks for implementing environmental law in Africa:

The weakness of community environmental policies in Africa

In the last few years, environmental law has undergone profound changes in relation to the increasingly important environmental requirements of the world and the reinforcement of legal rules. The text adopted in Maputo in 2003 is considered the most comprehensive convention regional conventions by extending its normative field, but also in its ability to integrate the principles of international law of the environment.

The Bamako Convention, an important step in the construction of an African environmental law, is part of the prohibition, it is the result of a political will to go further on certain points than Basel, and to achieve at the regional level goals that have not been achievable at the global level.

The effectiveness of environmental protection has long been known to require policies that go beyond national frameworks. However, the lack of environmental policies of African economic integration organizations is quite striking. There are here and there documents of community environmental policies

[5] SITACK YOMBATINA BENI - Environmental law challenged by African cultural representations: The need for a dialectical and more responsible approach. - 2000

which stick to generalities and formulations often vague, and which, in any case, are rarely binding[6].

Thus, since 2008, an Environment Directorate has been created within ECOWAS, and Community Regulations have been adopted concerning pesticides, seeds, food safety, etc. However, in general, there is no real Community environmental law in most African community organizations. It is therefore not surprising that within these organizations there are no specific institutions dedicated to the implementation of environmental law or its control in the Community area. There is indeed an important component on the protection of the environment and the institutions responsible for implementing the relevant standards in various joint water resources management organizations such as the River Development Organization. Senegal (OMVS), the Niger Basin Authority (ABN), the Lake Chad Basin Commission (LCBC), the Lake Mano Development Organization, the Zambezi River Management Organization, etc. But the weakness of these institutions lies in their scattering. Indeed, the lack of coordination of their environmental policies and actions does not allow them to share their experiences, but worse, prevents them from achieving common goals. For example, what lessons can be learned from the construction of the Great Renaissance Dam in Ethiopia for the environmentally sound management of other watersheds, or more concretely, for the future construction of the Inga III dam on the Congo River?

In any case, this is a fragmented and overly specialized approach which cannot replace in any way a comprehensive Community policy and well-monitored and legally sanctioned implementation.

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[6] Maurice KAMTO "THE IMPLEMENTATION OF ENVIRONMENTAL LAW: STRENGTHS AND WEAKNESSES OF INSTITUTIONAL FRAMEWORKS" p35 - African Journal of Environmental Law • No. 01-2014 (Revue Africaine de Droit de l'Environnement N° 01 • 2014)

Strengths and weaknesses of environmental conditionality

Conditionality is an instrument of the financing policy of most international financial institutions. Recall that, according to the International Monetary Fund (IMF), it means "all the particular conditions for which the Fund makes the use of resources conditional on the circumstances"[7]. Most international financial institutions have developed comprehensive procedures that borrowers must comply with. These procedures are accompanied by eco-standards or environmental clauses consisting of practices that these institutions are expected to respect in the choice, preparation and implementation of the projects they finance. These rules and practices are therefore binding on borrowers, who are generally the states. Eco-conditionality consists in subordinating the payment of public aid to the respect of environmental standards in the realization of the projects to which this aid is allocated. By systematically imposing an impact study of the projects it finances or contributes to financing, the Bank undoubtedly contributes to the implementation of environmental law. However, we must be wary of the effects of these conditionalities of the Bank for countries often very poor and crushed by the burden of debt. According to a Eurodad (European Network on Debt and Development) study conducted in 2006, about 37% of World Bank loans contain social and environmental conditionalities, some of which are the result of inappropriate micro-management of different public sectors. It is quite excessive, for example, to ask a government - as it did to grant a loan to the Rwandan government under a National Poverty Reduction Support Credit - "to

[7] Maurice KAMTO "THE IMPLEMENTATION OF ENVIRONMENTAL LAW: STRENGTHS AND WEAKNESSES OF INSTITUTIONAL FRAMEWORKS" p35 - African Journal of Environmental Law • No. 01-2014 (Revue Africaine de Droit de l'Environnement N° 01 • 2014)

prepare a strategy aimed at to promote better practices in homes and in 184 rural public schools "[8].

The difficulties of integrating the rules of international environmental law into national law

They are twofold: one is related to economic considerations that weigh on the development and especially the application of environmental law standards; the other difficulty is linked to the slow pace of ratification by states of the various environmental conventions they have signed.

The weight of economic issues

The environment has long been seen more as a constraint than an asset, with environmental constraints appearing as a brake on growth. The weight of economic issues is important in the definition of environmental policies. In the African context, the priority remains the fight against poverty. The exploitation of natural resources is part of this approach, all in all, except when we consider the tiny place reserved for the environment. This race for growth can only be detrimental to the environment if there are no common rules, environmental standards defined and respected by all countries in the context of economic competition.

Economic competition and the role of economic operators in environmental dumping

In the European Union, the policy of harmonization of environmental standards has not led to a race to the bottom of environmental protection standards, quite the contrary. For example, the emission levels tolerated for cars have been gradually reduced and are today among the strictest in the world. The most recent decisions of the Court of Justice of the European Communities (ECJ) reflect a concern to reconcile trade and environment. Har-

[8] Maurice KAMTO "THE IMPLEMENTATION OF ENVIRONMENTAL LAW: STRENGTHS AND WEAKNESSES OF INSTITUTIONAL FRAMEWORKS" p35 - African Journal of Environmental Law • No. 01-2014 (Revue Africaine de Droit de l'Environnement N° 01 • 2014)

monization of environmental standards results in "a high level of protection"[9].

This rise in the level of protection leads to additional costs and it is tempting for some Western multinationals to export polluting industries where high costs of pollution control can be avoided. African countries may in the future be the home of these highly polluting foreign industrial activities because of environmental legislation which, even when it exists, is little or not enforced.

It is clear that trade liberalization inevitably creates a form of competition among states to attract as much foreign capital as possible for immediate return on investment. This competition consists of creating the most attractive fiscal and legislative conditions for foreign investment.

The financial stakes of the exploitation: the patrimonial management of the natural resources:

Public and private economic actors weigh in their strategies on the development and implementation of development policies and more specifically on the choice of environmental constraints. It is equally clear that natural resources are an important issue in the definition of economic policies as they are seen as a tool for promoting development. In general, the French-speaking African states have made the choice, under the impetus of the structural adjustment plans, of the immediate profitability of the exploitation of the natural resources in order to face the growing poverty. Hence the authorities' control over their management. It is not a coincidence that countries with large forest resources such as Central African countries have consistently opposed the development of a legally binding forest instrument[10]. The destruction

[9] Article 95 of the Treaty establishing a European Economic Community (EEC) (1957).

[10] See Global Witness, "The logs of war: the timber trade and armed conflict," March 2002. See also note de reading on this subject: http://www.institut-gouvernance.org/en/documentlfiche-document-61.html.

of forests in the Congo Basin as a result of industrial activities is progressing rapidly throughout the region, despite the obvious need for more sustainable management. Industrial logging remains the main cause of the destruction of the African rainforest.

Ratification by States as the prerequisite for transposition

Lack of promptness in ratification

The application of a treaty by a State depends above all on its ratification, its transposition and the effectiveness of the judicial control put in place. In Africa, the ratification of conventions is a long-term process. Many treaties and conventions are slow to come into force because of insufficient ratification. The 1991 Bamako Convention entered into force only on 22 April 1998, seven years after its signature, when only ten ratifications were required. Only 25 out of 54 States have ratified. The Algiers Convention, which came into force in 1969, had at its revision only 30 members stats[11]. The Protocol to the African Charter on Human and Peoples' Rights signed in Ouagadougou in June 1998 only entered into force on 25 January 2004. As of 2018, 53 states have ratified the Charter, with South Soudan the only African states that hasn't yet signed or ratified it[12]. Nearly four years after its signature, the Maputo Convention has only seven of the fifteen ratifications required by Article XXXVIII for its entry into force. One of the most striking features of international legal instruments relating to the protection of the environment is their rarely self-executing nature, the consequence of which is the difficulty for the courts to sanction the violation when they are incorrectly transposed.

[11] For a record of ratifications, see. African Union website. https://au.int/fr

[12] Official Site of the African Commission on Human and Peoples' Rights http://www.achpr.org/instruments/achpr/ratification/

The lack of transposition of the principles of international environmental law

It is important to create the legal and legislative conditions that will allow domestic law to integrate the international obligations to which the state has subscribed. These obligations derive from norms but also from the main principles which base the rules of the international law of the environment.

The theme of participation has found an anchor in environmental law through Principle 10 of the Rio Declaration, enshrined in the 1998 Aarhus Convention and taken up by various African conventions, including those of Maputo in 2003 and Bamako. But its implementation is not always obvious, especially in countries with a democratic deficit. In Africa, there is a marginalization of local actors in the development and implementation of the law and policies of which they are the main recipients. Neither civil society nor the judicial system of the countries that shelter the bulk of biodiversity and forest resources is a sufficient counterweight to countering the predatory behavior of the state vis-à-vis natural resources. Its administrations do not have the technical, financial and human means either to control the activities of private companies[13]. The regulations are little known, little applied by recipients, therefore not very effective.

Conflict between written law and customary law

An example of the role of land tenure systems and land rights in protecting the environment and conserving nature illustrates this point. Indeed, the link between the status of soils and the rational management of spaces is obvious. Sensitive and thorny problem, the land issue is a challenge for the African legislator. Land rights in Africa are the centralized management of land by state power, since the colonial era. This regime enshrines

[13] Granier L - Contemporary aspects of environmental law in West and Central Africa, p181- IUCN | Gland, Switzerland 2008
(Granier L - Aspects contemporains du droit de l'environnement en Afrique de l'ouest et centrale p181- IUCN | Gland, Switzerland 2008)

the virtual monopoly of state ownership of land and subsoil by denying customary rights and private property rights over land. The clashes between customary rights and modern land law result from the fact that the perception of property is not the same between the two cultural universes. Land is not perceived in Africa as a dead thing susceptible of individual privative appropriation opposable to any third party, but as a sacred thing which mediates the man to the sacred and determines the social relations of the individual to the groups. Because his affiliation with a group is established, the individual has an absolute right to a land of his community, by lineage or inheritance. The state control of land could have been the instrument of a more rational development of the territory and management of space respectful of the environment. The State has not used its "ownership" status of land to encourage better use of spaces and resources more considered from the point of view of economic profitability than conservation. In Cameroon, for example, forest legislation deprives local people of their traditional rights over forest resources, placing them in a position of poachers in relation to modern law. Although attenuated in its rigor by the promotion of community forests, the Cameroonian forest legislation places the farmer in a land legal insecurity prejudicial to the protection of the environment[14].

Conclusion

Since the independence of African countries, there have been a proliferation of norms and rules of environmental protection, which besides illustrating the commitment and will of African countries in favor of the protection and safeguarding of their resources, denotes their awareness that the development of the

[14] Rose Nicole Sime - Contemporary aspects of environmental law in West and Central Africa - "Harmonization of environmental law standards at the regional and sub-regional levels" - IUCN Environmental Law and Policy - 2008 - p171 (Rose Nicole Sime - Aspects contemporains du droit de l'environnement en Afrique de l'Ouest et du Centre - "Harmonisation des normes du droit de l'environnement aux niveaux régional et sous-régional" UICN Droit et Politique de l'environnement- 2008 - p171

continent passes by the guarantee of a healthy environment, as stipulated in Article 24 of the African Charter on Human and Peoples' Rights "Peoples will have the right to a satisfactory general environment favorable to their development". Thus, many regional organizations share the responsibility for the implementation of the continent's environmental objectives, however, the lack of real coordination between these institutions, has contributed to the proliferation of Community legal instruments. Hence their weakness. Indeed, the lack of coordination of their environmental policies and actions does not allow them to share their experiences, but worse, prevents them from achieving common goals. The same is true of the conditionality of the loans of certain financial institutions, which in many cases is a double-edged sword, especially for the African countries which already because of their poverty cannot fulfill these conditions. In addition to these difficulties of an external nature to the States, which obstructs the effectiveness of the environmental norms on the continent, there is the incorporation of the international standards in the internal legal order of the States which meets the economic preoccupations and politico-social priorities of these states. but also, to another legal-social problem inherent to African countries: the co-existence of written law and customary rules.

LEGAL ASPECTS OF IMPLEMENTATION OF “EXTENDED PRODUCER RESPONSIBILITY PRINCIPLE" IN THE FIELD OF WASTE MANAGEMENT IN RUSSIA

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Environmentally safe waste management is a main part of state environmental policy of the Russian Federation and one of the most fundamental goals of state environmental policy in Russia in conditions of intensive growth of industrial production in different spheres of economy. Ensuring environmentally-friendly waste management is a problem that is gaining increasing resonance both at the state level and internationally.

The rapid growth of industrial production, accompanied by a consumer "boom" in the second half of the XX century, by the beginning of the third Millennium has led to a catastrophic situation, expressed in trillions of tons of waste accumulated on the planet nowadays.

This waste is not only a source of significant pollution of the environment (soil, water bodies, air), but it also destroys natural environmental systems and have a negative impact on human health. This problem is particularly acute in States where there is still no adequate state environmental policy and an effective system of state regulation of relations in the field of waste management.

According to official statistics, about 4 billion tons of production and consumption waste are generated in the Russian Fed-

eration annually, 55-60 million tons of which are the solid municipal waste[1]. 134844 places of unauthorized disposal of production and consumption waste (70% of all identified) on the total area of 56672 hectares were liquidated in 2016 on the territory of the Russian Federation[2].

Ensuring of legal regulation of environmentally safe waste management is an important part of the state environmental policy of Russia. President of the Russian Federation Vladimir Putin in his Annual Message to the Federal Assembly of Russian Federation on March 1, 2018 noted the necessity to solve the problem of landfills, in particular, liquidation of the landfill in urban areas. For solving these problems the President gave a list of instructions to the Government of the Russian Federation, including the organization of effective waste management, the liquidation of unauthorized dumps in urban areas, the creation of a complex system of Solid Municipal Waste management[3].

What is "extended producer responsibility" (EPR)?

EPR is a legal mechanism which can solve the main environmental problems in the field of waste management. EPR is one of the most important principles of state environmental policy in the field of waste management, successfully applied in the European Union countries, and reflected in European law.

This principle refers to the responsibility of the producer (or importer) of the goods for the environmentally-friendly or for the disposal of waste generated by their use, or for the possibility of their recycling and reuse.

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[1] p. 11 Strategy of environmental safety of the Russian Federation for the period up to 2025, approved by the decree of the President of the Russian Federation dated April 19, 2017 № 176.

[2] State report "On the state and environmental protection of the Russian Federation in 2016". – M.: Ministry of natural resources and ecology of Russian Federation; NIA-Priroda. – 2017. P. 600.

[3] p. 7 of the decree of the President of the Russian Federation of May 7, 2018 № 204 "On national goals and strategic objectives of the Russian Federation for the period up to 2024".

The introduction of "producer responsibility" at the national level is a fairly important legal mechanism, which, on the one hand, significantly increases the degree of responsibility of producers or importers of products, demanding quite high requirements, which significantly complicates their activities in the market, and on the other hand – simplifies the possibility of waste disposal, removes a significant part of the associated financial costs from the state in whose territory the activities related to the treatment of these wastes are carried out.

History of legal regulation of EPR in European Union

For the first time the legal provisions on "producer responsibility" have been legislatively enshrined established recently – the responsibility for the collection and recycling of packaging waste has been introduced for its producers from all countries of the European Union by the *Directive of the European Parliament and of the Council 94/62/EC on packaging and packaging waste* (adopted in Brussels on 20th of December 1994).

Despite the General rules laid down in this Directive, EU member States still have the possibility to introduce an application for packages or charges taxes (payments) for certain types of packages, for example, to support reusable packages.

Later the mechanism of "producer responsibility" was applied to the payments in the sphere of operation and utilization of vehicles (for the period from 2002) and was reflected in *Directive of the European Parliament and Council 2000/53/EC on end-of-life vehicles (the ELV Directive)* of 18 September 2000 (adopted in Brussels on 18th of September 2000).

A little bit later was adopt *Directive of the European Parliament and of the Council 2005/64/EC of 26 October 2005 on type-approval of motor vehicles with regard to their reusability, recyclability and recoverability and amending Council Directive 70/156/EEC* (was adopted in Strasbourg on 26th of October 2005).

Finally, the relevant producer responsibility rules have been extended to manufacturers of electrical and electronic equipment

since 2007 by *Directive 2002/96/EC of the European Parliament and of the Council of 27 January 2003 on waste electrical and electronic equipment (this Directive was adopted in 2012 in a new version Directive 2012/19/EC of the European Parliament and of the Council on waste electrical and electronic equipment (WEEE)* (adopted in Strasbourg on 4th of July 2012).

Directive 2006/66/EC of the European Parliament and of the Council of 6 September 2006 on batteries and accumulators and waste batteries and accumulators (adopted in Strasbourg on 6th of September 2006) also subsequently highlighted a number of important points concerning the "responsibility of manufacturers" for the collection and disposal of used batteries.

Implementation of EPR in Russian waste management and in Russian legal system

The consolidation of this principle in the Russian legislation is of great importance for Russian manufacturers producing products for both the domestic (Russian) market and for export to other countries.

Additional obligations (including financial obligations) imposed on producers, new requirements for product quality, the materials from which it is made, lead to a significant increase in the prices of the products themselves, and, as a consequence to a decrease in consumer demand for it.

This step also significantly affects foreign manufacturers of products imported into Russia from the European Union countries, since in this case the responsibility (including financial responsibility) will be imposed either on them or on Russian importing companies purchasing these products abroad and importing them into Russia.

The first step towards establishing the "principle of producer responsibility" in Russia was the introduction of a recycling (utilization) fee for wheeled vehicles. A recycling fee has been introduced for each wheeled vehicle imported into the Russian Federation or manufactured in the Russian Federation.

Now producers or importers of goods are obliged to ensure the disposal of the waste from the use of these goods according to the list of goods, including packaging, to be disposed of after the loss of their consumer properties, established by the Directive of the Government of the Russian Federation from 28.12.2017 № 2970-R in accordance with the recycling standarts established by the order of the government of the Russian Federation of 28.12.2017 № 2971-R "On approval of the standarts for the disposal of waste from the use of goods on 2018-2020". Federal law "On waste management of production and consumption" establishes 3 main ways of implementation of EPR principle in Russia as a regulation in the field of waste management from the use of goods:

1) self-utilization by the producer (importer) of the waste formed as a result of use of their goods according to the standards of utilization established by the Government of the Russian Federation;

2) conclusion of a recycling contract between the producer (importer) and the Association (Union) of producers and importers of goods;

3) "financial producer's responsibility":

(a) payment of environmental fee by producers, importers, which do not provide self-utilization of the waste from the use of goods (since the end of 2014);

(b)payment of recycling fee by producers, importers of cars and other wheel vehicle for each wheel vehicle imported to the Russian Federation or made in the Russian Federation (since 2013). Now there is an introduction of only environmental tax in the Tax Code of the Russian Federation instead of environmental fee, recycling fee and payments for negative impact on the environment. Thus, we can say that implementation of "extended producer responsibility" in the field of waste management helps to solve the problem of development of recycling waste industry thereby helping to ensure the constitutional right of citizens to a favorable environment in Russia.

THE BALTIC, THE BIOSPHERE & THE GLOBAL PACT FOR THE ENVIRONMENT

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Cooperation in the Baltic is a fine example for other regions around the world. May I note, for example, the promotion of protected areas, under Article 15 of the HELCOM Convention? Nature parks around the Baltic are recognized internationally. Like HELCOM, IUCN advances cooperation and solidarity in support of our shared environment. Such efforts at nature conservation began in the late 19th century, here on the shores of the great Baltic Sea, and elsewhere. Across the Baltic Area, there are found components of the *Natura 2000* network of nature protection areas.[1] The on-going designation of areas protected by environmental law by Baltic States is commendable.

The IUCN World Commission on Environmental Law notes with appreciation that Russia's world-renowned system of zapovedniki, which celebrated its 100th anniversary in 2017. Russia's long commitment to nature protected extends to the Baltic and is exemplified in this past year by the protection extended to the Vostok Finskogo Zaliva State Nature Reserve,[2] which con-

[1] http://natura2000.eea.europa.eu/ .

[2] See the decision "On establishing the Vostok Finskogo Zaliva State Nature Reserve" (Leningrad Region), Ministry of Natural Resources and the

sists of 14,086 hectares in the eastern part of the Gulf of Finland in the Baltic Sea), on islands as well as in the adjoining internal and territorial waters of the sea of the Russian Federation (this reserve consists of nine isolated sectors belonging to the Vyborg and Kingisepp municipal areas of the Leningrad Region). This reserve protects habitats with significant concentrations of migratory birds and nesting of aquatic and semiaquatic bird species, as well as whelping and herding of seals and ringed seals, spawning grounds of fish. This protected area will help sustain the biodiversity on the islands, including habitats for rare and endangered flora and fauna species, such as for the conservation of the ringed seals in the Gulf of Finland, which now are only some 100 seals. The protected area has a social dimension, in that it will facilitate education tourism.

HELCOM's work is important in furthering the attainment of the United Nations Sustainable Development Goals, adopted in 2015.[3] SDG 15 encompasses the protection of natural habitats, but comprehensively extends to all aspects of socio-economic and

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Environment of the Russian Federation, 26 December 2017 06:15, at http://government.ru/en/docs/30779/ : "A 14,086 hectare nature reserve will be created in the eastern part of the Gulf of Finland (the Baltic Sea), on islands and in the adjoining internal and territorial waters of the sea of the Russian Federation.. …The decision provides the legal foundation for taking special measures to protect the ecosystems as well as the facilities in the nature reserve." Reference: The proposal was submitted by the Ministry of Natural Resources and Environment in keeping with the Federal Law On Specially Protected Nature Areas. The creation of the Ingermanlandsky State Nature Reserve in the Leningrad Region was approved as per the Plan for Implementing the Concept for the Development of Specially Protected Natural Areas of Federal Significance to 2020 (approved by Government Directive No. 2322-r of 22 December 2011) and the Plan for Marking the Year of the Environment in Russia in 2017 (approved by Government Directive No. 1082-r of 2 June 2016).

[3]http://www.undp.org/content/dam/undp/library/corporate/brochure/SDGs_Booklet_Web_En.pdf

ecological sustainability, as HELCOM has recognized.[4] HELCOM's report on its undertakings to support the SDGs is an important regional contribution to this global effort.[5]

The SDGs are ambitious. If the UN SDGs are to be fulfilled by 2030, as is the hoped then everyone will need to devote far greater resources to attaining the goals. The foundations of international cooperation consist of nations agreeing on the basic principles of international law. These principles are found throughout both international agreements and national laws.[6]

The Baltic Convention[7] is an important expression of these principles. Article 3 recognizes the fundamental obligation to protect the environment: "The Contracting Parties shall individually or jointly take all appropriate legislative, administrative or other relevant measures to prevent and eliminate pollution in order to promote the ecological restoration of the Baltic Sea Area and the preservation of its ecological balance."

This duty is then elaborated in specific instances, such when the *principle of care for nature* in Article 15 of the Baltic Convention provides for the protection of natural areas, or in Article 14 where it provides for cooperation in combatting marine pollution. Fundamental principles underpin all the Convention's work, such as in Article 3, such as the *Precautionary Principle,* by working to take preventive measures when there is reason to assume that substances or energy introduced, directly or indirectly, into the marine environment may create hazards to human health, harm living resources and marine ecosystems, damage

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[4] http://www.helcom.fi/news/Pages/How-is-the-Baltic-Sea-Region-Doing-in-Implementing-the-Sustainable-Development-Goals0406-2202.aspx

[5] HELCOM Sustainable Development Goals – Measuring Progress for the Same Targets in the Baltic Sea (2017) at http://www.helcom.fi/Lists/Publications/BSEP150.pdf .

[6] See N.A. Robinson and L. Kurikulasuriya, Manual on International Environmental Law (UN Environment Programme) on line at https://digitalcommons.pace.edu/lawfaculty/791/

[7] http://www.helcom.fi/about-us/convention

amenities or interfere with other legitimate uses of the sea. You also employ Best Environmental Practice and Best Available Technology.[8] Finally, you aim to observe the *Polluter Pays Principle,* seeking to allocate responsibility for damage to pollution to those whose discharges have caused the injury.

The Baltic Convention's commitments, in Articles 16 and 17, explicitly provide for cooperation among states in providing for scientific research into understanding environmental stewardship, and sharing that information with all stakeholders so that a common approach can be realized. The Baltic Convention recognizes the roles for environmental impact assessment, in Article 7.

The Baltic Convention is a leader in observing and implementing these fundamental principles of environmental law. Other regions could profitably learn from your experience. It is because of your experience with the principles of environmental law that IUCN's World Commission on Environmental Law is pleased to share with you the proposal for a Global Pact of environmental principles.[9] French President Emmanuel Macron, with the president of IUCN Zhang Xinsheng and former UN Secretary General Ban Ki Moon, and others, endorsed the draft Global Pact at La Sorbonne in France on 14 June 2017. France, which is also an IUCN State Member, in September of 2017,[10] submitted the draft Global Pact to the UN General Assembly. This is a proposal

[8] Criteria appear in Annex II of the Convention. http://www.helcom.fi/about-us/convention/annexes/

[9] The draft Global Pact for the Environment was prepared by the "Group of Experts on the Pact" (GEP), an international network of over one hundred world-renowned experts in environmental law representing more than 40 nationalities, chaired by Laurent Fabius, President of the French Constitutional Council and former President of COP 21, and mobilized by the Environment Commission of the Club des juristes. On 24 June 2017, the President of the French Republic, Emmanuel Macron, announced his intention to present the draft Pact to the United Nations. This White Paper is a reference document designed to provide a clear and educational presentation of the issues and content of the Global Pact for the Environment.

[10] https://onu.delegfrance.org/The-Global-Pact-for-the-Environnement

for all States to agree on a "Global Pact for the Environment."[11] The proposed Global Pact aims at bringing together one set of commonly agreed principles for the protection of the Earth's biosphere.[12] A "White Paper" from Laurent Fabius and Yann Aguilar, for the Club des Jurists, outlines the Pact and its benefits for global sustainable development and environmental protection.[13]

Many members of the IUCN World Commission on Environmental Law, as well as the International Council of Environmental Law, collaborated with the *Club des Jurists* in Paris to design this Global Pact for the Environments. The Baltic Area provided important expertise.[14] The draft Global Pact is now being studied in national and regional inter-governmental meetings

[11] https://www.iucn.org/sites/dev/files/content/documents/draft-project-of-the-global-pact-for-the-environment.pdf

[12] See the Concept Note on the Global Pact for the Environment – Update, at https://onu.delegfrance.org/The-Global-Pact-for-the-Environnement

[13] https://onu.delegfrance.org/The-Global-Pact-for-the-Environnement

[14] Experts included, for example: (a) JACOBSSON Marie, Ambassador, Principal Legal Adviser on International Law at the Swedish Ministry for Foreign Affairs, Member of the United Nations International Law Commission from 2007 to 2016, Sweden; (b) KAPUSTIN Anatoly, Professor at the Peoples' Friendship University of Russia, Vice Director of the Institute of Legislation and Comparative Law under the Government of the Russian Federation; (c) KENIG-WITKOWSKA Maria Magdalena, Professor of law, University of Warsaw, Faculty of Law and Administration, Member of Scientific Council of the University of Warsaw Centre for Environmental Research, Poland; (d) KICHIGIN Nicolas, Leading research fellow of the Institute of Legislation and Comparative Law under the Government of the Russian Federation, Associate professor of the Vysokovsky Graduate School of Urbanism of National Research University High school of Economics, Russia; (e) REHBINDER Eckart, Professor at the Johann Wolfgang Goethe University Frankfurt, Former Chair of the German Advisory Council on Environment, Germany; (f) Peter H. SAND, Institute of International Law, University of Munich, Formerly World Bank Legal Adviser for Environmental Affairs, Germany; (g) among others.

worldwide. The texts are available on line[15] and included in an appendix to this paper.

Because the Baltic Area is arguably the first region to frame and implement general principles of environmental stewardship, it is important for the Baltic States to contribute their expertise to the on-going consultations in the UN General Assembly to refine and eventually adopt this proposal for a "Global Pact for the Environment."

It will make a significant difference if Denmark, Estonia, Finland, Germany, Latvia, Lithuania, Poland, Russia, and Sweden share the success that the Baltic Marine Environment Protection Convention has had with other nations. There are several reasons why.

First, you all know *from experience* that the general principles of international environmental law contained within the Baltic Convention work in practice. They encourage cooperation. Other regions, where this record of cooperation is still very young, need to understand that the principles provide benefits. Lacking this knowledge, some wonder why further agreement on principles is needed.

Second, you also know that ecological restoration and environmental protection is very difficult work. It requires sustained efforts over many years, even generations. Principles of environmental law serve to guide these inter-generational struggles.

Third, there are principles that are widely agreed, but not yet stated. For example, the Global Pact sets forth the text for the *Principle of Resilience* in Article 16: The Parties shall take necessary measures to maintain and restore the diversity and capacity of ecosystems and human communicates to withstand environmental disruptions and degradation and to recover and adapt." This principle is almost a restatement of the fundamental purpos-

[15]https://www.iucn.org/news/world-commission-environmental-law/201707/global-pact-environment-introduced-world-0

es of the Baltic Marine Environmental Protection Convention. It needs to be applied to all human activities.[16]

Fourth, resilience is at the essence of humans being able to cope with and adapt to the impact of climate change. The disruptions that climate change has produced are unpredictable and often severe. For human communities to prepare for such impacts, and recover from them, much more cooperation among States will be required. Promoting such cooperation is the very purpose and function of agreed principles of international law. Thus, all the principles of this proposed Global Pact would strengthen national, regional, and global capacities to cope with the disruptions Climate Change.

This Global Pact will also have a beneficial effect on the work under the Baltic Convention. Increasingly, the effects of climate change and loss of biological diversity are impacting all areas of the Earth. There was once a time when we could hope to protect regional areas in the northern regions, such as the Baltic Sea or the Great Lakes in North America, or Beringia, because the adverse environmental impact were regional and could be controlled within each region. This is no longer the case, as set forth in the UN Intergovernmental Panel on Climate Change (IPCC)[17] and the United Nations Environmental Global Environment Report (GEO-5).[18]

While we cannot do without such regional cooperation, regions must take into account (a) how global change impacts their regions and (b) how their region can help mitigation impacts abroad. The general principles of law was restated in the Stockholm Declaration of 1972, that no State should harm the envi-

[16] Nicholas A. Robinson, The Resilience Principle, 5 IUCN Acad. Envtl. L. eJournal 19 (2014), at http://digitalcommons.pace.edu/lawfaculty/953/.

[17] See the 5th Assessment Report of the Intergovernmental Panel on Climate Change, https://www.ipcc.ch/report/ar5/

[18] See the 5th Global Environmental Outlook of UN Environment, GEO-5. http://web.unep.org/geo/assessments/global-assessments/global-environment-outlook-5.

ronment of another or of the shared commons enjoyed by all.[19] This principle needs to be updated. Science has taught us that it is unavoidable that all States now affect each other and the entire biosphere.

What is required today is the right to an ecologically sound environment, which is the first principle proposed in the Global Pact: “Every person has the right to live in an ecologically sound environment adequate for their health, well-being, dignity, culture and fulfillment.”

This right to the environment is the basis for engaging all sectors of society in work to protect whatever aspects of the environment affect them, or are affected by them.

We shall need a common global set of agreed principles worldwide if we are to provide our communities with a robust environmental, social and economic foundation. It seems to me that this is the vision that this Baltic Days Forum celebrates with its dedication to the memory of Leonid Korovin. I regret that I had no opportunity to get to know Leonid Korovin. He chaired the HELCOM group on LAND, with its focus as on mitigation of land based pollution of the Sea. He headed the Saint-Petersburg Public Organization "Ecology and Business." Significantly, he advanced implementation HELCOM’s Baltic Sea Action Plan in Russia. Such international cooperation is to be applauded.

The principles in the Global Pact for the Environment will encourage other States in other regions to agree upon and strengthen programs like the Baltic Sea Action Plan.

Globally, the escalating environmental crises make it imperative that lawmakers at all levels employ the principles of the proposed Global Pact for the Environment. Internationally, the progressive development of international law needs to codify general principles of law, and induce their realization as state practice. Within countries, legislatures will have to enact local

[19] Principle 21 of the Stockholm Declaration on the Human Environment (1972), at http://www.un-documents.net/unchedec.htm.

ordinances and national statutes based on those set forth in the Global Pact for the Environment. If human society is to avert the most severe disruptions of climate change and stem the ecological hemorrhage of the planet, it must reform its laws to hold and reflect a shared vision globally, just as in the Baltic Sea you have a shared vision regionally. Robust sustainability will require governing not for human relationships, as now, but as stewards for the community of life in the future.

The UN SDGs 2030 Development Agenda are uneven in their vision. They do not yet consistently show the common pathways needed in order to sustain Earth's biosphere, with its biodiversity as a shared community of all life. To do this, the vision of the Baltic Marine Environmental Protect on Convention needs to be widened and embraced by all States. This is what the Global Pact can foster. Unless we do so, we shall not find is possible to achieve sustainability and end poverty as the SDGs hope.

It is encouraging to recognize that in other regions States are deciding to recognize the right to an ecologically sound environment., For example: (i) The *African Charter on Human and People's Rights,* 1981 (article 24);[20] (ii) the San Salvador Protocol, 1988 (article 11);[21] (iii) the Aarhus Convention, 2001 (Preamble);[22] and (iv) the Arab Charter on Humans Rights, 2004 (ar-

[20] African Commission on Human and People's Rights. African Charter of Human and People's Rights. http://www.achpr.org/instruments/achpr/ (November 2017).

[21] Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights "Protocol of San Salvador", November 17, 1988. Available at: https://www.oas.org/dil/1988%20Additional%20Protocol%20to%20the%20American%20Convention%20on%20Human%20Rights%20in%20the%20Area%20of%20Economic,%20Social%20and%20Cultural%20Rights%20(Protocol%20of%20San%20Salvador).pdf (December 2017).

[22] Convention on Access to Information, Public Participation in Decision Making, and Access to Justice in Environmental Matters, Aarhus, Denmark, June 25 2001. Available at:

ticle 35).[23] Surprisingly, in Europe, neither the *European Convention for the Protection of Human Rights and Fundamental Freedoms*[24] nor the *European Social Charter*[25] have any explicit reference to the protection of the environment.[26] In Europe, the *Charter of Fundamental Rights of the European Union* of the year 2000 (in force since 2009), only recognizes the duty of public authorities to integrate a "...high level of environmental protection" as well as an "...improvement of the quality of the environment" in public policies (article 37). This does not yet encompass the principle of a right to an ecologically sound environment.

In light of these other regional tendencies, the proposed Global Pact for the Environment could help all regions come into a harmonious vision about the environment, by agreeing upon the same set of basic principles. Sharing a common respect for the right to the environment could mean that the sustainable development goals would be attained sooner, rather than later. Nationally, there is evidence that this is happening. We see the national

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https://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf (December 2017).

[23] Arab Charter on Human Rights, adopted in Cairo on 15 September 1994. Available at: http://www.humanrights.se/wp-content/uploads/2012/01/Arab-Charter-on-Human-Rights.pdf (December 2017).

[24] European Court of Human Rights. "European Convention on Human Rights", available at: http://www.echr.coe.int/pages/home.aspx?p=basictexts (October 2017).

[25] European Union Parliament, Conseil and European Commission, "Charter of Fundamental Rights of the European Union", 2000 C/364/01, Official Journal of the European Communities, 18 December 2000, available at: http://www.europarl.europa.eu/charter/pdf/text_en.pdf (October 2017).

[26] The European Social Charter containing a paragraph that refers to the interpretation of the scope of the provisions of the Charter, in the sense that "(m)easures should be introduced to prevent activities that are damaging to health, such as smoking, alcohol and drugs, and to develop a sense of individual responsibility, including such aspects as a healthy diet, sex education and the environment." (p. 240). The Charter can be found at: https://rm.coe.int/168048b059 (October 2017).

level, as of the year 2012, 177 of the 193 UN member countries recognize the right to environmental quality through their Constitution, legislation, judicial precedent, or an international agreement,[27] and the right is explicitly recognized in environmental legislation or Constitutions, in more than a hundred countries.[28]

Recognizing the right to the environment brings salutatory consequences, it encourages agreement by different communities about care for nature. We have proof of this in the record of designating protected areas, around the Baltic Sea and all over the world.[29] All social institutions, governmental or non-governmental, will need to acknowledge their moral responsibility for the care of the environment. This mutuality will engender empathy and cooperation among people, and in turn deference to sharing ideas and thus the sort of inclusive community that the Global Pact for the Environment envisions. The *Principle of Sustainability* has become an accepted principle of international law, and in a relatively short time since the 1992 Rio UN Conference on Environment and Development ("Earth Summit").[30] The same evolution can bring the principle of the right to an ecologi-

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[27] Boyd, David. "The Constitutional Right to a Healthy Environment." Environment: Science and Policy for Sustainable Development. July-August 2012.
http://www.environmentmagazine.org/Archives/Back%20Issues/2012/JulyAugust%202012/constitutional-rights-full.html .

[28] Boyd, David. "Constitutional Right to a Healthy Environment." RECIEL 20 (2) 2011, pp. 171-179.

[29] See the UN List of Protected Areas, at https://www.unep-wcmc.org/resources-and-data/united-nations-list-of-protected-areas . See also the IUCN best practices for protected areas, at https://www.iucn.org/theme/protected-areas/publications/best-practice-guidelines .

[30] In K. Bosselmann and J. R. Engel, Earth Charter: A Framework for Global Governance, Björn Bischoff explains how sustainability has become a principle of law in its own right, with legal content beyond the policies of sustainable development. The same has happened for the Polluter Pays Principle and the Precautionary Principle.

cally sound environment into universal recognition, as the Global Pact contemplates.

Thus, in light of these considerations, the Baltic Marine Environment Protection Convention is more than an essential regional agreement. It has pioneered a common vision and shared practices that all regional need to follow. IUCN's World Commission on Environmental Law would encourage this. We urge you to study the proposed Global Pact for the Environment. Not all countries will bring themselves to support this Pact at this time, but leading nations such as yours can, and I predict will. IUCN welcomes your study and support of the Global Pact.

ADVISORY OPINION ON THE ENVIRONMENT AND HUMAN RIGHTS ISSUED BY THE INTER-AMERICAN COURT OF HUMAN RIGHTS: SOME REMARKS

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Currently, there are quite a few researches on the protection of environmental human rights at the national and international level; however, such a category of human rights is not directly enshrined in any of the universal binding international legal instrument. Furthermore, a lot of scholars continue to claim that this category of human rights is just beginning to develop, and specifically devote insignificant attention to this category of human rights, so that environmental lawyers are already starting to doubt the feasibility of their activities. Yes, that's right, the environmental human rights are "deduced" by means of a broad interpretation of the provisions of the universal human rights treaties[1]. At the regional level, the situation is "better": the right to a healthy environment is enshrined in the 1981 African Charter on Human and Peoples' Rights as a collective right (Article 24), in the 1988 San Salvador Protocol to the American Convention on Human Rights – as an individual right (Article 11), but the 1950 European Convention for the Protection of Human Rights and

[1] See, for example: Solntsev A.M. Environmental Human Rights under the International Covenant on Economic, Social and Cultural Rights // Issues of Economics and Law. 2016. No. 5. Pp. 38-44.

Fundamental Freedoms also infers this right through the expansive interpretation.

The Inter-American Court of Human Rights (hereinafter referred to as "the Inter-American Court" or "the Court") did what ecologists of all countries and peoples dreamed of — it clarified whether this category of human rights exists and what obligations the States have regarding their observance.

On 8 February 2018, the Inter-American Court, at the request of the Republic of Colombia, issued an Advisory Opinion on the obligations of States regarding the environment in the context of protecting and guaranteeing the rights to life and personal integrity, recognized in Articles 4 and 5 of the 1969 American Convention on Human Rights (so-called "Pact of San José") with respect to Articles 1 (1) and 2 of the said Convention[2].

It should be noted that the Court took into account the positions of five States presented in writing as *amicus curiae* (Colombia, Argentina, Bolivia, Honduras and Panama), various international organizations and bodies, as well as 24 NGOs and 20 different experts representing civil society[3]. These documents themselves are extremely important, extensive and interesting for lawyers to study. For example, the document submitted by the

[2] Advisory Opinion, Inter-American Court of Human Rights, OC-23/17. URL: http://www.corteidh.or.cr/docs/ opiniones/seriea_23_esp.pdf. For convenience, we shall clarify here that Article 1 (1) states that "The States Parties to the American Convention have the obligation to respect and ensure the rights recognized in this instrument to all persons subject to their jurisdiction, the free and full exercise of these rights and freedoms without any discrimination based on race, color, sex, language, religion, political or other opinions, national or social origin, economic, class or any other social status", and Article 2 states that "In those cases when the exercise of any of the rights or freedoms referred to in Article 1 is not yet ensured by law or other provisions, the States Parties undertake to adopt, in accordance with their constitutional procedures and the provisions of this Convention, such legislative or other measures which may be necessary to introduce the effect of these rights and freedoms".

[3] http://www.corteidh.or.cr/cf/jurisprudencia2/observaciones_oc.cfm?nId_oc=1650.

World Commission on Environmental Law of the International Union for Conservation of Nature consists of 76 pages[4].

In the current Advisory Opinion, the Court recognized the right to a healthy environment, which is fundamental to the human existence, and listed the key obligations of States to protect this right and other environmental-related human rights.

In its Advisory Opinion, the Court recognized the dependence between environmental protection and the realization of human rights, as well as the fact that environmental degradation impacts on the effective implementation of human rights. In addition, the Inter-American Court emphasized the interdependence and indivisibility of such categories as human rights, the environment and sustainable development, since the full enjoyment of all human rights depends on an enabling environment. Based on this close connection, the Court noted that at present, on the one hand, the regional systems for the protection of human rights recognize the right to a healthy environment as a right in itself, and, on the other hand, other categories of human rights are vulnerable under the impact of the environmental degradation, which, in turn, indicates the existence of a number of environmental obligations for States to implement and ensure these human rights.

The right to a healthy environment is autonomous. Other rights are also related to the environmental issues, and the Court has proposed to classify them as follows: 1) the rights, the implementation of which especially depends on the state of the environment, – "substantive rights" (for example, the right to life, the right to personal integrity, the right to health or property rights); 2) the rights, the implementation of which contributes to the improvement of environmental policy – "procedural rights" (for example, the human right to freedom of expression and association, information, participation in decision-making and an effective remedy).

[4]http://www.corteidh.or.cr/sitios/observaciones/colombiaoc23/40_world_com.pdf.

It is important to note that in this Advisory Opinion the Court recognized that the right to a healthy environment is both an individual and a collective right that protects both present and future generations. More importantly, however, is the Court's recognition of the extraterritorial nature of environmental human rights. States, in accordance with the Convention, are obliged to protect the environmental human rights from damage caused by activities under the jurisdiction or control of the State, even when harmful effects fall outside their territory.

The Inter-American Court has stated its position regarding the existence of the principle of prevention: States are obliged to prevent the significant environmental damage inside and outside their territory. States must ensure that their territory is no way used to cause significant damage to the environment of other States or regions beyond their territorial restrictions. Therefore, in the Court's opinion, States are obliged to prevent the transboundary harm. In order to fulfill this obligation of prevention, States must regulate and control activities under their jurisdiction that can cause significant damage to the environment; to conduct an environmental impact assessment (EIA procedure) when there is a risk of significant damage to the environment; to prepare action plans in emergency situations to establish safety measures and procedures to minimize the possibility of major environmental disasters and mitigate any significant environmental damage that may occur even if it happened, despite preventive actions. States must act in accordance with the precautionary principle to protect the human right to life and personal integrity in the event of possible serious and irreversible damage to the environment, even in the absence of scientific certainty.

With respect to the principle of cooperation, the Court noted that States are obliged to cooperate in good faith in order to protect against the environmental damage. When States realize that the activities planned under their jurisdiction may create a risk of significant transboundary damage, and in the case of environmental emergencies they must inform other States that may be

affected, and also consult and negotiate with States potentially affected by significant transboundary damage.

As regards the procedural environmental rights, the Court pointed out that States are obliged: to ensure the right of access to information recognized in Article 13 of the American Convention in respect to the possible damage to the environment; to ensure the right to public participation of persons in accordance with their jurisdiction, as set forth in Article 23 (1) (a) of the Convention, in the decision-making process and issuing policies that may affect the environment; to provide access to justice in relation to the State polluting the environment.

Undoubtedly, the Advisory Opinion issued, although of its recommendatory nature, expanded and strengthened the international legal framework containing the obligations of States to protect the right to a healthy environment. It is especially important to note that this is not the last step taken by Latin America in the field of environmental protection in 2018. Also, on March 4, the long-awaited Regional Agreement on Access to Information, Public Participation and Justice in Environmental Issues in Latin America and the Caribbean was adopted (4 March 2018)[5] – the so-called "Latin American analogue" of the 1998 European Aarhus Convention.

[5]https://treaties.un.org/doc/Treaties/2018/03/20180312%2003-04%20PM/CTC-XXVII-18.pdf.

PROTECTION AND CONSERVATION OF MIGRATORY SPECIES OF WILD ANIMALS AT INTERNATIONAL AND NATIONAL LEVELS

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The Convention on the conservation of migratory species of wild animals (23 of June 1979, Bonn) (hereinafter – the 1979 Convention) interprets "migratory species" as "the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries" (article I, paragraph 1 "a"). It is obvious that the Convention determines only one part of the notion of "migratory species of wild animals" which is "migratory species". It should be noted that applying another part of the term - "wild animals" – the developers of the Convention either did not think of or did not have as a purpose the determination of its meaning. That is why we believe that the Convention notion shall be specified as follows: the entire population or any geographically separate part of the population of any species or lower taxon of animals, which are in genuine freedom condition and process of evolution of which is not influenced by human, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries

The notion of "migratory species" is applicable to animals with one common characteristic of migratory type of behavior. Migration (from Latin *migro* – to cross, to move) means transference, movement. Such animals move in accordance with certain laws. Rumina R. determines migration as "active regular move-

ments of entire population or any part of it concluded annually between nesting and wintering sites"[1].

Ramsar Convention on wetlands of international importance especially as waterfowl habitat[2] (the 2 of February 1971) in preamble recognized migratory birds as an international resource: "waterfowl in their seasonal migrations may transcend frontiers and so should be regarded as an international resource".

We consider that migratory species of wild animals should be regarded as an international nature resource, for due to a specific feature of such animals (migratory type of behavior) not being influenced by human during their natural cycle they range in international spaces or appear at territories of different states at different seasons.

Migratory species of wild animals present the central element of biological diversity which conservation at the international level is regulated by the Convention on biological diversity[3] of 5 of June 1992 (entered in force on the 29 of December 1993, for Russia in force since the 4 of July 1995) (hereinafter – the 1992 Convention).

Though initially the 1992 Convention should have been applicable to all the species[4], its provisions "shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity" (article 22).

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[1] Рюмина Р.Б. Правовая охрана мигрирующих видов животных :дис. … канд. юрид. наук : 12.00.10 / Рюмина Раиса Борисовна. - М., 1987. С.22.

[2] Ramsar Convention on wetlands of international importance especially as waterfowl habitat (2 of February 1971). URL: https://www.ramsar.org/sites/default/files/documents/library/scan_certified_e.pdf.

[3]Конвенция о биологическом разнообразии // Собр. законодательства Рос. Федерации. 1996. №19 (06 мая), ст.2254.

[4]Heijnsbergen P. van.International Legal Protection of Wild Fauna and Flora.Amsterdam, 1997.P.25.

The 1992 Convention sets a double approach: protection of habitats and conservation of species.

The 1992 Convention settles such principles of international legal regulation of sustainable use and conservation of biodiversity which can and should be applied in respect of migratory species of wild animals as well:

1) sovereign rights of each state to develop own biological resources according to priorities of national environmental policy[5];

2) comprehensive approach to conservation;

3) reasons of sufficient decrease or loss of biodiversity should be foreseen, prevented and removed;

4) guarantee of fair and sharing of the benefits arising out of the utilization of genetic resources[6];

5) recognition of close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources.

Moreover, different issues of the protection and conservation of migratory species of wild animals are regulated, directly or indirectly, by the following instruments (non-exclusive list): Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 1973; Convention on Wetlands of International Importance especially as Waterfowl Habitat of 1971; Convention Concerning the Protection of the World Cultural and Natural Heritage of 1972; the United Nations Convention on the Law of the Sea of 1982; Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks of 1995; World Charter for Nature 1982;

[5] The states should provide that such a use does not cause any harm to the environment of other states or areas out of their national jurisdiction.

[6] See: Text of the Cartagena Protocol on Biosafety. URL: http://bch.cbd.int/protocol/text/.

Code of Conduct for Responsible Fisheries of 1995; Red Books and Red Lists of the International Union for Conservation for Nature (IUCN); Convention on the Conservation of Antarctic Marine Living Resources of 1980; Convention on the Conservation of European Wildlife and Natural Habitats of 1979; African Convention on the Conservation of Nature and Natural Resources of 2003; ASEAN Agreement on the Conservation of Nature and Natural Resources of 1985; African Convention on the Conservation of Nature and Natural Resources of 2003; Benelux Convention on Nature Conservation and Landscape Protection of 1982; Convention for the Protection, Management and Development of the Marine and Coastal Environment of the Eastern African Region of 1985. There is also a huge group of bilateral agreements and treaties.

Contemporary international law can positively influence Russia activities which membership "in international "environmental" conventions (agreements, treaties" sufficiently facilitates work on draft enactments and bylaws"[7].

Conservation of biodiversity and, therefore, conservation of migratory species of wild animals is set as a principal direction of activities of Russia in resolution of global ecological problems (Decree of the President of Russia of 04.02.1994 №236 "On the state strategy of the Russian Federation on environment protection and sustainable development"[8].

Russian legislation does not provide with the determination of the notion of "migratory species of wild animals". However, there are definitions of certain species belonging to the group of migratory species of wild animals. For example, Federal Act of the Russian Federation "On Fisheries and Conservation of Aquat-

[7] Копылов М.Н. Государственная экологическая политика России и международное право // Международное право – International Law. 1998. № 02 (2). С.304.

[8] Указ Президента РФ от 04.02.1994 №236 «О государственной стратегии Российской Федерации по охране окружающей среды и обеспечению устойчивого развития» // Рос.газ. 1994. 9 февраля. №26.

ic Biological Resources"[9] of 2004 (article 1) determines anadromous species, catadromous species, transboundary species of fish and other aquatic animals, highly migratory species of fish and other aquatic animals.

Before 2009[10] the Federal Act of the Russian Federation "On the Exclusive Economic Zone of the Russian Federation" of 17 of December 1998 in article 4 contained definitions of anadromous, catadromous, transboundary, shared species of fish and highly migratory species.

To provide national measures to strengthen the control over extraction, trade and customs border admission of the samples of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Russia participates) there was developed action plan for federal executive authorities[11].

Meeting engagements under art. VIII of CITES there were worked out «Rules on forfeit wild animals and plants, their parts or derivates covered by the Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March of 1973»[12].

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[9] Федеральный закон «О рыболовстве и сохранении водных биологических ресурсов» №166-ФЗ от 20.12.2004 г. // Собр. законодательства Рос. Федерации. 2004. №52. Ч.1, ст.5270.

[10] Федеральный закон «О внесении изменений в отдельные законодательные акты Российской Федерации» от 27.12.2009 г. // Собр. законодательства Рос. Федерации. 2009. №52. Ч.1, ст.6440.

[11] See: Солнцев А.М. Выполнение Россией обязательств по международным экологическим соглашениям // Московский журнал международного права. 2006. №1 (61). С.184-200.

[12] Постановление Правительства РФ от 28.05.2003 №304 (ред. от 09.01.2009) «Об утверждении Правил использования безвозмездно изъятых или конфискованных диких животных и растений, их частей или дериватов, подпадающих под действие Конвенции о международной торговле видами дикой фауны и флоры, находящимися под угрозой исчезновения, от 3 марта 1973 г.» // Собр. законодательства Рос. Федерации. 2003. №22 (02 июня), ст.2168.

In order to execute provisions of the 1992 Convention (art. 6) there were adopted National Strategy and Action Plan on the conservation of biological diversity of the Russian Federation[13] in 2014 according to which issues of the conservation of biodiversity shall be resolved on the base of low-level taxonomic and ecosystem approaches.

The Strategy aims at the conservation of diversity of natural biosystems at the level providing their sustainable existence and inexhaustible use.

Though the Strategy estimates Russian legislation in the area of the conservation and use of biodiversity as respectively developed, the Strategy states the necessity to make efforts in introduction of amendments and additions to applicable legislation and in development of new directions of law-making provided by the 1992 Convention. It is caused by a range of problems such as for example natural resources direction of legislation, framework character of laws, legal gaps and contradictions.

As stated in the 2002 National Strategy of the conservation of the Russian biodiversity[14], migratory species require a special attention, because "for their existence it is necessary to conserve the entire range of seasonal habitats which are ordinary situated wide apart (often even in different states). Besides, during migration these animals are extremely vulnerable, and their mortality during this period shall be compensated. The conservation of these species requires interregional and intergovernmental coordination of the conservation measures and fixing quotas of their extraction volumes".

In 2014 Russia provided the Secretariat of the Convention on biodiversity with a Fifth national report of the Ministry of na-

[13] See: Национальная Стратегия и План действий по сохранению биологического разнообразия Российской Федерации. М., Министерство природных ресурсов и экологии РФ, 2014. URL: http://strategy2014.ru/.

[14]See: Национальная Стратегия сохранения биоразнообразия России. М., Министерство природных ресурсов РФ, 2002. С.110. URL: http://www.caresd.net/img/docs/530.pdf.

ture and natural resources "Conservation of biodiversity in the Russian Federation" which contains table "Extent of carrying out of the measures on conservation and sustainable use of biodiversity provided in Priority guidelines of the national action plan (2001)"[15]. The extent of implementation of the measures on the issue of "conservation of migratory species" is estimated at 3 points, or 60%.

Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets[16] invites Parties and other Governments at the forthcoming meetings of the decision-making bodies of the other biodiversity-related conventions, and other relevant agreements to consider appropriate contributions to the collaborative implementation of the Strategic Plan for Biodiversity 2011-2020 and its Aichi Targets (par. 16 "a"). Under the "relevant agreements" the Strategic plan means the Ramsar Convention on wetlands of international importance especially as waterfowl habitat, the Convention Concerning the Protection of the World Cultural and Natural Heritage, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the Bonn Convention on the conservation of migratory species of wild animals.

Under the State Program of the Russian Federation of 2012 "Conservation of the environment for 2012-2020"[17] it is expected to increase the square of specially protected areas up to 13,5% by 2020; to achieve positive dynamics in endangered species of flora and fauna; to provide protection of natural complexes and objects of biological and landscape diversity; to secure the conservation

[15] See: Пятый национальный доклад «Сохранение биоразнообразия в Российской Федерации». С.63-72. URL: https://www.cbd.int/doc/world/ru/ru-nr-05-ru.pdf.

[16] See: Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets. URL: https://www.cbd.int/decision/cop/?id=12268

[17] See: Постановление Правительства РФ от 15.04.2014 №326 «Об утверждении государственной программы Российской Федерации «Охрана окружающей среды» на 2012-2020 годы» // Собр. законодательства Рос. Федерации. 2014. №18 (05 мая). Ч.III, ст.2171.

of species of flora and fauna included in the Red Book of the Russian Federation; to implement international obligations of Russia in the sphere of the conservation of biodiversity, threatened and endangered species of flora and fauna, deriving from the 1992 Convention on biodiversity and other international treaties and agreements.

Subprogram determines conservation of unique and typical natural complexes and objects (including threatened and endangered ones) in their natural habitats, i.e. conservation in-situ, as a priority direction of the conservation of biodiversity.

Russia's participation in international conventions and agreements (such as Convention on biodiversity; Convention on Wetlands of International Importance especially as Waterfowl Habitat; Convention on International Trade in Endangered Species of Wild Fauna and Flora; the United Nations Framework Convention on the climate change; International Convention for the regulation of whaling; Memorandum of understanding concerning conservation measures for the Siberian crane (Grus Ieucogeranus) in the frames of the 1979 Convention; other multilateral and bilateral agreements on the conservation of species (migratory birds, polar bear, Amur tiger) is one of the most important direction in the sphere of the conservation of biological diversity.

Framework for the state policy in the area of ecological development of the Russian Federation for the period to 2030[18] provides a list of mechanisms applied for solving of the problem of the conservation of environment including natural ecosystems, species of flora and fauna, which includes strengthening and development of the system of protected areas, creation of the system of measures on the conservation of threatened and endangered species and their habitats, prevention of uncontrolled spread of invasive species, securing of gene pool of wild animals,

[18] See: Основы государственной политики в области экологического развития Российской Федерации на период до 2030 года. Утв. Президентом РФ 30.04.2012. URL: http://kremlin.ru/acts/15177.

resolution of ecological problems of the Baikal area, regions of the North and Arctic, areas of traditional nature management of indigenous peoples of the North, Siberia and Far East.

The Russian Government Order of the 17 of February 2014 №212-p ratified the Strategy for the conservation of threatened and endangered species of animals, plants and mushrooms in the Russian Federation for the period to 2030[19] (hereinafter – the 2014 Strategy). The main principles of this Strategy are species principle based on the conservation of a population and areas of the species (subspecies); population principle based on the conservation or recovery of a population and areas of natural populations enough for their sustainable existence; organismic principle based on the conservation of separate specimens, securing their reproduction and conservation of genotypes (section I).

However, Russia is still not a member of the 1979 Convention on the Conservation of migratory species of wild animals. But it signed two Memoranda of understanding adopted under the 1979 Convention – on Siberian crane and saiga antelope, and the Ministry of Natural Resources considers accession to the Agreement on the Conservation of African-Eurasian Migratory Waterbirds[20], which is also a part of the 1979 Convention system.

In December 2013 Minister of natural resources and ecology, after meeting with Executive Secretary of the 1979 Convention during the Forum on the Protection of the white bear (the 4-6 of December 2013, Moscow), stated that the issue on the accession to the 1979 Convention is included in the agenda of the Ministry.

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[19] See: Стратегия сохранения редких и находящихся под угрозой исчезновения видов животных, растений и грибов в Российской Федерации на период до 2030 года. Утв. Распоряжением Правительства РФ от 17.02.2014 №212-р // Собр. законодательства Рос. Федерации. 2014. №9 (03 марта), ст.927.

[20] See: Присоединение к Боннской конвенции – на повестке дня Минприроды России. URL: http://www.mnr.gov.ru/news/detail.php?ID=131894.

In 2014 the director of the Department of international cooperation of the Ministry of natural resources of Russia, after meeting[21] with the Secretary of the 1979 Convention, reaffirmed commitment to join the Convention, noting that "this work requires time and agreement with concerned departments and organizations" [22].

At the plenary session of the 70th Meeting of the United Nations General Assembly on the 28 of September 2015 the President of Russia suggested "to call a special forum under the aegis of the United Nations, where problems concerning exhaustion of natural resources, habitats destruction, climate change should be regarded in complex. Russia is ready to act as one of the organizers of such a forum" [23].

In the speech at the 21st Conference of the Parties to the United Nations Framework Convention on climate change and at the 11th Meeting of the Parties of the Kyoto Protocol on the 30 of November 2015 Vladimir Putin reaffirmed "the suggestion to hold a scientific forum under the aegis of the United Nations, where there should be discussed the problems not only concerning climate change, but also exhaustion of natural resources and degradation of environment" [24].

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[21] The meeting took place during the First session of UN Environment Assembly of the UN Environment Programme, 23-27 June 2014, Nairobi, Kenya. // Documents: First session of the UN Environment Assembly. URL: https://web.unep.org/environmentassembly/node/41214.

[22] See: Российская Федерация заинтересована в присоединении к Конвенции по сохранению мигрирующих видов диких животных (Боннская конвенция). URL: http://www.mnr.gov.ru/news/detail.php?ID=134625.

[23] 70-я сессия Генеральной Ассамблеи ООН. Владимир Путин принял участие в пленарном заседании юбилейной, 70-й сессии Генеральной Ассамблеи ООН в Нью-Йорке. URL: http://kremlin.ru/events/president/news/50385.

[24] Конференция стран-участниц Рамочной конвенции ООН по вопросам изменения климата. Владимир Путин принял участие в работе 21-й Конференции стран-участниц Рамочной конвенции ООН по вопросам изме-

The President of Russia signed the Decree on conducting a Year of ecology in 2017 in the Russian Federation in order to attract attention to the issues of ecological development of Russia, conservation of biodiversity and providing of ecological safety.

Though Russia directly expresses its intention to join the 1979 Convention, it is still unknown how much time it will take to agree "with concerned departments and organizations" and to bring Russian legislation in compliance with the provisions and requirements of the Convention, as advantages for migratory species of wild animals from the participation of Russia in the Convention which is a habitat for 246 species of wild animals[25] covered by the system of the 1979 Convention, is doubtless.

It also should be noted and born in mind that ecological problems exceed national sovereignty. Borders of territorial jurisdiction cannot limit migratory species of wild animals. States are liable for the conservation and sustainable use of their biological diversity, for the activities under their jurisdiction or under their control which would not cause any harm to the environment of other states or areas out of national jurisdiction.

нения климата и 11-го Совещания сторон Киотского протокола. URL: http://kremlin.ru/events/president/transcripts/50812.

[25] See: Parties and Range States. Russian Federation. URL: http://www.cms.int/country/russian-federation.

THE PROBLEMS OF JOINT USE OF THE TRANSBOUNDARY AMU DARYA AND SYR DARYA RIVERS BY THE STATES OF CENTRAL ASIA

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In the XXI century water becomes not just vital necessity, but one of the main problems of mankind and a source of the possible interstate conflicts. According to the international analysts by 2025 the lack of water resources will be suffered by two thirds of the population of the planet. Already now in the world there are nearly four tens countries which are geographically located in droughty zones which have deficiency of water. The management of the general resources of the transboundary rivers demands institutional mechanisms and the international legal providing that is one of the most considerable problems facing the international community.

According to the international experts and politicians, one of the regions which are most sharply experiencing difficulties in the sphere of water resources is Central Asia. The problem of water supply and sharing of water resources of the transboundary rivers in the states of Central Asia has gained special sharpness for the last more than twenty years as a direct consequence of a social and economic and political crisis in the region.

The main transboundary water resources in the region are the Amu Darya and the Syr Darya which cover all the region and fall into the basin of the Aral Sea.

Amu Darya the largest river on the area of Central Asia, is formed in the boundary territory of two states by confluence Vakhsh (Tajikistan) and Pyandzh (Afghanistan)[1]. The Syr Darya River is formed generally in the territory of Kyrgyzstan by confluence Naryn and Karadarya in the east part of the Fergana Valley. The Syr Darya is the largest river of Central Asia, on water content concedes only to Amu Darya. Extent of the river is 2337 km. The total catchment area of the pool which is located in the territory of the republics Kyrgyzstan, Tajikistan, Uzbekistan and Kazakhstan, makes 150 thousand sq.km.[2]

During the Soviet period of great technological achievements the Amu Darya and the Syr Darya became "the victims of unreasonable hydrological projects that has led to the Aral crisis. as the Aral Sea existed and exists at the expense of a drain of waters of these rivers. Irrational use of these water resources is complemented with a problem of a high increase in population in the region of Central Asia now.

After the Central Asian republics gained the independence the system of the balanced water use that had been developed for decades has stopped its existence. This system assumed compensation in the form of energy carriers to the states which are located upstream of the rivers (Kyrgyzstan, Tajikistan) from the "lower" neighbors (Kazakhstan, Uzbekistan, Turkmenistan) in exchange for uninterrupted supply of water for an irrigation of objects of agriculture and the electric power.

More than 20 years the states don't manage to overcome the conflict of interests[3]. In these conditions Kyrgyzstan and Tajiki-

[1] Iskandarkhonova B.A. Legal regulation of use of the transboundary rivers in Central Asia // Moskovskiy zhurnal mezhdunarodnogo prava. 2007 July-September. № 3(67). P. 140-141

[2] The transboundary rivers – a strategic resource of water supply of Kazakhstan / Kazinform news agency. 2005. URL: www.inform.kz (date of reference April 3, 2018)

[3] Guseynov V., Goncharenko A. Water resources of the CAR // Tsentral'naya Aziya. Geopolitika i ekonomika regiona. M.: Krasnaya zvezda, 2010. URL:

stan which are geographically in the territory of formation of a drain of Amu Darya and the Syr Darya have been forced to transfer the large hydroelectric power stations to a power operating mode. The question of irrigation for these republics is of secondary importance. The situation is different in this part with the republics of Kazakhstan, Uzbekistan and Turkmenistan. For them, the priority is the growing season, during which time water is actively used for irrigation[4]. There are also roots of the main problems of the interstate relations in Central Asia. They bear growth of potential tension both in the republics, and beyond her limits. The countries of Central Asia pursue own policy in the field of control and use of water resources. Each of the states, at implementation of this policy, is guided by the national interests[5]. The states of an upper course, Kyrgyzstan and Tajikistan, referring to the Dublin principles of 1992 which defines water as goods, suggest to introduce a payment for water, as for a resource. For example, Kyrgyzstan in 2001 has fixed by the law a payment for water[6]. However, the states of the lower current, Uzbekistan and Kazakhstan, refer to provisions of the Helsinki water convention and proclaim water a public and free resource[7].

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http://www.isoa.ru/docs/central_asia-book.pdf (date of reference April 3, 2018)

[4] Valentini K.L., Orolbayev E.E., Abylgaziyeva A.K. Water problems of Central Asia. Bishkek, 2015. P. 142.

[5] Zhil'tsov S.S. The power will define the future of Central Asia. URL: http://www.ng.ru/energy/2017-02-14/9_6928_future.html (date of reference April 3, 2018)

[6] Water Code of the Kyrgyz Republic of December 9, 2004 (with changes and additions as of 6/14/2016). URL: http://faolex.fao.org/docs/texts/kyr49854R.doc (date of reference April 3, 2018)

[7] Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes of 1992. URL: http://www.un.org/ru/documents/decl_conv/conventions/watercourses_lakes.shtml (date of reference April 3, 2018)

At the present stage the situation concerning water use is preserved. However the countries still continue to pursue national interests and to unilaterally realize the projects uncoordinated to neighboring countries. So, Kyrgyzstan and Tajikistan, despite difficulties with financing, haven't refused the idea of construction of large hydraulic engineering constructions in the territories. Tajikistan continues a course towards completion of Rogunsk hydroelectric power station. The Kyrgyz side also, despite failure of agreements with Russia on construction of Kambar-Atinsk hydroelectric power station-1 and the top Naryn cascade of hydroelectric power station, goes on the way of ensuring power independence of neighboring countries. In particular, the Kyrgyz side managed to make the important break on this way by construction of the internal high-voltage Datka-Kemin line which has allowed the country to reduce dependence on electrical supply from Kazakhstan and Uzbekistan. It is also necessary to mention the CASA-1000 project (Central Asia-South Asia power project) which purpose is sale of summer surplus of the electric power to the states of the Southern Asia: Afghanistan and Pakistan.

This project is sponsored by the World Bank, the Islamic Development Bank, the United States Agency for International Development, United States State Department, The ministry of the international cooperation of Great Britain and the Australian agency of the international development[8].

All these projects of Kyrgyzstan and Tajikistan aren't supported by the states of the lower reach of the rivers, especially Uzbekistan and create tension. In reply, on plans of the states of an upper course Uzbekistan and Kazakhstan have started building and construction of additional tanks of accumulation of superficial drains, including in basins of the transboundary rivers. So,

[8] Sarkorova A. The CASA-1000 project will connect Central and Southern Asia // BBC, Dushanbe. URL: http://www.bbc.com/russian/international/2016/05/160512_casa_project_launch (date of reference April 3, 2018)

Uzbekistan, seeks to increase the water independence due to new technologies of water conservation, drop irrigation and development of the underground water horizons.

As the international experience shows, conflict situations between the coastal states have to be resolved on the basis of interstate agreements, consultations, negotiations, by creation of interstate integration associations. It is necessary to strengthen political, legal and institutional base of interstate cooperation taking into account established practices of transboundary water interaction in a river basin of Danube, the experience of which makes sense to analyze in the context of the solution of water problems of Central Asia.

Such international organizations as the Eurasian Economic Union (further EAEU), the Shanghai Cooperation Organization and others can contribute to the creation and conclusion of such legal acts, as well as to assist in signing the international "water" conventions by the countries of Central Asia. The establishment of the International Water and Energy Consortium (further IWEC) within the framework of the EAEU, the project of which was proposed by Kazakhstan in 2003, would remove existing disagreements among the states of the region on the exploitation of the Syr Darya water and energy resources and help maintain the ecological balance. However, at this stage, integration in the water and energy sector does not fully correspond to the narrow economic interests of the Central Asian countries that have not developed a unified approach to the use of the region's water and energy resources: the Kyrgyz and Tajik sides view the IWEC as a body for the construction of hydropower facilities for production electric power with its subsequent sale as a commodity, which contradicts the norms of international law. For Kazakhstan and

Uzbekistan, the creation of the Consortium is one of the solutions for the guaranteed water supply of irrigated agriculture[9].

After declaration of independence, all five states of Central Asia have started formation of the water legislation at the national level. In all five states the Codes or Laws governing the water relations have been adopted. In all five states water, according to their Constitutions, is recognized as state ownership. In the water legislation of four states (except Turkmenistan) independent article has enshrined the requirement that if the international treaty has established other rules, than those which contain in the legislation of these states then are applied provisions of the international treaty.

The contractual legal mechanism is without doubt one of the key components of interstate cooperation in the field of use and protection against pollution of transboundary watercourses.

At present, two universal international documents regulating the use and protection of transboundary watercourses have been adopted. The United Nations Convention on the Law of the Non-Navigational Uses of International Watercourses, 1997 (further the 1997 Convention), which, according to modern international law theorists, is "the only legal instrument providing a comprehensive legal framework for transboundary water management"[10] which establishes two key principles that determine the conduct of states in relation to general watercourses: "fair and rational use" and "duty not to cause significant harm" to neighbors. Nevertheless, countries themselves must determine what exactly these terms mean in the context of their specific water-collecting areas[11].

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[9] Water and conflict of interests in Central Asia / Caucasus times. URL: http://caucasustimes.com/ru/voda-i-konflikt-interesov-v-centraln/ (date of reference April 3, 2018)

[10] Kalinichenko T.G. Formation and development of the international water law // Ekologicheskoye pravo. 2005. № 6. P. 33

[11] The UN Convention on the Law of the Non-Navigational Uses of International Watercourses of 1997. URL:

On August 17, 2014 there was an event that could not go unnoticed: the 1997 Convention entered into force 17 years after the adoption. According to a number of scientists, the 1997 Convention as an act of codification summarizes the various rules for the protection and use of watercourses that previously operated in the form of customary law, soft law, case law and certain general principles of international law[12].

The second multilateral international instrument is The United Nations Economic Commission for Europe Convention on the Protection and Use of Transboundary Watercourses and International Lakes, of 1992, entered into force on 6 October 1996, which, despite its regional orientation (56 countries in the region), may also be called universal, as since 2003 accession to the Convention of states from other regions is allowed.

At present, the cooperation of the Central Asian states in the joint use of waters of transboundary rivers is based on the two most important statutory interstate treaties – the Tashkent Declaration of the Heads of State of the Republic of Kazakhstan, Tajikistan and Uzbekistan of 2001 and the Treaty between the Republics of Kazakhstan, Kyrgyzstan, Tajikistan and Uzbekistan on the establishment of the Central Asian Cooperation Organization (further CACO) of 2002. Among the main directions of the CACO, the most important in the context under consideration is coordinated actions in the field of rational and mutually beneficial use of water bodies, water and energy resources and water management facilities in Central Asia on the basis of universally recognized principles and norms of international law.

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http://www.un.org/ru/documents/decl_conv/conventions/watercrs.shtml (date of reference April 3, 2018)

[12] Ryazanova M.A. Entry into force of the Convention of the UN on the right of non-navigable types of use of the international water currents of 1997 as new stage of codification of international law of water resources // Analitich-eskiy portal Otrasli prava. 2016. URL: http://xn----7sbbaj7auwnffhk.xnp1ai/article/15565 (date of reference April 3, 2018)

In order to regulate the issues of water relations in the Aral Sea basin, on February 18, 1992, the Interstate Agreement between the Republic of Kazakhstan, the Kyrgyz Republic, the Republic of Uzbekistan, the Republic of Tajikistan and the Republic of Turkmenistan "On cooperation in the sphere of joint management of the use and protection of water resources of interstate sources". In Article 1 of the mentioned agreement, the equal rights of the states of the region to use transboundary water bodies and equal responsibility for ensuring their rational use and protection are recognized. Later this agreement was confirmed by the Kyzyl-Orda Agreement of March 26, 1993 and the Nukus Declaration of September 20, 1995.

In accordance with the decision of the Heads of State of Central Asia, on January 4, 1993, the International Fund for Saving the Aral Sea was established in Tashkent, the main objective of which is financing and lending joint practical actions, long-term programs and projects for saving the Aral Sea, ecological rehabilitation of the Aral Sea and the Aral Sea basin in general, taking into account the interests of all the states of the region[13].

Bilateral and multilateral agreements between the Central Asia countries are of great importance in resolving the problem of protection and use of transboundary waters.

The agreement concluded between Kazakhstan, Kyrgyzstan, Uzbekistan and Tajikistan in 1998 on the use of water and energy resources in the Syr Darya River Basin governs the concerted and mutually beneficial use of the Naryn-Syrdarya cascade of reservoirs, and the Agreement between Kazakhstan and Kyrgyzstan of 2000 on the use of water management

[13] Cooperation with the countries of Central Asia in the sphere of rational use of hydro-electric resources. 2016. URL: http://www.mfa.kz/ru/content-view/sotrudnichestvo-so-stranami-tsentralnoj-azii-v-sfere-ratsionalnogo-ispolzovaniya-vodno-energeticheskikh-resursov (date of reference April 3, 2018)

facilities for interstate use on rivers Chu and Talas regulate the development and implementation of joint measures for the uninterrupted and safe operation of water management objects of these rivers.

Thus, today water is the strategic resource representing exclusive importance for development of welfare of any state.

However today the mankind faces serious crisis of water resources. The director of Institute of water problems V. Danilov-Danilyan claims that by 2025-2030 nearly a half of the population of the planet will lack fresh water for satisfaction of elementary requirements[14].

The most important question which have to consider the countries of Central Asia for a solution of the problem of water use – creation of the platform concerning rational distribution of water resources on the region within which all agreements concluded between the parties will be obligatory. Existence of a large number of the signed documents, the intergovernmental agreements designed to regulate use of water resources of the transboundary rivers of Central Asia have more frame character.

Use of water resources of Central Asia represents a complex of the interconnected problems today: social, political, economic.

Despite agreements which the countries regions periodically reach, there is still no mechanism of joint management of water resources. Contradictions in approaches to the solution of water problems interfere with acceptance of effective measures on the integrated management of a hydro-electric complex focused on equal participation in him of all branches, local bodies and representatives of water users. This method establishes interrelation of water use with natural and economic factors, balance of

[14] Danilov-Danil'yan V. Water is more expensive than oil? // Argumenty i fakty. 2008. № 4. P. 45.

achievement of the goals of economic development with ecological safety of river systems[15].

The lack of the accurate legislation, the effective mechanism of distribution of water, management of water use and resolutions of conflicts, the low level of exchange of information concerning quality of water and its use are an obstacle for regional cooperation in use of water resources of transboundary rivers.

The countries of Central Asia experience difficulties in comparison of fuel and energy resources and water resources. Moreover, the coastal countries try to divide benefits from access to water, but not water that conducts to a complication of sharing of the transboundary rivers.

National legislations of the countries of the region on water resources "are too one-sided", consider only the national interests of the states. Accession of all non-aligned states of the region to the international universal Conventions regulating use and protection of transboundary water currents would allow to create uniform legal approaches to the solution of problems of rational use and protection of the transboundary rivers.

Thus, cooperation of the states of the region in the solution of problems of transboundary water currents is an important factor of strengthening of regional security in Central Asia. Today all countries of the region have to realize that no national plans made outside the common regional strategy of joint operation of water reserves can be realized without the corresponding negative economic, social and ecological consequences for other states of the river basin. To effectively integrate local strategies into the regional scenario of sustainable development, it is necessary to increase the role of political negotiations, to improve interstate

[15] Auyelbayev B. Policy of the countries of Central Asia and hydro-electric problems of the region // Analytic (Kazakhstan). 2009. № 3. P. 13-18.

agreements, and also to strengthen support for intergovernmental basin organizations[16].

Cooperation will be fruitful if the states of Central Asia develop it on a basis and at respect for the principles and rules of international law.

[16] Sidorova L. States of Central Asia: problems of sharing of transboundary water resources // Tsentral'naya Aziya i Kavkaz. 2008. № 1(55). URL: https://cyberleninka.ru/article /n/gosudarstva-tsentralnoy-azii-problemy-sovmestnogo-ispolzovaniya-transgranichnyh-vodnyh-resursov (date of reference April 3, 2018)

CONTENTS

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