Nordisk Miljörättslig Tidskrift

Nordic Environmental Law Journal

2010:1

www.nordiskmiljoratt.se

Nordisk Miljörättslig Tidskrift/Nordic Environmental Law Journal 2010:1

ISSN: 2000-4273

Redaktör och ansvarig utgivare/Editor and publisher: Gabriel Michanek

Webpage http://www.nordiskmiljoratt.se/omtidskriften.asp (which also includes writing instructions).

Innehåll

Introduction to the Second Issue

Gabriel Michanek, editor[1]

The second issue of Nordic Environmental Law Journal includes different topics. In *Rätt och riktig rättsvetenskap [Law and "Right" Legal Science]*, Staffan Westerlund criticises a great part of the present research in environmental law for not responding adequately to today's crucial environmental problems. His point of departure is mankind's ecological dilemma, meaning we are dependent on the biosphere that cannot be substituted. But as our development today is not ecologically sustainable, it puts the biosphere at risk. At the same time, law is necessary to certify that unsustainable behavior is avoided. This follows from the rule of law (principle of legality). Research in environmental law must relate and respond to this situation. It is no longer sufficient with good critical analyses of valid law ("reactive" legal research). Scholars should step over to "*proactive*" research with the task to solve problems on system level by constructing a law for sustainability. As editor, I welcome responses to this provocative article.

The second article has an international perspective. The Nord Stream Pipeline in the Baltic Sea will not only be located in territorial waters or economic zones of different states, a possible damage on the pipeline may cause transboundary harm. In *Reflections on Environmental Responsibility – with an Emphasis on the Nord Stream Pipeline in the Baltic Sea Area*, Seita Romppanen discusses environmental responsibility and liability in the context of the pipeline. The article lays down the general legal framework and it systemizes and analyzes the relevant responsibility and liability instruments.

The first issue of Nordic Environmental Law Journal included a Nordic comparative study on the role of courts in environmental law. Ole Kristian Fauchald continues now with a more specialized article: *Environmental Justice in Courts – a Case Study from Norway*. He examines first the extent to which Norwegian courts have secured environmental interests in their case law and, secondly, whether recent legislative reforms in Norway (a new Planning and Building Act 2008 and a new Nature Diversity Act 2009), are likely to strengthen the role of courts as a vehicle to secure environmental interests.

---

[1] Gabriel Michanek is professor in environmental law at the Faculty of Law, Uppsala University.

In *Do not Miss the Forest for all the Trees*, Inga Carlman criticises social sciences scholars for generally overlooking a cornerstone in democratic societies, the Rule of Law. She claims that social sciences are being hampered by pre-environmental sectoral paradigms. By contrast, environmental law methodology has developed a theory for sustainable law capable of handling non-linearity, complexity and Rule of Law. Thus, some of what other social sciences have brought forward can be reinterpreted for inclusion in an adequate sustainability theory, while much of the rest can be explained as ineffective.

One of the threats to sustainable development is the rapid loss of biodiversity, in the Nordic states as well as in other parts of the world. The loss concerns not least species and their habitats. Species are diminishing due to human activities in a rate which we have not seen before. Only in Sweden, 4127 species were 2010 classified as red listed by the Swedish Species Information Centre. Numerous legal statutes on different levels have obviously not been sufficient to curb the trend. In *The Convention on Biological Diversity. Supporting Ecological Sustainability or Prolonging Denial?*, Aðalheiður Jóhannsdóttir analyses the main features of Convention of Biological Diversity and its interaction with, firstly, the principle of state sovereignty and, secondly, the responsibility of states to prevent environmental damage in other states. She argues that the convention and its interaction with the two principles "are prolonging an international denial of what is really needed in order to support the future of biodiversity".

There are more things in heaven and earth, Horatio,
than are dreamt of in your philosophy.

Rätt och riktig rättsvetenskap

Staffan Westerlund

1 Inledning

Att utveckla en disciplin

Drygt fyrtio år av strävan att utveckla disciplinen miljörättsvetenskap har erbjudit svårigheter, utifrån vilka en del problem kan identifieras och slutsatser dras. Mycket handlar det om en tröghet, för att inte säga motstånd, mot utvecklandet av miljörätten som fortfarande finns inom själva (den svenska eller skandinaviska) rättsvetenskapen som sådan.

En rimlig hypotes är att det tänkande, som präglar den s.k skandinaviska rättsrealismen (eller i vart fall uppfattningen om densamma), har kommit att prägla rätten på ett fatalt, förlamande sätt. Paradoxalt nog förefaller detta i sin tur – åtminstone i hög grad – gå tillbaka på en strävan att göra rättsvetenskapen "vetenskaplig". Mest har dock detta lett till en begränsning, för att inte säga reducering, av forskningsområdets problematisering till endast sådant, som anses kunna mätas på vissa sätt.[2]

På tänkandet kan också ha inverkat att man förbiser den oerhört viktiga skillnaden mellan å ena sidan hur rätten borde vara (rent allmänt, eller etiskt etc), å andra sidan den metodologiska frågan hur rätten behöver vara för att... Ändå är den så tydlig. Det kommer att framgå i denna artikel att den senare frågeställningen aktualiserar metodik men inte i och för sig politik.

Bakgrund

- Världsbilder har utvecklats under århundraden, också efter att rättsvetenskapen anser sig redan ha funnit sin form. Den senaste stora världsbildsutvecklingen är antagligen insikten om att Jorden, såsom varande en planet, utgör ett begränsat ekosystem (benämnt biosfären) med typiskt sett begränsade resurser och underkastat termodynamikens andra huvudsats och precis alla andra naturlagar.[3]
- Världssamhällets problembilder har successivt utvecklats utifrån föregående, med det tydligaste uttrycket i begreppet *sustainable development* och inriktat på att allt mänskligt beteende ska hållas inom sådana ramar, att ingen framtida generation står utan biosfärsresurser för tillgodoseende av sina behov.[4]
- I samhällen underkastade the Rule of Law (legalitetsprinciper) är sådant mänskligt beteende tillåtet som inte i, eller med stöd av, lag är förbjudet eller lagt under restriktioner. Om rätten i ett sådant land inte begränsar mänskligt handlande, tillåter alltså rätten i fråga detta mänskliga handlande, oavsett inverkningarna på förutsättningarna för hållbar utveckling.
- Jordens befolkning är för närvarande (2010) alltså omkring 6,8 miljarder och har fördubblats på

[2] Det rättsfilosofiska förloppet var kanske mer eller mindre ofrånkomligt, men det kan inte tillåtas stanna vid de Hägerströmska och Rosska stadierna och dess trötta avläggare. Jag återkommer till detta indirekt via frågan vad som inte skulle kunna beforskas rättsvetenskapligt men där ändå rätten spelar en viktig roll, om man håller fast vid ett s.k rättsrealistiskt synsätt såsom det enda riktiga.

[3] Westerlund, S: *Världsbilder, rättsvetenskap, juridik och hållbar utveckling*, i Svensk Juristtidning 2006 s 309-344. Termodynamikens andra huvudsats är fundamental. I ekologiskt hållbarhetstänkande visar den att energiomvandlingen kan gå bara i en riktning och att mänsklighetens energibehov *långsiktigt* endast kan bygga på det som solen ger – så länge som solen lyser. Av detta följer en mängd viktiga slutsatser, där den om *tiden* är mycket viktig. Varje dag som en åtgärd för att minska och helst motverka en negativ effekt dröjer, ökar mänsklighetens användning av enegiresultaten, så att säga. Att återskapa sådant är typiskt sett dyrare än att aldrig hamna i situationen att behöva återskapa sådant. Däri ligger också termodynamikens fundamentala betydelse för ekologisk hållbarhet. En del klarar naturen själv genom solen, resten är förlorat eller kräver än dyrare mänskliga åtgärder för att återställa. Se också bl.a vid not 51.

[4] Op. cit.

omkring 40 år.

- Omfattande data finns som visar att den biologiska mångfalden (inklusive naturtyper som i sin tur kan vara viktiga även globalt, såsom regnskog) i allt väsentligt länge har minskat och fortsätter att göra detta även när denna text skrivs.

Att mänskligheten har ett *ekologiskt dilemma*[5] går igenom hela denna artikel. Dilemmat följer av människornas beroende av biosfären samtidigt som biosfären *inte* kan ersättas med något annat i det hänseendet. Biosfären utgör alltså naturbasen för *Homo sapiens* samtidigt som *Homo sapiens* har förmåga att påverka denna naturbas. Dilemmat är alltså mänsklighetens, människornas.

Naturbasen reagerar på denna *antropogena* påverkan uteslutande utifrån naturlagarna.[6] Det ekologiska dilemmat manifesteras bland annat däri att när naturbasen ger mindre än vad ett antal miljarder människor behöver för sin överlevnad, kraschar (med ekologisk terminologi) den mänskliga populationen och en ny mänsklighet med rimliga levnadsvillkor uppkommer inte förrän så många människor har svultit eller slagits ihjäl eller på andra sätt försvunnit från de levandes krets, så att *dels* det nya antalet kan bäras upp av den kvarvarande biosfärens resursrester, *dels* kulturer och civilisationer under de nya, begränsade förutsättningarna kunnat utvecklas som kan samordna människornas handlande så, att de kvarvarande resurserna därefter räcker till för dem alla.

Mänskligheten har därtill ett *politiskt* dilemma. Det ligger i att om inte världspolitiken, men också nationell politik, anammar att det ekologiska dilemmat måste hanteras på ett sådant sätt, att ingen ekologisk krasch ska uppstå, så kommer med nuvarande utveckling kraschen. Det politiska dilemmat aktualiserar åtminstone fyra faser, nämligen:

1) Att besluta om att hantera det ekologiska dilemmat och undvika en ekologisk krasch för mänskligheten.

2) Att göra detta beslut genomdrivbart i varje land gentemot alla aktörer (juridiska och fysisk personer).

3) Att *genomföra* hanteringen av det ekologiska dilemmat och därvid att *genomdriva* det som behöver genomdrivas för att (1) ska kunna uppnås.

4) Att verkligen – "*in fact*" – undvika den ekologiska kraschen.

Den del av mänskligheten som hävdar rättsstatlighet har därtill ett *juridiskt* dilemma i det att den gällande rätten i varje land, och mellan de olika staterna, måste vara tillräcklig till innehåll och form för att det som följer av lösningen av det politiska dilemmat ska motsvara en ändamålsenlig hantering av mänsklighetens ekologiska dilemma.[7]

2 Världsbilder, problembilder och rätten

Under årtusenden har *Homo sapiens* kämpat mot naturen men också använt den. Samtidigt har människorna haft konflikter sinsemellan. Ofta har dessa konflikter rört naturen (som resurs) även om konflikterna har stått mellan människor; mellan enskilda *personer*, personer i grupp och så småningom också mellan stater. Civilisationer har växt fram och många har sedan gått under. De har varit beroende av konfliktlösningsmekanismer. Mer avancerade civilisationer har reglerat konfliktlösningen. De har blivit rättssamhällen, så småningom rentav rättsstater.

Många tänkare har bidragit till utvecklingen av principer och regler för konfliktlösningar. Att lösa konflikter tjänar inte bara att få tyst i några bostadsområden utan också att utveckla näringar och väl även

[5] Westerlund, S: *Law and Mankind's Ecological Dilemma*. I Führ, Wahl, Wilmowsky (Hearausgeber): Umweltrech und Umweltwissenschaft. Festschrift für Eckart Rehbinder. Erich Schmidt Verlag 2007.

[6] Det är därför teknikerna kunnat konstruera flygplan m.m, något som de inte kunnat göra om de inte kunnat förutse hur naturen fungerar. Det är också därför det fortfarande går att få fram mat till de flesta på Jorden – genom jordbrukstekniken som utnyttjar naturens lagbundna reaktioner.

[7] När detta brister, föreligger ett miljörättsligt underskott (Westerlund, S: *Det svenska miljörättsliga underskottet*. Webpublicerad 2004 på <http://www.imir.com/pdf-filer/u-skott.pdf>).

att förvalta och fördela gemensamma resurser. Konfliktlösning tjänade överlevnaden i den mån lösningen motverkade krig och olika övergrepp, och ekonomin i den mån lösningen gjorde ekonomisk samfärdsel smidig, förutsebar och på andra sätt effektiv.

Mycket av ovanstående ägde rum när man trodde att Jorden är platt, trodde att den är centrum i universum och räknade med att det alltid fanns tillräckligt med resursreserver i naturen. I den mån man ändå inte trodde det sistnämnda, såg man ofta förr till egna intressen än till något vidare och man utrotade bekymmerslöst den ena djurarten efter den andra. Jordens befolkning låg för ett par tusen år sedan mycket långt under en miljard, barnadödligheten var hög, att dö i barnsäng var en inte ovanlig kvinnlig konsekvens av livet, svält och sjukdomar öste på bördorna och allmänbildningsnivån var med nutida mått mätt synnerligen måttlig.

Naturvetenskapen utvecklades dock stegvis (en mera vardaglig beskrivning för det som betecknas som paradigmskiften), Jorden visade sig så småningom vara inte bara rund utan därtill blott en planet kretsande kring en medelstor stjärna benämnd Solen. Teknologin utvecklades, även det ofta stegvis. Industrialiseringen tog fart, vilket bland annat ledde till betydande demografiska förändringar. Medicinen utvecklades också, kanske lite senare, och förutsättningarna för individers överlevande av spädbarnsålder och sjukdomar förbättrades drastiskt. Jordens befolkning ökade allt snabbare för att in på 1900-talet ha en tillväxt av för mänskligheten aldrig tidigare upplevd hastighet och storleksordning. Ekonomin såsom hävdad vara en samhällsvetenskap producerade mera modern teori från åtminstone slutet av 1700-talet (Adam Smiths *An Inquiry into the Nature and Causes of the Wealth of Nations* 1776). Också rättsteorin utvecklades. Eller i vart fall förändrades.

Den nu nämnda tekniska och vetenskapliga utvecklingen ägde rum under en avsevärd tid men har accelererat högst avsevärt. Naturvetenskapen strävade efter att undersöka den fysiska verkligheten med hjälp av observationer och prövbar teori. Den var inriktad på att beskriva det som vi idag kallar naturlagar och klarade av att förstå sådant som naturbundenhet etc. Tack vare detta kunde alltmer avancerad teknik tas fram och i bruk. Men inte bara det. Naturvetenskapens utveckling bidrog till en alltmer välgrundad natur- och världsbild.

Folkökningsproblematiken brukade hanteras genom bland annat migration, om än ofta till områden där det redan fanns befolkning – numera eufemistiskt benämnd urbefolkning – som inte sällan drevs bort eller utrotades, eller i vart fall sattes under de inflyttades överhöghet. Emellertid räckte de geografiska kunskaperna till för att så småningom få folk att begripa att det inte fanns så många fler reservområden på Jorden för att tillgodose folkmängdernas levnadsbehov. Den mera våldsamma problemlösningen på detta kom bland annat att ge upphov till sådana juridiska begrepp som folkmord och kanske också etnisk rensning. Så värst mycket längre än så sträckte sig inte rättens förhållande till folkökningen. Tvärtom, i en del länder användes (och används än idag) rätten, ofta av religiösa skäl, till att förhindra födelsekontroll.

3 Från konflikt till dilemma

Globaliserade ekologiska insikter

Om det nu är i huvudsak riktigt att rätten väsentligen har utvecklats primärt för konfliktlösning (samt som medel för att utöva makt över personer) och näringsutveckling, så är det inget omstörtande antagande att detta har skett mot bakgrund av de världsbilder som rådde under respektive utvecklingsskede.

Däri kan ingå att en successiv anpassning har skett till att resurskonflikter ändrade karaktär och att resursanspråken inte har varit förenliga med varandra. Industrialiseringen ledde till vatten- och luftföroreningar, gruvbrytning har praktiskt taget alltid inneburit både markingrepp och föroreningsrisker, utbyggnad av vattendrag förminskade nyttan av andras vattenrätter etc. Juridiskt sett var detta konflikter *mellan personer* (inklusive företag) och/eller med staten (kungen etc). Konflikterna avsåg dock *begränsade naturresurser* (vi kan här se också miljökvalitet som en resurs). Konfliktlösningen i denna kontext kom att i

allt högre grad ses som *avvägningsfrågor*. En *avvägningstanke* kom att prägla mark- och vattenrätten och rätten till natur- och miljöresurser.[8]

Det föreligger ett fundamentalt problem av dilemmakaraktär med avvägningar. Om en avvägningspost är begränsad samtidigt som den är nödvändig (oersättlig), kan den inte vägas bort mot något annat utan att det, som resursen är nödvändig för, förr eller senare kollapsar.

Denna problematik präglade dock inte juridikens huvudfåra när på 1960-talet miljöproblematiken föreföll byta skepnad. Jordens befolkning hade passerat 3 miljarder för att fortsätta med en tioårstillväxt om omkring 20%. Många miljöhot identifierades och miljökatastrofer blev kända, inte minst genom Rachel Carsons *Silent Spring*.[9] Länder reagerade genom att börja utveckla lagar för att hantera detta. För svenskt vidkommande är 1969 märkesåret – då infördes miljöskyddslagen. Ämnet miljörätt började få en identitet. 1972 kom Romklubbens *Limits to Growth*, samma år som Stockholmskonferensen avhölls,[10] föregången av boken *Only One Earth*. Två år tidigare infördes USA:s National Environmental Policy Act som introducerade inte bara ansvaret för framtida generationer utan också krav på helhetssyn på miljökonsekvenser, ett krav som implementerades genom det därmed införda instrumentet Environmental Impact Statement.

Ämnet ekologi blev nu allmänt bekant liksom begreppen ekosystem och biosfären. Det sistnämnda betecknar Jorden med dess atmosfär och dess levande organismer och därmed det stora ekosystem, inom vilket mänskligheten har att söka sina livsförutsättningar och som i sin tur består av mängder av mindre ekosystem, som på ett eller annat sätt kan vara beroende av varandra.

Att *Homo sapiens* är, i grunden, bara en biologisk varelse, låt vara med mycket speciella artegenskaper, präglade alltmer insikterna.

[8] Att avvägningar redan i mycket gammal konfliktlösningsrätt varit fundamentala torde ha underlättat utveckling.

[9] Carson, R: *Silent Spring*. Houghton Mifflin 1962.

[10] Ward, B. and Dubos, R: *Only One Earth: The Care and Maintenance of a Small Planet* (New York, 1972).

Nordiska trögheter

Miljölagstiftningens huvudfåra i bland annat Norden kom trots detta att präglas av ett fasthållande vid avvägningar samt av uppfattningen att miljöfrågor egentligen var politiska frågor. Ekonomiska aspekter blev på många sätt överordnade. I den mån rättsvetenskapen i stort alls reagerade, så var det med ett slags förnekelse (något som jag återkommer till längre fram).

Dock tenderade några länder där utanför att arbeta också med rättsverkande miljökvalitetsgränser. De förebådade därmed vad som skulle bli omstörtande för inte bara rätten utan också rättsvetenskapen. Sådana gränser relaterar nämligen inte till ideologiska parametrar, heller inte ekonomiska, utan till något ute i naturen – luften, vattnet etc.

Detta var i princip nytt. Man hade därmed tagit in i själva rätten något som endast *reagerar* enligt naturlagarna.

Bakgrunden var att vatten och luft i många områden hade blivit så dåliga, så att hälsan hotades, ja, också livet. Smogsituationer i London och USA är exempel. En milstolpe i den rättsliga utveckling blev USA:s Clean Air Act Amendments 1970, det troligen första lagverk som i princip fick rättslig operationalisering[11] av miljökvalitetsnormer att fungera hjälpligt. Människornas *beroende* av miljökvalitet hade framträtt tydligt, men också människans *inverkan* på samma kvalitet. Begreppet *antropogen påverkan*, uttalat eller ej, kom in i rätten.

Ungefär här, vid de tydliga gränserna för hälsa, detroniserades i vissa länder avvägningstanken såsom allena överordnad. Ytterligare miljökvalitetsförsämring gjordes i princip olaglig. Ett nytt perspektiv hade framträtt. Det perspektivet återspeglade ett reellt *dilemma*. Människans miljödilemma. Hon riskerade hota sig själv om hon överskred vissa miljögränser.

Detta gick ganska oförmärkt förbi de nordiska länderna som i olika utformningar stannade i avvägningstanken. Internationellt skalades däremot gränstänkandet upp till biosfärsnivå, inte minst genom

[11] Gipperth, L: *Miljökvalitetsnormer. En rättsvetenskaplig studie i regelteknik för operationalisering av miljömål*. Uppsala universitet 1999.

Brundtlandkommissionens försorg när denna byggde sitt förslag på *hållbar utveckling*, vilket sedan fördes in i den internationella rätten genom Rio-deklarationen 1992 (då hade Jordens folkmängd nått omkring 5 miljarder). En rättslig princip om hållbar utveckling började erkännas[12] liksom insikten, uttryckt också av Brundtlandkommissionen, att naturbasen och miljön var nödvändiga förutsättningar för mänskligheten och för utveckling.[13] Land efter land föreföll föra in hållbar utveckling i sina rättsordningar. Läpparnas bekännelse var ofta mycket tydlig: Basen för levandet och för utveckling får inte försämras så att någon framtida generation därför inte skulle kunna tillgodose *sina* behov.

Återstod då bara att operationalisera detta rättsligt, d.v.s att omsätta inriktningen på hållbar utveckling till hållbart handlande.

Där tog det i stort sett tvärstopp. Marginella förändringar inträffade, ja, men hållbar utveckling förutsätter mer, nämligen att det samlade handlandet av mänskligheten generation efter generation måste vara sådant, att dess samlade inverkan på naturen jämte naturens *reaktioner* på denna samlade antropogena påverkan över tiden inte leder till att biosfären vid någon enda tidpunkt saknar förutsättningar att tillgodose samtliga människors behov.

Vad som nu ställde anspråk på rätten var att denna åtminstone inte skulle motverka lösandet av mänskligheten ekologiska dilemma. Detta dilemma är överordnat konfliktproblematiken, samtidigt som konfliktproblematiken är än allvarligare än någonsin tidigare, helt enkelt därför att Jorden hyser alltfler människor som ska samsas om alltmer begränsade resurser. Att begreppet hållbar utveckling därtill tar hänsyn också till kommande generationer minskar inte, utan ökar ytterligare, konfliktproblematiken. Det är ju *intergenerational equity* som – till så mycket annat – ska gälla.

Varför tog det då tvärstopp? Orsakerna är flera. En kan vara att det ekologiska dilemmat ställde frågor till rättsvetenskapen som denna helt enkelt saknade teori och tankemönster för att kunna ge sig i kast med.

4 En rättsvetenskaplig disciplins utvecklingsproblem

Inledning

Den starka förändring i världs- och problembilder, som jag nu har summerat, liksom lagstiftares reaktioner på dessa, väcker flera rättsvetenskapliga frågor som i allt väsentligt hör samman med framväxten av ännu en rättsvetenskaplig disciplin.

I föreliggande fall benämns disciplinen *miljörätt* (environmental law, Umweltschutzrecht etc.). Åtminstone delvis kom benämningen som en följd av att länder till följd av tidigare nämnda miljöinsikter identifierade miljöproblem som sådana samt vidtog lagstiftningsåtgärder med anledning just därav.[14]

Erfarenheterna från miljörättsdisciplinens utvecklingsproblem belyser frågor av intresse också i ett vidare rättsvetenskapligt sammanhang. Världsutvecklingen, samhällsutvecklingen, den tekniska utvecklingen och ökade kunskaper kommer att leda till ytterligare discipliner, kännetecknade av specifika *problematiseringar* i kombination med fakta och

[12] Se t.ex Backer: Miljöskydd och ekonomiskt utnyttjande – principen om hållbar utveckling, Det Nordiska Juristmötet i Helsingfors 2002.

[13] Intressant är att det inte är ovanligt bland rättspositivister att ifrågasätta huruvida det i bl.a denna rapport (eller för den delen i tänkandet bakom hållbar utveckling) verkligen sägs att naturen är en nödvändig förutsättning för att framtida generationer ska ha tillräckligt med resurser för att kunna tillgodose sina behov. Även om rapporten inte hade utsagt just detta, *men klart angett att de framtida generationerna skulle ha sådana möjligheter*, så följer därav att det måste finnas en tillräcklig naturbas för sådant. Detta är elementär naturvetenskap.

[14] I andra fall kan benämningen ha härstammat ur själva den *problematisering* som miljöförändringar och folkökning aktualiserade. Problematiseringen kan då ha utgått från miljön som kvalitet och resurs, från naturen och förhållandena där. En del jurister närmade sig å andra sidan miljöproblematiken utifrån mänskliga rättigheter. (När umgänget mellan miljöintresserade jurister utvecklades under 1970-talet var det sålunda inte ovanligt med deltagare som hade utvecklat sin problematisering utifrån mänskliga rättigheter och miljöfrågor.) Ytterligare andra problematiserade istället utifrån näringsliv och tillväxt och såg då i första hand miljöfrågor och miljölagstiftning som hämmande för sådant. I min artikel *Law and Mankind's Ecological Dilemma* (*supra* not 4) knyter jag samman miljörättens nuvarande hållbarhetsinriktning med mänskliga rättigheter och likställdhet mellan generationer.

omständigheter som rätten tidigare inte har hanterat på ett sätt som är ändamålsenligt också för dessa nya, specifika problematiseringar.

Utifrån det antagandet ämnar jag nu reflektera över skeden och problem i utvecklandet av miljörätt som en rättsvetenskaplig disciplin.

Problem och forskningens huvudfåra

Att välja vattenföroreningar som rättsvetenskapligt problem var 1968 inte *comme il faut* Ändå visste nästan alla att vattenkvalitetsproblemen i Sverige var enorma och att vattendomstolarna (och därmed rätten) bidrog till problemen. Grundproblemet låg ute i naturen, men kopplingen mellan rätten och det problemet var mycket tydligt.

Rättsvetenskapens huvudfåra kände inte riktigt igen den typen av problem.

Det första miljörättsliga forskningsbekymret var de tankespillror från Uppsalaskolan som tycktes begränsa kretsen av vad som över huvud taget kunde problematiseras rättsvetenskapligt.[15] 1968 var detta för vattenkvalitetens del främst 8 kapitlet vattenlagen (som i huvudsak hade fått sitt innehåll 1941 men, märk väl, då i syfte att hantera en allt svårare vattenförorening från kloakvatten och industriellt avloppsvatten).

Redan 1941 formades alltså de centrala regler som gällde 1968, d.v.s mer än tjugo år innan 1960-talet insikter om miljöproblematiken spreds i samhället och insikterna om biosfärens begränsningar blev riktigt spridda.

Hur förenar man en rättsvetenskaplig miljöproblematisering, där objektet finns ute i naturen (men är en förutsättning för människorna), med det förhållandet att gällande rätt byggde på hur lagstiftarna långt tidigare hade angripit problemen utifrån vad de *då* kände till, och där dikningslagkommitténs betänkande 1915 tillmättes en inte obetydlig vikt? Om man är rädd att lämna huvudfårans inriktning på gällande rätt?

Kommitténs problembild kom till tydligt uttryck i förarbetena. Det som idag kallas försiktighetsprincipen var kärnan i 1915 års betänkande. Bakom detta låg den typiska avvägningstanken på det sättet att "...vattenförorening måste till en viss grad tålas, men å andra sidan finge föroreningen ej bliva större eller svårare än nödigt".[16] Förr än att hindra att föroreningssituationen gick över gränser för vad som skäligen kunde anses förenligt "med grannskapsrättens allmänna grunder", menade kommittén att skadestånd skulle betalas för att kompensera sådant överskridande.[17]

Huvudfåreforskningens begränsning – död fisk flyter med strömmen

Min valda problematisering 1968 hade däremot att göra med det som idag benämns hållbar utveckling.[18] Jag försökte först förena detta med ett fasthållande vid då gällande rätt, även när denna övergick i miljöskyddslagen 1969.[19] Det gick fel av flera samverkande anledningar som har bäring på ämnet för denna artikel. Svensk rätt utgick ju från avvägningar mellan intressen. Jag försökte då pressa in detta under en viktnorm[20] där framtiden ingick, trots att lagstiftarna egentligen inte hade försökt så mycket i den riktningen. Jag prövade att integrera teori för cost-benefitanalys, men inte heller det höll, ty framtida generationers behov av mat m.m kan inte omsättas i pengar som kommer dagens generation till godo, om framtida generationer därför saknar naturförutsättningar för matproduktion m.m.[21]

Men jag skulle ju prestera en doktorsavhandling. Fasthållande vid huvudfårans policy att gällande rätt är forskningsobjektet, undersökte jag därför hur miljöskyddslagen tillämpades i rättspraxis. Miljö-

[15] Och som idag kanske har ingått en förening med en allmän uppfattning om "positive law" som det (enda) riktigt rättsvetenskapliga objektet för forskning.

[16] SOU 1939:40 s 72 summerande vad Dikningslagkommittén hade uttalat.

[17] Ibid. Med modern terminologi: För kommittén var det ekonomi, inte ekologi.

[18] Den första tryckta återspeglingen av min hand som uttryckte detta var Westerlund 1971 *Miljöskyddslagstiftning och välfärden*, Natur och Kultur 1971, särskilt s. 13.

[19] Op. cit.

[20] En viktnorm är en gemensam nämnare, då ofta kallad måttstock, för att göra olika poster jämförbara, vägbara, i förhållande till varandra.

[21] Westerlund, S: *En hållbar rättsordning*, Iustus förlag 1997.

problematiken fanns visserligen kvar och inverkade på analysmetoden, men det var ändå gällande rätt som var forskningsföremålet. Ända till sista kapitlet,[22] då gällande rätt utvärderades mot en miljöproblematik som mer eller mindre återspeglade mänsklighetens ekologiska dilemma.

Avhandlingen *Miljöfarlig verksamhet* kom 1975 och var den första med klart modern miljörättslig inriktning, 32 år efter Ljungmans välgjorda *Om skada och olägenhet från grannfastighet*.[23] Dessa avhandlingar utgör undersökningar av den rätt som gällde fram till respektive forsknings slutförande. Kunskapsutveckling, med andra ord. Och uppordnande m.m. I den mån problematisering och avhandlingsinriktning hörde samman, gällde det kunskapsutvidgning i olika hänseenden och, för min del, ett diskret bakomliggande miljökonsekvenstänkande.[24]

Med min avhandling började således ett nytt rättsområde utforskas. Det inleddes med att den mer eller mindre nya men gällande rätten blev föremålet. Trots en del likheter var däremot Ljungman avhandling, enligt honom själv, att bearbeta ett antal frågor inom ett rättsområde som var mycket gammalt – grannelags- och immissionsrätten med särskild inriktning på den sistnämnda.[25] Alltså var de bakomliggande bevekelsegrunderna för respektive arbete olika, forskningsföremålen var å andra sidan gällande rätt, men angreppssätten skilde sig åt.

Att svensk miljörätt per 1975 inte löste några miljöproblem av ekologiskt dilemmakaraktär var lätt att se på grundval av min undersökning. För den fortsatta forskningen, var skulle man då hitta uppslag till sådana lösningar?

En sedan länge fullt godtagbar arbetsform var och är *komparativ* rätt. Eftersom USA i flera hänseenden hade kommit något så när långt, blev dess miljörätt nästa studieobjekt. Först gällde det miljökvalitetsnormer, därför att sådana – till skillnad från avvägningsregler – utgick från något i naturen.[26] Därefter blev det miljökonsekvensbeskrivningar,[27] därför att med dessas införande övergick miljörätten, också internationellt, till en ny fas. Miljörätten som disciplin skulle utan tvekan utvecklas genom att sådant beforskades.

Rönen av sådan forskning vidgade kunskaper om olika metoder för rättslig miljökontroll. Redan här skymtade en rättsvetenskaplig övergångszon där begreppet *metodik* börjar behövas. Inte bara miljöpolitik jämfördes utan – och kanske främst – teknik för att genomföra sådan och lösa miljöproblem.

Men jämförande studier har en allvarlig begränsning i det att de inte inbegriper mer än vad som redan har gjorts i något (annat) land. Den rätts- eller metodikjämförande forskaren *reagerar* så att säga på det som redan finns. Om i världen inga effektiva lösningar har sett dagens ljus, kommer heller inga sådana lösningar fram i en rent jämförande studie. Om å andra sidan sådana studier görs utifrån en övergripande problematisering som gäller hur det ekologiska dilemmat skulle kunna hanteras, så blir en jämförande studie inget annat än ett första, *reaktivt* steg. Ett sådant steg belyser "the state of the art".

Om man därefter analyserar i vilken utsträckning (om någon) den modernaste metodiken verkligen är tillräcklig för dilemmats hantering, samt hur den skulle kunna utvecklas, så har forskaren utvidgat forskningsfältet i ett viktigt hänseende. Ty då lämnar hon gällande rätt, även gällande rätt i olika länder, och övergår till instrumentell forskning via konsekvensanalys. Det innebär faktiskt att gå över en gräns. I och med att hon då inte låter sig begränsas av redan framtagna lösningar, utan utgår från ett problem och

[22] Westerlund, S: *Miljöfarlig verksamhet.* Norstedts 1975, kap 23, särsk. s 315 f och 322 ff.

[23] Uppsala 1943.

[24] Alltså en ansats till ett rättsekologiskt angreppssätt.

[25] Ljungman strävade bl.a efter att "placera in grannelagsrätten i ett större rättsidéhistoriskt sammanhang" varvid han fann att "just utvecklingskedjan från *äldsta romerska tid till Justitianus* . . . och vidare till *tysk-romersk rätt och BGB* var ett givande arbetsfält." Op. cit. s 8.

[26] Westerlund, S: *Clean Air Act, Federal Water Pollution Control Act, Miljöskyddslagen;* Olika metoder för rättslig kontroll av luft- och vattenkvalitet. Stencil. Juridiska institutionen i Uppsala 1976 samt Westerlund, S: *Det rättsliga genomförandet av USA:s luftkvalitetsnormer.* Stencil. Juridiska institutionen i Uppsala 1977.

[27] Environmental Impact Assessments. Westerlund, S: *Miljöeffektbeskrivningar. Del 1: Reglerna och tillämpningen i USA.* Naturresurs- och miljökommittén. Stockholm 1981.

hur detta skulle kunna lösas, har hon övergått till problemlösningsinriktad, *proaktiv* forskning.[28]

För miljörättens del innebär detta en övergång till *miljörättslig metodik*.[29]

5 Rättslig metodik

Inledning

En problematisering som är relaterad till något utanför rätten själv eller samhället, *men där detta något är eller kan göras beroende av hur rätten är*, samtidigt som problematiseringen syftar till att kunna hantera detta något – det hör inte hemma i åtminstone den svenska rättsvetenskapens huvudfåra. Situationen förefaller likartad i övriga nordiska länder. Mest utförs reaktiv forskning, alltså forskning där forskaren reagerar på vad lagstiftare har gjort och domstolar m.fl har beslutat (plus vad andra forskare m.fl redan har skrivit) medan väldigt lite görs i form av proaktiv forskning,[30] alltså forskning som kännetecknas av lösande av miljöproblem.[31]

Jag hävdar nu att sådant indikerar en kris för varje rättsvetenskaplig disciplin, där disciplinen ändå relaterar till ett problem som ligger utanför själva rätten.

Miljöproblematikens rättsliga sida

Jag har många gånger erfarit hur miljöproblematiken som sådan inte accepteras som lämplig för rättsvetenskaplig problematisering.

Några synes ha menat att rättsvetenskapens uppgift inte är att åstadkomma något i verkligheten, utan bara inom sig själv.

Andra uppfattar miljöproblematik som uteslutande politik, oavsett det förhållandet att så snart som en lagstiftande församling beslutar om en politik och att den ska genomföras, så kräver (åtminstone i en rättsstat) ett framgångsrikt genomförande att lagstiftningen anpassas till detta.[32]

Många som i och för sig inte tar sin tillflykt till politikhänvisningar förefaller dra en gräns bortom samhället. D.v.s att de kan acceptera att samhällsproblematik kan få inverka på rättsvetenskaplig problematisering, så länge det inte rör sig om ren politik.

Ytterligare andra, som jag har mött också i mycket sen tid och på överraskande nära håll, ser ett hinder i att miljöproblems lösande kräver kunskaper också om själva problemet – miljön, naturen etc. – och "då

[28] Märk här att det handlar om ett eller flera problem, för vilka en lösning söks. Vi rör oss alltså inte med frågor om t.ex lag och moral. Detta betyder att inget av det som är skrivet om det sistnämnda har någon bäring på instrumentell, problemlösningsinriktad forskning. Vad sedan gäller begreppet proaktiv (och därmed också reaktiv) forskning, är termerna delvis öppna. Till att börja med ägnar sig många forskare endast åt att forska utifrån sådant, där någon annan redan skapat eller formulerat något – inom rättsvetenskapen vanligen eller eller flera rättsregler och system. En renodlad sådan forskare går inte utanför just detta. Andra forskare utgår däremot från ett visst problem eller problemkomplex, typiskt sett utanför rättsordningen men där rättsordningen ger principer och regler (inklusive att om inget sägs, så är det oreglerat), och försöker utifrån detta att utveckla ett bättre regelverk än det befintliga. Att rättsvetenskaplig forskning kan vara reaktiv men ändå ha med sådana element, gör den till blandad, så att säga. Om blandningen ytterst utgår från reglerna som de är eller antas vara, och inte från det bakomliggande problemet, är forskningen reaktiv i princip.

[29] Språket är i sig mycket begränsat jämfört med mängden tankar som språket kan ge uttryck för. Begreppet "miljörättslig metodik" är bara ett av många exempel. Sådan metodik kan bara begränsat till reaktiv forskning, då man är begränsad av de regler och system som redan finns (eller har funnits). Då har man ingen direkt forskningskoppling till miljöproblematiken, endast en indirekt sådan som då är bunden av hur gällande rätt (eller motsvarande) bestämmer *sina* problem. Om man däremot utgår från ett problem (såsom den om ekologisk hållbarhet) är det just det problemet som styr såväl teoriutveckling som annat, även sett utifrån juridisk synpunkt.

[30] Begreppen reaktiv och proaktiv miljörättsforskning lyfts fram i Westerlund, S: *Theory of Law for Sustainable Development – Towards or Against?*, in Bugge, H.C. & Voigt, C: Sustainable Development in National and International Law. Europa Law Publishing 2008.

[31] Termen 'proaktiv' används också i en annan, kanske främst inomrättslig, kontext ("Proactive Law has its origins in Preventive Law comprising legal and practical principles for anticipating and avoiding legal problems" – <http://www.proactivelaw.org/> besökt 26 februari 2008) vilket inte ska blandas samman med hur termen används här av mig – jag avser proaktiv *forskning* som är en motsats till reaktiv *forskning*.

[32] Den praktiska rättsstatliga betydelsen belyses bl.a i min slutrapport angående Ålands miljöpolitiska handlingsprogram, publicerad som Staffan Westerlund: *Ålands Miljöpolitiska handlingsprogram. Slutrapport*. Åländsk utredningsserie. 1992:8.

är det inte juridik". En sådan inställning kan i sin tur vara av minst två slag. Att den som talar själv saknar tillräckliga miljökunskaper och därmed underkänner sådan problematisering som kräver sådana, respektive ren okunskap om juridiken och om det förhållandet att betydande delar av denna har utvecklats för att hantera problem utanför densamma.[33]

Att miljörättsvetenskapen medför problem för dem som forskar i huvudfåran är lätt att förklara. Jag ska göra det med ett ganska begränsat problem, nämligen hur en fiskpopulation ska förvaltas, så att den reproducerar sig tillräckligt och regelbundet så att människor ska kunna skörda därur (alltså fiska).[34]

Vi börjar med konstaterandet att det resultat som då ska nås avser något ute i naturen, inte i samhället. Men det finns ingen fiskarnas gud att be till, utan för att resultatet ska kunna nås, måste människorna totalt sett (och därmed i samhället) så anpassa sitt handlande och sina verksamheter, så att *dels* de ekologiska förutsättningarna för fiskarten i vattensystemet blir tillräckliga *för fisken*, *dels* inte det mänskliga uttaget av fisk ur populationen sker på ett sådant sätt, eller i sådan omfattning, att fiskpopulationen underskrider en för förvaltningsmålet uppställd kvantitativ gräns. Styrningen av mänskligt beteende, och därmed samhället, är alltså ett medel för att nå målet, men inte ett mål i sig. Det som målet relaterar till (avser) reagerar endast enligt naturlagarna. Av detta följer givetvis att kunskaperna om det som målet omfattar måste ingå i underlaget för de rättsliga lösningarna.

Vetenskapsteoretiskt är det inte mer komplicerat än så.

Det slags okunskap som jag antydde inledningsvis i detta underavsnitt motverkar miljörättsvetenskapens utveckling. Miljöproblematiken är ju i sig synnerligen komplex och kunskapskrävande. Den avser mänskligheten ekologiska dilemma och kan därför inte hanteras som ett rent avvägningsproblem. Av detta följer till att börja med att kunskaperna om det ekologiska dilemmat som sådant och om dess bakgrund måste vara tillräckliga. Det räcker då inte med att prata om "behov av tvärvetenskap" etc, ty de naturvetenskapligt beskrivbara omständigheterna måste på ett eller annat sätt *föras in i själva rättsvetenskapen.*

Vidare måste olika lösningar på miljöproblematik vara ändamålsenliga, effektiva, om de alls ska kunna ses som lösningar. Det är givet att det är respektive problem som genererar kriterier för sin lösning, och att det inte är lyckosamt att först välja en viss lösning och därefter omformulera problemet till att passa den föregivna lösningen. Om tretåig hackspett ska uppnå och/eller bibehålla tillräckligt starka populationer i ett land, behöver man veta vad arten i fråga behöver i form av biotoper m.m, varefter man måste se till att sådana kommer att finnas i tillräcklig omfattning. Svaret på vad som krävs för denna fågelarts fortlevnad finns varken i Dworkins skrifter eller i Europakonventionen om mänskliga fri- och rättigheter, heller inte i Hägerströms alster eller hos Habermas. Svaret på frågan hur man säkerställer denna fortlevnad, däremot, är en metodikfråga där lösningen är underkastad ändamålsenlighetskravet – att den ska vara effektiv för just artskyddet i fråga. Det innebär att rätten ska utformas därutifrån och att därmed verkligheten (realia) ingår i vad som är rättsvetenskapligt relevant, vilket i sin tur har betydelse för hur handlingsregler m.m behöver konstrueras och tillämpas.

Verklighetens rättsvetenskapliga relevans

Av detta följer att varje rättsvetenskaplig analys som rör en regel vars syfte är att uppnå eller undvika något

[33] Som att i skadeståndsrätten beakta att om stenen A faller i huvudet på person B och B omedelbart därefter ligger med krossat huvud bredvid stenen, så kan det finnas ett samband och därmed en möjlighet att låta den betala som ställde till med eländet genom att släppa stenen A från tredje våningen när B stod därunder. Eller familjerätten som att om C idkar oskyddat samlag med D och D efter omkring nio månader föder ett välartat barn samt hon inte har idkat samlag med någon annan än C under tiden av säg drygt nio månader före nedkomsten, så har man fixerat rättsligt vem som är far till den lilla telningen. Eller straffrätten. Vattenrätten. Byggnadsrätten. Finansrätten. Och många till. Var finns de problem som dessa discipliner egentligen relaterar till?

[34] För en närmare sentida beskrivning och analys av hur olika slags regler m.m inverkar på yrkesfiskares överfiskning, se Lövin, I: *Tyst hav. Jakten på den sista matfisken*. Ordfront 2007. En mer brutal beskrivning av hur allmänningarnas tragedi verkar, och av ett regelverk som inte säkerställer en resurs' hållbarhet, är svår att finna.

utanför rätten själv, och som avses inbegripa en effektivitets- eller ändamålsenlighetsanalys, *måste* bygga på information om, och bedömningar av, sådant som ändamålet inbegriper.

I teoretiskt hänseende är detta generande självklart. Varje miljörättslig teori som utgår från ett miljöproblem, men som förutsätter något som är naturvetenskapligt felaktig, blir därmed också rättsvetenskapligt felaktig.

När det gäller vetenskaplig *metod*, i meningen tillvägagångssätt, är det lätt att se svårigheterna. Men dessa måste övervinnas. Den forskare som inte anser sig klara av detta ska naturligtvis inte förändra den miljörättsvetenskapliga problematiseringen, utan antingen lära sig mer, gå till någon annan disciplin eller begränsa sig till delar av miljöprocess och miljöbrott och lite annat, som egentligen utgör process- eller straffrätt. Att däremot degradera eller omdefiniera en disciplin, därför att man själv inte klarar av vad den egentligen kräver, strider mot rimlig vetenskaplighet,

Detta får full aktualitet när den rättsliga disciplinen tar steget från reaktiv forskning om gällande rätt till problemlösande, proaktiv forskning av typen rättslig *metodik*. Betänk här att varje person som deltar i ett lagstiftningsarbete är inblandad i just metodik! Han måste därvid anlägga ett instrumentellt synsätt för att utforma lagen som ett ändamålsenligt styrmedel. Detta kräver bl.a kunskap om de realia, som ändamålet aktualiserar.

Åtminstone i Sverige är lagstiftningslära inget läroämne. Bland de få som ändå sysslar med sådan lära, förefaller reaktiva förhållningssätt dominera (alltså att studera olika lagstiftningstekniker m.m så som dessa har utvecklats) på bekostnad av proaktiva förhållningssätt (att utveckla lagstiftningsteknik i och för olika ändamål).

Lagstiftningslärans undanskymda eller obefintliga roll inom juridiken är egentligen mycket märklig, eftersom det tillskapas så mycket lagstiftning – men utan utbildning eller ens utvecklade läror för sådant. Ändå ser nästan ingen detta som ett problem.

6 Miljörättens utveckling i proaktiv riktning

In på 1980-talet fortsatte jag min i stor omfattning reaktiva forskning.[35] Dock märkte jag att problematiken med inte bara illa konstruerad lag, utan också lag som inte alls räckte för sitt påstådda ändamål, ökade. Det gällde inte bara Sverige, även om det kanske var särskilt tydligt där. Den komparativa forskningen visade på redan känd miljörättslig metodik som gick långt bortom den nordiska.[36] Att intressera det svenska rättssamfundet för sådant visade sig med tiden snudd på omöjligt,[37] främst beroende på ett fasthållande vid den tidigare avvägningstanken men också på oförståelse inom juridiken för den "nya" disciplinens problematisering över huvud taget, för att den berörde mer än vad de etablerade disciplinerna kunde erbjuda.[38]

Det framstod alltmer tydligt att det förelåg ett mycket allvarligt teoriproblem när det gällde något så grundläggande som styrsystem för hantering av miljöproblem och för genomförande av miljömål och liknande. Genom Gabriel Michaneks inträde som doktorand fördubblades den på miljörättsutveckling inriktade svenska miljörättsforskarskaran. Alltmer av systemtänkande (och därmed också helhetstänkande) kom in. Hans bok *Den svenska miljörättens uppbyggnad*[39] var den första undersökningen av hela miljöregelsystemet (inklusive många regler vilkas tillämpning kunde stå i konflikt med miljöskyddsinriktade regler). Tänkandet i den boken kom så småningom att avspeglas i arbetet på en svensk miljöbalk. Sådana

[35] Till och med om ersättningsregler vid naturskydd m.m., Westerlund, S: *Naturvård och pågående markanvändning*. Liber 1980.

[36] Westerlund, S: *Miljörättslig utveckling. Tendenser 1960-talet och framåt.* I Förvaltningsrättslig tidskrift 2007.

[37] Se närmare om detta i Westerlund op. cit.

[38] Från vissa andra samhällsvetenskaper såsom (svensk) statsvetenskap och rättssociologi kom därtill signaler om att lag över huvud taget saknade betydelse när det gällde att genomföra miljöpolitik och de, som stod nära den svenska lagstiftningsprocessen, formligen älskade sådana påståenden och upphöjde dem nästan till dogmer.

[39] Michanek, G: *Den svenska miljörättens uppbyggnad*. Iustus 1985.

begrepp som *genomförbarhetsanalys* och *kontraproduktivitet* blev i det skedet aktuella.[40] För min del ledde detta till den första boken i miljörättslig metodik, *Miljörättsliga grundfrågor*[41] samt en på systemtänkande grundad studie av svensk miljökontroll.[42]

I och med att miljörättsvetenskapen därmed hade utvecklats till sin andra nivå – metodiknivån, kunde gällande rätt undersökas och utvärderas utifrån en annan problematisering än att advokater och domare inte visste ut eller in om vad som "gällde", men också utifrån en annan problematisering än sådana exploatörers, för vilka miljölagar var ett problem för deras näringsplaner och lönsamhet.

Detta gick väl ihop med den internationella utvecklingen inom det miljöpolitiska området med dess förändrade inriktning till hållbar utveckling. Metodiken begränsades inte till hur man ändamålsenligt kunde tillämpa gällande rätt, eller hur man kunde lagstifta så att ett uppställt miljöproblem vilket som helst kunde hanteras som just ett sådant. Nej, den anpassades också till den internationella övergången från avvägningstanke till mänsklighetens ekologiska dilemma och därmed till betydelsen av miljörelaterade gränser ägnade att rättsligt säkerställa att miljökvaliteter m.m inte underskred vissa värden, nivåer etc.

Att miljörättslig metodik genererade teorifrågor, som miljörättsdisciplinens första nivå inte gjorde, var lätt att se. En kardinalfråga var hur man skulle hushålla med en begränsad resurs, där resursen i fråga reagerar enligt naturlagarna samtidigt som den behöver behållas tillräcklig. Denna fråga gällde nu hela biosfären. Men den kunde också brytas ner till att gälla en vattentillgång, en levande resurs (såsom fiskpopulationer), en miljökvalitetsfaktor etc.[43] Frågan blev helt enkelt ofrånkomlig i och med inriktningen på hållbar utveckling.[44]

Två svenska forskningsinsatser återspeglar detta i särskilt hög grad, Jonas Christensens om fosfor[45] och Lena Gipperths om miljökvalitetsnormer och genomförande av miljömål.[46] Därtill kom en tredje synnerligen viktig insats med grekiskt ursprung genom Michael Decleris,[47] när han åskådliggjorde systemtänkandets särskilda betydelse i hållbarhetssammanhang.[48] Den som har läst dessa arbeten och förstått, kan därefter inte backa i sitt tänkande tillbaka till tidigare rättsteori och äldre rättslig metodik. Systemteori som också inbegriper ekosystemen och biosfären (Decleris), icke-linjäritetens problem och omformningen av icke-linjära effekter till rättsligt genomförbara regler – rättslig operationalisering – (Gipperth) samt termodynamikens relevans för hushållning med icke utbytbara naturresurser (Christensen) rör samtliga sådant, som man måste förstå, om man ska kunna utforma ändamålsenliga förvaltnings- och styrsystem och därmed också (i rättsstater) lagstiftning.

De tre nämnda arbetena relaterar till frågan hur man uppnår att en ekologisk resurs inte försämras bortom en eller annan gräns, i detta fall gränsen för ekologisk hållbarhet. Särskilt hos Decleris behandlas också problemet att inom gränsen för ekologisk hållbarhet åstadkomma samhällelig hållbarhet och utveckling. De två övrigas forskning förberedde för sådan problemutvidgning. Inga Carlmans påföljande arbeten om adaptiv miljöplanering[49] utgör just en

[40] Se bl.a Högberg G: *Rätten som nödvändig faktor i genomförandet av miljöpolitik.* I Miljörättslig tidskrift 1993:2.

[41] Westerlund, S: *Miljörättsliga grundfrågor*. Tapir Forlag, 1987.

[42] Westerlund, S: *Svensk miljökontroll i rättsligt styrningsperspektiv*. Reviderad utgåva av rapport 1987, nu publicerad på <http://www.imir.com/pdf-filer/rapport87.pdf>.

[43] Vilket kan studeras i ett antal EG-direktiv om vattenkvalitet och numera också inom vattenramdirektivet.

[44] Se särskilt Christensens och Gipperths avhandlingar.

[45] Christensen, J: *Rätt och kretslopp. Studier om förutsättningar för rättslig kontroll av naturresursflöden, tillämpade på fosfor*. Iustus Förlag 2000.

[46] Gipperth 1999, supra not 10.

[47] Decleris, M: The Law of Sustainable Development. General Principles. <http://europa.eu.int/comm/ environment/law/pdf/sustlaw.pdf (2000)>.

[48] Dessförinnan hade Torstein Eckhoff och Nils Kristian Sundby kopplat samman systemteori och rättssystem inklusive samhällsystem. Eckhoff, T. och Sundby, N. K.: Retssystemer. Systemteoretisk innføring i rettsfilosofien, 2 uppl. (Oslo: Tano, 1991).

[49] Carlman, I: *Adaptiv miljöplanering nästa.* I Michanek & Björkman (red): Miljörätten i förvandling – en antologi. Rättsfondens skriftserie 36. Iustus förlag 2003, och Carlman, I: *The Rule of Sustainability and Planning Adaptivity*, in Ambio

sådan utvidgning.

Kunde de nämnda arbetena ha fullbordats utan ett första steg inom den spirande disciplinen miljörätt, det steg där utgångsläget (gällande rätt) och dess inverkan på förutsättningarna för biosfärens förhållanden och miljökvalitet hade blottlagts?

Inte gärna. Om man inte förstår rättens betydelse i miljö- och hållbarhetshänseende, vet man inte hur man ska utveckla, i meningen konstruera, rätten i önskad riktning.[50] Man behöver teoriramar som är adekvata utifrån just detta. När sådana finns, har ett mycket viktigt steg tagits i utvecklandet av miljörätt som en egen rättsvetenskapliga disciplin.[51]

Detta behöver dock inte göras genom att varje miljörättsforskare ägnar omfattande tid åt reaktiv forskning. Den reaktiva delen av miljörätten samlas ganska väl i litteratur och i framtiden väl också i den grundläggande juristutbildningen, rimligtvis då på grundval av hållbarhetsinriktningen.

Detta måste göras kompromisslöst. Forskningen ska inte styras av teori och metod *som inte passar för problematiseringen*.[52] Här kan akademiska trögheter bromsa den vetenskapliga utvecklingen. Varje akademisk bedömning av ett forskningsarbete, där bedömningen bygger på kriterier som inte är fullt relevanta utifrån problemställningen, bidrar till att bromsa eller rentav motverka sådan utveckling. Åtminstone tre sammanhang är här särskilt riskabla – doktorsavhandlingar, varje arbetssituation där forskaren sneglar mot akademiska karriärmöjligheter, samt – bekant för så många – ansökningar om forskningsanslag. Dessa situationer präglas ofta, för att inte säga typiskt sett, av att insatserna ska bedömas av personer, som kan komma att bedöma utifrån sina egna uppfattningar om vad som är "riktig" juridik etc snarare än utifrån en full accept av den problematisering, som forskaren har arbetat utifrån.

7 Den tredje nivån: Teoriutveckling

Om då rättsvetenskapen utvecklar sig själv till att acceptera också proaktiv forskning och problemlösning, vid sidan av rättspositiv forskning och liknande, så följer att utvecklandet av nya rättsvetenskapliga discipliner – särskilt sådana som är relaterade till något problem utanför rätten själv – dels blir problemінriktat och därför proaktivt, dels medför teoritillväxt.

Teoriutveckling är därför den tredje nivån (eller snarare komponenten)[53] i en disciplins utveckling. Redan initialt behövs naturligtvis en teoriram, men mycket behöver sedan utvecklas. Teoriramen måste vara adekvat i förhållande disciplinens problematisering och kan därför inte utan vidare hämtas från någon annan disciplin.

Figuren på föregående sida återspeglar dels miljörättsvetenskapens uppdelning i aktörs- och reaktörsperspektiv, dels den mest elementära styrsystemproblematiken, och går vad gäller det förstnämnda tillbaka på min installationsföreläsning 1992.[54]

Problematiseringen tar sitt avstamp på högersidan men avser förhållandet mellan högersidan och vänstersidan. Ekologisk hållbarhet avser kvaliteter på högersidan men kan ändå inte stipuleras utan avseende på dess beroende av, och inverkan på, förhållanden

Vol. 34, No. 2, March 2005.

[50] För att uppnå sådan förståelse måste man dock relevant problematisera också undersökningar av gällande rätt. Forskningens "syfte" ska alltså inbegripa att det man får fram bidrar till förståelse i miljökontrollhänseende. Då medverkar man till miljörättsvetenskaplig kunskapstillväxt. Om däremot "syftet" är att ordna upp gällande miljöregler utifrån ett gällande förvaltningsrättsligt synsätt – och inget mer – så måste därefter någon annan ta itu med att bearbeta detta i och för miljökontrollförståelse.

[51] Märk att jag talar om utvecklandet av en disciplin, inte av enskilda forskare. När väl en disciplin börjat utvecklas och nya forskare går dit, behöver de inte börja med gällande rätt etc. De kan i stället lära sig sådan genom böcker m.m.

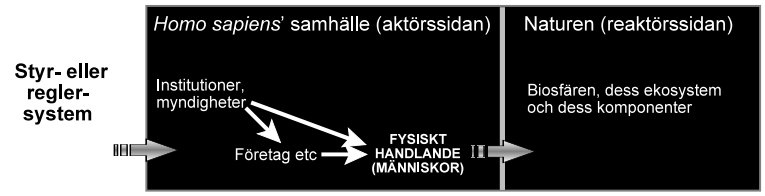
[52] Se fotnot 2.

[53] Egentligen är själva den nivåterminologi som jag hittills har använt problematisk. De tre "nivåerna", alltså kunskapsinsamlande och förståelse av utgångsläget, metodiken och teoriutvecklingen, går i varandra. Å andra sidan är kunskaper och förståelse av utgångsläget – i ljuset av miljö- och hållbarhetsproblematiseringen – en förutsättning för att metodiken ska kunna utvecklas på ett ändamålsenligt sätt och då, om inte förr, aktualiseras också olika teoretiska frågor. Att stanna vid utgångsstudier och metodik är dock vetenskapligt ganska otillräckligt.

[54] Westerlund, S: *Miljörättsligt perspektiv*, i Miljörättslig tidskrift 1993:1.

på vänstersidan. Det ekologiska dilemmat uttrycks alltså indirekt via begreppet ekologisk hållbarhet.

stater etc) till vänster – inkluderande också elementära sociala saker som rör familjeliv och mycket annat. Och



På högersidan finns allt som blott reagerar enligt naturlagarna. I mitten finns människan i egenskap av aktör och hennes institutioner m.m, alltså samhällssystemet. Endast aktörer kan vara adressater för lag. Bilden illustrerar alltså de två stora systemen – biosfären (till höger) och de samhälleliga (mer till vänster). Antropogen miljöpåverkan är alltid en direkt eller indirekt följd av hur människors beter sig fysiskt – deras handlande korsar så att säga gränssnittet mellan de två systemen (se pilen). Emellertid kontrolleras samhällssystemet genom lag (i kombination med andra, ytterst sett lagberoende, styrmedelssystem). Det finns i bilden längst till vänster.

Avvägningstanken är däremot avgränsad till vänstersidan även om det var resurser på högersidan som olika intressen antogs ha olika anspråk på. Avvägningstanken satte ingen gräns för hur hårt högersidan får försämras utan krävde bara att onödig påverkan[55] undveks. Det sistnämnda fann jag anledning att i *Miljörättsliga grundfrågor* 1987 benämna *dämpningsregler*.[56]

Eftersom mänskligheten och dess samhällen, civilisationer, är totalt beroende av förhållandena på högersidan, i biosfären, innebär hållbarhetstanken därför att biosfärsförhållandena ska räcka till för hela mänskligheten över tiden, samt att detta i sin tur ska åstadkommas genom en fullt tillräcklig *återhållsamhet* på vänstersidan – i samhället.

I systemhänseende måste därför åtminstone tre (egentligen fyra) system ingå i det miljörättsliga teoribygget. Biosfären (med dess alla ingående mindre ekosystem) till höger (på reaktörssidan). Världssamhället (med alla dess ingående delsystem i form av så rättsordningen såsom ett regelsystem för att styra samhällena och dess personer. Närmare besett är det ett samhälleligt styrsystem som behövs och som regleras genom ett regelsystem – rättsordningen.[57]

Naturen, biosfären, som ett rättsligt relevant system ger miljörätten dess specifika karaktär.[58] Om biosfären vore gränslöst stor eller obegränsat självförnyande, skulle miljörätten främst ha varit en naturresursrätt och miljökvalitetsrätt, där avvägningstanken vore relevant. Men biosfärssituationen är den motsatta, vilket ger mänskligheten dess ekologiska dilemma. Att fullt ut assimilera detta och utveckla problematisering och förståelse för att hantera detta dilemma bidrar till att ge miljörätten sin särskilda karaktär. Om inte förr så på det stadiet är disciplinen så långt utvecklad, att den inte längre kan hanteras som en komponent i någon äldre disciplin.

Detta sammanhang av system kräver sin specifika

[55] Som kunde förebyggas inom ramen för tillgänglig teknik etc.

[56] Sådana regler uttrycker krav på att dämpa, för att inte säga minimera, miljöpåverkan. Jfr "precautionary rules" m.m. Se vidare särskilt Westerlund *Miljörättsliga grundfrågor 2.0*, Åmyra förlag 2003, s 141 med not 13.

[57] Nordisk rättsvetenskap har tillförts en viss insikt i systemteoretiskt tänkande genom Eckhoff. T & Sundby, N K: Retssystemer (not 47 *supra)* och kommer förhoppningsvis också att observera Decleris' bok (not 46 *supra*).

[58] Grannelagsrätten och immissionsrätten av äldre typ är på det sättet här föregångare i det att störningar som huvudregel kräver något medium (luft, vatten etc). Undantag är det som kallas psykiska immissioner. Men medium är en sak, resurs en annan.

förståelse och därmed teori, även om problematiseringen relaterar till biosfären och mänsklighetens beroende därav. Ansatser utifrån sådan förståelse finner man i bland annat Christensens och Gipperths tidigare nämnde arbeten. De slutsatser som där dras indikerar rättsliga lösningar, som ställer flera traditionella rättsproblem på huvudet. Slutsatsernas hållbarhet kan prövas utifrån hållbarhetsproblematiseringen. Om de håller i det perspektivet, behövs sedan ytterligare teori för att hantera att en del traditionella rättsproblem ställs på huvudet.

När då exempelvis äganderätt och rättssäkerhet framstår i en ny dager på grund av miljö- eller hållbarhetsproblematisering, så blir teorin för detta i princip miljörättsvetenskaplig, samtidigt som den på något vis behöver inverka på till exempel konstitutionell rätt och förvaltningsrätt. Begreppet för detta är att åstadkomma *kompatibilitet* däremellan.[59]

8 Allmänna läror

Att utveckla en miljörättsvetenskaplig disciplin är en viktig sak, men man får – vilket jag hoppas har kommit fram ovan – för den skull inte glömma återkopplingen till rätten som sådan, alltså gällande rätt.

För den miljörättsliga metodiken gäller inte bara att utforma lag och liknande, utan också att se till att gällande rätt bringas att fullt ut återspegla vad lagstiftarna avser att uppnå eller undvika. Teoretiserandets återspegling inom gällande rätt är doktriner och/eller *allmänna läror*. En viktig uppgift för miljörättsvetenskapen är att uttyda och utveckla sådana läror. Också detta är kopplat till problematiseringen, men då den problematisering som ligger bakom ett visst regelverk.

Det är i de allmänna lärorna som olika rättsområden får sin egentliga karaktär och profil – och funktion. Ett exempel: Anta att förvaltningsrätten har en uppfattning om en proportionalitetsprincip, enligt vilken man ska väga nyttan för en enskild miljöpåverkare mot den ekologiska skada som *kanske* följer av hans (eventuella) miljöpåverkan, samt att uppfattningen också inkluderar att det är "det allmänna" som har ett slags bevisbörda för en restriktion (t.ex ett avslag på en tillståndsansökan).[60]

Ekologin känner sådana begrepp som ekologiska tröskeleffekter och resiliens. Det är sålunda välkänt att ekosystem normalt reagerar icke-linjärt. Det är också välkänt att olika ekosystem kan sam- och motverka på mycket komplicerade sätt. Känt är också att när väl en ekologisk tröskel har överskridits, så kan det behövas mångdubbelt mer av tid och insatser för att återställa till läget för tröskelöverskridandet (inte minst inom biologisk mångfald kan detta visa sig omöjligt). Slutligen vet vi att vi inte vet hur många människor som finns på Jorden i framtiden. Allt detta tillsammans gör att det är omöjligt, för att inte säga intellektuell humbug, att påstå sig kunna bedöma proportionerna mellan exploatörsnytta och negativa konsekvenser.

Av detta följer givetvis att den här antagna förvaltningsrättsliga proportionalitetsprincipen inte kan assimileras i någon miljörättslig allmän lära utan att skada det som den miljörättsliga disciplinen problematiserar. Här behövs alltså en annan allmän lära om proportionalitet än en äldre förvaltningsrättslig.[61] Den äldre kan bara fungera ändamålsenligt om det rör sig om uteslutande linjär påverkan, samt förutsatt att påverkningarna meningsfullt kan jämföras med varandra (jfr cost-benefit-analys). Det ligger faktiskt i den rationella avvägningens idé att den inte kan överföras på situationer och samband där påverkan

[59] Westerlund, S: *Miljörättsvetenskap – med nödvändighet interaktiv.* I Gräns, M & Westerlund, S: (red): *Interaktiv rättsvetenskap. En antologi.* Uppsala universitet 2006, <http://www.diva-portal.org/diva/getDocument?urn_nbn_se_uu_diva-7443-1__fulltext.pdf>.

[60] Det sistnämnda kan också ses som en förvaltningsrättslig uppfattning om legalitet.

[61] En viss hjälp i sammanhanget är att skilja mellan materiell och instrumentell proportionalitet (Westerlund, S: *Proportionalitetsprincipen – verklighet, missförstånd eller nydaning?*, i Miljörättslig tidskrift 1996:2). Den instrumentella ifrågasätter inte vad som ska uppnås, men däremot hur. Den materiella däremot ifrågasätter vad som ska uppnås. Det förefaller inte finnas några bekymmer mellan förvaltningsrätt och miljörätt vad gäller instrumentell proportionalitet. Det är när man kommer till materiell sådan som åtskillnad behövs.

är icke-linjär.[62]

9 Så vad kännetecknar då en utvecklad disciplin?

Inledande sammanfattning

Rättsvetenskapen arbetar dels inom rätten och ser då ett visst rättsområde som en juridisk disciplin (avtalsrätt, finansrätt, miljörätt etc), dels från utsidan av rätten och ser då sitt område som en rättsvetenskaplig disciplin (som dock kan ges samma benämning som motsvarande juridiska disciplin). Allmänna läror uppfattar jag, med den distinktionen, som den juridiska disciplinens motsvarighet till den rättsvetenskapliga disciplinens teori.

Inom en disciplin är det något som inte bara eftersöks och studeras utan också undersöks. Men inte bara det, där kan också sökas och lösas problem som på något väsentligt vis rör sådant som hör till disciplinens område. Ingen skulle förneka att en cancerdisciplin (onkologi) behåller sin vetenskaplighet även när den utvecklas för att förebygga, behandla och bota – och inte bara passivt beskriva och analysera – cancer.

Ställningstagande

Vad först gäller en tillräckligt utvecklad *juridisk* disciplin (ett "rättsområde"), så har den ett gott grepp om gällande rätt samt adekvata allmänna läror och metodik för *ändamålsenlig* rättstillämpning.

En tillräckligt utvecklad *rättsvetenskaplig* disciplin kännetecknas till att börja med av att rättsområdet kan definiera vilka slags allmänna läror och metodik som just det området behöver. Vidare ska metodiken för lösning av rättsområdets egentliga problem vara utvecklad eller under ordentlig utveckling. Slutligen ska disciplinen kännetecknas av en specifik teoriram som i sin tur är ägnad att generera fler teoretiska frågor.

Dessa krav har jag funnit adekvata grundat på erfarenheterna av att utveckla och etablera den på sin tid nya disciplinen miljörättsvetenskap.

Rättsvetenskap måste följaktligen kunna vara mycket mer än rättsdogmatik. Rätten, rättsordningar, kulturers normsystem och institutioner för sådana system samt inte minst det förhållandet, att många använder rätten för att (skyddade av samhällsorgans reglerade våldsapparat) handla också på sätt som är skadliga för andra – allt sådant är exempel på vad som måste kunna vara föremål för vetenskaplig forskning. Så länge rätten är central eller på annat sätt relevant för problematiseringen, är det rimligt att hänföra forskningen i fråga till en vetenskap *om* rätten. Alltså rättsvetenskap.

Det är också först då som forskning om rätten kan bli ordentligt probleminriktad, verkligt proaktiv. En vetenskap som avvisar anspråk på problemlösning är en outvecklad vetenskap.

Att sedan vetenskap *om* rätten kan innehålla flera underdiscipliner, varav en är (vilket kan låta lite speciellt) vetenskap om vad som finns och gäller *inom* rätten, är bara en fördel. Tokigt blir det först om en sådan underdisciplin hävdas vara den enda eller den viktiga delen av rättsvetenskapen.

Rättskällor är naturligtvis inte tillräckligt material för proaktiv forskning. Undersökningar av hur domstolarna i själva verket handlar ger i många hänseenden inte mer än en förbättrad information om ett *problem*, men utgör i sig själv ingen problemlösning. Men för att kunna utveckla goda genomföranderegler, blir frågor om genomdrivande av reglerna mycket viktig. Detta har bl.a lett till teori om återkoppling inom själva regelverket som slår till, när regler inte tillämpats fullt ut eller regler visar sig behöva skärpas, därför att det ändå inte blir tillräckligt resultat.

Exemplet miljörättsvetenskap

Utvecklandet av miljörättsdisciplinen har rört upp frågor om vad rättsvetenskap egentligen kan innefatta. På olika sätt har synen på förhållandet mellan rättsvetenskap och rättspositivism, och inte minst den så kallade rättsrealismen – skandinavisk eller annan –

[62] Westerlund, S: *Sustainable balancing*. I Juhlajulkaisu Erkki J. Hollo. Helsinki 2000, s 405 ff och Westerlund, S: *Miljön och avvägningarna* I Michanek & Björkman (red): Miljörätten i förvandling – en antologi. Rättsfondens skriftserie 36. Iustus förlag 2003.

därmed aktualiserats. Upptakten till min forskarbana var ett *problem*, visst, men ett problem som hade sitt ursprung i mänsklighetens påverkan på, och beroende av, biosfären. Ofrånkomligt implicita är därmed frågor om dels hur människans påverkan stod och står i förhållande till lag och rätt, dels hur lag och rätt skulle kunna utvecklas för den händelse att man vill undvika att människan bidrar till sin egen ekologiska kollaps (och till annan skada och ohälsa etc).

Kopplingen till rätten var alltså given, eftersom problemet hade att göra med antropogen miljöpåverkan kopplat till det ekologiska dilemmat och i konsekvens därmed rättslig kontroll av mänskligt beteende.

Att studera mänsklighetens ekologiska beroende är i sig en uppgift för andra vetenskaper än rättsvetenskapen, men resultaten därav är rättsvetenskapligt relevanta. Med mänsklighetens inverkan på de ekologiska förutsättningarna för sin egen existens är det en annan sak. Miljövetenskap i stort kan belysa den antropogena miljöpåverkan och dess effekter, kanske under beteckningen humanekologi. Men vi behöver därutöver en vetenskap som på något vis har samband med insikten att arten människa (*Homo sapiens*) har – tack vare evolutionen – sådana särdrag som gör henne till *aktör* och *tänkare* och *normutfärdare* m.m samt – inte minst – potentiell *ansvarstagare*.

Människans ekologiska dilemma är synnerligen reellt och går inte att komma undan genom samhälls- eller humanvetenskaplig jargong och förvirring om social konstruktion etc. Det juridiska dilemmat i rättsstater (under Rule of Law) är på ett avgörande sätt kopplat till det ekologiska, eftersom handlande, verksamheter och produkter är fria och legala, så länge de inte med stöd av lag har lagts under restriktioner eller förbud. Härtill kommer att legaliteten innebär att rättsordningen *stöder* sådant som inte är illegalt, bland annat genom att tillhandahålla domstolar och polismakt m.m för att skydda personers rättigheter när dessa utan lagstöd angrips.

Om rätten då medger sådant som bidrar till degradering av naturbasen bortom vad som räcker för att upprätthålla en folkmängd på så många miljarder som finns vid varje tillfälle nu och i framtiden, så utgör rätten en fara för mänskligheten. Detta är mänsklighetens *rättsekologiska dilemma*.

Problematisering och proaktiv forskning

Anta nu att det skulle bestämmas att samhällena ska så anpassa sina rättsordningar, så att mänsklighetens ekologiska dilemma hanteras fullt effektivt i den meningen att aldrig någon generation ska lida brist på resurser för att tillgodose samtliga då levande människors behov.[63] Detta återger ett *problem.*

Bland de vetenskaper, vars teori och data kan ha betydelse för problemlösningen, ingår rimligen en vetenskap som studerar och utvecklar sådana styrsystem, med vilka mänsklighetens sammanlagda potentiellt miljöpåverkande beteende behöver regleras och styras. Dessa styrproblem ser ut ungefär som följer.

Vi har som jag nämnt tidigare (minst) tre olika *typer* av system att beakta (figuren i avsnitt 7). Det till höger är biosfären och en nödvändig förutsättning för de till vänster. Till vänster därom finns samhället. Det styrs i sin tur av normsystemet, i en rättsstat bland annat rättssystemet.

Jämför nu följande två forskningsfrågor:

1. Hur inverkar styr- eller reglersystemen på vad som sker i samhället och därifrån vidare vad som inträffar i och med biosfären?

2. Hur behöver styr- eller reglersystemen vara konstruerade och fungera för att på så sätt påverka vad som händer i samhället och vidare i och med biosfären, att biosfären inte försämras så långt så att människor någon gång i framtiden inte kan tillgodose sina behov?

Den första problemställningen begränsas till att studera och utvärdera det som redan finns och förekommer. Sådan forskning begränsas till att *reagera* på vad som redan finns och händer – det är därför den är *reaktiv*.

Den andra går längre i det att problemställningen rör hur man kan eller behöver lösa mänsklighetens ekologiska dilemma. Den är således *proaktiv*.

Den som accepterar teserna om mänsklighetens ekologiska dilemma men också dess rättsekologiska

[63] Som bekant är detta i princip infört i rätten såsom hållbar utveckling.

dilemma, samt avser att proaktivt bearbeta det problemet, kan inte undvika en mängd frågor som rör rätten. Det följer redan av det rättsekologiska dilemmats betydelse för det ekologiska dilemmat.

Vilken syn på rättsvetenskaplighet har den som skulle hävda att detta inte är något för rättsvetenskapen?

Reaktiv rättsvetenskap omfattar grovt sett dels rättsdogmatik, dels rättsekologi,[64] dels komparativ metodik. Vi har inom Sverige ingen egentlig forskning där rättsekologi som sådan utgör själva kärnan.[65]

Proaktiv rättsvetenskap bygger främst på metodik och teoriutveckling. Här innefattas bland annat lagstiftningsmetodik och styrsystemkonstruktioner. Det är lätt att förstå av bilden (avsnitt 7 ovan) att sådant kräver både rättsekologiskt underlag och sådant underlag som man får av den del av metodiken som handlar om rättstillämpning m.m. Detta kräver i sin tur underlag om hur gällande rätt fungerar och hur sådan rätt tillämpas.

Jag tror att vi nu, i början av 2000-talet, kan se med ett milt överseende på fastsklamrandet vid det som kallas rättsrealism. Mycket kan förstås om vi antar att rättsvetenskapen har haft identitetsproblem i förhållande till detta med gällande rätt. Det är lätt att acceptera, och respektera, rättsdogmatik och/eller rättspositivism *såsom en av flera underdiscipliner* inom rättsvetenskapen. Den som utifrån detta ägnar sig åt sådant må sedan brottas med frågan hur det görs vetenskapligt. Först när företrädarna för detta försöker kapa hela disciplinen rättsvetenskap och föreskriver att sådan endast är rättspositivistisk och inriktad på rättsdogmatik, blir det lite löjligt. Ty därmed skulle de förvisa all forskning som syftar till bl.a rättsteknisk problemlösning (utöver frågor om vad som hör till rättens givna innehåll) någon annanstans.

Detta är vanligen inte deras avsikt, får man förmoda. Mitt bidrag i denna artikel till att hantera detta är att föreslå en helhetssyn på rättsvetenskap och dess discipliner, att där placera in den mer domarinriktade rättsdogmatiken men också placera in den rättsliga metodiken och rättsteori, där den senare är såväl intern som extern.

Under de första åtta åren av min forskning, då embryot till miljörätt som forskningsämne i Sverige började utvecklas, valde jag att forska utifrån det problem som hade sitt ursprung i mänsklighetens påverkan på, och beroende av, biosfären. Men jag gjorde det fatala vetenskapliga felet att jag ändå valde att forska utifrån teoriramar m.m *som inte genererades av det problemet*.

På ett sätt var det kanske tur att jag begick det felet, eftersom jag därigenom blev synnerligen väl insatt i gällande rätt och i rättspositivistiskt arbetssätt. Emellertid, om jag hade stannat kvar på det stadiet, hade miljörättslig metodik inte utvecklats så tidigt som faktiskt skedde, vilket – om inte sådan metodik utvecklades någon annanstans – skulle ha hållit miljörättsvetenskapen kvar på en embryonal nivå där den på sin höjd (med varierande grader av förvåning) redovisar olika rättstekniska och andra styrningstekniska lösningar världen runt, under beteckningen komparativa studier eller något i den vägen, utan att ta steget över till problemlösning, till proaktivitet.

Att en färdigutvecklad disciplin också innehåller proaktiv forskning illustreras ganska väl av erfarenheterna av att utveckla miljörättsdisciplinen, bl.a med beaktande av vissa lagstiftningsvetenskapliga frågor.

Rätten är ju inte given av naturen, den skapas av människor. Ekologiskt ohållbar rätt kombinerad med rättsstatlighet legaliserar ohållbart beteende och leder i riktning mot ekologisk kollaps. Förloppet i den riktningen är numera snabbt och varje ekologisk tröskel som överskrids, varje gång ett ekosystem flippar,[66] minskar resursbasen. Om mänskligheten ska

[64] Rättsekologi är inte något definierat akademiskt ämne i Sverige. Om ett sådant ämne skulle utvecklas, skulle det bli en parallell till bl.a rättsekonomi. Jag avråder från att försöka isolera rättsekologi som eget ämne eftersom sådant lätt leder till isolationism. Bättre är att utveckla rättsvetenskapen så att den klarar av att – till sin egen förkovran – interagera med andra vetenskaper varav ekologi är en sådan.

[65] Rättsekologi avses här inte vara något mycket bestämt. Det finns utrymme för sådan inom reaktiv forskning liksom inom proaktiv. I senare fallet är den helt nödvändig på det sättet att utan sådan, blir olika styrmedelslösningar mer eller mindre hängande i det blå.

[66] Detta innebär att ekosystemet går över i ett nytt läge som det ofta sedan fastnar i.

förebygga något, måste den i sina ansträngningar ligga före. Detta reducerar reaktiva[67] domstolar till att utgöra potentiella delar av problemet, samtidigt som det framhäver *lagstiftarnas* betydelse.

Lagstiftande förutsätter två slags aktörer. Dels de som är lagstiftare enligt konstitutionen. Dels de som konstruerar lagstiftningen (reglerna, lagarna, regelsystemen). Rättsvetenskapligt måste de senare sättas i fokus (medan statsvetenskapen får syssla med de förra). Om då inte kunniga personer medverkar i lagkonstruerandet, samt om teori och metodik saknas för sådant, samtidigt som miljöproblematiken är ofantligt komplex, så blir typiskt sett lagstiftningens kvalitet och ändamålsenlighet undermålig. Skulle det trots detta hävdas att det inte är en rättsvetenskaplig uppgift att utveckla metodik och teori för att utforma adekvat lagstiftning, är den rimliga frågan vilken vetenskap som då ska ta över alla sådana frågor, som ändå hör samman med just lag och rätt.

Om det i stället hävdas att det visst hör till rättsvetenskapen, men att den å andra sidan endast ska ägna sig åt rättsdogmatik och liknande positivistiska övningar, så blir diskussionsläget ett annat. Det räcker nämligen då med att ställa frågan vilka slags problemställningar, som en sådan outvecklad rättsvetenskap av den anledningen inte klarar av att hantera. Med andra ord: Vad faller bort i form av teori, metodik och problemlösning, om endast rättspositivism vore tillåten?

Detta för mig tillbaka till denna artikels rubrik. För att bli mogen måste en disciplin inkorporera metodikfrågor.

När väl detta är gjort, kan disciplinen verksamt delta i problemlösning. Och det är här som de verkliga vetenskapliga utmaningarna kommer till ytan. Miljörättsvetenskapen ökar den vetenskapliga problematiken mångfaldigt vid passagen över gränsen mellan rättspositivism och rättslig metodik.

[67] Här används termen "reaktiv" i ett annat sammanhang. Domstolar kan ju blott invänta att mål kommer till dem, på vilka de sedan kan reagera.

Attitydproblemen och den vetenskapliga utvecklingen

Många förefaller tveka inför detta och föredrar att inte överskrida denna gräns. Vid ett första påseende tycks orsakerna vara två, men det är möjligt att det hela egentligen har sitt ursprung i förnekelse.

Den första möjliga orsaken är tanken att juridik är rättsvetenskap är rättspositivism, och att rättskällorna är rättsvetenskapens (egentliga) källor.

Den andra är att det blir så svårt, därför att inte bara andra realia blir relevanta, utan det krävs också annan och mer avancerad teori än den som är förhärskande i respektive land eller kultur.

Det som ligger bakom den första orsaken torde avvisas av vilken seriös forskare som helst, eftersom det förutsätter att man har ristat en teoriram och metod i sten och sedan anpassar problemställningarna till dessa, i stället för att göra tvärtom.

Den andra orsaken borde knappt någon forskare våga formulera högt, eftersom det skulle implicera att forskning inte ska ge sig på sådana problem som kräver ansträngningar och teoriutveckling.

De två möjliga orsakerna kan förefalla tillräckliga, så varför dra in eventualiteten av förnekelse?

Två skäl är näst intill uppenbara. Det första har sitt ursprung i hur det ekologiska dilemmat har uppfattats. Naturvetenskapligt är det ingen revolutionerande teori att biosfären är begränsad och att människorna är beroende av naturbasen. Data om folkökningen är väl kända. Huvudlinjerna av minskningen av den biologiska mångfalden likaså. Termodynamikens andra huvudsats har inte kullkastats.[68]

I överföringen till politik, men också till gemene mans handlande, är det dock lätt att se ett slags förnekelse. Å ena sidan utgjorde bestämningen av begreppet hållbar utveckling ett viktigt steg i riktning mot att se verkligheten klart. Å andra sidan har ännu inget land systematiskt ställt om sig för hållbarhet. Men inte bara det. Själva begreppet utsätts för så kallad uttolkning, där nästan all sådan går i samma riktning som en ren förnekelse av det ekologiska

[68] Den kanske bästa integrationen av termodynamik och miljörättsvetenskap är Jonas Christensens avhandling *Rätt och kretslopp*.

dilemmat gör, nämligen försök att skjuta undan den nödvändiga naturvetenskapligt grundade slutsatsen att en biosfär måste finnas med tillräcklig bärkraft för alla de människor som finns, generation efter generation – annars ingen social och ekonomisk hållbarhet.

Detta slags förnekelseliknande beteende är inte begränsat till politiker och näringslivsföreträdare utan ses hos många forskare – inte minst inom samhälls- och humanvetenskaperna.

Det andra skälet till att dra in eventualiteten av förnekelse går faktiskt tillbaka till Kuhn och hans idé om paradigm. Motståndet mot ett nytt paradigm är (ofta) en form av förnekelse.[69] Det typiska fulla paradigmskiftet kännetecknas ju av att det nya paradigmet i själva verket förklarar mer än det tidigare och/eller därtill kanske på ett mera rationellt sätt. Ändå stretar många forskare emot – så många och så typiskt, att Kuhn ansåg det värt att skriva sin bok därom.

Förnekelse lik sådan har jag mött under många år inom rättsvetenskapen. Den har ofta understötts av argument på låg akademisk nivå. Jag har sålunda mötts av professorsargumentet att detta med miljökvalitetsnormer är ett utslag av naturrätt, att detta med lagstiftningsteknik är politik och inte juridik, samt att endast rättspositivism uppfyller kriterier på vetenskaplighet. Inte ens när politiken beställer rättsligt genomförande av hållbar utveckling, svarar sådana forskare med att acceptera att det också är en rättsvetenskapligt godtagbar uppgift. Många håller i stället fast vid äldre rättsgrundsatser och äldre synsätt (såsom att allt är avvägningar), samtidigt som de – till synes paradoxalt – hävdar att de minsann inte är naturrättare.

Teori

Och därmed återvänder jag än en gång till den tredje nivån i en rättsvetenskaplig disciplins utveckling och vetenskapliga mognad – teori.

Nya problem kräver lösningar som är anpassade för just dessa problem – eftersom många forskarkollegor genom handling förnekar detta, måste truismen utsägas. Den förutsätter förståelse för problemen och för lösningsmöjligheter. Förståelsen kräver adekvata världs- och problembilder. Av detta följer att adekvat teori behövs.

Egentligen ryms allt i den redan framställda enkla tesen att ett problem genererar behov av teori och metod, inte tvärtom.

Det finns dock mer i denna värld än vad som dröms om i rättspositivism och naturrätt, Horatio! Det finns riktig vetenskap och en fysisk verklighet! Vi missar en viktig poäng om vi reducerar ihjälsvultna barn och fördrivna folk och systematiska folkmord till att blott utgöra exempel på social konstruktion eller politik. Inte heller att naturen reagerar på mänsklig inverkan är särskilt meningsfullt att se som en social konstruktion eller enbart politik. Det är därför som jag i denna artikel, utgående från erfarenheter av att utveckla miljörättsvetenskapen, behandlat en del frågor runt hur en rättsvetenskaplig disciplin verkligen utvecklas.

Till vetenskap.

Och en tillräckligt utvecklad rättsvetenskap är inte begränsad till att studera rätten som den är, utan den är också utvecklad för att lösa reella problem och för att fördjupa och utveckla adekvat teori. Underlaget för den slutsatsen må vara hämtat från miljörättsvetenskapens utvecklande men torde *mutatis mutandis* vara av betydelse för varje rättslig disciplin.

10 Några avslutande reflektioner

I synnerhet efter Rio 1992 är det moderna miljörättsliga paradigmet annorlunda än de paradigm, som rättsvetenskapen normalt har varit inriktade på. Skillnaden är knuten till dels systemet som så att säga formar problematiken, dels och som konsekvens härav till införandet av mångenerationspersektivet i de materiella (och följaktligen därför också formella) konsekvenserna av styrsystemens utformning. Mängden människor är en del av problemet, tekniken för att styra dem är idag inte ordentligt utvecklad,

[69] Jag har utvecklat paradigmfrågan och miljörätten i dels *En hållbar rättsordning*, Iustus 1997, dels *Världsbilder, rättsvetenskap, juridik och hållbar utveckling*, i Svensk Juristtidning 2006 p. 309.

beroendet av biosfären kan man inte ta sig ifrån (bara modifera med teknik m.m). Lösningarna på hållbarhetsproblematiken kräver att annat tänkande än de olika traditionella juridiska angreppssätten. Osäkra förhållanden gör att många misstag kommer att begås också framöver men ett hållbart regelverk måste klara av även den saken. Det finns inget alternativ till hur detta ska göras utan att man överskrider också helt elementära rättighetsgränser.

Det gamla paradigmet, än så länge nästan helt dominerande, löser inte frågan men det nya utgår just från frågan som sådan. Återverkningarna på rätten och dess teorier av detta kan inte undvikas, utan att ekologisk ohållbarhet består. Och med sådan ohållbarhet, fallerar också övriga hållbarhetsmål.

Detta är fundamentalt och följer av naturvetenskapliga realia som utgör det miljörättsliga paradigmet. Människan är beroende av naturen och kan använda teknik m.m för att inom den ramen klara hållbarheten, men går man utanför, slår ohållbarheten till.

Bland kommentarerna till denna artikels utkast har ingått också hänvisningar till att naturvetare inte alls är så entydiga, som jag förefaller ha framhävt. Här har begreppet ekologiskt hållbar utveckling en mycket central betydelse. Det är helt riktigt att en hel del naturvetare *inte anger sådan utveckling* som miljörättsligt övergripande. Vad gäller först klimateffekter är exempelvis 2%-målet i sig synnerligen diskutabelt. Vad gäller biologisk mångfald, ingår full sådan i begreppet ekologiskt hållbar utveckling. Och så tillkommer rätten för alla framtida generationer människor att ha tillräckligt med biosfärsunderlag för att kunna tillgodose *sina* behov. Varje försök att lindra dessa aspekters tillgodoseende är i själva verket ett försök att avvika från ekologiskt hållbar utveckling. Naturvetare kan mycket väl ta in icke naturvetenskapliga argument i sitt tänkande. Men då riskerar de att utgöra ytterligare en del av problemet, och inte av lösningen.

Efter att ha uttalat detta, behöver jag återvända till denna artikels grundfråga som alltså egentligen handlar om *paradigm* utifrån ekologisk hållbarhet, och ställer sådan mot andra paradigm som inte fullt ut tar till sig vad sådan hållbarhet innebär. Det framgår,anser jag, tydligt att det mesta av också miljörättsforskningen än så länge försöker hålla fast vid äldre paradigm. Sådant kan gå för sig, när man studerar olika sätt att åstadkomma en i och för sig bestämd lösning. Men det är ju behovet av lösningarna som avgör paradigmfrågan, och ekologiskt hållbar utveckling är en sådan, som inte kan hanteras enligt äldre paradigm.

Med den insikten, tillsammans med att inget land ännu har en fullt hållbar rättsordning och folkrätten inte klarar den ekologiska hållbarheten[70] på grund av flera än så länge motstridiga grundläggande folkrättsliga principer, vad ska då denna artikel bidra med?

Främst kunskapsutveckling inriktad på miljörättsliga allmänna läror utifrån hållbarhetsparadigmet. Detta paradigm ligger bakom Rio 1992. Det finns inget alternativt paradigm inom rätten som klarar av också alla framtida generationers möjligheter till att tillgodose sina *behov*. Biologisk mångfald är i sin tur en stomme i sådan hållbarhet. *Varje rättsforskare, men också andra forskare, som avser att hantera ekologiska hållbarhetsfrågor som ett problem att lösa, måste acceptera att det är dessa frågor som bestämmer paradigmen – eller så kommer de fel.*

Att rättsvetenskapen därmed fått till sig betydligt fler – och svårare – frågor än tidigare, är i sin tur en följd av just paradigmskiftet.

[70] Som bl.a kommer fram genom Aðalheiður Johannsdottirs avhandling, som den i detta nummer sista artikeln utgår från.

Reflections on Environmental Responsibility – with an Emphasis on the Nord Stream Pipeline in the Baltic Sea Area

Seita Romppanen

Abstract

The article examines environmental responsibility and liability and discusses the issue of environmental damage in the context of the Nord Stream gas pipeline case on the Baltic Sea. More specifically, the goal is to analyze who would be held liable for the damage, how this liability would be established, and what would be the criteria to be applied to this particular case.

To answer these questions, the article first lays down the general applicable legal framework. Secondly, the article systemizes and analyzes the relevant responsibility and liability instruments. The relevant instruments for the theme are the UNCLOS, certain civil liability instruments together with the ILC work on state responsibility and liability. The relevant instruments are analyzed from the point of view of their usefulness and relevance in regard to the research questions set for the article.

Keywords: Environmental responsibility, environmental liability, marine environmental damage, Nord Stream pipeline, Baltic Sea

1 Introduction[1]

1.1 Objective and research problem

The overarching context of the article is the concept of transboundary harm. Under customary international environmental law, states should refrain from causing harm to another state.[2] If transboundary harm occurs, the state might have failed in controlling its activities. However, states also carry out activities that are inherently dangerous or harmful to the environment. Even when the states are obliged to control these activities by taking all the necessary measures to minimize the harmful impacts, they are not obliged to cease all environmentally harmful activities. Not all transboundary harm is "illegal", but neither does the "legality" of these activities necessarily abolish the state's responsibility towards the impacts caused by the state to another state. Therefore, the concept of transboundary harm places certain standards of conduct on sovereign states, and states have enacted common rules and general principles to express the content of prevention of transboundary harm.

International rules on transboundary environmental harm were one of the first fields of international law to develop into general principles.[3] Among the first ones were the *principle of harmless use of territory* (*responsibility not to cause damage to the environment of other states*) as well as the *principle of state responsibility*.[4] This article takes the *principle of harmless use of territory*[5] as its point of departure.

The *principle of harmless use of territory* has developed together with another key principle of international environmental law, namely *the sovereignty over natural resources*.[6] The principles are reiterated in the leading international environmental law instruments: in the Declaration of the United Nations Conference on the Human Environment (1972, the Stockholm

[1] Seita Romppanen, M.Sc (*environmental law*), LL.M (*international environmental law*), is a postgraduate student at the University of Eastern Finland, Department of Law.

[2] Customary international environmental law refers here to law that derives from *custom*. R. M. M. Wallace: International law, Fifth edition, *Sweet & Maxwell London* 2005, p. 7.

[3] See further for example the Trail Smelter arbitration. Trail smelter case (*United States v. Canada*), 16 April 1938 and 11 March 1941, Vol.III, pp. 1905–1982, 3 R.I.A.A. 1905 (1941), reprinted in 35 AJIL 684 (1941). See also the Corfu Channel Case (*United Kingdom v. Albania*), Judgment of April 9th 1949 (Merits), ICJ Reports 1949, p. 4, on the state's obligation not to allow its territory to be used for acts contrary to the rights of other states, p. 22.

[4] E. Louka: International Environmental Law. Fairness, Effectiveness, and World Order, *Cambridge University Press* 2006, p. 40; M. L. Larsson: The Law of Environmental Damage. Liability and Reparation, *Norstedts Tryckeri, Stockholm* 1999, p. 159.

[5] The *principle of harmless use of territory* has been elaborated and further worked on in the legal literature, and several variations on the definition exist. P. W. Birnie and A. E. Boyle: International Law and the Environment, Second edition, *Oxford New York* 2002, p. 109; E. Louka: *International Environmental Law*, p. 50; P. Sands: Principles of International Environmental Law, Second Edition, *Cambridge University Press* 2003, p. 235.

[6] See discussion on *the Harmon doctrine* (each state has the right to use its natural resources without restriction according to the concept of state sovereignty) from T. Kuokkanen: International law and the Environment. Variations on a Theme, *Kluwer Law International Hague* 2002, pp. 11–14; M. L. Larsson: *The Law of Environmental Damage*, p. 155.

Declaration) as well as in the Rio Declaration on Environment and Development (1992, the Rio Declaration), reaffirming the Stockholm Declaration.[7] These principles are an inseparable part of customary international environmental law and, as such, provide international environmental law its foundations.[8] Obligation of other states to tolerate pollution is not absolute but neither is the sovereignty of states to exploit their natural resources.[9] Both are subject to some limitation, as will be discussed in the article.

The above-mentioned Trail Smelter case has been pointed out by many scholars as one of the first evidence of the establishment of the concept of state responsibility for environmental harm.[10] The case activated the discussion in the field of international law about whether a standard of state responsibility (liability) had been established for environmental polluting activities or not.[11] After the early case law, the International Law Commission (ILC) continued to work on and develop the principles of state responsibility and liability.

It is important to make a difference between *state responsibility* towards environmental damage and *state liability* on the other hand.[12] *Civil liability* also needs to be distinguished from these concepts.[13] Furthermore, the international environmental law uses the concepts somewhat contextually when discussing environmental responsibility and liability in general, and several understandings of the concepts exist.[14] Therefore, this article keeps to a rather general level of definition, although the profound contextualization of these concepts within general international environmental law would unquestionably be a fruitful discussion.

The concepts of state responsibility and state liability are sometimes, according to *Larsson*, used synonymously and they do overlap. Responsibility and liability are activated in somewhat different contexts. *Liability* refers to the duty to pay compensation for damage. Liability can also be viewed as a sanction to be used in cases where there is a breach of valid international rules. Liability is not merely a legal tool; it is also a financial tool in the form of the liable one being responsible for paying compensation.[15] *Responsibility*, on the other hand, more generally encompasses this liability together with the obligation to prevent, reduce and control environmental damage. Responsibility towards environmental damage could also be characterized as the duty to take *particular preventive actions*. Therefore, the damage as such does not need to be realized in order for a party to be held responsible.[16] If a state does not take the necessary preventive actions under the principle of state responsibility[17] and according to the state's international

[7] Declaration of the United Nations Conference on the Human Environment, A/CONF.48/14 and Corr.1 (1972), reprinted in 11ILM 1416 (1972); Rio Declaration on Environment and Development, June 13, 1992, reprinted in 31 ILM 876 (1992). See further article 6 of the Stockholm Declaration, and principle 2 of the Rio Declaration.

[8] P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p.104. See also A. Jóhannsdóttir: The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law, *Edita Västra Aros, Västerås* 2009, pp. 208–212.

[9] P. Sands: Principles of International Environmental Law, Second Edition, *Cambridge University Press* 2003, pp. 241 and 246.

[10] See e.g. P. Sands*: Principles of International Environmental Law*, p. 241. See also the Corfu Channel Case (*United Kingdom v. Albania*) and Gut Dam Arbitration (*United States v. Canada*), 8 ILM (1969).

[11] E. Louka: *International Environmental Law*, p. 41.

[12] E. M. Basse: Environmental Liability – Functions and Traditions in P. Vihervuori and K. Kuusiniemi and J. Salila: Juhlajulkaisu Erkki Johannes Hollo 1940 – 28/11 – 2000, *Lakimiesliiton Kustannus Helsinki* 2000, p. 14. On customary law and transboundary environmental harm, see also J. Ebbeson: Compatability of International and National Environmental Law, *Iustus Förlag Uppsala* 1996, pp. 103–105.

[13] Civil liability refers here to the potential responsibility for payment of damages, to the right to obtain redress from another person. State liability, on the other hand, refers to liability of one state to another for the non-observance of the obligations imposed by the international legal system. M. M. Wallace: *International law*, p. 187; E. Louka: *International Environmental Law*, p. 448

[14] E. M. Basse: Environmental Liability – Functions and Traditions, pp. 14–15.

[15] E. Louka: International Environmental Law, p.477.

[16] M. L. Larsson: *The Law of Environmental Damage*, pp. 154–155.

[17] State responsibility as enacted in the Rio Declaration: "the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of

obligations, state liability can be activated under the general principles of state liability. The state is also responsible for prevention, but triggering of liability requires a certain criteria to be fulfilled.

The question of *what constitutes environmental harm or damage* for the purposes of activating liability is central for this article. However, it is essential to clarify at this point that there are no straightforward answers to the question, and that this article is by no means able to answer this question comprehensively. This article, however, aims at *outlining the problems* attached to the question on *what environmental harm or damage is* in relation to environmental responsibility and liability.

During the last twenty or thirty years states have agreed on a complex network of treaty obligations to protect and preserve our environment and control hazardous impacts on it. Therefore, it is somewhat surprising to note that there are *no generally agreed or overarching principles of international environmental liability that could be applied when these treaty obligations are violated*. States have not been very eager to oblige themselves on liability instruments. It is more tempting to ratify general framework rules on responsibility than specific criteria on the establishment of liability. International environmental law offers solutions for solving environmental disputes, but these solutions mostly employ general international environmental law principles rather than international environmental liability principles.[18]

In line with the above, the principal objective of this article is to discuss international law on environmental responsibility and liability. Furthermore, the above-mentioned issues are analyzed *in the context of the Nord Stream gas pipeline case (the Nord Stream case) in relation to the Baltic Sea*. This approach makes the article more concrete and more to the point. The overarching research questions are: *who is to be held liable for environmental damage in the Baltic Sea area*, caused by the Nord Stream pipeline project, and *how is this liability established, and what are the criteria to be applied in this particular case*? The situations "caused by the Nord Stream pipeline" for the purposes of this article include weaknesses in or damages to the pipeline occurring due to laying and construction errors as well as lack of proper maintenance during the operation phase of the pipeline. However, environmental damage caused by a third party is excluded from the discussion in this article.

In the forthcoming sections, the article first analyzes the relevant elements of environmental responsibility and liability. These elements are the key international environmental law instruments, as well as the relevant concepts included in the application of environmental responsibility (primary obligations and environmental damage). The United Nations Convention on the Law of the Sea (1982, UNCLOS)[19] sets the general legal framework for the article, and Part XII (protection and preservation of the marine environment), in particular, is important for this article. The essential rules of the international environmental responsibility instruments are analyzed from the point of view of the Nord Stream case. Secondly, with this analysis, the article suggests approaches to international environmental responsibility and liability in the context of the Nord Stream pipeline case.

The structure of the article is the following: section two discusses general legal framework towards responsibility and liability. This section discusses the relevant instruments as well as the content of the primary obligations. Section three analyzes the international environmental civil law instruments, their relevance in the Nord Stream case as well as the key concept of environmental damage. Section four focuses on the ILC work on state responsibility and liability.

other States or of areas beyond the limits of national jurisdiction" (latter part of principle 2).

[18] E. H. P. Brans: Liability for damage to public Natural Resources. Standing, damage and damage assessment, *Kluwer Law International Hague* 2001, p. v. See also A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, p. 212.

[19] United Nations Convention on Law of the Sea, Dec. 10, 1982, reprinted in 21 ILM 1261 (1982).

1.2 The Baltic challenge

Nord Stream AG is a joint venture owned by four companies[20] that have specialized in natural gas distribution, purchasing and sales of natural gas. Nord Stream AG plans to build a 1220-kilometer-long undersea pipeline from Vyborg (Russia) to Greifswald (Germany). The preparations for the pipeline construction are well underway, and the construction work has been planned to commence in April 2010.[21] The project is to be finished by the year 2012.[22]

Today, the Baltic Sea is one of the most threatened marine ecosystems in the world, and also one of the world's most exploited sea areas. The Baltic is unique in several ways. It forms the second largest body of brackish water in the world, it is very shallow and the water quantity is low compared to other similar small scale sea areas. It is a semi-enclosed sea, which means that the exchange of water with the North Sea is extremely slow.[23] Because of its special geographical, climatological and oceanographic characteristics, the Baltic Sea is highly sensitive to the environmental impacts of human activities in its sea area and its catchment area. The Baltic Sea was listed as a Particularly Sensitive Sea Area (PSSA) by the International Maritime Organization (IMO) in 2005.[24] The Baltic is also a special area under the MARPOL 73/78 regulation.[25] The poor situation of the Baltic Sea is largely due to management failures. To summarize, the Baltic ecosystem is now close to a final collapse.

The Nord Stream project has all the potential to harm the maritime environment of the Baltic during the different phases of the construction or the operation of the pipeline. The potential effects of the pipeline could include, for example, damage to the ecosystem due to munitions clearing or an oil leakage. The *unplanned events* are mostly associated with the construction phase, pipeline failure being the exception. For example, a major oil spill could impact "any number" of the Baltic states.[26] Furthermore, the gas pipelines run through areas that are important for the *commercial fisheries* of several states. Fishing is important to several coastal communities in the countries around the Baltic, and therefore the impacts affecting fisheries along the pipeline route are truly transboundary. There is a particular concern over the ability of bottom trawlers to adapt their approaches and patterns to adjust to the presence of the pipelines in the open seas of the Baltic.[27]

The Nord Stream pipeline case has several legal issues to tend to. The pipeline project is above all a political issue, but its execution has also raised some serious environmental concerns over the environmental impacts on the highly sensitive sea area. One of the discussed issues has been the implementation of the environmental impact assessment (EIA) on the area, particularly its adequacy and scope. The general public, respective national governments and the media have also been concerned about the consolidation between different national legislations, as the pipeline route passes through several national jurisdictions.

[20] The owners and their shares are as follows: the largest Russian company Gazprom (51 %), BASF SE/Wintershall Holding AG (20 %), E.ON Ruhrgas (20 %) and Gasunie (9 %). However, the headquarters of the company is based in Zug, Switzerland.

[21] Information on the Nord Stream pipeline project is available on the Nord Stream website, www.nord-stream.com (15.2.2010).

[22] Nord Stream is only one of several planned or existing energy infrastructure projects in the Baltic Sea area. See more on the other projects from the Nord Stream website on Baltic infrastructure projects, http://www.nord-stream.com/en/the-pipeline/pipeline-route/baltic-infrastructure-projects.html (15.2.2010).

[23] More information on the Baltic Sea ecosystem, please see further e.g. HELCOM (Helsinki Commission, Baltic Marine Environment Protection Commission) website on the marine environment http://www.helcom.fi/environment2/en_GB/cover/ (15.2.2010) and the Baltic Sea Portal website http://www.itameriportaali.fi/en_GB/ (15.2.2010).

[24] Resolution A.927 (22) (PSSA and Special Areas Guidelines), pp. 3–10. IMO website on marine environment, http://www.imo.org/ (15.2.2010).

[25] International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (the MARPOL 73/78). In its annexes I, II, V and IV the MARPOL defines certain sea areas as special areas.

[26] Nord Stream Espoo Report, March 2009, 1608–1609; Nord Stream Espoo Report: Non-Technical Summary, February 2009, pp. 39–40.

[27] Nord Stream Espoo Report, March 2009, pp. 12, 1323–1336.

Certain concerns over the national administrative processes have also been represented concerning the complaints on the national permitting, for example.[28]

This article focuses on environmental responsibility and liability relating to environmental damage. This choice was made simply because, out of all the legal matters related to the case, this issue has not been carefully analyzed. The realization of the project is very likely. When the project is realized, the responsibility and liability issues also become relevant. What if – due to an accident, incident or error in the construction or operation of the pipeline – environmental damage or other potentially harmful environmental impacts do occur?

2 General legal framework towards responsibility and liability

2.1 Main legal jurisdictions and rights on the Baltic Sea

Treaty law is the main source of obligations in international environmental law, containing more defined rules and differentiated obligations for implementation than customary law.[29] Therefore the main rules are presented below.

Since the article analyzes state responsibility, and customary international law is one of the main sources of state responsibility, it is also necessary to discuss customary international law with a few words. Customary international law contains primary rules that in cases of breach give rise to (state) responsibility. The most important rule applicable in the context of this article is the *principle of harmless use of territory* presented earlier (obligation to not cause harm to the environment of other states and to areas beyond any jurisdiction).[30] However, the content of rule of custom ary international law is not as exact as the content of a legal rule. For example, regarding the objective of this article, does *the principle of harmless use of territory* relate to the transboundary harm as such or to specific activities that cause harm? This article accepts the point that harm is *per se* prohibited. Therefore, *the principle of harmless use of territory* should in fact be considered a part of customary law, despite the lack of definite content. [31]

In general, the Baltic Sea area is regulated through several international, EU, regional and national instruments. It does not serve the purpose of the article to go through all of them. The most relevant international treaties from the point of view of the general legal framework are the UNCLOS and the Helsinki Convention on the Protection of the Marine Environment of the Baltic Sea Area (1992, the Helsinki Convention). The UNCLOS and the Helsinki Convention are both *binding* on all of the states surrounding the Baltic Sea.[32]

The Nord Stream pipeline project is also of central importance for the European Union (EU).[33] The Baltic Sea is a basin bordered by as many as eight EU member states and 80% of its shores are EU territory, and the sea as such is under the rule of the EU within the territorial waters of the member states. All contracting parties, *except for Russia*, of the Nord Stream case are members of the EU. The EU member states are obliged to apply and implement environmental and other rules of the EU which are applicable to the

[28] See also T. Koivurova and I.Pölönen: The Baltic gas pipeline – can we manage it sustainably?, *Baltic Rim Economies* 31.8.2009 4/2009, p. 23; E. Karm: Environment and energy: The Baltic Sea gas pipeline, *Journal of Baltic Studies* Vol. 39, No. 2, June 2008, p. 99.

[29] C. Voigt: State Responsibility for Climate Change Damages in *Nordic Journal of International Law* 77 (2008), p. 5.

[30] Trail smelter case (*United States v. Canada*), p. 1965; Gabčikovo-Nagymaros Project (*Hungary v. Slovakia*), Judgment, ICJ Reports 1997, p. 41. See also C. Voigt: State Responsibility for Climate Change Damages, pp. 7–8.

[31] C. Voigt: State Responsibility for Climate Change Damages, pp. 7–9. See also R. Higgins: Problems and Process: International Law and How We Use It, *Clarendon Press Oxford* 1994 (reprinted in 2003), p. 165; Trail smelter case (*United States v. Canada*), p. 1965.

[32] Sweden, Finland, Denmark, Estonia, Latvia, Lithuania, Germany, Poland and Russia.

[33] See also Trans-European Energy (TEN-E) Guidelines in 2006, Decision No 1364/2006/EC of the European Parliament and the Council of 6 September 2006 laying down guidelines for trans-European energy networks and repealing Decision 96/391/EC and Decision No 1229/2003/EC, OJ L 262, 22.9.2006. The Nord Stream project is listed as one of the projects of common interest.

Baltic area, including the Baltic Sea area.[34] Therefore, the Baltic Sea is covered by national jurisdiction, complemented by EU law[35] and international law.[36]

As a general background, it is necessary to start of with the *principal legal jurisdictions* concerning the Baltic Sea. *Firstly*, rules relating to the *territorial sea* are relevant. In line with articles 2, 3 and 4 of the UNCLOS, each state around the Baltic Sea has 12 nautical miles of territorial waters. On the territorial sea, the coastal state actually enjoys sovereignty, giving the coastal state the power to apply national law. [37]

Secondly, in line with UNCLOS articles from 55 to 57, each coastal state has in addition to that a maximum of 200 nautical miles of exclusive economic zone (EEZ) from the baseline. Due to geographical facts,[38] none of the Baltic states actually has 200 nautical miles of EEZ.[39] The surrounding states have agreed on the delimitation of the maritime boundaries by using bilateral agreements, and the Baltic Sea is fully covered with territorial waters or EEZs. The most significant right for the *coastal state* on the EEZ, in line with article 56 (a), are the sovereign rights for the purpose of exploring and exploiting, conserving and managing the living and non-living natural resources of the waters superjacent to the seabed and of the seabed and its subsoil. According to UNCLOS article 60, a coastal state has the exclusive right to construct and to authorize and regulate the construction, operation and use of installations and structures for the purposes provided in article 56 and other economic purposes.

The coastal state has jurisdiction with regard to the protection and preservation of the marine environment, in line with article 56 (b) sub-paragraph iii). The jurisdiction to protect and preserve can also be viewed as an obligation. Article 56 gives the competence to legislate and to enforce, which is further stipulated in Part XII of the UNCLOS on the protection and preservation of the marine environment. Any obligation as to the *use of the jurisdiction* and *how it shall be used* will have to be deduced from Part XII of the UNCLOS or other international environmental agreements, such as the Helsinki Convention.

The UNCLOS also includes other more specific articles on the protection of the marine environment of the EEZ, namely in Part XII article 210 on dumping, articles 211, 220 and 234 on pollution from vessels and pollution from sea-bed activities, in line with articles 208 and 214. The powers to control pollution *outside territorial sea* are, however, limited. According to *Churchill and Lowe*, the UNCLOS has had a limited impact on the state practice on the matter and the coastal states do not use the entire jurisdiction provided by these articles. [40]

The UNCLOS regulates the rights and duties of

[34] See also P.Graig and G.de Búrca: EU Law. Text, cases, and materials 4th Edition. *Oxford University Press* 2008, pp. 82–88; E. Hollo: The Baltic Sea and the Legal Order on Placing Energy Pipelines in Miljøretlige emner. Festskrift til Ellen Margrethe Basse, *Jurist- og Økonomforbundets Forlag*, København 2008, pp. 180–181. Note also that the EU's common fisheries policy (CFP) extends to the Baltic Sea area (article 3 on common policy in the sphere of agriculture and fisheries, articles 32–38 legislative powers of the Community on fisheries, Treaty Establishing the European Community (EC treaty), Consolidated version, Official Journal of the European Union C 321 29.12.2006. Note that the Lisbon treaty came into force in 1.12.2009, and the title of the Treaty establishing the European Community has been replaced by Treaty on the Functioning of the European Union by the article 2 § 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, 13.12.2007, Official Journal of the European Union C 306 17.12.2007 (Treaty of Lisbon). The corresponding articles to articles 3 and 32 to 38 are articles 3, 4 and 38 to 44.

[35] "EU law" as taking into consideration the Lisbon Treaty that entered into force 1.12.2009.

[36] Particularly on environmental protection, see also European Court of Justice (ECJ) findings on the case C-459/03 between the European Commission and Ireland on the case better known as the "MOX plant case", paragraph 92. The MOX plant case seems to assume that the EEZ is also under the EU competence. The situation on the EU jurisdiction on the EEZ is not, however, clear. See also E. Hollo: T*he Baltic Sea and the Legal Order on Placing Energy Pipelines*, p. 181.

[37] P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 370.

[38] "Geographical facts" means here that because the Baltic Sea is very narrow and because the states are within close proximity from each other, it is not possible for the states to have 200 nautical miles of EEZ.

[39] However, article 76 (1) entitles the coastal state to a minimum of 200 miles continental shelf (the seabed and the subsoil of submarine area).

[40] R. R. Churchill and V. Lowe: Law of the Sea, Third edition, *Manchester University Press* 1999, p. 169 and 351.

other states in the EEZ in article 58. The UNCLOS explicitly confers the other states with the right of laying submarine cables and pipelines in article 58. Article 58 (3) also includes an obligation for other states to ensure compliance with legislation adopted by the coastal state according to its rights and jurisdiction under article 56.

Thirdly, the rights on the continental shelf are relevant. In line with article 77 (1), the *coastal state* exercises sovereign rights over the continental shelf for the purpose of exploring it and exploiting its natural resources. Continental shelf is a legal definition given for the stretch of the seabed adjacent to the shores of a particular state to which it belongs.[41] The continental shelf and the EEZ are two distinct legal bases of coastal states that both create rights for the coastal state towards the sea bed. However, the continental shelf exists *ipso facto* and *ab initio*, but the EEZ must always be claimed.[42] In addition, on the *overlap between the two zones*, it needs to be noted that article 56 (3) on EEZ provides that the rights provided to the coastal state shall be exercised in accordance with Part VI rules on continental shelf (article 77). Lastly, from the point of view of the geographical definition, the whole Baltic Sea floor is continental shelf. Regarding the right to lay submarine cables and pipelines according to article 58 (1), the subjection to "relevant provisions" of the UNCLOS involves a reference to the *relevant provisions* of part VI on the continental shelf.

2.2 Right to lay pipelines on the continental shelf

According to article 79 on submarine cables and pipelines on the continental shelf, *all states* have the *general right to lay submarine cables and pipelines on the continental shelf*. As stated in the article 79 (2), the *coastal state* may not impede the laying or maintenance of such cables or pipelines, subject to its right to take reasonable measures for the exploration of the continental shelf, the exploitation of its natural resources and the prevention, reduction and control of pollution from pipelines.

The delineation of the course for the laying of pipelines on the continental shelf is, however, *subject to the consent of the coastal state*, in line with article 79 (3). *It is, however, questioned how far the article 79 (3) is compatible with the freedom to lay pipelines.* Lastly, it might be pointed out that article 79 (4) confers the coastal state the right to establish conditions for cables or pipelines entering its territory or territorial sea, or its jurisdiction over cables and pipelines constructed or used in connection with the exploration of its continental shelf or exploitation of its resources.

From the point of view of this article, the UNCLOS provisions on cables and pipelines do not tackle the breaking or injury of a submarine cable or pipeline, whereas UNCLOS articles from 112 to 115 on high seas cables and pipelines do regulate the issue.

2.3 Duty to protect, control and prevent

The UNCLOS addresses various aspects of the use of the seas, including marine pollution. The UNCLOS defines marine pollution in its article 1 as substances or energy which are introduced into the marine environment by man and which *result or are likely* to result in *deleterious effects* as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities.[43] The Helsinki Convention has a similar approach towards

[41] Article 76 (1) UNCLOS, continental shelf of a coastal state comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.

[42] R. R. Churchill and A. V. Lowe: *Law of the sea*, p. 145; T. H. Heidar: Legal Aspects of Continental Shelf Limits, article for conference, shortened version form the article in Legal and Scientific Aspects of Continental Shelf Limits, *Martinus Nijhoff* 2004, pp. 34–35.

[43] There is no international case law or discussion on the question whether discharge of natural gas qualifies as pollution of marine environment and whether this pollution is of a scope that renders it violation of obligations under law of the sea or international environmental law. The question is, however, discussed later in this article.

the definition of marine pollution, according to its article 2. In fact, the first Helsinki Convention dating from 1974 (as the convention was later, in 1992, amended to its present form) is said to have had an important influence on the formulation of the marine pollution provisions of the UNCLOS treaty.[44]

The obligation to protect the marine environment as regulated in the UNCLOS represents a codification of customary law, and the UNCLOS articles are supported strongly by *opinion juris*.[45] Article 192 of the UNCLOS lays down the general obligation to protect and preserve the marine environment.[46] Although the environmental provisions can be found in several sections of the UNCLOS, Part XII in particular deals with the preservation and protection of the marine environment. Furthermore, in line with article 193, states have the sovereign right to exploit their natural resources pursuant to their environmental policies and in accordance with their duty to protect and preserve the marine environment.

In line with article 194 (2), states shall take all measures necessary to ensure that *activities under their jurisdiction or control* are conducted in such a manner that they do not cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights.

Part XII on protection and preservation of the marine environment deals with *all types* of marine pollution, in line with article 194 (3). However, article 194 (3) is not an exhaustive list of the measures taken to minimize pollution. Therefore, in line with article 194 (c), for example, pollution from installations and devices used in exploration or exploitation of the natural resources of the seabed and subsoil and pollution from other installations and devices operating in the marine environment, as in article 194 (d), are included. *Therefore pollution from pipelines is also subsumed.* Article 194 does apply to pipelines because although a pipeline might not be seen as an installation or a device used in "exploration or exploitation of the natural resources of the seabed and subsoil", it at least belongs to the category of an "installation" or "device" used in "operating in the marine environment".[47]

According to article 208 of the UNCLOS, coastal states shall adopt laws and regulations to prevent, reduce and control pollution of the marine environment arising from or in connection with seabed activities subject to their jurisdiction and from artificial islands, installations and structures under their jurisdiction. Regarding the article 208, also articles 60 and 80 on artificial islands, installations and structures in the exclusive economic zone and continental shelf are to be noted. In order for article 208 to be applicable to submarine pipelines, the pipelines must be subjected to the jurisdiction of the coastal state and qualify as seabed activities under article 80 of the UNCLOS. According to judge *Treves*, "the pipelines used in connection with the exploration and exploitation of the resources of the continental shelf or with artificial islands, installations and structures *thereupon are under the jurisdiction of the coastal State*" [italics by the writer].[48] Therefore, for the purposes of this article, pipelines are subjected to the jurisdiction of the coastal state as seabed activities.

There is a need for balance between the freedom to lay pipelines and the recognized rights of the coastal state. According to Treves, it could, for instance, be

[44] P. W. Birnie and A. E. Boyle: International Law and the Environment, Second edition, *Oxford New York* 2002, p. 104.

[45] The obligation to protect the marine environment existed before the UNCLOS framework. UNCLOS is generally accepted as customary law regarding to its essential content, and such customary provisions are binding on states as such. P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 352; R. R. Churchill and A. V. Lowe: *Law of the sea*, pp. 24–25.

[46] E. Louka: *International Environmental Law*, p. 148; R. R. Churchill and V. Lowe: *Law of the Sea*, p. 349.

[47] "As far as installations for exploring and exploiting seabed… accidental pollution may result from... or from the breaking of pipelines", R. R. Churchill and V. Lowe: *Law of the Sea*, p. 153–155 and 330.

[48] T. Treves: The International Tribunal for the Law of the Sea and the Oil and Gas Industry, Second International Oil and Gas Conference –Managing Risk –Dispute Avoidance and Resolution London 20-21 September 2007, pp. 9–10, pdf available online at www.itlos.org (8.4.2010).

disputed whether a certain pipeline is used in connection with the operation of artificial islands, installations and structures on the continental shelf. Additionally, other disputes may concern the protection of pipelines and the duties of the state laying the pipeline, such as disputes concerning the breaking or damaging of the pipeline.[49]

The obligation to prevent, control and reduce pollution is required *according to each state's capability*, in line with article 194 (1) of the UNCLOS (*due diligence*).[50] The primary subject of this obligation is the coastal state. The obligation to take "all measures necessary" is moderated allowing the state to use the "best practicable means at their disposal and in accordance with their capabilities". This makes the obligation more flexible to the discretion of the state. However, when it comes to the seabed operations laws, regulations and measures taken by the coastal state to prevent, reduce and control, pollution shall not be less effective than international rules, as is stated in article 208. This could imply a stronger, primary obligation of states to prevent pollution.[51] In general, the UNCLOS can set a legal obligation, although in a form of general framework, to protect the marine environment. According to article 197, states also have the obligation to *cooperate* in the protection of marine environment.[52]

2.4 Responsibility regarding the obligation to protect and preserve

According to article 235 of the UNCLOS, states are responsible for the fulfillment of their international obligations concerning the protection and preservation of the marine environment. Article 235 deals with different aspects, including both responsibility and civil liability. The *responsibility* extends to flag states just as it applies to coastal states in respect of the activities *that they permit within their jurisdiction or control*.[53] The *liability* for marine environmental damage goes in accordance with international law. The UNCLOS refers to international law whenever the scope of the liability needs to be identified. Furthermore, according to article 235, states should also ensure that recourse is available in accordance with their legal systems for prompt and adequate compensation or other relief in respect of damage caused by pollution of the marine environment by natural or juridical persons under their jurisdiction.

Article 235 therefore assumes, firstly, that states are obliged by it to develop rules on liability and, secondly, that the liability is to be constructed according to international law. This leaves the article rather open for debate.

2.5 National permits

According to the national regulation applicable to the Nord Stream project, the project requires permits from all of the coastal states, which are Finland, Sweden, Germany, Russia and Denmark.[54] *In Finland*, in addition to the permit, the pipeline project needs Government's approval (according to the article 6 and 7 of the Finnish Act on EEZ)[55], for the activity as such, and also for the delineation of the course for the pipe lay. The legal standing of the Government's approval deserves some discussion.

Under article 3 (1) of the Finnish Act on EEZ, the

[49] T. Treves: The International Tribunal for the Law of the Sea and the Oil and Gas Industry, p. 10.

[50] On *due diligence*, see also C. Voigt: State Responsibility for Climate Change Damages, pp.9–10.

[51] This view is, however, not unanimous, see the discussion in P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 353.

[52] See further Land reclamation by Singapore in and around the straits of Johor (*Malaysia v. Singapore*), Order, 8 October 2003, paragraph 92 and MOX plant case (*Ireland v. United Kingdom*), Order 3 December 2001. 41 ILM 405, paragraph 82.

[53] P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 382.

[54] The project also requires national EAI processes. As of February 2010, the project has received all the necessary permits. All the required national processes and permits are listed at the Nord Steam website on national permitting processes, http://www.nord-stream.com/en/environmental-impact-assessment-permitting/national-permitting-processes.html (22.2.2010).

[55] Finnish Act on EEZ (Laki Suomen talousvyöhykkeestä, 1058/2004).

Finnish Water Act[56] is to be applied on the Finnish EEZ together with other legislation, such as the EIA legislation[57]. The consideration on the *permit* focuses on the permit issuing criteria according to the Water Act. However, when deliberating the *approval*, coastal state is required to take the viewpoint of marine protection (general obligation to protect, control and prevent harm to marine environment) into consideration when deliberating the suitable delineation of the pipeline and to consider other socio-economical viewpoints. Therefore, the Government should, when considering the approval, take a comprehensive approach on the *general permissibility* of the pipeline project (expediency consideration). The Government's approval does not have the status of a permit, but it is appealable. The Government's decision on the approval is binding when considering the permit and permit conditions.[58]

It is rather unclear whether this consideration would make it possible for the coastal state to deny the approval due to marine protection aspects. The criterion for the consideration does not appear in the law. According to the UNCLOS, a coastal state may not prevent other states from placing pipelines and cables on the continental shelf or the EEZ of the coastal state. According to article 79 (2) of the UNCLOS, coastal states are *not allowed to obstruct or hinder the laying or maintenance of cables or pipelines*, unless the restriction is conditioned by its right to take reasonable measures for the exploration of the continental shelf, the exploration of its natural resources and the prevention, reduction and control of pollution from pipelines.

At the outset it does not seem possible to reject an application due to states' freedom to use international waters for the purpose of laying pipelines.[59] However, by allowing an activity that in fact acts against the UNCLOS articles on protection and preservation of the marine environment, the state "allows" polluting activity. Polluting activity refers here to a situation where, for instance, there is a significant oil leakage to the sea due to damage to the pipeline. Therefore, the state might breach its obligations under the UNCLOS, as regulated in articles from 196 to 194 of the UNCLOS and according to article 235 on responsibility and liability. However, this view represents a clear juxtaposition between two obligations: the obligation to protect and preserve on one hand and the obligation to allow the freedom to lay pipelines on the other. Furthermore, it needs also to be noted that article 235 (1) does not include any independent or particular obligations; rather, the article stipulates what is general international law.

2.6 Analysis

The UNCLOS does not provide any specific or concise rules on pollution prevention since it merely sets general framework for its contracting parties. The UNCLOS articles on tackling marine pollution are enacted on a general level and are therefore open for national interpretation as well as balancing of interests.[60] Their application involves a great level of discretion. Even though the UNCLOS rules are relatively clear, they are not precise enough to survive the interpretation towards balancing between, for example, economic needs.

To clarify the nature of the substantive obligation, namely the obligation to protect and preserve, the complex MOX plant case (*Ireland v. United Kingdom*)[61]

[56] Finnish Water Act (Vesilaki, 264/1961, VL).

[57] Finnish act in environmental impact assessment (Laki ympäristövaikutusten arviointimenettelystä 468/1994, YVAL) and Finnish decree on environmental impact assessment (Asetus ympäristövaikutusten arvioin timenettelystä, 713/2006).

[58] There has been one appeal against the consent to the Supreme Administrative Court of Finland (30.12.2009).

[59] The Government's consent comes before the EIA process, and the water permitting process comes last – after the EIA process. The EIA process evaluates the alternatives. According to Hollo, the states do not have the possibility to reject the application for permit either. E. Hollo: *The Baltic Sea and the Legal Order on Placing Energy Pipelines*, pp. 188–192.

[60] See also J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 86–88.

[61] See ITLOS on MOX Plant Case (*Ireland v. United Kingdom*), Orders 13 November 2001 and 3 December 2001; ECJ on MOX Plant case C-459/03; Permanent Court of Arbitration

is here very briefly described. The case was the first case for the ITLOS to be faced with the UNCLOS Part XII obligations, and that is why the case is also of relevance here. The case concerned a dispute over a mixed oxide fuel plant, the MOX plant, in Sellafield, England, on the shores of the Irish Sea.[62]

In 2001, the British government gave a decision on the commissioning and operation of the new MOX plant. The view of Ireland was in short that the MOX plant would pollute the Irish Sea even further by both direct and indirect radioactive discharges into the sea. With regard to the focus of this article, Ireland's claims in the case are interesting. Ireland claimed, among other things, that its rights under the UNCLOS had been violated by the UK that had neglected its obligation to protect the marine environment of the Irish Sea, including the obligation to take all necessary measures to prevent, reduce and control further radioactive pollution of the Irish Sea.[63]

The MOX plant case is fairly well comparable to the Nord Stream case, even though the Nord Stream case, of course, is based only on potentially harmful effects, not to an actual case in any international court. In its reasoning, ITLOS explicitly noted the importance of the UNCLOS Part XII obligations,[64] but the obligation to protect and preserve marine environment was not confirmed as such (i.e. that the other party could have seen to be violating this particular obligation). Even though the MOX plant case was not as such focused on issues of responsibility or liability, it does give an important insight into the *nature of the substantive obligation* in a situation very close to what the Nord Stream case might be. *The obligation needs to be taken into consideration, but it is not, as such, a legal rule that could form the sole base for an international claim.*

The obligation of states not to cause damage to the territory of another state is not only a one-way obligation: according to customary international law, states are also bound to tolerate a certain amount of pollution. Human influence on the environment is inevitable, and harmful effects do follow from legal activities of states. In respect of the maritime environment, these obligations do not mean an absolute prohibition to pollute. They rather represent *due diligence obligations* (standards) with the goal to minimize pollution.[65]

Furthermore, perhaps the most important element of article 235 (2) is the obligation of states to provide for recourse to their legal systems for compensation for pollution caused by persons under their jurisdiction (civil liability).[66] This can be interpreted that states are obliged to develop their national systems on environmental responsibility and liability, so that these national regimes would *primarily cover damage to the marine environment*.[67] Therefore, it cannot be stated that states could incur responsibility on the basis of article 235.

3 Civil liability for marine environmental damage

3.1 No regime

Part XII of the UNCLOS on the protection and

on the dispute between Ireland and United Kingdom ("OSPAR" Arbitration), Final Award on 2 July 2003; Permanent Court of Arbitration on the dispute between Ireland and United Kingdom ("MOX plant case"), Order No. 6 on 6 June 2008.

[62] The MOX plant case (in its proceedings in different international tribunals) does not analyze responsibility or liability as such, even when the case raises some interesting questions of jurisdiction and applicable law for international environmental claims under the UNCLOS. The analysis of the case here concentrates merely on the facts that are relevant form the point of view of the Nord Stream case. See also M. B. Volbeda: The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS in *Texas International Law Journal*, Vol 42, No 1, 2006, pp. 211–212.

[63] 9.11.2001, Request for Provisional Measures, ITLOS proceedings.

[64] See further The MOX plant case (*Ireland v. United Kingdom*), Order, December 3, 2001, paragraphs 82–84 and 1.

[65] See also C. Voigt: State Responsibility for Climate Change Damages, pp.9–10.

[66] Civil liability is discussed further later in the article.

[67] In Finland, for example, the Act on reparation of certain environmental damages, Laki eräiden ympäristölle aiheutuneiden vahinkojen korjaamisesta (383/2009) (translation done by the author), covers such damage on the Finnish EEZ.

preservation of the marine environment addresses several sources of *marine pollution*. However, only the ship-source pollution has an existing operative civil liability regime. Hence, it needs to be pointed out that there is no global convention dealing with environmentally damaging activities on the continental shelf (exploration and exploitation), and that there is no liability regime in force either.[68] IMO has developed the regimes for the liability and compensation for damage to the marine environment, but these regimes cover only a part of the hazardous environmental challenges that the marine environment faces.[69] The civil liability regimes have been developed in relation to specific activities which are considered to be ultra-hazardous. Therefore, regimes such as the CLC (oil pollution damage)[70] and HNS (carriage of hazardous and noxious substances)[71] are not relevant in the Nord Stream case since they only apply to these specified activities.

States have been somewhat careful on what kind of activities they are ready to place under international liability regimes in general, although the EC regulation needs to be of course distinguished from these international environmental law regimes.[72]

3.2 What damage and threshold for liability?

Environmental damage needs to be shown in order for the liable party to compensate for it. The two applicable international treaties that are the most relevant in the Nord Stream case, namely the UNCLOS and the Helsinki Convention, do not give definite answers to what substitutes damage in the marine environment of the Baltic Sea. The definition given to "pollution" in article 4 (1) of the UNCLOS provides some guidance in respect to the standard of damage: "deleterious effects as harm to living resources and marine life, hazards to human health, hindrance to marine activities, including fishing and other legitimate uses of the sea, impairment of quality for use of sea water and reduction of amenities". This definition is not, however, sufficient to define damage when constructing liability.[73] The Helsinki Convention, in its article 2 (1), also gives a definition to pollution, not to damage. The definition is rather similar to the definition in the UNCLOS, and at least as vague.

When it comes to the UNCLOS rules in articles from 192 to 194 and 235 on the protection of the marine environment, the wide discretion allowed in these articles limits their applicability towards responsibility and liability. The lack of clarity in the rules that must be observed might give states the discretion to choose the rules they wish to follow – states can implement these rules according to their own capabilities as reiterated in article 194.[74] Thus, actual *liability* based on breach of UNCLOS articles 192 to 194 and 235 (on the different preventive obligations, relating to the protection and preservation of the marine environment and responsibility and liability) would be impossible to establish. The UNCLOS does not hold any rules for compensation either.

[68] L. A. de La Fayette: *Compensation for Environmental Damage in Maritime Liability regimes*, p. 232.

[69] M. Göransson: Liability for Damage to the Marine Environment in A. Boyle and D. Freestone: International Law and Sustainable Development. Past achievements and future challenges, *Oxford University Press New York* 1999, p. 357; L.A. de La Fayette: *Compensation for Environmental Damage in Maritime Liability regimes*, p. 236.

[70] Convention on Civil Liability for Oil Pollution Damage (1969). 9 ILM 45 (1970).

[71] International Convention on Liability and Compensation for Damage in Connection with the Carriage of Hazardous and Noxious Substances by Sea, May 3, 1996, reprinted in 35 ILM 1406 (1996).

[72] M. L. Larsson: *The Law of Environmental Damage*, p. 172; P. Sands: *Principles of International Environmental Law*, pp. 904–905; R. R. Churchill and V. Lowe: *Law of the Sea*, p. 358.

[73] See also The MOX plant case (*Ireland v. United Kingdom*), Order, 3 December 2001.

[74] P. Sands: *Principles of International Environmental Law*, pp. 396 and 900; L. A. de La Fayette: Compensation for Environmental Damage in Maritime Liability regimes in A. Kirchner (ed.): International Marine Environmental Law. Institutions, implementation and innovations, *Kluwer Law International* 2003, pp. 232–232; E. Louka: *International Environmental Law*, p. 167; P. W. Birnie and A. E. Boyle: *International Law and the Environment*, p. 353; R. S. J. Tol and R. Verheyen: State responsibility and compensation for climate change damages – a legal and economic assessment, *Energy Policy* 32 (2004), p. 1117. For further discussion, see also ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities 2001, with commentaries 2001. Available online at http://untreaty.un.org/ilc/texts/ instruments/english/commentaries/9_7_2001.pdf (8.4.2010).

Polluting human activity might cause environmental damage,[75] but not all environmental damage triggers liability.[76] There are no agreed international standards which *establish a certain threshold* that would always trigger liability and allow claims to be brought. Different criteria are used in different instruments. The Trail Smelter case, for example, referred to an injury of "serious consequence".[77] Outside actual liability claims, ITLOS has referred to "serious harm to the marine environment"[78] as the conduct that is not allowed or as the circumstance justifying the prescribing of provisional measures, in line with article 190 of the UNCLOS.[79]

Therefore, it seems that the correct threshold depends on the facts of each case as well as on regional and local circumstances. A number of civil liability instruments do define damage and establish thresholds for environmental damage or adverse effects, but generally states prefer using more open-ended definitions and analyze the threshold by taking into consideration the case at hand. According to *Sands*, it seems to be undisputed that the threshold requires a relatively high level of environmental damage.[80]

3.3 Relevant civil liability instruments

3.2.1 Environmental liability directive

Directive 2004/35/EC of the European Parliament and of the European Council of April 21, 2004, on environmental liability with regard to the prevention and remedying of environmental damage establishes a framework of environmental liability[81] based on the *polluter pays principle*, in line with article 191 (2) in the Treaty on the Functioning of the European Union (ex article 174 [2] of the EC Treaty)[82] as well as article 1 of the environmental liability directive. The directive concentrates on damages *per se*. The directive was the result of three decades of legislative work for introducing a legal instrument to compensate for environmental or environmental-related damage.[83]

The environmental liability directive provides

[75] The international environmental law instruments contain numerous definitions for the *concept of environmental damage*, but there are no final conclusions on the definition. As *Sands* points out, there is a distinction between (compensable) environmental damage and pollution. Pollution on a "tolerable" level is not compensable. P. Sands: *Principles of International Environmental Law*, p. 877. See also T. Kuokkanen: Defining environmental damage in international and Nordic environmental law in The Legal Status of Individual in Nordic Environmental Law, *Juridica Lapponica Series* 10 1994, p. 56; E. H. P. Brans*: Liability for damage to public Natural Resources*, pp. 9–12; B. Sandvik: Miljöskadeansvar. En skadeståndsrättslig studie med särskild hänsyn till ansvarsmotiv, miljöskadebegrepped och ersättning för skada på miljön, *Åbo Akademi University Press* 2002, p. 123. P. Sands: *Principles of International Environmental Law*, p. 877.

[76] The early environmental cases did not treat environmental damage as a separate issue from other damages to be compensated, and, for example, the arbitral court in the Trail Smelter case did not look into environmental damage as such. Trail smelter case (*United States v. Canada*), p. 1965; P. Sands: *Principles of International Environmental Law*, p. 878. The ICJ case on Gabčíkovo-Nagymaros project was actually the first international court case to treat environmental damage as a separate compensable damage. Gabčikovo-Nagymaros Project (*Hungary v. Slovakia*), Judgment, ICJ Reports 1997, pp. 7–81, paragraph 152.

[77] Trail smelter case (*United States v. Canada*), p. 1965; P. Sands: *Principles of International Environmental Law*, p. 878.

[78] Case concerning Land reclamation by Singapore in and around the straits of Johor (*Malaysia v. Singapore*), Order, 8 October 2003, paragraph 2.

[79] The MOX plant case (*Ireland v. United Kingdom*), Order, December 3, 2001, p. 11, paragraph 63.

[80] The difficulty of agreeing a threshold is illustrated by the Chernobyl accident. The absence of generally accepted standards on safe levels of radioactivity made it very difficult to assess whether these measures were even justified, and therefore resulted confusion. P. Sands: *Principles of International Environmental Law*, pp. 879–880.

[81] The European Parliament has raised concerns on the liability issue related to the Nord Stream case. See further P6_TA(2008)0336, Environmental impact of the planned gas pipeline in the Baltic Sea, European Parliament resolution of 8 July 2008 on the environmental impact of the planned gas pipeline in the Baltic Sea to link up Russia and Germany (Petitions 0614/2007 and 0952/2006) (2007/2118[INI]).

[82] See more on polluter pays principle from N. de Sadeleer: Polluter-pays, Precautionary Principles and Liability in G. Betlem and E.Brans: Environmental Liability in the EU. The 2004 Directive compared with US and Member State Law, *Cameron May* 2006, p. 98.

[83] See also European Commission White Paper on Environmental Liability from 2000 (COM [2000] 66 final). The White Paper was the first outcome of the long years of preparation. The White Paper examines important factors for a functional EU-wide environmental liability regime. E. H. P. Brans: *Liability for damage to public Natural Resources*, p. 177.

compensation for damage to *biodiversity* protected on European and national levels, *to waters* as regulated under the Water Framework Directive (2000/60/EC) and to *contaminated land* posing threat to human health.[84]

At the outset, the directive sounds promising for the Nord Stream case: it has a comprehensive view on the damage, and it is not restricted to special types of environmental damage. Environmental damage is defined by the article as damage to protected species and habitats, damage to water and damage to soil, in line with article 2 of the environmental liability directive. The directive also defines damage as the "a measurable adverse change in a natural resource or measurable impairment of a natural resource service which may occur directly or indirectly" in its article 1 (2).[85]

In line with article 3 (a) of the environmental liability directive, the directive firstly applies to environmental damage caused by any of the occupational activities listed in Annex III and to any imminent threat of such damage occurring by reason of any of those activities. Annex III gives an extensive listing of activities. All activities listed in Annex I of the Council Directive 96/61/EC concerning integrated pollution prevention and control (the IPPC directive), although with a few exceptions, are activities under the environmental liability directive (paragraph 1, Annex III). Annex I to the IPPC directive does not list pipelines as industrial activities under the IPPC directive, and therefore pipelines are not under article 1 and Annex III of the environmental liability directive either. Furthermore, the directive applies to *environmental damage* – the definition of environmental damage *does not include territorial waters or EEZ*, see further article 2 of the environmental liability directive and also article 2 in the Water Framework Directive.

Secondly, the directive applies to damage *to protected species and natural habitats* caused by any occupational activities other than those listed in Annex III and to any imminent threat of such damage occurring by reason of any of those activities, whenever the operator has been at fault or negligence, in line with article 3 (b) of the environmental liability directive. The application refers to damage to protected species and natural habitats that are protected under the EC legislation, namely the Council Directive 79/409/EEC on the conservation of wild birds (the Birds directive) and Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats directive).[86]

The point here is that since the environmental liability directive covers *all occupational activities* other than those listed in Annex III to the environmental liability where there is damage or imminent threat of damage to species or natural habitats protected by EC legislation, the environmental liability directive seems to be applicable to the Nord Stream pipeline case, although with a limited scope. However, the realization of such liability depends on specified criteria: firstly, on how to prove the causal connection between the possible damage and the Nord Stream project, and secondly, how to proof fault or negligence.[87]

Furthermore, according to article 16 of the environmental liability directive, states are allowed to maintain or adopt provisions in relation to the prevention and remedying of environmental damage, including

[84] See also L. A. de La Fayette: *Compensation for Environmental Damage in Maritime Liability regimes*, p. 260.

[85] See also L. Krämer: Directive 2004/35/EC on Environmental Liability in G. Betlem and E.Brans: Environmental Liability in the EU. The 2004 Directive compared with US and Member State Law, *Cameron May* 2006, pp. 29–31. See also A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, pp. 215–217.

[86] See also the website of the EU on environmental liability http://europa.eu/legislation_summaries/enterprise/interaction_with_other_policies/l28120_en.htm (25.2.2010).

[87] The definitions and the scope of the environmental liability directive remain somewhat unclear in relation to damage to Habitats and Birds Directives. This creates legal uncertainty. For example, it is not clear whether liability covers only damages to natural resources (protected in Habitats and Birds Directives) in Natura 2000 areas or if it also expands to the areas outside of the Natura 2000 network. See further discussion in P. Kallio: Luontovahingot EY:n Ympäristövastuu direktiivissä – vastuun ulottuvuus ja merkittävyyskynnys (has an abstract in English, Damages to Protected Habitats and Species Under the 2004 EC Environmental Liability Directive – Scope of the Liability and Significance thresholds) in Ympäristöpolitiikan- ja oikeuden vuosikirja, *Saarijärvi* 2007, pp. 168–176.

the identification of additional activities to be subject to the prevention and remediation requirements and the identification of additional responsible parties.[88]

The environmental liability directive has been implemented *in Finland* with an Act on reparation of certain environmental damages.[89] The Finnish Act on Reparation of Environmental Damage also applies to significant pollution in the water body as regulated in the Finnish Environmental Protection Act, article 84. According to article 3 of the Environmental Protection Act, water body refers to water areas referred to in chapter 1, section 1, subsection 2, and to territorial waters referred to in section 3 of the Water Act. The Water Act regulates that *everything that applies to water body, also applies to the Finnish territorial waters and EEZ*, in line with article 1:3 of the Finnish Water Act. In line with article 84 of the Finnish Environmental Protection Act, significant pollution in the water body applies only to significant pollution due to violation or negligence. The Finnish Environmental Protection Act prohibits any acts which cause or may cause marine pollution, see further article 9.

Finally, since an operation (any operation, also an operation that has been permitted by an environmental permit) against the prohibition to pollute marine environment *would violate* the Finnish Environmental Protection Act, the act also falls under the application of the Finnish Act on reparation of certain environmental damages. The scope of the application is then wider than the scope of the application in the environmental liability directive. The Nord Stream Project is subject to national legislation in each of the countries of whose territorial waters and/or EEZs it crosses. It needs to be noted, however, that the Finnish Act on reparation of certain environmental damages applies only if the damage occurs in the Finnish territorial waters or EEZ.

[88] Minimum harmonization. J. H. Jans and H. H. B. Vedder: European Environmental Law, *Europa Law Publishing* 2008, p. 98.

[89] Laki eräiden ympäristölle aiheutuneiden vahinkojen korjaamisesta (383/2009), (translation done by the author).

3.2.2 Lugano Convention

In 1993, the Council of Europe passed the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (the Lugano Convention).[90] The Lugano Convention of 1993 has not yet entered into force.[91] A strict liability for damage caused by activities dangerous to the environment, including activities conducted by public authorities, is provided by article 1 of the Lugano Convention. It covers the environmental risks of dangerous substances, genetically modified organisms, dangerous micro-organisms and waste, as listed in article 2.[92] The Lugano Convention defines damage to life and personal injury and damage to property, *but also damage to the environment*: damage refers, in line with article 2 (7), to loss or damage by impairment of the environment. The Lugano Convention holds the operator, i.e. the person who exercises the control of a dangerous activity, primarily liable. *Surprisingly*, this liability regime, in its article 4, *explicitly mentions pipelines*: the Lugano Convention does not apply to carriage, but it does apply to "*carriage by pipeline*, as well as to carriage performed entirely in an installation or on a site inaccessible to the public" [italics by the writer]. Hence, this explicit mention limits cables and pipelines *outside* the Lugano Convention.

The Lugano Convention suggests an innovative approach towards environmental damage. It establishes rules of application beyond any particular industrial sector, particular activity or source of environmental damage.[93] The Lugano Convention does not provide specific limitations to liability (see further articles 5 and 6 of the convention). This might also be one of the reasons behind the reluctance of

[90] Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, June 21, 1993, reprinted in 32 ILM 480 (1993).

[91] Only nine states have signed the Convention, but no state has ratified it yet (three ratifications would be required). Council of Europe Treaty office website http://conventions.coe.int (25.2.2010).

[92] See Annex I, Directive 67/548/EEC.

[93] P. Sands: *Principles of International Environmental Law*, pp. 933–934.

states to sign and ratify the convention. In addition, the Lugano Convention covers a rather wide variety of dangerous activities, which makes the Convention also unappealing for ratification. Even though the Lugano Convention requires a low level of ratification and would, as such, create a very effective liability scheme, it is unlikely that the convention will ever enter into force.[94] Regardless of the steps taken forward, even a progressive convention becomes more or less powerless without any signatures and ratifications. Therefore, the relevance of the Lugano Convention on the field of international environmental law on environmental liability – as well as in the Nord Stream case – is secondary.[95]

4 State liability and the Nord Stream case

4.1 Draft Articles on State Responsibility

On the international environmental field, there are no general rules governing responsibility and liability. There are non-binding instruments that generate rules on environmental liability (such as the Lugano Convention), but, in general, states have not been too keen on binding themselves to overarching liability regimes.[96] *General principles on international liability* have gone through significant developments during the last decades, mainly due to the work of the ILC. When it comes to environmental damage, however, the liability rules are still evolving and the rules require further development regarding the scope and exact content of environmental liability as such.

In 2001, the ILC adopted the Draft Articles on the Responsibility of State for Internationally Wrongful Acts (Draft Articles on State Responsibility). The Draft Articles culminated decades of ILC work on state responsibility, and, most importantly, the articles reflect existing customary law.[97] Therefore, they reflect international law on their essential content. Although the ILC Draft Articles are not specifically aimed at environmental situations,[98] they still create a regime of general international law. The Draft Articles create a standard of strict liability for harm that cannot be predicted or prevented.[99]

The Draft Articles create basic rules of international law on state responsibility for their *internationally wrongful acts*, and therefore they are secondary rules which do not define the actual content of the international obligations. International obligations are the primary rules, the substance. Therefore, the Draft Articles do not give the substantial basis for the breach, but give the general conditions under international law for the state to be considered responsible

[94] E. Louka: *International Environmental Law*, pp. 466–468; P. Sands: *Principles of International Environmental Law*, p. 933.

[95] It needs to be noted, however, that the EC directive on environmental liability is also an instrument with a more general approach.

[96] See also P. Sands: *Principles of International Environmental Law*, pp. 870–871. On the other hand, however, states can also accept responsibility. E. Louka: *International Environmental Law*, p. 469.

[97] Report of the International Law Commission on the work of its fifty-third session (23 April – 1 June and 10 August 2001), Document A/56/10, chapter on State Responsibility (ILC Report on Draft Articles on State Responsibility). The ILC work on state responsibility and liability is still continuing; see further http://untreaty.un.org/ilc/sessions/53/53-sess. htm (24.2.2010).

[98] In this respect, note also ILC work on International Liability for Injurious Consequences arising out of Acts not Prohibited by International Law. The relevance of the ILC work on international liability in the Nord Stream case is questionable. They do not offer that much more than what already exists, namely the obligation to prevent transboundary harm and to develop law on environmental liability. Therefore, the regime on prevention of transboundary harm or Draft Principles on International Liability are not of that much relevance in the Nord Stream context even when they do spell out certain concepts (like damage and environment) more clearly than the other regimes. See further Report of the International Law Commission on the work of its fifty-third session (April 23 – June 1 and August 10 2001), Document A/56/10, chapter on International Liability (ILC Report 2001 on International Liability) as well as Prevention of Transboundary Harm from Hazardous Activities and the secondary rules, Draft Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.

[99] ILC has the view that the injured state is in no position to control activities of other states (here the activities of the source state) P. W. Birnie and A. E. Boyle: *International Law and the Environment*, pp. 188–189; See more on state responsibility especially in public international law from A. Cassese: International law, Second edition, *Oxford University Press* 2005, pp. 245 and 262; See also M. B. Volbeda: *The MOX Plant Case: The Question of "Supplemental Jurisdiction" for International Environmental Claims Under UNCLOS*, pp. 211–212.

for violations of environmental obligations and the legal consequences of such act or acts.[100]

So far the discussion in this article has focused on the international obligations of states, on the *primary rules*. In the case of the Nord Stream, the UNCLOS and the Helsinki Convention are the international instruments that regulate on the *substance*, namely on the obligations that are imposed on states by articles from 192 to 194 of the UNCLOS, and article 3 of the Helsinki Convention. Thus, these are the international obligations that set the primary obligations.

The basic rule of the Draft Articles, in line with article 1, is that every internationally wrongful act of a state entails the international responsibility of that state, and that a breach of international law by a state constitutes international responsibility of that state. There are *two essential elements* of an internationally wrongful act of a state. According to article 2, an internationally wrongful act of a state occurs when the conduct consisting of an action or omission is either *attributable* to the state under international law or constitutes a *breach* of an international obligation of the state. An act of a state cannot be characterized as internationally wrongful unless it constitutes a breach of an international obligation even if it violates the state's national laws.[101] In international environmental law the basic principle translates that for a state to be held responsible for pollution, such pollution needs to be wrongful under international law. If the pollution is legal, the state (or states) cannot be held responsible.[102]

The following sections of this article aim at analyzing how state responsibility could be established according to the ILC Draft Articles.

4.2 Systematization

4.2.1 Act of state

The conduct of any state organ is considered an act of that state under international law – whether the organ exercises legislative, executive, judicial or any other functions, whatever its position is and whatever its character as an organ is (see further article 4). Articles from 5 to 11 show that the formulation is general, but also very wide-ranging.[103] The articles do not merely stick to the narrow view on state as an actor; the articles do, in fact, cover a variety of actors and their conduct. Therefore, the articles also make it difficult for a state to try to escape responsibility under the fact that the conduct cannot be attributed to a state.

In environmental cases this wide application could be seen as a positive aspect since pointing out the responsible one is usually challenging. There is no specific requirement for fault either; it is only the act of state that matters.

What would constitute an *act of state* in the Nord Stream case is a question that deserves attention, or, put in other words, it could be asked how the state is indentified. Nord Stream AG is building a pipeline through the Baltic Sea. A certain level of marine pollution is due to happen no matter what. The possibility of an unplanned, accidental event causing significant harmful impact on the marine environment cannot be ruled out, and the risk for environmental damage exists.

The state responsibility reflects the responsibility – actions or omissions – of a state. The relevance of different actors in the Nord Stream case is a somewhat tangled issue: Nord Stream AG is the company pursuing the construction of the pipeline since it has acquired the permission to do so by the states. It is the states who have the freedom to lay pipelines, as stated in the article 79 (1) of the UNCLOS. Since the pipeline

[100] See further discussions on the concepts, responsibility and liability as well as discussions on the form of the instrument. ILC Report on Draft Articles on State Responsibility, pp. 24–25 and 31.See also J. Crawford and J. Peel and S. Olleson: The ILC's articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading in *European Journal of International Law*, EJIL (2001), Vol 12, No. 5, pp. 965–670.

[101] The state cannot escape the characterization of that conduct as wrongful by international law by stating that the conduct is not violating its own internal law, as this is regulated by article 3 of the Draft Articles. ILC Report on Draft Articles on State Responsibility, p. 36.

[102] See also E. Louka: *International Environmental Law*, p. 468; ILC Report on Draft Articles on State Responsibility, pp. 33–34.

[103] ILC Report on Draft Articles on State Responsibility, pp. 40 and 53.

passes territories fully or partly under national jurisdiction, the states in command of the national jurisdictions also play a role being the ones to allow the construction.

The MOX plant case (ITLOS proceedings) was a dispute between two states, Ireland and the UK. Ireland accused the UK of breaching its obligations under the UNCLOS (article 194 among others) in relation to the UK *authorizing and commissioning* the MOX plant, and, by doing so, Ireland saw the UK "failing to take the necessary measures to prevent, reduce and control pollution of the marine environment".[104] In the Southern Bluefin Tuna Cases between New Zealand and Japan, and Australia and Japan, New Zealand and Australia claimed that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, among other things, *authorising* experimental fishing for southern bluefin tuna.[105] In the ICJ case concerning Pulp Mills on the River Uruguay between Argentina and Uruguay, Argentina instituted proceedings against Uruguay for the alleged breach by Uruguay of certain environmental obligations. The breach was said to arise from "the *authorization*, construction and *future commissioning* of two pulp mills on the River Uruguay [italics by the writer]".[106]

The Nord Stream project is subject to national legislation, and the project has received the required environmental permits. In practice, these environmental permits allow marine pollution on a specified level or type, but in order to minimize these impacts, the permits also issue rules. Even though these permits make the pollution *legal* in some sense, the permits cannot be issued in the first place if the rules they include violate relevant international environmental regimes on the Baltic Sea area.

In addition, the Finnish Government, for example, has issued an approval (required by the Finnish internal law) for the project. Hence the countries that have issued permits or approvals to the Nord Stream case have also permitted or approved the conduct of Nord Stream AG when the company is carrying out its project – it is an action the *states have permitted within their jurisdiction or control*. Therefore, this should then be understood, in the light of the Draft Articles, so that these states also become *responsible* for the project when they allow the project to be carried out in an area under their jurisdiction.

On the other hand, however, the basis of the possible liability of the coastal states such as Finland depend on its obligations under the UNCLOS and other international binding obligations, as stated in the Draft Articles 2 and 11. The coastal states also have limited competence to regulate the laying of the pipelines under article 79.

The ILC Report on Draft Articles on State Responsibility states that:

"*The State is a real organized entity, a legal person with full authority to act under international law. But to recognize this is not to deny the elementary fact that the State cannot act of itself. An 'act of the State' must involve some action or omission by a human being or a group: 'States can act only by and through their agents and representatives.' The question is which persons should be considered as acting on behalf of the State, i.e. what constitutes an 'act of the State' for the purposes of State responsibility. In speaking of attribution to the State what is meant is the State as a subject of international law. - - For the purposes of the international law of State responsibility the position is different. - - In this as in other respects the attribution of conduct to the State is necessarily a normative operation. What is crucial is that a given event is sufficiently connected to conduct (whether an act or omission) which is attributable to the State under one or other of the rules set out in chapter II.*"[107]

A state cannot "act of itself". Act of the state must involve some action or omission by a human being or

[104] The MOX plant case (*Ireland v. United Kingdom*), Order, December 3, 2001, paragraph 26.

[105] Southern Bluefin Tuna Cases (*New Zealand v. Japan; Australia v. Japan*), Order 27 August 1999, paragraphs 28–29.

[106] Case Concerning Pulp Mills on the River Uruguay (*Argentina v. Uruguay*). Request for the indication of provisional measures. Order of 13 July 2006, paragraphs 1 and 73.

[107] ILC Report on Draft Articles on State Responsibility, p. 35.

group – here it is Nord Stream AG. Therefore, an action of a private entity authorized, permitted, allowed or otherwise commissioned by the state could be seen as an act of state.[108]

There is one more viewpoint to be added to the previous discussion on the act of state – *the polluter pays principle*. Even though the principle is still under construction, it can be safely stated that *the polluter pays principle* reflects a principle according to which the costs of the pollution should be borne by the one responsible for causing the pollution.[109] Traditional view on *the polluter pays principle* entails that the polluter has the primary responsibility for environmental harm. According to the *principle of state responsibility*, the state is primarily responsible for the violation of international obligations. The regimes on environmental liability actually aim to minimize the resort to the principles of state responsibility by applying *the polluter pays principle* in the private law liability regimes in the national law but not on the international level. The states use this as an alternative for state responsibility in international law.[110]

In the Nord Stream case Nord Stream AG is the operator of the activity causing environmental impacts on the Baltic Sea and to the environment of other states. Nord Stream AG is, however, operating its polluting activity with a permit. The state has not only permitted the activity, but it is also the state that regulates and controls the activity. Who then is the polluter in this case – is it the operator of the polluting activity, or could it be the state regulating, controlling and licensing the activity?

The Trail Smelter case between the USA and Canada was about a Canadian company causing pollution, but the actual case was still about state responsibility, a state v. state case. In the MOX plant case, Ireland invoked proceedings against the UK for commissioning the nuclear plant, and the Pulp Mills on the River Uruguay case was between Argentina and Uruguay for Uruguay authorizing the polluting activities. In these cases, for example, it was an *individual operator* actually causing the environmental damage, but there were still international state v. state claims brought between states. In these cases there was no generally applicable environmental liability regime.

The victim of the pollution cannot claim compensation, or at least not in full, if the liability of the operator cannot be established or if the liability has been limited. Therefore, the status of the victim is rather weak against the operator. For the *polluter pays principle* to apply fully in these situations, the state authorizing the activity should be held liable on a residual basis, *de Sadeleer* argues. The rights of the victim as being justified to receive compensation would be protected. The victim state would receive compensation from the source state and compensate its nationals who have suffered loss due to the damage. The source state on the other hand would then claim the operator for the damages with an interstate claim.[111]

It seems that the "lower threshold" for states to compensate for damage would, at least, secure the rights of the pollution damage victim better. The state being responsible for the activity it allows and controls would also bear the responsibility for the environmental pollution to another state. The national laws on reparation also include other forms of reparation besides compensation; therefore the state could also oblige its national to restore the environmental status before the damage occurred. This is, however, usually not possible due to the nature of the environmental impact. Therefore *the polluter pays principle* seems to enable two different scenarios for application: firstly, one where the operator would be held liable for the

[108] On international personality, see R. M. M. Wallace: *International law*, pp. 60–61.

[109] N. de Sadeleer: *Polluter-pays, Precautionary Principles and Liability*, p. 98. See also N. de Sadeleer: Environmental Principles, *Oxford University Press* 2002, pp. 25–27; J. H. Jans and H. H. B. Vedder: *European Environmental Law*, pp. 35 and 43–45; P. W. Birnie and A. E. Boyle*: International Law and the Environment*, p. 95.

[110] N. de Sadeleer: *Environmental Principles*, p. 24.

[111] "nothing prevents an act of wrongful pollution of being evaluated from the perspective of the requirement for duty of care owed by the liable party - - the granting of an administrative authorization does not automatically absolve its holder from liability." N. de Sadeleer: *Environmental Principles*, pp. 24–25 and 40.

polluting activity, and, secondly, one where the state would be held liable, but residually to the operator (according to internal law, however).

4.2.2 Breach

The second element of the wrongful act is that the action or omission constitutes a breach of an international obligation of a state. According to article 12 of the Draft Articles, there is a breach of an international obligation by a state when an act of that state is not in conformity with what is required of it by that obligation. As already stated, in the Nord Stream case the content of the international obligation comes from the UNCLOS and the Helsinki Convention (articles from 192 to 194 of the UNCLOS and article 3 of the Helsinki Convention).

A breach of an international obligation consists of a disconformity between the conduct required and the conduct actually adopted. In the Nord Stream case the *conduct required* could be translated as the obligation of states to take all measures necessary to ensure that activities are conducted in a way that they do not to cause damage by pollution (as it is regulated by article 194 of the UNCLOS). The conduct actually adopted could be seen as, for example, a polluting incident causing damage by pollution. This can be expressed in different views. In the Gabčíkovo-Nagymaros Project case[112] the ICJ used the expression "[t]he Court infers from all these elements that, in the present case -- Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it had helped, by act or omission to bring it about". The ICJ also explicitly referred to state responsibility by stating that it is well-established that when a state "has committed an internationally wrongful act" its responsibility is "likely to be involved whatever the nature of the obligation it has failed to respect".[113] The ICJ actually referred to the ILC Draft Articles on State Responsibility, as they were provisionally adopted by the ILC already in 1976.

The final analysis of a breach lies always in the hands of interpretation and application that take the case objective and the facts of the case into account.[114] In the Nord Stream case, therefore, analyzing the breach would be based on the facts of the claimed breach, but also on established customary rules. However, it needs to be noted that the obligations set in the UNCLOS are fairly open for interpretation, so constituting the breach would be a challenging task, as already discovered in the article.

4.2.3 Environmental damage included?

The responsible state is under an obligation to make full reparation of the injury caused by the wrongful act, and includes "any damage, whether material or moral", as in article 31. Furthermore, according to article 31, injury includes any damage, whether material or moral, *caused by the internationally wrongful act of a state*. Therefore, it is *only* an injury caused by the internationally wrongful act of a state for which full reparation must be made. The subject matter of reparation is, globally, the injury resulting from the wrongful act, rather than any and all consequences flowing from an internationally wrongful act.[115] Therefore, there needs to be a causal link between the wrongful act attributed to the state and the damage that has incurred.

According to article 34, the forms of reparation are restitution, compensation and satisfaction. Full restitution is not often possible in environmental damages, so compensation would be the most relevant form of reparation, according to article 36.

The key concept here is, of course, damage.[116] What

[112] Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*), Judgement, 25 September 1997.

[113] Gabčíkovo-Nagymaros Project (*Hungary v. Slovakia*), Judgement, 25 September 1997, paragraph 57 and 47.

[114] ILC Report on Draft Articles on State Responsibility, p. 54.

[115] ILC Report on Draft Articles on State Responsibility, p. 92.

[116] More discussion on environmental harm, see for example M. Bowman: The Definition and Valuation of Environmental Harm: An Overview in Environmental Damage in International and Comparative Law, *Oxford University Press* 2002, pp. 1–2.

is the material or moral damage for which the state is responsible? Since the article has already opened the discussion on the definition of the concept of damage, this point deserves some attention.

The Draft Articles seem to take environmental damage into consideration. If two or more states have agreed to engage in particular conduct, for example building and operating a pipeline, the failure by one state towards the obligations set for the conduct concerns the other. The Draft Articles mention harm to the environment explicitly: "In many cases, the damage that may follow from a breach (for instance, harm to a fishery from fishing in the closed season, *harm to the environment by emissions exceeding the prescribed limit*, abstraction from a river of more than the permitted amount) may be distant, contingent or uncertain. Nonetheless, states may enter into immediate and unconditional commitments in their mutual long-term interest in such fields [italics by the writer]". The Draft Articles define "injury" in a broad manner, leaving it, again, to the primary obligations to specify what is required in each case.[117]

Since the instruments of international law, particularly on transboundary pollution, are filled with definitions of damage, the Draft Articles needed to be drafted in an open way in order to stay flexible for the primary obligations. Even though the definition is broad, one should not assume that any definition of injury or damage would do – but that it is up to the primary obligation to define the damage.[118]

Compensation clearly also includes damage to the environment. According to the ILC Report, compensation has been awarded to environmental damage as well. Damage to such environmental values, as biodiversity, is "no less real and compensable than damage to property". It is also mentioned that environmental damage is often difficult to measure.[119] Hence it can be concluded that environmental damage, as defined in the given international environmental law instrument, is included in the Draft Articles formulation.

4.3 Balancing primary obligations for liability

It is now established that environmental damage, and therefore marine pollution damage, could be applicable as "injury" under the ILC Draft Articles. Furthermore, violation of the UNCLOS and the Helsinki Convention obligations could constitute an internationally wrongful act of a state and hence trigger state responsibility. By studying the MOX plant case, this article already observed how the UNCLOS obligations on protecting and preserving the marine environment function in an international dispute. It all boils down to the primary obligations again. What constitutes the obligation against which the violation or breach could be established? The secondary ILC rules are not applicable if the primary rules do not set the substance.

Ebbeson introduces *balancing norms* as a normative approach towards international obligations. Balancing norms are a particular kind of regulatory technique for defining obligations where the balancing as such is required *inside* the norm, not *between* norms. These balancing norms usually create frameworks that need to be complemented by information on interests, facts and other legal considerations before any normative solution can be drawn. As frameworks, they provide for more precise rules. International obligations defined by the balancing norm leave the minimum standard vague.[120]

The UNCLOS article 194 on measures to prevent, reduce and control pollution of the marine environment is an apt example of an article containing a balancing norm: "best practicable means at their disposal and in accordance with their capabilities". What constitutes the balancing norm in this extract?

[117] ILC Report on Draft Articles on State Responsibility, p. 92.

[118] J. Crawford and J. Peel and S. Olleson: *The ILC's articles on Responsibility of States for Internationally Wrongful Acts: Completion of the Second Reading*, pp. 971–972.

[119] ILC Report on Draft Articles on State Responsibility, pp. 101–102.

[120] J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 86–88. See also A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, p. 213.

Firstly, what is "best practicable"? In the Nord Stream case, is it the most cost-efficient choice? The most environmentally sound route? Or is it the best cost-efficient choice considering the environmental aspects? Secondly, what does "means at their disposal" actually mean? Thirdly, what are the "means in accordance with their capabilities"? What capabilities are of relevance here? Economic or legislative capabilities? If we look at the Helsinki Convention, the balancing norm can also be recognized there: "take all appropriate legislative, administrative or other relevant measures".

There are plenty of question marks surrounding these issues. The point here, however, is that the obligation for environmental protection can be balanced against other interests – the international instrument is directing legislative norms to states, but with the content lacking definition, defining the content is left to the states themselves. States are allowed to balance environmental protection against other factors.[121]

The Draft Articles on State Responsibility do not define the content of the obligation, so it depends solely on the primary obligation. If the obligation is not sufficiently well-defined and clear, is it then possible to define the violation or breach of that obligation in a way that would establish responsibility due to a wrongful act? Breach of an international obligation of the state is a compulsory prerequisite for establishing a wrongful act of a state.

4.4 Analysis

After systematizing and analyzing the Draft Articles, the next thing to do is to assess their relevance in the Nord Stream case. How relevant are the Draft Articles on State Responsibility in the Nord Stream case? Could state responsibility be established? Furthermore, it is important to ask if the Draft Articles can solve the problem presented earlier in this article: the fact that so far the article has not found any fully applicable liability regime, since the existing liability regimes do not offer a solution for possible liability claims.

The Draft Articles reflect and codify the existing customary international law in the field of state responsibility,[122] and the Draft Articles are the result of decades of work on the matter. When it comes to the actual implementation of these Draft Articles, the first thing to point out is that they are not binding. The Draft Articles are a *soft law* instrument.[123] Albeit soft law instruments do have a fairly good standing in the field of environmental law in particular,[124] they work rather as an element or tool for interpretation than as a binding, decisive tool in the consideration. Even though soft law instruments are not binding *per se*, they are often seen as "informally" establishing acceptable norms of behavior and thereby codifying or even reflecting rules of customary law. This is evidently the case with the ILC Draft Articles on state responsibility as well.

This is not to diminish the value of soft law instruments in the field of environmental law in general since some of the greatest instruments of international environmental law are soft law instruments (Rio Declaration, for example). However, it seems that these soft law instruments or soft law rules require more precise regulation in a more compact instrument in a similar manner to the way the states have dealt with the Rio Declaration principles. In a way, the

[121] J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 89 and 103.

[122] See for instance the discussion on the Trail Smelter case (*United States v. Canada*) from the previous sections. See further discussion from M. Drumbl: Trail Smelter and the International Law Commission's Work on State Responsibility for Internationally Wrongful Acts and State Liability in Transboundary Harms in International law: Lessons from the Trail Smelter Arbitration, Cambridge University Press 2006, pp. 1–19. Pdf available at SSRN http://ssrn.com/abstract_id=411764 (9.4.2010).

[123] This discussion needs to be separated from the binding effect of the primary rules or primary obligations. This discussion here refers only to the Draft Articles as such.

[124] See for example J. Klabbers: "there is widespread agreement that the environment might be better off if actors were being persuaded into compliance instead of being forced to comply with norms: gentle pressure, or carrots rather than sticks". J. Klabbers: Reflections on soft international law in a privatized world, *Lakimies* 7–8/2006, p. 1193. See also T. Määttä: Soft law som rättskälla på nya rättsområden i den nationella rätten, *Juridiska Föreningens Tidskrift* 6/2006, pp. 554–555 and 557.

framework, if given in the Draft Articles on State Responsibility, would need to be further elaborated as workable rules. The same motive is present in the UNCLOS and the Helsinki Convention: the states are expected to regulate further on responsibility and liability, (see again article 235 of the UNCLOS and article 25 of the Helsinki Convention).

The key to the Draft Articles is the establishment of a wrongful act. This can be done by demonstrating that the act is attributable to the state and that a breach against an international obligation has occurred. The establishment of the breach is a more complex issue. In order for there to be a breach, there needs to be an international obligation. The international obligation is the primary rule that defines the content of the obligation. In the Nord Stream case, the obligation is to protect and preserve the marine environment; to eliminate, prevent, reduce and control pollution in accordance with a state's capabilities. States are responsible for the fulfillment of their international obligations and they should ensure recourse for damage caused by pollution. The "damage" is not defined, and "pollution" is defined in a very broad manner.

According to *Jóhannsdóttir*, the absence of treaty provisions that define the state's (preventative) obligation in a given situation, a breach of the *general preventative principle*, may trigger state liability. Furthermore, it is not the legal status of the principle (obligation) that is lacking content, *but the standard of care that is required of states under the principle* "if they are to avoid being held responsible for damage".[125]

If a polluting incident occurred in the Baltic Sea due to the construction or operation of the pipeline (for instance, a damage to the ecosystems due to munitions clearing or pollution by pipeline leakage), how would these obligations respond? Firstly, the exact "pollution" or "damage" would be difficult to define. Secondly, the exact content of the obligation – have the states, according to their capabilities, allowed the construction and operation of the pipeline so that they have taken their duties to prevent marine pollution into consideration in a sufficient manner – would be a challenge. States balance these environmental obligations against other interests.[126] Thirdly, for another state to claim for reparation (including compensation) under the Draft Articles the injury (material or moral damage) needs to be sufficiently clear.

If, due to balancing of interests, the state is found to comply with all the requirements and obligations set in the UNCLOS or the Helsinki Convention (no breach), the state will not be responsible for any harm which, nevertheless, results from the activity in question – no matter how serious that harm may be. *Therefore, reflecting the reasons given above, the Draft Articles cannot be seen as the legal regime that solves the problem set for this article*. The Draft Articles undisputedly create a framework for state responsibility, and a systematized body of secondary rules. In a more concrete scenario such as the Nord Stream case, however, they do not create functional and applicable rules for establishing the responsibility.[127]

5 Conclusion

States are free to use their territory, *their environment*, for the purposes of exploring and exploiting natural resources or otherwise use their environment for their economic benefit and other purposes. The customary international law requires that states take into consideration the environment of other states, so that the actions states carry out within their jurisdiction do not cause damage to the environment of other states. International law does not hold any generally agreed

[125] A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, pp. 212–213.

[126] On the balancing norm, see J. Ebbeson: *Compatability of International and National Environmental Law*, pp. 106–107, and also on the other hand, A. Jóhannsdóttir: *The significance of the default: A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law*, p. 213.

[127] Birnie and Boyle also argue that while the Draft Articles offer potentially effective means of resolving environmental disputes, reliance on the Draft Articles do have serious deficiencies (liability standards and the type of environmental damage) P. W. Birnie and A. E. Boyle: *International Law and the Environment*, pp. 199–200.

principles on international environmental liability as such even though there are, of course, options for solving environmental disputes between states as well as special regimes on civil liability over environmental damage. The first finding of this article is that there is neither a generally applicable nor a special regime on environmental liability directly applicable in the Nord Stream case. Since the Baltic Sea is tightly governed by national jurisdictions, an environmental damage could possibly lead to some environmental disagreements, disputes or liability claims. The area as such is prone to environmental damage. Therefore, in order to point out and assess the potentially relevant regime, one must search into the possibly relevant regimes and their systemization. This is what the article aimed to do.

The UNCLOS obligation to protect the marine environment needs to be taken into consideration by the state when permitting operations (pipeline) in an area under its jurisdiction. On the other hand, however, the other states have the right to lay such a pipeline. If a state allows the construction and operation of the pipeline, the state could also be seen as allowing the potential environmental impacts of the pipeline (and these harmful impacts are to be tolerated by other states). However, a state cannot allow an operation or activity against the UNCLOS obligations, and other *states are not obliged to tolerate environmental damage*. The threshold and exact content of the *primary obligation should be sufficiently defined.* The UNCLOS articles on tackling marine pollution are general and created for balancing of interests. When the obligations are balanced against other relevant criteria, it is not possible to define these criteria in order to establish liability. Therefore, environmental liability in the Nord Stream case cannot be established solely based on the UNCLOS articles on obligations, and furthermore responsibility and liability.

In section three the article discussed the civil liability instruments and the concept of environmental damage. The article found out, firstly, that the concept of environmental damage has a key function in establishing environmental liability since it defines extent of the threshold to trigger liability. However, environmental damage is poorly defined in the international environmental law. The determination of the applicable threshold seems to be tied to the facts of each case, and there are no general rules on establishing the threshold or environmental damage.

The European instruments on civil liability, the environmental liability directive as well as the Lugano Convention, were promising at the first sight. The article discovered that the environmental liability directive seems to be applicable to the Nord Stream pipeline case with a limited scope of damage to protected species and natural habitats. This application is, however, limited only to EU member states, and there is also plenty of uncertainty regarding the areal application of the directive. The Lugano Convention is not in force, and furthermore, does not apply to pipelines. However, the Lugano Convention could serve as an example of what the civil liability regime on environmental damage should stand for.

Section four of the article looked at responsibility and liability from a state's point of view, and analyzed the ILC work on state responsibility and liability. What is the relevance of the ILC work, and how is this liability established, what are the criteria to be assessed in Nord Stream case and the Baltic Sea connection? The key to state liability is the establishment of the wrongful act of state. For this purpose, the primary and secondary obligations need to be distinguished. The ILC Draft Articles on State Responsibility create secondary rules; the primary obligation in the Nord Stream case refers to the obligations analyzed in this article. The problems of defining the content of the primary obligation (UNCLOS) was analyzed earlier – the result was that the primary obligation cannot be sufficiently defined for the purposes of establishing wrongful acts. Furthermore, the ILC Draft Articles are a soft law instrument, and therefore not binding upon states. Consequently, the article found out that even though the ILC work on state liability does create a tempting framework of state liability, it is not applicable in practice due to the lack of sufficiently defined primary obligations, and secondly, due to non-binding principles.

The international environmental law on environ-

mental liability is a complex system, and as this article concluded, *it is not possible to directly point out who is to be held liable for the potential damage*. Is the liable party Nord Stream AG or the state or states, is a question that remains unanswered. *Therefore, as this article has hopefully shown, different approaches do exist.* Liability can be established by different criteria, and at last, it always seems to depend on the case facts at hand. The lack of well-defined primary obligations and generally applicable rules on environmental liability seem to be a deficiency that might reduce the efficiency of generally agreed principles of preventing, protecting and controlling marine environmental damage.

Environmental Justice in Courts – a Case Study from Norway

Ole Kristian Fauchald[1]

[1] Professor, Department of Public and International Law, Faculty of Law, University of Oslo.

1. Introduction to environmental law and decision-making

The term "environmental justice" combines perspectives of human rights and environmental protection. It concerns, *inter alia*, the ability of private parties to enjoy acceptable and equitable environmental conditions.[2] This article aims at examining the extent to which Norwegian courts can help achieve environmental justice. This is partly an empirical question which will be addressed on the basis of an examination of cases before Norwegian courts between 1996 and 2005.[3]

Obviously, the ability of private parties to achieve environmental justice through the judiciary depends not only on the procedural and jurisdictional rules of courts. The extent to which courts can fulfil such a function also depends on the existence of legislation that can be invoked by private parties. The extent to which courts have been used to achieve environmental justice may thus also indicate the extent to which Norwegian environmental legislation is conducive to the achievement of environmental justice. A second purpose of the present study is to examine whether recent legislative reforms in Norway, namely the new Planning and Building Act (2008 no. 71) and the new Nature Diversity Act (2009 no. 100), are likely to strengthen the ability of courts to secure environmental justice.[4] This part of the study will be based on an assessment of the extent to which the revised legislation provides clear legal rights and obligations which may be invoked by private parties where environmental interests are harmed or threatened.

The Norwegian legislation of relevance to the first part of this study covers a broad range of laws and government regulations, including public law and private law. The core environmental legislation in Norway consists of the Pollution Control Act (1981 no. 6), the Nature Conservation Act (1970 no. 63, replaced by the Nature Diversity Act) and the Environmental Information Act (2003 no. 31). In addition, there are a number of laws that have environmental protection as a main objective along with other objectives, including in particular the Planning and Building Act (1985 no. 77, replaced by the new Planning and Building Act), the Water Resources Act (2000 no. 82), the Outdoor Recreation Act (28 June 1957 no. 16), the Wildlife Act (1981 no. 38), the Neighbouring Properties Act (16 June 1961 no. 15), the Product Control Act (1976 no. 79), and the Act relating to Land (1995 no. 23).

These two groups of environmental legislation are of relevance to the empirical study in three situations. The first is cases where public authorities fail to act to protect the environment in accordance with their powers under the legislation. The decision-making power under these acts are placed with different authorities, including municipalities (under the Planning and Building Act), government appointed or elected authorities at the regional level (e.g. under the Wildlife Act and the Nature Conservation Act), and central government authorities, i.e. directorates, ministries or the Government (e.g. under the Nature Conservation Act). The second situation is cases where claims can be made that private parties have failed to comply with requirements set out in the legislation or in decisions made according to the legislation. The third situation is regulated through the Neighbouring Properties Act which provides a basis for private parties to initiate cases against other private parties or public entities claiming that their acts are in non-compliance with the protective standards of the Act.

A third category of legislation is laws concerning exploitation of natural resources, including the Forestry Act (2005 no. 31), the Aquaculture Act (2005 no. 79), the Act relating to Regulation of Watercourses

[2] On different approaches to "environmental justice" see David Schlosberg, Defining Environmental Justice. Theories, Movements, and Nature, Oxford University Press (2007) at 3-7. This article does not aim at contributing to the discussion of the "environmental justice" concept.

[3] This part of the study has been prepared as part of a Nordic comparative study, see H.T. Anker, Fauchald, O.K, Nilsson, A. and Suvantola, L.: The Role of Courts in Environmental Law – a Nordic Comparative Study, in *Nordisk Miljörättslig Tidskrift*, 2009 at 9-34. The structure of this part of the study and the categories used to classify cases have thus been harmonised with the other studies for comparative purposes.

[4] Acts in Norwegian or English versions can be accessed at <www.lovdata.no>.

(14 December 1917 no. 17), the Marine Resources Act (2008 no. 37), and the Act relating to Petroleum Activities (1996 no. 72). A fourth category of legislation is related to the construction, management and use of infrastructure, such as the Act relating to Roads (21 June 1963 no. 23), the Harbour Act (1984 no. 51), the Railways Act (1993 no. 100) and the Aviation Act (1993 no. 101). Decision-making power under these two categories of legislation is in general vested with central government authorities, but has in some cases been vested with regional or local authorities (e.g. the Act relating to Roads). Court cases of relevance under these two groups of legislation concern private parties' claims that decisions or activities are unlawful or generate rights of compensation.

This study starts (section 2) with an overview of the court system in Norway, including remarks on the relationship between courts, on the one hand, and administrative review procedures and alternative approaches to present claims or solve disputes, on the other. Thereafter follows a discussion of rules related to access to courts in Norway, including issues concerning *de facto* access to courts. Section 3 continues with a discussion of the number of environmental cases before Norwegian courts, including some comments on possible problems related to the statistics. This overview is followed by closer analyses of which legal themes (claims) were subject to court proceedings, which environmental issues were addressed in the cases, which activities were subject to the court decisions, who were the parties to the proceedings, and what was the outcome of the cases. Finally, the study concludes by an assessment of the potential future role of courts in light of recent legislative reforms (section 5).

2. General introduction to the court system

2.1 Courts and administrative appeal

Norway has a simple court system with few specialized courts.[5] There are three levels of courts; the district courts ("tingretten"), the courts of appeal ("lagmannsretten") and the Supreme Court ("Høyesterett"). In addition, there are a limited number of specialized courts, some of which might be of interest in environmental cases, in particular the land consolidation courts ("jordskifteretten"), that address technical issues concerning rights to immovable property.

The right of appeal to the Supreme Court has gradually been restricted. The Dispute Act (2005 no. 90)[6] states that a case cannot be appealed to the Supreme Court unless the Court accepts to address the case. Such leave to appeal can only be given where the judgement will be of importance beyond the case in question, or where there are other important reasons for asking the Court's opinion, see § 30-4 of the Dispute Act.

The Norwegian administrative review system in environmental matters is in general not independent from the executive, *i.e.* the government or local authorities. Most complaints are decided by superior administrative bodies, which in general are subject to the same instructions from politicians or bureaucrats as the original decision-makers.[7] Hence, while Sweden and Finland have administrative courts, and Denmark to a significant extent makes use of quasi-judicial complaints mechanisms,[8] Norway's administrative complaints procedure in the field of environmental law can in general be characterised as non-judicial.

The general conditions for bringing forward an administrative complaint are set out in § 28 of the

[5] For a brief overview of specialized courts in Norway, see Inge Lorange Backer, The Norwegian Reform of Civil Procedure, in *Scandinavian Studies in Law* vol. 51, (2007) 41-76, at 48-50.

[6] Please remark that the Dispute Act was adopted after the end of the empirical part of the study, and that some of the rules of relevance to the cases examined were thus subsequently amended. This will be commented where relevant below.

[7] Exceptions are cases that are decided by local authorities, such as local land-use plans, which can be reviewed by regional or central administrative bodies, and cases that are decided by independent review bodies (frequently referred to as "nemnder"), such as the Environmental Information Board ("Miljøinformasjonsnemnda").

[8] See H.T. Anker et al., *supra* note 2.

Public Administration Act, according to which the complainant must demonstrate a legal interest in a review of the decision.[9] On the one hand, the low cost and the flexibility of the Norwegian administrative complaints procedure make it an attractive alternative to court proceedings. On the other hand, the lack of independence may reduce the likelihood that it will provide an effective review of the decision. In addition, there are alternatives to court proceedings and administrative complaints as a means to review acts and omissions of public authorities.[10] The most relevant from an environmental perspective is the complaints procedure before the Ombudsman for Public Administration.[11]

2.2 Court procedures

There are separate court procedures for civil and criminal cases, set out in the Dispute Act and the Criminal Procedure Act (1981 no. 25) respectively. According to § 1-1 of the Dispute Act, its main purposes are to:

> … provide a basis for dealing with legal disputes in a fair, sound, swift and confidence inspiring manner through public proceedings before independent and impartial courts. The Act shall attend to individual dispute resolution needs as well as the need of society to have its laws respected and clarified.[12]

Reforms adopted under the Act include separate procedures for small claims, *i.e.* claims involving economic values estimated at less than NOK 125,000 (EURO 15,600), and new rules concerning class action, which may be of particular interest in environmental cases.[13]

In general, environmental cases have not been singled out for separate court procedures in Norway.[14] However, two groups of cases, which are of particular interest in an environmental context, enjoy special rules of procedure. These include cases concerning expropriation[15] and cases concerning property rights over agricultural land.[16]

2.3 Access to court

The basic conditions for bringing a case to court in Norway are, according to § 1-3 of the Dispute Act, that there must be a "legal claim" and that the claimant must demonstrate a "genuine need for having the claim determined". The changes that were made to these requirements in the new Act of 2005 were aimed at facilitating access to courts.[17] Of particular relevance to the issues to be addressed here is the improved possibility under the new Act to initiate cases concerning abstract legal claims, for example related to the lawfulness of government regulations.[18] There was no focus on the role of courts in environmental cases during the preparation of the Dispute Act, despite obligations concerning access to justice under Article 9 of the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 1998 (the Aarhus Convention) and the general principles set out in § 110 b of the Norwegian Constitution.[19]

[9] Specific legislation may set out other requirements, including requirements that give rights to bring forward complaints to persons that would not enjoy such rights under § 28 of the Public Administration Act, see e.g. the Pollution Control Act.

[10] For an overview, see ot.prp. no. 51 (2004-2005) chapter 7.

[11] See the Act concerning the Storting's Ombudsman for Public Administration (22 June 1962 no. 8).

[12] See also Backer (2007), *supra* note 5, at 42.

[13] See Chapters 10 and 35 of the Dispute Act, respectively.

[14] For an overview of court procedures, see Backer (2007), *supra* note 5, at 57-8.

[15] See the Act relating to Procedure in Cases concerning Compensation and Expropriation (1 June 1917 no. 1).

[16] See the Land Consolidation Act (1979 no. 77).

[17] The previous version of the provision set out two conditions: there had to be a legal relationship ("rettsforhold") or rights ("rettighet"), and the claimant had to show legal interest ("rettslig interesse"), see § 54 of the former Dispute Act (13 August 1915).

[18] See ot.prp. no. 51 (2004-2005) at 139-143 and 363-366, and innst. O. no. 110 (2004-2005) at 31.

[19] The relationship to the Aarhus Convention was only mentioned in passing in the preparatory works, see ot.prp. no. 51 (2004-2005) at 143 and NOU 2001:32, section 5.4.10. See also Ole Kristian Fauchald, Forfatning og miljøvern – en analyse av Grunnlovens § 110 b, in *Tidsskrift for Rettsvitenskap*, vol. 120 (2007) no. 1-2, 1-84, at 69-75.

Access to court for non-governmental organisations (NGOs) is regulated in § 1-4 of the Dispute Act, which sets out two cumulative conditions, namely that the claim must be covered by the purpose and ambit of the NGO. Hence, NGOs have access to court as long as the claims fall within the objective as set out in the basic documents of the NGOs, and as long as the NGOs have not been established essentially with a view to generate a right of access to court in the case in question. Neither of these requirements has been interpreted strictly to the disadvantage of NGOs.[20] It can also be noted that public authorities may require exhaustion of administrative complaints procedures before a case is brought to court.[21]

While private parties thus have broad *de jure* access to court in Norway, it may be asked to what extent they enjoy *de facto* access to court.[22] The basic costs incurred by a claimant bringing a case before a district court in Norway is NOK 4,300 (EURO 540) increasing with NOK 2,580 (EURO 320) per day of court proceedings for each day beyond the first day.[23] After six days, the fee increases to NOK 3,440 (EURO 430) per day for each additional day. Appeals to the courts of appeal costs NOK 20,640 (EURO 2,580), and the costs per day of proceedings are the same as for the court of first instance. The same applies to cases appealed to the Supreme Court. Accordingly, the minimum fee for a civil case that is appealed all the way to the Supreme Court is NOK 45,580 (EURO 5,700), provided that the case only needs one day in court at each level. In addition, the claimant may have to cover costs of hiring a lawyer, costs of paying expert witnesses, the opponent's and possibly also intervening parties' expenses, and loss suffered by the opponent as a consequence of the case. Although a main purpose when revising the Dispute Act was to reduce the costs of litigation, the measures taken are mainly aimed at simple disputes that do not involve third parties or public interests.[24] One objective was to lower the threshold for making use of courts, in particular with regard to small or insignificant claims, through class action.[25] In addition, *de facto* access to courts was improved mainly through increased access to alternative dispute resolution, increased use of formalised mediation, the establishment of a new procedure for insignificant claims, and reform of the rules on costs.[26] Only one minor procedural reform was adopted in order to improve the management of complex disputes.[27]

Problems related to *de facto* access to courts were addressed when Norway ratified the Aarhus Convention. Norwegian authorities chose to focus on the requirement that claimants grant security for potential financial liability for losses that defendants may suffer as a consequence of the case, and rules concerning allocation of costs of the proceedings. The review resulted in a revision of the relevant rules aimed at removing obstacles to effective and reasonable access to court. This reform was limited to claims concerning injunctive relief.[28]

The issue of injunctive relief has come up in a number of environmental cases.[29] Due to the requirement that claimants have to demonstrate that the underlying claims have reasonable chances of success, these cases have had a tendency of becoming resource

[20] These conditions represent codifications of conditions developed in case law. See, in particular, Rt. 1992 at 1618 concerning the former condition, and Rt. 2003 at 833 concerning the latter.

[21] See § 27 b of the Public Administration Act (10 February 1967).

[22] *De facto* access to court is addressed in Article 9(4) of the Aarhus Convention: "shall provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive."

[23] See the Act concerning Court Fees (1982 no. 86). The EURO equivalent is based on the exchange rates on March 17, 2010.

[24] See Backer (2007), *supra* note 5, at 66-71.

[25] See ot.prp. no. 51 (2004-2005) chapter 25.

[26] See in particular § 20-2 no. 3 of the Dispute Act.

[27] See § 9-15(8) of the Dispute Act and ot.prp. no. 51 (2004-2005) at 48 and 50.

[28] See §§ 32-11(1) and 34-2(3) of the Dispute Act and ot.prp. no. 116 (2001-2002) chapter 18.

[29] For a general introduction to the Norwegian rules on injunctive relief from an environmental perspective, see Inge Lorange Backer, Domstolsbeskyttelse mot naturinngrep – midlertidige forføyninger etter norsk rett, in Andersson and Lindell, *Festskrift til Per Henrik Lindblom*, Iustus förlag, Uppsala, 2004 at 27-46.

and time demanding. In a much discussed case concerning the lawfulness of permits to hunt wolves, all five wolves were shot before the case was heard by the court.[30] Such concerns were not highlighted during the revision of the Dispute Act; to the contrary, the reform of the relevant rules seems to increase the likelihood that environmental damage may occur before courts are able to make decisions concerning injunctive relief.[31]

3. Environmental cases before the courts

3.1 Introduction

This study is limited to cases that were initiated with a view to, explicitly or implicitly, protect or promote environmental interests. It has been fairly straightforward to distinguish such cases from other cases concerning environmental issues. However, in some cases it was difficult to distinguish cases concerning rights or benefits of individuals from cases concerning protection of the environment, in particular where respect for the rights or benefits of individuals would result in environmental protection. Cases concerning individual rights or benefits, such as compensation for noise or pollution related to public roads, have been classified as environmental cases for the purpose of this study provided that they contain significant environmental elements.

The term "environmental" does not have a clear definition. For the purpose of this study, cases concerning animal welfare and public supply of water, heat and other necessities have been left out, while cases concerning protection of cultural heritage have been included.

3.2 What cases are brought to the courts?

3.2.1 Number of cases

This study is based on the cases that are available through "Lovdata", which publishes a selection of Norwegian court decisions.[32] While Lovdata contains almost all Supreme Court decisions and a substantial number of appeal court decisions, it contains very few decisions from district courts.[33] Hence, our focus should be on the percentage of environmental cases rather than on the actual number of such cases.[34]

During the 10-year period from 1996 to 2005, the percentage of environmental cases found in the cases registered in Lovdata was 0,4 % for civil cases and 0,7 % for penal cases.[35] Hence, while approximately one in every 250 civil cases was brought to court to protect environmental interests, the corresponding number for penal cases was one in every 140 cases. Cases promoting environmental interests were thus far more likely to appear as penal cases than as civil cases.

The numbers also indicate that environmental cases may be less likely than other cases to be appealed from district courts to appeal courts. However, such cases were more likely than other cases to be appealed to the Supreme Court. This may indicate that the parties to

[30] Three environmental NGOs brought the case to court in the winter of 2005, after three of the five wolves were killed. For an overview of press coverage of the case, see <www.fvr.no/index.php?option=com_content&task=view&id=54&Itemid=30>.

[31] See ot.prp. no. 51 (2004-2005) at 246-7.

[32] See <www.lovdata.no>. This is a commercial database which is used as a basis for the printed publication of court decisions in Retstidende (Rt) for Supreme Court decisions, and Rettens Gang (RG) for a selection of district courts and appeal courts decisions. Some court decisions are available on the web-pages of the respective courts, see <www.domstol .no>.

[33] For the 10-year period 1996-2005, the numbers were: Supreme Court – 2697 civil cases and 2643 penal cases, appeal courts – 17015 civil cases and 9629 penal cases, and district courts – 1456 civil cases and 1475 penal cases.

[34] Statistics concerning cases before Norwegian courts are available in the annual reports from the National Courts Administration, see <www.domstol.no>. The statistics contain hardly any information concerning the nature of the cases before the courts and cannot be used as a basis for research into the role of courts in relation to environmental issues.

[35] These percentages are based on an estimated 84 civil cases and 97 penal cases. These numbers are estimates, since cases that were subsequently appealed were counted as only one case. The numbers registered were 51 civil cases and 57 penal cases. The estimate is needed since the database is likely to contain the same case several times, and since we do not know the extent to which the database contain the same case several times. The estimate is based on the average between a minimum where only one case is counted and a maximum where each Supreme Court case is counted as three, and each court of appeal case is counted as two (i.e., 116 for civil cases and 137 for penal cases).

these cases found the potential costs of appealing environmental cases higher than the potential benefits, and it may indicate that where a case had been appealed from the district court to an appeal court, a higher number of the environmental cases were regarded as sufficiently important to be brought before the Supreme Court. However, the overall number of cases is so low that there are significant uncertainties related to these observations.

The environmental cases were distributed as follows (see next page, table 1) during the years studied (the year of the final decision in the case):

These numbers indicate that there has not been any significant change in the use of courts for environmental purposes during the period examined. In order to further clarify whether there have been significant changes in the use of courts for environmental purposes in Norway, we may refer to a study of environmental cases brought before Norwegian courts during a 26 year period from 1 July 1979 to 30 June 2005.[36] A provision on environmental protection was introduced in § 110 b of the Norwegian Constitution in 1992, and the period examined covers an equal period of time before and after the constitutional amendment. Hence, the study could indicate whether the adoption of § 110 b led to significant changes in the attitude towards environmental issues in the Norwegian legal system. Even if § 110 b does not include any specific clause relating to judicial review, its emphasis on the rights of individuals in relation to the environment indicates that courts could be expected to play an increasingly important role.[37]

A total of 171 environmental cases were identified during the 26 year period.[38] There were 72 cases decided before 1 June 1992 and 99 cases decided subsequently. If we break down the numbers into five years intervals, we get the following distribution, (see next page, table 2)

These numbers thus indicate that there was a significant increase in the use of courts for environmental purposes during the period when § 110 b was adopted (1990-94), which also coincided with the Rio Conference on Environment and Development. However, as the numbers of environmental cases declined in the following two periods, the study indicates that there has not been any long-term significant change in the use of courts for environmental purposes during the period.

3.2.2 Legal themes

Here, we shall focus on the claims brought forward in civil cases. It has been difficult to get access to information concerning the claims in penal cases, and the analysis of penal cases has thus focused on the outcome of the cases rather than on the claims brought forward by prosecutors, see section 3.4 below.

The legal issues raised in the cases concerned the validity of administrative decisions, the validity of and amount of compensation under expropriation decisions, compensation for environmental harm, both based on contracts and non-contractual, and cases initiated to stop environmentally harmful acts. The cases identified were distributed as on next page. A clear majority of the claims brought forward in civil cases concerned compensation for loss suffered as a consequence of environmentally harmful activity. Most of these cases, 49 % of the 51 cases,[39] raised issues concerning compensation based on legislation. Moreover, 14 % of the cases concerned compensation on the basis of contractual obligations and 22 % of the cases concerned issues related to compensation in the context of expropriation. Taken together this means that four out of five civil environmental cases brought before Norwegian courts concerned, at least in part,

[36] See Fauchald (2007), *supra* note 19, at 71-4.

[37] Inge Lorange Backer, who was one of the main proponents of the constitutional amendment, contributed with information concerning the provision aimed in particular at courts, see Inge Lorange Backer, Domstolene og miljøet, i *Lov og rett*, 1993 at 451-68. See also Inge Lorange Backer, Grunnloven og miljøet, in *Jussens venner*, 1991 at 219-34.

[38] These numbers include all cases registered in "lovdata" during the period. Some cases that were subsequently appealed are thus counted two or more times.

[39] *Ibid*.

Table 1 – Number of cases

Civil cases										
1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	**Total**
5	7	5	7	3	1	9	6	4	4	**51**
Criminal cases										
4	5	3	5	8	5	4	5	8	10	**57**

Table 2 – Environmental cases 1980-2004 in five-year intervals

1980-84	1985-89	1990-94	1995-99	2000-04
26	20	48	38	33

Table 3 – Cases by legal theme[40]

Legal theme	**Civil cases**										
	1996	97	98	99	2000	01	02	03	04	2005	**Total**
Review of adm. decisions	0	0	0	1	0	1	1	1	0	1	**5**
Review of expropriation decision	2	3	1	1	0	0	1	1	1	1	**11**
Compensation outside contract	2	4	3	5	3	0	4	1	2	1	**25**
Compensation under contract	1	0	0	0	1	0	2	1	0	2	**7**
Stop env'lly harmful activity	0	0	3	0	0	1	1	2	1	0	**8**
Total	5	7	7	7	4	2	9	6	4	5	**56**

Table 4 – Cases by environmental interest, civil cases before the "/" and penal cases after the "/"[41]

Environmental interest	**Civil cases / criminal cases**										
	1996	97	98	99	2000	01	02	03	04	2005	**Total**
Pollution (air, water, soil)	1/1	0/1	0/1	0/2	2/1	0/0	4/2	1/1	1/3	2/2	**11/14**
Nature protection / conservation	0/3	0/4	0/2	1/2	0/5	1/4	0/2	2/4	0/5	0/8	**4/39**
Neighbour issues	3/0	5/0	4/0	5/0	1/0	0/0	3/0	2/0	2/0	2/0	**27/0**
Private rights to resources	1/0	2/0	1/0	1/0	0/0	0/0	2/0	1/0	1/0	0/0	**9/0**
Cultural heritage	0/0	0/0	0/0	0/1	0/2	0/1	0/0	0/0	0/1	0/1	**0/6**
Total	**5/4**	**7/5**	**5/3**	**7/5**	**3/8**	**1/5**	**9/4**	**6/5**	**4/9**	**4/11**	**51/59**

[40] Five cases were placed in two categories. This is the reason why the percentage of cases belonging to the various categories adds up to more than 100 % (see next page).

[41] Two criminal cases were placed in two categories.

monetary compensation to a private party. Only 16 % of the cases brought forward claims that harmful activities should stop, including cases concerning injunctive relief, and 10 % concerned judicial review of administrative decisions.

It can thus be observed that the Norwegian courts only to a very limited extent were an option for efforts to prevent environmental harm. Moreover, the courts were only in exceptional cases used by private parties either seeking to overturn administrative decisions permitting environmentally harmful activities, or seeking to force public authorities to take action to protect environmental interests.

3.2.3 Environmental themes

The cases addressed a broad variety of environmental issues. When looking at both the civil and criminal cases, we got the results set out in table 4 (see the previous page).

Among the civil cases, 53 % were related to neighbour issues. These cases concerned competing interests where the parties bringing the cases to court were those suffering from environmental degradation. Another 18 % of the cases concerned private rights to natural resources, and were initiated by parties whose access to such resources would suffer due to acts leading to environmental degradation. Only in 29 % of the cases were the issues brought before the courts related to more general environmental concerns, such as issues concerning pollution (21 %) or nature protection and conservation (8 %). Hence, it can be observed that anthropocentric interests were dominant in the civil cases. These findings indicate that private parties had few incentives or opportunities to bring cases promoting environmental interests before courts in Norway. This was in particular the case for issues concerning nature protection and conservation. It is also remarkable that there were no civil cases concerning recreation and public access to nature, or concerning cultural heritage.[42]

In contrast to the civil cases, the criminal cases concerned almost exclusively general environmental issues. The main focus was on nature protection and conservation (68 %), followed by cases concerning pollution (25 %). Some few cases concerned protection of cultural heritage (11 %).

In sum, the analysis shows that general issues related to nature protection are almost exclusively taken care of by public authorities, either through criminal cases or as responsible for administering relevant legislation. The picture is somewhat more nuanced in relation to general pollution issues, where private parties seem to take some initiatives to promote environmental interests before courts. However, initiatives by public authorities through use of criminal law seem to be at least equally important. This indicates that the court system and Norwegian environmental legislation are not designed in a way that promotes private initiatives to secure environmental interests through the judiciary. Rather, criminal law is promoted as a main instrument to secure environmental interests.

3.2.4 Activities

It is also of interest to analyse which environmentally harmful activities were addressed by the courts (see table 5 on page 87).

In civil cases, 39 % of the cases concerned pollution-related activities, including efforts to clean up existing pollution, prevent future pollution and noise, and one case concerning the introduction of alien species. Cases concerning construction of public infrastructure, including in particular roads, railways and airports, were a significant part of the cases, 35 %. Taking into account the importance of natural resources in the Norwegian economy, it is remarkable that only 16 % of the cases concerned extraction of such resources, including two cases concerning hunting of wolves. None of the cases concerned extraction of marine resources, and only one concerned forestry. It is also remarkable that only 10 % of the cases concerned building and construction. Hence, an insignificant part

[42] It might be worth recalling, in this context, that only few cases from the courts of first instance were available in the database. Hence, cases concerning recreation and cultural heritage might have occurred before courts of first instance without being included in the database.

of the numerous cases brought before Norwegian courts related to the planning and building legislation were initiated for environmental purposes.

Among the criminal cases, a significant number concerned pollution-related activities, 42 % of the cases. The most significant group of cases under this category were cases concerning use of motor vehicles in the wilderness, which constituted almost half of the cases. Cases concerning extraction of natural resources amounted to 40 % of the cases, including eight cases concerning hunting of carnivores and one case concerning aquaculture. Only 11 % of the criminal cases concerned building and construction. The remaining 9 % of cases concerned a variety of activities having environmental implications, such as agriculture, import of endangered species, and arson.

Against this background, it may be observed that a significant portion of the environmental cases brought before Norwegian courts concerned polluting activities. Moreover, almost all cases concerning construction of infrastructure were civil cases, while the clear majority of cases concerning exploitation of natural resources were criminal cases. Even if activities related to land-use are regarded as the main threat to biodiversity in Norway,[43] few environmental cases involving construction of houses, offices, infrastructure, etc. were brought to Norwegian courts.

3.3 Who were parties to the proceedings?

As the parties to the cases differ significantly between civil and penal cases, we will address civil and penal cases separately below. In relation to civil cases, the numbers were as follows (claimants before the "/" and defendants after the "/"), (see table 6 on page 88).

Hence, as many as four out of five civil cases (80 %) were initiated by private parties, including citizen groups, landowner associations and other interest groups that fall outside the concept environmental non-governmental organizations (NGOs).[44] Cases were brought forward by enterprises in 10 % of the cases, and by environmental NGOs in 8 % of the cases. Public authorities did only initiate one civil case. The low number of cases brought by NGOs, even fewer than cases brought by private enterprises, is remarkable in light of the broad *de jure* access to courts enjoyed by such organisations under Norwegian legislation.[45] It is also of interest that public authorities almost never initiated civil cases to protect environmental interests. Hence, public authorities seem to rely almost exclusively on criminal cases as means to promote environmental protection through courts.

Among the four cases brought by NGOs, two were appealed to the Supreme Court, and two were decided by district courts. Three cases were unsuccessful, including one case concerning logging in forests considered for protection, one case concerning the establishment of a military artillery range, and one case concerning hunting of wolves.[46] The only successful case was another case concerning hunting of wolves, in which the court of first instance decided that the hunting should stop.[47] This case was not appealed.

A majority of the cases, 59 %, were brought against public authorities. The remaining cases were brought against private enterprises (25 %) and private individuals (16 %). As shown in section 3.2.2 above, few cases concerned judicial review of administrative decisions. On closer inspection, it can be observed that most of the cases raised against public authorities concerned neighbour issues. This could indicate that public authorities are involved in a higher number of

[43] See NOU 2004:28, Lov om bevaring av natur, landskap og biologisk mangfold, chapter 7.

[44] Cases raised by private parties also include a group of cases where public authorities according to the law are regarded *de jure* as claimants, mainly for the purpose of responsibility for costs associated with the case, but where private parties are the *de facto* claimants ("skjønnssaker").

[45] See section 2.3 above.

[46] The first two cases were published in Rt. 2003 at 1630 and Rt. 2003 at 833. The latter case has not been published. It was decided by Oslo namsrett on 16 February 2001. This case is illustrative of the economic risks for NGOs of bringing cases to courts. The NGOs had to cover the costs of the public authorities as well as the costs of third parties allowed to intervene in the case in support of the public authorities. For an overview of press coverage of the case, see <http://www.fvr.no/index.php?option=com_content&task=view&id=54&Itemid=30>.

[47] This decision has been published in RG 2000 at 1125.

controversial projects that generate environmental problems than are private enterprises. However, the difference is most likely the result of special rules concerning distribution of costs of proceedings in expropriation cases.[48] Hence, the difference between public authorities and private enterprises can be regarded as illustrative of the importance of the distribution of costs of proceedings when private parties decide whether or not to bring a case to court.

All the criminal cases were initiated by the public prosecutor. Criminal cases were only brought against private individuals and private enterprises, (see table 7 on page 88).

This means that 83 % of the cases were brought against private individuals, including non-profit associations of individuals, and 17 % were brought against enterprises. What is most remarkable is that no penal cases were brought against public authorities. This is in contrast to the significant number of civil cases brought against public authorities. Taken together, these findings may indicate that the public prosecutor is reluctant to bring charges against public authorities. Some of this difference may be explained by public authorities being more likely to accept and pay fines, and thus avoid court proceedings, while private parties may be less likely to do so.

3.4 Outcome of the cases

A detailed assessment of the outcome of the cases is challenging, since the cases differ significantly. Two criteria have been identified as important from an environmental perspective, namely whether the results in the cases were beneficial to the environmental interests involved, and whether the interpretation of key provisions in the case was in favour of environmental interests. A third issue to be addressed is the outcome in cases concerning judicial review of administrative decisions.

In most civil cases it was relatively easy to determine whether the results were beneficial to the environmental interests involved. In general, the answer would depend on an assessment of the extent to which the claimant was successful. However, in some complex cases and in some cases where the court did not produce a clear final decision, the conclusion was that the case was neutral in relation to the environmental interests (see table 8 on page 88).

Hence, a majority, 53 %, of the cases was concluded in favour of the environmental interests, 39 % were concluded to the disadvantage of the environmental interests, and 8 % of the cases were neutral. Significantly more cases were thus determined in favour of the environmental interests involved than *vice versa*. While it thus could be argued that Norwegian courts are sensitive to environmental issues, another explanation may be that the economic risk of bringing cases to courts in Norway is so high that only cases where the claimant has a high degree of certainty that the case will be successful will be brought to courts. From such a perspective, it might be argued that it is remarkable that as many as two out of five cases were unsuccessful. The numbers can possibly indicate that there is a weak tendency in favour of the environment towards the end of the period, but the tendency is too weak to conclude on this issue.

In the majority of the cases, it could not be determined whether the courts' interpretation of key provisions was or was not in favour of environmental interests. Those cases in which it was possible to make such an assessment were distributed evenly between interpretations in favour of and contrary to environmental interests. Hence, it seems that Norwegian courts do not in general favour environmental interests when interpreting provisions in civil cases.

There were five cases concerning judicial review of administrative decisions. Of these cases, only one was successful in overturning the administrative decision, namely a case concerning hunting of wolves.[49] The four unsuccessful challenges concerned the validity of a decision to permit the hunting of wolves,[50] the validity of a land-use plan related to future expansion of Gardermoen Airport,[51] the validity of a decision to

[48] See section 2.2 above.

[49] See RG 2000 at 1125.

[50] See decision by Oslo namsrett on 16 February 2001.

[51] See Rt. 2002 at 352,

locate a lane for snowmobiles close to a cabin,[52] and the validity of a decision to expropriate to the benefit of a hydropower station.[53] These cases are too few to draw conclusions concerning the general attitude of Norwegian courts in cases concerning judicial review of administrative decisions in environmental cases. However, they seem to confirm the general impression that private parties avoid bringing cases concerning the validity of such decisions to courts. It also contrasts with the above findings that a majority of environmental cases brought to courts were decided in favour of environmental interests. These findings can thus be regarded as supporting the thesis that has been put forward by some theorists that Norwegian courts tend to decide in favour of public authorities.[54]

There is a significant difference between civil cases and criminal cases when it comes to assessing whether the results in the cases were beneficial to environmental interests, in the sense that the latter cases can be distinguished according to the sentences imposed by the courts. Whether or not such cases were decided in favour of environmental interests was based on the extent to which the claim of the prosecutor was successful (see table 9 on page 89).

In these cases, 70 % were decided in favour of the environmental interests, 14 % were decided to the disadvantage of environmental interests, and 16 % were neutral. This most likely reflects the policy of the prosecutor not to bring cases to courts unless there is a high degree of likelihood that the accused will be sentenced.[55] This picture may be supplemented by an overview of the punishments rendered by the tribunals: prison sentences were used in 33 % of the cases, fines in 54 % of the cases, loss of rights, such as the right to hunt, in 21 % of the cases, and confiscation, for example of snowmobiles used unlawfully, in 25 % of the cases. The result was unknown in 14 % of the cases, and the person charged was acquitted in 14 % of the cases.

4. Some concluding remarks

This study, which has been limited to cases brought to court with a view to promote environmental interests, finds few cases of relevance during the ten-year period examined. In all, the study identifies 51 civil cases and 57 criminal cases, which represented approximately 0,4 % and 0,7 % respectively of the total number of cases. There was no significant increase or decrease in such cases during the period.

As to the legal claims brought forward in the cases, the main focus of civil cases was on achieving monetary compensation. Few cases aimed at stopping environmentally harmful activities or at challenging the validity of administrative decisions. Moreover, most of the civil cases concerned neighbour issues and pollution. Few concerned protection of nature. Almost all civil cases concerned activities related to emission of pollutants and the construction of infrastructure. Few cases concerned extraction of natural resources. Only in one case did the claimant argue that public authorities had failed to comply with a duty to take measures to protect the environment. Hence, courts did in general not serve to prevent environmental damage in civil cases. In criminal cases, the issues brought to courts were mainly related to nature protection, and the activities addressed were mainly polluting activities and extraction of natural resources.

These findings, when taken together, indicate that the Norwegian environmental legislation and court system in the period studied did not favour the use of courts to achieve environmental justice in civil cases related to administrative decision-making. The significant reform of the Dispute Act in 2005 is unlikely to have changed this situation, at least in the short or medium term.[56] On the other hand, courts

[52] Unpublished decision by an appellate court on 12 August 2003.

[53] See RG 2006 at 401.

[54] See Asbjørn Kjønstad, Er Høyesterett statsvennlig, in *Lov og Rett*, 1999, at 97-122 with further references.

[55] Økokrim, the Norwegian special prosecutor for economic and environmental cases, aims at limiting the number of acquittals in the cases they bring to court to 10 %, see Økokrim, Årsrapport 2005, at 9 and 11.

[56] This may possibly change in the longer term due to long term effects of procedural reforms, such as the possibility to

were used more actively to contribute to environmental protection through criminal cases. In sum, courts seem generally to serve to reinforce rather than to act as a correction to the approach of public authorities to environmental protection. This conclusion is confirmed by the findings that environmental NGOs initiated very few civil cases and by the fact that the outcome in cases concerning judicial review of administrative decisions was in favour of public authorities in four of five cases.

The assessment of the outcome of the civil cases is inconclusive as to whether courts were likely to conclude in favour of environmental interests. Where cases were brought by environmental NGOs and where they concerned judicial review of administrative decisions, courts generally concluded contrary to the environmental interests. These findings, although based on a low number of cases, lend some support to the hypothesis that Norwegian courts tend to conclude in favour of public authorities.

Formally, Norway offers broad access to courts in relevant legislation, and courts have so far interpreted the requirements for initiating environmental cases in a manner beneficial to NGOs and others wanting to bring such cases to courts.[57] The above findings indicate that significant obstacles to bringing environmental cases to courts remain. We may distinguish between three main reasons why courts do not play any important role in securing environmental justice: 1) the potential costs of bringing cases to courts in Norway, 2) the tendency of courts to conclude in favour of public authorities and 3) that environmental legislation in general provides public authorities with broad discretionary power and few legal duties. The above study indicates that all three factors are significant, but it does not permit us to draw any clear conclusion regarding which of these factors are most significant. The factor that is subject to the highest degree of uncertainty is the one concerning the tendency of courts to conclude in favour of public authorities. In particular, courts have been reluctant to provide private parties with a means to force public authorities to take action.[58] In a recent case before the Supreme Court concerning the right of access to environmental information from a logging company on the basis of Section 16 of the Environmental Information Act (2003 no. 31), the Supreme Court concluded that the NGO bringing the case had a right of access to the information sought in the form of maps detailing the occurrence of old forests.[59] While this case signals a willingness to protect the rights of private parties, it concerns the relationship between private parties and not the relationship between private parties and public authorities.

Against this background, it can be argued that a main reason why Norwegian courts have been unwilling to conclude that public authorities are under an obligation to take acts to promote environmental interests is the lack of legislation setting out sufficiently clear duties. Hence, under the assumption that the lack of such legislation is a main factor, we shall in the next section briefly assess whether the approach of the legislator in recent environmental legislation is likely to improve the possibility of using courts to achieve environmental justice.

5. Are recent environmental law reforms likely to strengthen the role of courts?

Recently, there have been two main reforms of Norwegian environmental legislation: a revised Planning and Building Act was adopted in 2008 (no.

initiate "class action" and abstract claims.

[57] Two landmark cases are the Supreme Court decisions in Rt. 1992 at 1618 and Rt. 2003 at 833.

[58] See Rt. 2003 at 1630, in particular paras. 37, 42, 43 and 45. The case, which is one among a handful of environmental cases brought by environmental NGOs, concerned the duty of public authorities to prevent a person from logging in forests that were considered for protection. See also the discussion of the case in ot.prp. no. 51 (2004-2005) at 143. Another case of interest is Rt. 2009 at 661, where the Supreme Court upheld the decision concerning location of the U.S. embassy despite failure to carry out the prescribed environmental impact assessment. For a critical comment to the latter case, see Inge Lorange Backer and Hans Chr. Bugge, Forsømt konsekvensutredning av alternativer - Høyesteretts dom i Rt. 2009 s. 661 om den amerikanske ambassade i Husebyskogen, in *Lov og Rett* 2010 no. 3 at 115-27.

[59] Judgment 6 April 2010, reference no. HR-2010-00562-A.

71) and 2009 (no. 27), and a Nature Diversity Act was adopted in 2009 (no. 100). The preparatory works of these acts do in general not address the need to improve environmental justice through courts.[60] In the following, we shall examine whether these acts nevertheless are likely to strengthen the use of courts to secure environmental interests. Whether the new legislation strengthens the role of courts in this respect depends on the extent to which it introduces, or supports existing provisions implying, rights and obligations that can be invoked before courts.

The new Planning and Building Act contains at least five elements that could improve the prospects of bringing cases to courts in order to promote environmental interests. First, the Act contains clearer rules on the environmental aspects of objectives to be achieved and it uses "mandatory" language in this context. Section 1-1 states that the Act "shall promote sustainable development to the benefit of each individual, the society and future generations".[61] When taken together with provisions setting out the tasks and discretionary power of public authorities under the Act, this provision can strengthen the legal basis for claims that public authorities have failed to protect environmental interests as provided for in the Act.

Secondly, there are new rules setting out a legal framework for the content of land use plans, see Chapter 3, in particular Section 3-1. Moreover, according to Section 6-1, the government shall every four years adopt a document setting out "national expectations" to local planning in order to promote sustainable development. It is unlikely that Norwegian courts would agree to use Section 3-1 or decisions under Section 6-1 as independent legal bases for reviewing the validity of planning decisions.[62] Nevertheless, these provisions may serve to strengthen potential claims that public authorities have failed to protect environmental interests as provided for in the Act.

Thirdly, there are new rules concerning procedural requirements that aim to ensure environmental interests, in particular in Chapter 4 concerning environmental assessments, Chapter 5 concerning public involvement in planning processes and Chapter 25 concerning supervision. In some respects, these rules represent changes in the approach to procedural issues under the previous Planning and Building Act (1985 no. 77). One example is the duty to ensure "risk and vulnerability assessments" in the context of planning decisions in Section 4-3. Another example is the duty to ensure that persons and interests that are likely to be unrepresented, are able to participate effectively in the procedures leading up to planning decisions, see Section 5-1. On the other hand, it is stated in the preparatory works that failure to carry out supervision according to Chapter 25 cannot justify claims of economic compensation for damages.[63] The Supreme Court's decision in a recent case concerning environmental impact assessment shows that Norwegian courts so far have practiced a high threshold for finding against the validity of an administrative decision on the basis of failure to follow procedural requirements.[64] In sum, some of the procedural reforms, in particular in Section 5-1, improve the possibility of achieving environmental justice through courts.

Fourthly, the duty to adopt zoning plans is strengthened according to Section 12-1. Even if the revised rules do not exclude the possibility of exempting from the duty,[65] they provide an improved legal basis for bringing to courts claims that projects cannot be undertaken before a zoning plan has been adopted. This improves the opportunities for those potentially affected by projects to ensure thorough assessments of the projects' environmental effects.

Finally, the provision authorising public authorities to issue general exemptions under the law has been

[60] For the Planning and Building Act, see ot.prp. 32 and 45 (2007-2008) and NOU 2001:7, 2003:14, 2003:24, 2003:29 and 2005:12. For the Nature Diversity Act, see ot.prp. 52 (2008-2009) and NOU 2004:28.

[61] As there is no official translation of the Act at the time of writing, the translation provided is the translation of the author of this article.

[62] See ot.prp. 32 (2007-2008) at 178.

[63] See ot.prp. 32 (2007-2008) at 334.

[64] See *supra* note 59.

[65] See ot.prp. 32 (2007-2008) at 228-9 and the discussion of Section 19-2 below.

reformulated so that it allows extensive court review of such decisions. This was a controversial issue under the former Act,[66] and the Supreme Court finally decided that courts had limited opportunity to review decisions under Section 7 of the Act.[67] This judgment was controversial, and the revised Act makes clear in Section 19-2 and related preparatory works that there is a threshold for making exemptions and that decisions authorising exemptions can be subject to review by courts.[68]

Against this background, it can be observed that the revised Planning and Building Act contains some elements that might promote the use of courts to ensure environmental justice. However, when assessed in light of experiences under the former Act, where few cases have been initiated before courts to achieve environmental justice, we may conclude that the reforms provide a relatively weak basis for increased use of courts for such purposes. Significant parts of the Act continue the trend of delegating measures to ensure environmental protection to the executive rather than introducing rights and obligations. One example is Section 29-10 under which public authorities have full freedom to adopt or refrain from adopting rules addressing environmental impacts of projects that are subject to permits under the Act. Another example is Section 32-1 which sets out a duty for the municipality to follow up projects that have been carried out unlawfully. Despite the mandatory language used in the Section 32-1, the preparatory works state that private parties cannot invoke it as a basis for legal claims.[69]

The new Nature Diversity Act (2009 no. 100) contains a number of rules that did not exist under the former Nature Conservation Act (1970 no. 63), in particular rules on sustainable use in Chapter II, on species management in Chapter III, on alien species in Chapter IV, on "selected habitat types" in Chapter VI and on genetic material in Chapter VII. For the purpose of this study, I have gone through the provisions of the Act with a view to identify those that are likely to provide a significant legal basis for bringing cases to courts. Since we have little experience on the implementation of the Act and since most of the provisions of the Act lack parallel provisions in previous legislation, the analysis below is based on the wording of the Act and statements in the preparatory works. Against this background, I have identified five elements of the Act that are likely to provide a significant potential for increased use of courts to achieve environmental justice.

First, Section 6 of the Act contains a general duty of care. This duty is related to provisions concerning management objectives for flora and fauna in Sections 4 and 5. Moreover, Section 28 contains a more specific duty of care related to introduction of alien species. Failure to fulfil the duty of care is not subject to penal sanctions, but may according to Section 74 lead to an order to pay environmental compensation. Public authorities are under no obligation to order such compensation, and a failure to make such an order cannot be brought to court.[70] Another consequence from failing to carry out the duty of care may be the possibility of raising claims to compensation on the basis of torts law.[71] A third consequence may be a duty to carry out remedial acts according to Sections 69 or 70. Such remedial acts may be ordered by public authorities, but a failure to make such orders is not subject to subsequent review by courts. The issue of interest is whether there is a duty to take remedial acts independent of orders by public authorities, see para. 2 of Section 69 and para. 1 of Section 70. The duty to take remedial acts under Section 69, which concerns activities that are unlawful, can arguably be enforced through court proceedings.[72] It is less clear whether it

[66] See Johan Greger Aulstad, Domstolsprøvingen av dispensasjonsvedtak etter plan- og bygningsloven § 7, in *Areal og eiendomsrett* 2007 at 63-87.

[67] See Rt. 2007 at 257.

[68] See ot.prp. 32 (2007-2008) at 138-40 and 242.

[69] See ot.prp. 45 (2007-2008) at 352.

[70] This is confirmed in ot.prp. 52 (2008-2009) at 454-5 which uses hortatory language.

[71] See Inge Lorange Backer, Naturmangfoldloven, in *Tidsskrift for eiendomsrett*, vol. 5 (2009) no. 3 at 190, who emphasises this aspect of Section 6.

[72] While the wording of the provision seems to indicate that

is possible to enforce a duty to take remedial acts through court proceedings under Section 70, i.e. where the environmentally harmful activities are lawful. While certain statements in the preparatory works may be read in favour of concluding that there is a duty to take remedial acts independent of orders from public authorities,[73] courts may come to the opposite conclusion, for example by arguing that it should be left to public authorities to determine the remedial acts to be taken. A failure to fulfil the duty of care can be regarded as unlawful under the Act, and the related activities would thus normally fall under Section 69.[74]

Secondly, the provisions concerning species management in Chapter III contain mandatory language that possibly set a legally binding framework for decisions concerning permits to harvest, hunt or otherwise eliminate organisms. It is not possible within the framework of the present study to address the extent to which the various provisions, when read together with relevant provisions in related legislation, provide for rights or duties that are enforceable before courts.[75] Nevertheless, it is clear that a main purpose of including Chapter III was to establish a legal framework for decisions concerning species management.[76] This framework must be implemented in light of its function to secure the management objectives for species set out in Section 5. Such a legal framework may be of limited value unless it can be invoked in cases before courts. We may thus assume that the rules contained in Chapter III set a legally binding framework for decisions authorising elimination of organisms, and that they have legally binding implications for the process of preparing such decisions. Non-compliance with this framework may be brought to courts. However, the willingness of courts to effectively enforce the legal framework remains to be seen.

Thirdly, the provisions concerning protected areas in Chapter V of the Act contain clearer rules on activities that are prohibited and activities that are lawful in the various categories of protected areas than under the former Nature Conservation Act (1970 no. 63). Moreover, there are clearer duties for the authorities to define the purposes for which the protected areas are established and to adopt management plans.[77] Obligations under international law related to protected areas have been incorporated through Section 40.[78] In view of the practice of the Supreme Court under the former Act,[79] it can be assumed that courts will accept to address claims of non-compliance with such provisions.

Fourthly, the Act contains two new procedures for protection of species and habitats. Section 23 provides for decisions that species are "priority species", and Chapter VI provides for decisions on "selected habitat types". These provisions do not contain duties for public authorities to make such decisions under specific circumstances, for example where species are threatened. However, the provisions contain mandatory procedural elements, *i.e.* a duty to assess whether decisions shall be taken.[80] Failure to make such assessments can be brought to court. However, the preparatory works state that failure to make assessments cannot be subject to penal proceedings or claims of compensation.[81] It remains to be seen whether courts will address claims that assessments do not sufficiently assess all relevant factors and thus do not fulfil the requirements of the Act.

there is an independent duty to take remedial acts, this is not followed up in the preparatory works, which focus on the power of public authorities to issue orders, see ot.prp. 52 (2008-2009) at 339-40 and 451-2.

[73] See ot.prp. 52 (2008-2009) at 340-1 and 452.

[74] In the same direction, see Backer *supra* note 72 at 190.

[75] For some general comments on these parts of the Act, see Backer *supra* note 72 at 195-9.

[76] See ot.prp. 52 (2008-2009) at 113-4.

[77] For a more detailed discussion of these issues, see Backer *supra* note 72 at 201-5.

[78] This is relevant for wetlands listed under the Ramsar Convention on Wetlands (1971), see in particular Art. 5, and decisions to list protected areas within the Emerald Network under the Bern Convention on the Conservation of European Wildlife and Natural Habitats (1979).

[79] See, in particular, Rt. 1986 at 1999 and Rt. 1995 at 1427.

[80] See para. 3 of Section 23 and para. 3 of Section 52.

[81] See ot.prp. 52 (2008-2009) at 393 and 433. Moreover, the preparatory works state that decisions to start or not to start preparing decisions under the Sections 23 and 52 are not subject to any administrative complaints procedures.

Finally, the new rules concerning genetic material contain a provision in Section 60 seeking to ensure benefit sharing in accordance with Article 15 of the Convention on Biological Diversity (1992). According to Section 60, public authorities are encouraged to bring legal action in order to ensure benefit sharing of use of genetic resources on behalf of interested parties in other countries. While there is no duty on authorities to take such cases to court, the provision clearly indicates an interest in using courts as a vehicle to promote environmental justice.

While the above new elements of the Nature Diversity Act provide a significant potential for the use of courts to promote environmental interests, the Act does not provide any possibility of private parties to use courts to force administrative authorities to take enforcement measures, see Chapters VIII and IX. It can also be observed that the role of courts in relation to the new elements of the Act will to a significant degree depend on the willingness of courts to review decisionsthat are based on technical and complex assessments of the facts. Hence, while the Nature Diversity Act provides a number of opportunities for courts to contribute to effective implementation of the Act, it leaves the courts with significant discretion when determining the extent to which they will make use of these opportunities in specific cases.

Against this background, we can conclude that the revised Planning and Building Act is unlikely contribute to significant changes in the role of courts in environmental matters. The potential for increased recourse to courts to promote environmental interests is significant under the Nature Diversity Act. Hence, in light of the above findings that very few civil cases have been brought to courts in Norway to protect biodiversity or ensure sustainable use of biological resources,[82] despite the economic, social and cultural importance of exploitation of such resources and the current loss of biodiversity,[83] we might possibly face a significant increase in the use of courts in such cases in the future.

[82] See section 3.2.3.

[83] See <www.miljostatus.no>.

Table 5 – Cases by activity[84]

Activity in question	**Civil cases / criminal cases**										
	1996	97	98	99	2000	01	02	03	04	2005	**Total**
Emission of pollutants	2/2	0/1	3/1	2/2	2/4	0/0	2/2	4/3	2/4	3/5	**20/24**
Building / construction	0/0	2/0	1/1	0/1	0/2	0/1	2/0	0/0	0/0	0/1	**5/6**
Infrastructure	3/0	4/0	0/0	3/0	1/0	0/0	4/0	1/0	2/0	0/0	**18/0**
Extraction of natural resources	0/2	1/4	1/1	2/2	0/2	1/2	1/2	1/1	0/2	1/5	**8/23**
Other	0/0	0/0	0/0	0/0	0/0	0/2	0/0	0/1	0/2	0/0	**0/5**
Total	**5/4**	**7/5**	**5/3**	**7/5**	**3/8**	**1/5**	**9/4**	**6/5**	**4/8**	**4/11**	**51/58**

Table 6 – Cases listed by claimant / defendant, civil cases

	Claimant / defendant										
	1996	97	98	99	2000	01	02	03	04	2005	**Total**
Private parties	5/0	7/0	4/1	6/1	2/1	0/0	7/2	3/1	4/0	3/2	**41/8**
Enterprises	0/1	0/1	1/2	0/1	1/1	0/0	1/3	1/1	0/2	1/1	**5/13**
Authority	0/4	0/6	0/2	0/5	0/1	0/1	1/4	0/4	0/2	0/1	**1/30**
Environmental NGO	0/0	0/0	0/0	1/0	0/0	1/0	0/0	2/0	0/0	0/0	**4/0**
Total	5	7	5	7	3	1	9	6	4	4	**51**

Table 7 – Cases by defendant, criminal cases

	1996	97	98	99	2000	01	02	03	04	2005	**Total**
Private individuals	4	4	2	4	5	5	4	3	7	8	**46**
Enterprises	0	1	1	1	3	0	0	2	1	2	**11**
Total	**4**	**5**	**3**	**5**	**8**	**5**	**4**	**5**	**8**	**10**	**57**

Table 8 – Cases listed according to result, civil cases

	1996	97	98	99	2000	01	02	03	04	2005	**Total**
Pro environmental interests	2	3	2	4	2	0	5	3	3	3	**27**
Contra environmental interests	2	4	3	2	0	1	4	2	1	1	**20**
Neutral	1	0	0	1	1	0	0	1	0	0	**4**
Total	**5**	**7**	**5**	**7**	**3**	**1**	**9**	**6**	**4**	**4**	**51**

[84] One criminal case was placed in two categories.

Table 9 – Cases listed according to result, criminal cases

	1996	97	98	99	2000	01	02	03	04	2005	**Total**
Pro env'l interests	4	2	2	4	3	4	2	5	6	8	**40**
Contra env'l interests	0	3	0	0	3	1	1	0	0	0	**8**
Neutral	0	0	1	1	2	0	1	0	1	3	**9**
Total	**4**	**5**	**3**	**5**	**8**	**5**	**4**	**5**	**7**	**11**	**57**
Prison	2	0	1	3	1	1	1	1	4	5	**19**
Fine	3	2	2	2	3	3	1	4	6	5	**31**
Loss of rights	2	1	0	2	2	0	1	1	1	2	**12**
Confiscation	2	0	1	1	1	1	1	2	3	2	**14**
Acquitted	0	3	0	0	3	1	1	0	0	0	**8**
Unknown	0	0	1	1	2	0	1	0	1	2	**8**
Total	**9**	**6**	**5**	**9**	**12**	**6**	**6**	**8**	**15**	**16**	**92**

Do not Miss the Forest for all the Trees

Inga Carlman[1]

Abstract

In the 1960s environmental issues became analysed in a global context. 1992 sustainable development was made the overall policy. 2010 the biosphere is in a worse state than in the 1960s, and the world human population is higher than ever. For sustainability, human behaviour must be kept within biospherical carrying capacity. This presents enormous social and human scientific challenges. However, main social scientific schools generally overlook what basically makes democratic systems tick, namely Rule of Law. Most social scientific input has been hampered by pre-environmental sectoral paradigms missing the holistic prerequisites. Modern environmental law methodology has on the other hand analysed old law and developed theory for sustainable law capable of i.a. handling non-linearity, complexity and what makes societies tick – Rule of Law. Thanks to this, some of what other social sciences have brought forward can be reinterpreted for inclusion in an adequate sustainability theory, while much of the rest can be explained as ineffective.

This paper brings this into broader environmental science. It will (1) rely upon the still degrading biosphere and that no country has so far established effective control for sustainability; (2) explain why such control cannot be achieved in a democracy without recognising the Rule of Law and adapting the law to sustainability; (3) explain why mainstream social and human sciences yet have not contributed more effectively; (4) present a fundamental theoretical holistic structure essential for social environmental science, and (5) based on this demonstrate why it is impossible to solve the global unsustainability problems without full understanding of the Rule of Law.

Keywords: sustainable development, Rule of Law, social scientific environmental theory, ecological sustainability, scientific compatibility.

1 Introduction

The equation for the ecological dilemma of mankind is simply put an increasing population and resource

Inga Carlman, Professor of Environmental Science, Mid Sweden University, SE 831 25 Östersund, Sweden; Inga.Carlman@imir.com; http://www.miun.se.

use overshoot in a finite world with no other verdant planet as a back-up system (e.g. FAO:a 2009, Millennium Ecosystem Assessment:a 2005, Meadows et. al.1992, 2004; Daly & Cobb 1989). This dilemma has during centuries been propounded in different ways. The worry expressed in the 18th century regarding the fragile relationship between population growth and food-supply (Malthus 1798), was followed by concern for bad health conditions – foremost water and air related, e.g., the Health Act 1848 in England. Geographically this was perhaps mostly a European question (Carlman 2002). Since the 1950s population growth was once again highlightened and then on so called developing countries (e.g. Borgström 1953 & 1973; Boserup 1965 & 1981; Holdren & Ehrlich 1974, and Ehrlich & Ehrlich1990).

In the 1960s and 70s, knowledge about effects on ecological systems was integrated into the problem picture, which was analysed in a global context. The urgency to react to the constant environmental deterioration was in focus, manifested in e.g. the Stockholm conference (1972). In the 1980s the continuing severe environmental situation was, together with poverty around the world and the urge to cope with these problems, tackled in the WCED report (1987). The concept of sustainable development became after that solidly established. Poverty and mismanagement of resources once again underlined the population growth problem.

The most prominent outcomes of the Rio summit in 1992 were the principles of the Rio declaration and the Agenda 21 blueprint, together with the Convention on Biological Diversity, the Convention on Climate Change, the Statement of Forest Principles and the Convention to Combat Desertification, all pinning down the *overall* policy of sustainable development for the international community. In Johannesburg, 2002, the commitment to the Rio declaration and Agenda 21 was reaffirmed (Johannesburg Declaration 2002).

The evolution that societies have undergone since the beginning of the industrial era, often stated as the starting point of the severe environmental problems, has to an overwhelmingly degree been the result of technological development coupled with economical dogmas, designed when the world was understood quite differently from now. The more complex and wealthier the societies have become, the more intricate and diaphanous social scientific theories have become. The evolution of Adam Smith´s idea of an invisible hand (Smith 1776), the free market principle, the economic man theory etc. are examples of how nature´s carrying capacity and peoples´ health have been either set aside, or considered automatically to benefit society.

However, the environment is today also effected by legal principles formulated long before the industrial era. One prominent example is the international law Mare Liberum – The Free Sea – written by the Dutch jurist Hugo Grotius in 1609. He cited Placentinus (an Italian jurist in 12th century) saying"the sea is a thing so clearly common to all" and he concluded that "A nation can take possession of a river, as it is closed within their boundaries, with the sea, they cannot do so." (Grotius 1609, p 28).

Economic growth and trade are today social mantras and controlling forces behind the development of both dominating values and legal systems and other steering mechanisms. The underlying purpose of environmental laws has so far, to quote Decleris, merely been to "just prevent extremes of ruthless development, without in other respects intervening in economic policy" (Decleris 2000). Berman, who takes a wider grip on this, says that law during the 20th century has been less and less treated as a coherent whole, leading to fragmentation and conflicting rules (Berman 1983). This is also an explanation why most environmental degradation has been, and still is, legal and also why we have counterproductive and unsustainable laws.

From a scientific point of view, the academic "journey" depicted above started in theories/models based on linear reasoning, incorporating along the way knowledge of non-linear dynamic complex systems and chaos – but not really adapting to it. Most of the scientific work, linked to environmental problems and how to solve these, has in a historic perspective to a major part been performed by natural scientists and technologists resulting in deeper problem insights and ideas of how to solve them technically. These scientists have also many a time undertaken the role of social scientists giving advice on how to steer society, although seldom

with a social scientific understanding. Their approach has been rather schematic, putting forward adaptation and/or mitigation, rather than prevention and proaction. (IPCC:a & IPCC:b 2008).

In 2010, the biosphere as a whole is in a worse state than in the 1960s (Millennium Ecosystem Assessment:b 2005). The world´s population is higher than ever, 6,8 billion (US census Bureau 2010). Newly presented data state that starvation is increasing (973 million) and that the food-supply has to double at the latest in year 2050 (FAO:b 2009). In order to take responsibility for future generations, human behaviour must be kept within the biospherical carrying capacity. This presents enormous social and human scientific challenges, a gauntlet that must be picked up.

Between 1992,with the Rio conference and Agenda 21, and today no major steps have been taken. No country is firmly on the way towards sustainable development (Carlman 2007). Social sciences have in general terms not put forward significant or paradigmatic theoretical changes for the sake of sustainability. On the contrary, sustainable development problems are mostly reconstructed so as to fit into older theories, rather than letting the sustainable development problems steer theory building. This situation seemingly explains an alleged need to invent and exploit terms, e.g. weak and strong sustainability, and thin and thick Rule of Law, which I will return to.

However, the core of sustainable development is well known and defined in the WCED- report, as a development which meets the needs of the present generations without compromising the ability of future generations to meet their own needs. *All people*, no matter where and when they live or will live, have the same right to resources for their need. The natural base and a healthy biosphere are indispensable, which makes ecological sustainability a constraining factor. Key physical conditions to sustain human life can be understood from the laws of thermodynamics. Natural laws are therefore paramount.

All modern democracies are under the Rule of Law. This means that without any sufficient legal basis, it will be impossible to achieve sustainable development. Rule of Law is democratic states´ parallel to laws of nature. From this follows that any society, which will not conform to what is necessary and stay within limits of the natural basis, or which has insufficient laws for keeping persons and entrepreneurs within the biosphere, is unsustainable.

The logic of this is that neither laws of nature nor the Rule of Law can be disregarded in democracies.

Having said this, a choice must be made. In this article all solutions based on dictatorship are dismissed. Anarchy is also dismissed, since it does not react to ecological limits being jeopardised. For a similar reason, all economies that do not recognise the significance of ecological limits are dismissed, simply because they cannot really manage finity.

Instead, this article presupposes democracy and Rule of Law. This is fully compatible with the Rio Declaration of 1992. Democracy can have many shapes and still be a democracy. However, any democracy, the criteria of which prescribes anything that counteracts sustainability, is *a priori* dismissed simply because of the overall theme of the article – sustainable development.

Rule of Law is something different than democracy. The basic understanding of this concept is simply that no authority, not even the government, may restrict or command any physical or legal person (like an enterprise) in any way without full justification for this in law.

2 Democracy

Democracy rests on parliamentary sovereignty and is dependent on people exercising their rights to participate in the political power. A democracy is a political system where a government in power can be removed by a majority decision of the citizens, in just and open elections.

Democracy, western style, means that the majority rules by and under the laws, while respecting the rights of the minority. Generally speaking it is a political system, where the power lies with a body of representatives (e.g. parliaments) elected by the citizens entitled to vote.

However, one of democracy´s well known weak links is that it cannot totally prevent a dictator to be elected, which of course can affect the legal system in an adverse way. Hitler coming in to power in Germany (1930s) is probably the most prominent example of this.

After 1945, Rule of Law became more deeply rooted in democratic societies. The second world war most surely influenced that. The preamble of the 1948 Universal Declaration of Human Rights states "it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law."

Today, Rule of Law is omnipresent in relation to democracies and free market economies and good governance. *If* society is to move towards sustainable development one must understand that business as usual is no – no! The basic responsibility for sustainable development to come true rests with the legislators and hence indirectly with the people.

To adjust a legal order, so as to meet political goals, is in itself not new. The accomplishment of the industrial revolution needed that. Expropriation and water laws, enacted under the 19th and 20th centuries, are examples (Carlman 2000).

3 Rule of Law

Constraining factors for implementation of environmental goals are, apart from the prevailing legal and economic systems, attitudes and lack of knowledge. The fundamental task for social sustainability science is to construct a sufficiently effective system capable of making the collective action of humanity to stay within ecological sustainable boundaries. This will in this article be referred to as a sustainable control system.

Implementing policy goals rests, basically, on three kinds of functions – voluntariness and ethics (*soft instruments*), economic incentives, and legal directions and restrictions (Westerlund 2008). Actions not abandoned voluntarily and/or due to economy reasons will be carried through if they are not outlawed. If they are not outlawed, they are legal. That is the Rule of Law mechanism. In a sustainable control system, the law is ultimately a safety net with the function to catch whatever unsustainable conduct, which is not filtered away in the two previous ones.

This highlights Rule of Law. What the law filter cannot catch (define as illegal) will get through the filter with the blessing of being legal and therefore protected by the courts and the police.

The fact that man as a species has developed civilisations, founded on norms – laws – to solve political and economical conflicts, is elementary. Rule of Law – the principle of legality – has a long history (Aristotle ca 325 BC & Plato ca 360 BC) and is underpinned by interrelated principles.

Rule of Law ensures that no one is above the law, that governmental action must have legitimacy (that laws are established according to a due process) and that law rules the government itself. It implies established judicial systems with enacted laws and organized government institutions – *ruled by* law – and that all must obey the law – *rule under* law.

How e.g. the Nurnberg trials, in 1946 and 1947, corresponded to Rule of Law has been discussed. It has been argued that it is due to violation of both the Rule of Law principle and of the democratic principles that this hideous crime towards humanity could be handled. This reasoning seems to be underpinned by the fact that Nazi Germany abolished the principle of Rule of Law. As Bergman (1983, p. 25) points out "When a statute of National Socialist Germany made punishable as a crime any act that `deserves punishment according to sound popular feeling (gesundes Volksgefühl),´ this was viewed as a violation of the traditional Western concept of legality. This is also reflected in an article by Robert H. Jackson (the Chef of Counsel for the United States International Military Tribunal at Nurnberg), who said" Jurists' will find admonition in the way the rule of law was set aside, an independent judiciary destroyed and party and class use of the courts as instruments of political policy was established." (Jackson 1946). However, these trials have also been criticised, because they violated the principle "nullum crimen sine lege" – the principle of non retroactivity – and hence contradicted the Rule of Law principle (Safferling 2005).

Nevertheless, Rule of Law is central for good gover-

nance combatting abuse and corruption. Enforcing the Rule of Law is also vital for governance to guarantee conformity with internationally accepted norms, conventions and other agreements. Whereas market systems relay on promptly enforceable property rights sanctioned/warranted by the Rule of Law, a control system requires the full Rule of Law. Effective law enforcement.

In order to ensure the operationalisation of sustainable development, principles and environmental objectives need to have legal status, i.e. to be mandatory. The operationalisation must be legal. When principles and goals are legally binding, they are also covered by Rule of Law (Decleris 2000). Effectiveness furthermore requires that the governing capacity is sufficient, e.g. by enacted operative laws and established mechanisms to ensure the enforcement, including means to check the efficacy (Carlman 2007).

Having said this we must not forget what was said above regarding operationalisation of environmental goals and the control system. The legal function in the control system is *one function, constituting the last safety-net*, should the other two – the ethical and the economic functions – fail to reach a goal. One also has to bear in mind that all economical steering instruments such as tax have to be legally underpinned. So, all three functions within the control system play a role and the legal function is dormant as long as the legally binding goals can be reached with ethical and economic instruments.

Rule of Law is also consequently to blame, when an inadequate legal system leads to unclear situations. In unclear cases, Rule of Law tends to allow persons to act according to their desire. This has of course bearings on i.a. the free rider problem.

A free rider, generally defined as someone who avoids the cost and expense of finding the best course of action, is a main problem for a sustainable control system and well known within i.a. economics, political science and psychology. He consumes or destroys more than his fair share of a resource but does not carry an equivalent share of the burden. Free riding, which can be linked to the concepts of economic man and rules of profit maximizing, is a prominent sustainable problem, when it extends to excessive use of common property resources. From a public good perspective, free riders take advantage of collected-funded benefits without fully contributing to it. Hardin´s tragedy of the commons highlights this (Hardin 1968).

We know that some people are willing to, and do, act voluntary so as to help limit environmental negative impact. We also know that such noble actions are not sufficient. Furthermore it is well known that free riders are apt to relate to law, if that should meet their interests (Carlman 1993). The free rider problem is therefore a problem for the parliament/government to cope with. Rule of Law and constructing a sustainable and functional legal order is therefore of utmost importance.

The Rule of Law concept has been discussed among economists and developers. This was e.g. mirrored in the Economist where two authors were said to "tackle the question of what economists mean by the rule of law. They accept that the rule of law is necessarily tied to the success of development, although they propose a set of procedural values to enlighten this institutional approach."

These two authors bring forward "thick" and "thin" definitions of Rule of Law (The Economist 2008). Central to the thick definition is that Rule of Law is the core of a just society, linked to liberty and democracy, where the state's power is restricted and basic freedoms are guaranteed.

Thin Rule of Law is more formal. Important things here are that laws provide stability, property rights and efficient administration of justice, rather than democracy and morality (Trebilcock & Daniels 2008).

Just like weak and strong sustainability, expropriating and undermining a definition can be a sign of flaws in a theory´s capacity to tackle a problem or a question. Competing definitions also tend to undermine its usefulness.

To sum it up. The principle of Rule of Law is a very old fundamental cornerstone in Western legal tradition. It is closely tied to liberty and rights of the person and that similar cases be treated similarly, something that e.g. Rawls in Theory of Justice (1971) bases much of his reasoning on. It is a mechanism, with a function to set limits to political power. Is says nothing about the

legal system as such. It accentuates the assurance of individual rights, by restricting the power of the government. Therefore the independent authority of law overrides governments´ and agencies´ power to interfere.

4 Social science and sustainable development

The sustainability concept has, like the Rule of Law, been questioned and contested by academics, seemingly predominantly within economy and geography, and said to be unclear, lacking substance and/or difficult to pin down. This has led to ideas of concepts such as strong and weak sustainability. Since it relates to the perception of the very problem behind sustainable development, I will just mention what the difference between the two versions boils down to.

Strong sustainability denotes that trade-offs between environmental, social and economic dimensions of sustainability are not allowed or are restricted. Weak sustainability denotes that trade-offs between these factors are permissible (IUCN-report 2006). Another formulation of the difference is that weak sustainability implies that discounting and present values are central, whereas strong implies that discounting is discouraged and focus is on intergenerational justice (Moffatt 2007).

This discussion reflects a confusion between goals and means, tensions between different scientific theoretic paradigms and probably elements of ecological denial (Carlman 2007).

The three parts – environment, social and economic – which constitute sustainable development, have an internal but not really equal relation. The environment (nature) is the base, on which the other two totally depend. One simply cannot calculate on that natural capital can be substituted by economic capital. This is most evident in so called ecosystem services, e.g. the climate stabilizing function rainforests and oceans have, the protection provided by the ozone layer, etc. This does not mean that the use of non-renewable sources is banned. It rather stresses two things. Firstly we have always to investigate if a non-renewable source can be substituted for a renewable one. Secondly it implies that non-renewable sources should only be used during a limited period, allowing for a renewable system to be built up. Nuclear power is one example of this in order to face out fossil fuel. Handled correctly, the use of nuclear power should then in its turn be faced out according to a set plan.

There is no doubt that the overall policy of sustainable development entails a drastic paradigm shift, implicating that economic policy – planned or capitalistic – striving to maximize material well-being for present generations has to submit to the responsibility for coming generations (Decleris 2000). Interests promoting development cannot be balanced against the interest for ecological sustainability, without the latter being jeopardized. In a longer perspective development based on natural resources will also be put at risk. However, as long as alternatives are in tune with such sustainability, they can be balanced against each other. This often embraces economic thinking, as when analysing cost effectiveness is vital.

As mentioned above, natural science and technology have, in a historical perspective, been the most conspicuous sciences handling basic issues relating to environment. However, sustainable development belongs, deep down, to the social sciences. The reason is that even if the very nature of problems is a natural scientific one, they are human induced (Thomas 1956). Man is *the actor* and the only one who can take responsibility and steer mankind towards sustainable development. However, social science can never deviate from natural scientific facts, e.g. when setting environmental quality standards. The realisation of sustainable development is therefore dependent both on natural science and social science (Carlman 2008).

Nature, including man as a biological creature, reacts according to natural laws, implicating limits of different kinds. Nature is *the reactor* (Westerlund 1997). The significance of limits follows from the laws of thermodynamics and has implications for e.g. growth, biological diversity, etc. Due to ecosystems being non-linear and to the role of time, limits cannot be fixed once and for all in advance. Another factor is of course available knowledge or rather lack of knowledge. The more we

learn about how nature reacts, the better we can act.

Once again. The prerequisites for sustainable development rest in nature, and depend on the laws of nature. Human actions in modern democracies depend on Rule of Law. If social scientists question this or twist sustainable problems or highjack and reform established terms in order to apply their (old time) theories adequate, instead of letting the sustainability problems steer the problematisation, research thinking and theory, they will be misled, they will mislead, and they will delay urgent implementation.

5 Social environmental science – a theoretical holistic structure

Mankind's *ecological dilemma* puts forward mankind's and society's ultimate dependence on nature and natural resources. This was the basis for the world community's decision concerning sustainable development, and Agenda 21, aiming to avoid mankind's ecological crash, taking innumerable future generations into account. The biosphere, with all its different ecosystems, is very complex. Social systems are also very complex. This fact has of course a bearing on how best to construct a control system in order to achieve set goals.

Systems theory focuses on holism, i.e. how parts within a system are arranged and the relation between them. It is also a well known fact that a control system only can control something if it has sufficient internal variety to represent it. Ashby´s law of Requisite Variety states that the larger the variety of actions available to a control system, the larger the variety of perturbations it is able to compensate. Decleris (2000), with a background in both Science of System and Law, has used Ashby´s Law in order to show flaws in present legal systems and explain and clarify how a sufficient legal system must be constructed in order to meet set environmental goals and cope with e.g. the free rider problem.

Systems thinking regards the sectors and parts as components of the system. This is seemingly a necessary way to approach sustainability issues. Sustainable development relates to ecosystems together forming the biosphere. Man-made systems, interrelationship between them and – ultimately – the human control of these systems must, in order for one kind of system (man-made) to be adequate for the successful management of the biosphere, be compatible.

It should go without saying that the systems approach to sustainable development requires compatibility between the applied theories and methods.

For the academia this implies to explore problems and possibilities with respect to different scientific disciplines. However, most scientific disciplines dealing with sustainable development issues, especially within the sphere of social science, have already developed theories and paradigms without recognition of the ecological dilemma.

Theory of sustainable development/environmental theory, with philosophical, legal, natural scientific, economic, social and political dimensions, is mandatory. Such a theory must recognise the implications of the ecological dilemma. Solutions to such a dilemma dwell within the realm of social science.

In order for sustainability/environmental science to be fruitful, disciplines must produce and communicate theory and knowledge that are compatible with other disciplines. This in turn calls for the theory and knowledge, or rather the results, from one collaborating discipline to be *portable* within e.g. interdisciplinary mega-projects related to sustainable development. One discipline *exports* and another discipline, or a project, *imports* these results. It is in the end a matter of necessary, problem-relevant compatibility.

Each discipline must learn that environmental science is not discipline a+b+c etc., but rather something new, formulating and developing questions. This requires sufficient theoretical frames. Participating disciplines must therefore be prepared to change or adjust their deep-rooted identities to get full compatibility. This will for the participating discipline facilitate for theoretical questions to turning out in new ways. The challenge for social sciences is to grasp and manage not only methods for analysing and synthesising natural scientific theory and information, but also to make *use* of this when dealing with social scientific issues relevant for sustainable development.

In an effort to contribute to this thinking, I developed

a planning theory, adaptive environmental planning, based on modern environmental law theory (Westerlund 2003). It confronts the present mainstream planning approaches against the perspective of ecological sustainability, as relevant for Rule of Law countries (Carlman 2005).

6 Ten scientific pillars

There are scientifically very robust pillars upon which to develop social scientific theory for sustainability. Some of these are the following.

1 Humans are biological creatures but with an exquisite, not to say unique, capacity to think and plan and issue norms etc., – to *act.*
2 Earth with its atmosphere etc. is the Biosphere, a large ecosystem although mainly limited, but the receiver of in the first place solar energy.
3 Neither the laws of thermodynamics nor other natural laws can be changed by humans, only better and better understood.
4 The resilience and carrying capacity concepts, understood together with i.a. the second law of thermodynamics and ecology in general, makes us understand that it is normally more expensive to degrade and later upgrade to the same level as before, than not to degrade.
5 There was a Rio summit in 1992 where sustainable development was adopted as the new overall framework for mankind.
6 Sustainable development à la 1992 (going back to the WCED report 1987) includes intergenerational equity and that each generation shall manage the Biosphere so carefully, so that no future generation will lack of resources for satisfying their needs. From #1, 2 and 3 follows that ecological sustainability is necessary, and cannot be substituted, for sustainable development.
7 The Biosphere normally behaves non-linearly, which makes it impossible to define once and for all how to act within ecological sustainability. From this follows i.a. that future situations in the Biosphere cannot be brought into present day economic balancing.
8 Nature is a complex non-linear system, where subsystems – individual ecosystems – have no fixed boundaries. They can e.g. overlap and form so called transitional ecosystems such as where water meets land. Ashby's Law of Requisite Variety, considered more or less as a cybernetic axiom, falsifies implicitly all solutions based *solely* on decentralisation of control of large(r) scale systems.
9 The human population will continue to grow. There are soon 7 billion people and it is estimated to be more than 9 billion in 2050.
10 Rule of Law is as basic for how modern democratic societies function, as are laws of nature like those of thermodynamics for how nature reacts. Any effort to manage sustainability by means of human conduct, which conflicts with the law, is in the long run in vain (the free-rider problem). Adapting managing efforts to law, or changing the law, or both, is necessary. Law is, however, not necessarily only command and control. Law can also be a framework, within which – but not outside which – other means of control can be applied. This is the law's mirror of nature's sustainability.

None of these pillars seem possible scientifically to disqualify. If this can be agreed on, it is easy to lay down the very basics for social sustainability science. Nothing must be in conflict with any of these pillars. If, however, someone can scientifically prove – beyond reasonable doubt – that any of these pillars is wrong, then social sustainability science will really have taken a giant step forward.

7 Conclusion

Introducing environmental social science as a problem-related discipline (and not only as a discipline studying how people and organisations act with respect to environment), concerns basically three different issues related to sustainable development, represented by three keywords; namely *what*, *whether* and *how*.

One issue is *what* sustainable development is.

Another issue is *whether* sustainable development shall rule.

The third issue is *how* sustainable development shall be implemented in the most appropriate way.

Scholars who claim sustainable development to be "vague" do probably not address the first problem (*what*) but, in most cases, the third (*how*). If so, this implies that they do not know how to achieve sustainability. Some also address the second problem (*whether*). If so, they doubt either whether sustainable development really is decided, or whether sustainable development is something for them to take notice of.

To a large extent, such confusion might originate in how the discipline in question views the world through the discipline's older paradigm and theory. Actually, a very important step towards a higher degree of scientific compatibility within science for sustainable development would be to discuss, and find an agreement, on the need for distinction between *what*, *whether* and *how*.

So, in order to steer humanity towards sustainable development, there is a need to fully understand that Rule of Law implies that all kind of commands and other rules directed toward individuals, or organisations etc., must rest on law. Hence, all restrictions lacking such support are illegal. For researchers this implies that, when they analyse the implementation of environmental goals, it must be supported – directly or indirectly – by law. This is e.g. the case when predicating taxes or other such means for the common good. The same goes for planning e.g. a highway, an industrial area etc. Whenever actions – state actions towards private persons or actions between private persons – affect property, they in one way or the other need to consider Rule of Law.

Are there any researchers (or others for that matter), who disagree on that?

Furthermore, there is a fundamental system principle, which states that for a control system to be effective, it must at least be completely sufficient for the objective it is intended to control (Ashby´s law). This relates to hierarchies and what is best managed and on what administrative level. Setting overall goals, whether e.g. a water body or a habitat shall have a certain environmental standard and what the minimum standard should be, is best done on national/federal level – top down (Carlman 2008). How to effectuate this might very well best be a question for local levels. One implication of this is that any urge for decentralisation, which leads astray from ecological sustainable goals, counteracts the implementation of an environmental policy.

Are there any researchers (or others for that matter), who disagree on that?

If it can be assumed that there is a consensus on this, namely that scientists have to always take Rule of Law into consideration and not deviate from the significance of that. Neither when problematising nor making suggestions for solutions to implement and enforce environmental goals.

For active researchers, this means i.a. the following. Control systems must be ecosustainable, and can include many different subsystems. However, law must in the end support them. Ecosystems, all up to the biosphere, are non-linear. Therefore, controlsystems must include feedback and goal-directed rule mechanisms.

As far as we know today, such a feedback system calls for environmental planning from the top, but with as open frameworks as possible downwards without missing the ecosustainable goal. This environmental planning must be adaptable, never deviating from the goal (Carlman 2005 and 2007). Therefore, plans must be reviewed after a few, legally defined, years.

All this has a very strong bearing on property rights and similar rights issues. The basic mechanism is simple. If all such rights all over the world taken together, if fully applied, go beyond what the world's natural basis can take, all future generations included, then the legal order is unsustainable. If on the other hand such rights are allowed, but restrictions are economically fully compensated for whatever is necessary for ecosustainability, then the landowners and similar right holders are compensated by others for what is needed for sustainability. This is in full conflict with basic environmental principles and it deviates fully from the polluters' or users' pay principle. It means that those

who "own" land and water necessary for generation after generation will be allowed to degrade it, if they are not fully compensated.

Therefore the law must also contain a very good mechanism to redefine property rights in order to fit into eco-sustainability.

References:

Agenda 21 (1992) UNCED, New York.

Aristotle (ca 325 BC).Politics. (Translated by Jowett B., Republished 2007 by Forgotten Books).

Biello D, 2009 Another Inconvenient Truth: The World's Growing Population Poses a Malthusian Dilemma Scientific American Oct 2, 2009.

Berman H.J. (1983). Law and Revolution, Harvard university Press, USA.

Borgström G. (1953). Jorden vårt öde (Earth – our destiny), Stockholm.

Borgström G.(1973). The Food and People Dilemma (1973) Belmont Carifornia.

Boserup E. (1965). The Conditions of Agricultural Growth: The economics of agrarian change under population pressure, London.

Boserup E. (1981). Population and technological change : a study of long-term trends, Chicago.

Calman I (1992) TÄNKOM – studier av konflikter i svenska miljöärenden (RETHINK – studies regarding conflicts in Swedish environmental cases) Åmyra förlag. Uppsala.

Carlman I. (2000). Framtiden i förfädernas händer (The future in the hands of the forefathers) Carlssons förlag. Bjärnum.

Carlman I. (2002). Befolkningsfrågan - från överbefolkning till framtida generationer. (The population issue – from overpopulation to future generations), Iustus Förlag. Uppsala.

Carlman I. (2005) The Rule of Sustainability and Planning Adaptivity, Ambio, Vol 24.

Carlman I. (2007). The Resource Management Act 1991 Through External Eyes, New Zealand Journal of Environmental Law, Vol 11, 2007.

Carlman I. (2008). Control System for Sustainable Development, Computing Anticipatory Systems: CASYS'07; Eighth International Conference. AIP Conference Proceedings, Volume 1051.

Daly H.E. & Cobb J.B (1989). For the common good, Beacon Press, Boston.

Decleris M. (2000). The law of sustainable development. General principles. A report for the European Commission Environmental Directorate-General. Luxenburg. Office for Official Publications of the Communities.

Ehrlich P.R. & Ehrlich A.H. (1990).The population explosion. New York: Simon and Schuster.

FAO:a (2009) Food Insecurity in the World 2009, Economic crises – impacts and lessons learned, ISBN: 978-92-5-106288-3.

FAO:b (2009). Agence France Press, http://www.commondreams. org/head line/ 2009/ 01/ 26-8 (Visited 3rd of April 2010).

Grotius H 1609 Mare Liberum – The Free Sea, Lodewijk Elzevier published by Batoche Books Limited, Kitchener, Ontario, Canada, 2000.

Harding G. (1968). Tragedy of the commons, Science Vol 162 no 3859.

Holdren J.P. & Ehrlich P.R. (1974). Human population and the global environment. American Scientist 62:282-292.

IPCC:a (2008) Climate Change 2007 - Impacts, Adaptation and Vulnerability. Cambridge University Press.

IPCC:b (2008)Climate Change 2007 - Mitigation of Climate Change. Cambridge University Press.

IUCN-report (2006). The Future of Sustainability, Re-thinking Environment and Development, the Twenty-first Century Renowned Thinkers Meeting, 29-31 January 2006.

Jackson H., 1946, Justice Jackson Weighs Nuremberg's Lessons, Closing Argument for Conviction of Nazi War Criminals. http://www.roberthjackson.org/files/thecenter/files/bibliography/1940s/justice-jackson-weighs-nurembergs-lessons.pdf (visited April 2010).

Johannesburg Declaration on Sustainable Development, (2002). South Africa 4 September 2002.

Malthus T. (1798). An Essay on the Principle of Population, London.

Meadows et. al. (1992). Beyond the limits: global collapse or a sustainable future?, Earth Scan, London.

Meadows et. al. (2004) Limits to Growth: The 30-Year Update, Chelsea Green Publishing Company.

Millenium Ecosystem Assessment Board:a (2005). Living Beyond our Means: Natural Assests and Human Well-being. http://www.millenniumassessment.org/documents/document.429.aspx.pdf (visited 3rd of April 2010).

Millennium Ecosystem Assessment:b (2005) Ecosystems and Human Well-being: Biodiversity Synthesis. World Resources Institute, Washington, DC.

Moffatt I. (2007). Environmental space, material flow analysis and ecologial footprinting, in Eds: Atkinson et.al., Handbook of Sustainable Development, Edward Elgar, UK.

Plato (ca 360 BC). Laws ((Translated by Jowett B. Kessinger Publishing Llc, Dover Publication 2004).

Rawls, J. (1971) Theory of Justice, Massachusetts.

Safferling C. J.M., 2005, German Perspective on Nuremberg and its Legacy, speach held at the conference 60 Years after the Nuremberg Trials – crimes Against Humanity & Peace. (http://www.roberthjackson.org/contact/our-people/60-years-after-the-nuremberg-trials/; visited April 2010).

Smith A. (1776). Wealth of Nations, London. The Economist (2008 March 13).

The Stockholm Conference (1972). Report of the united nations conference on the human environment.

Thomas W.L., Ed. (1956). Man´s Role in Changing the Face of the Earth, University Chicago Press.

Trebilcock M. & Daniels R. (2008). Rule Of Law Reform And Development: Charting the Fragile Path of Progress, Edward Elgar,UK.

US Census Bureau(2010), http://www.census. gov/ipc/www/idb/ world pop info. html (Visited 3rd April 2010).

WCED -World Commission on Environment and Development (1987). Our common future, General Assembly Resolution 42/187, 11 December 1987.

Westerlund S. (1997). En hållbar rättsordning (A sustainable legal order), Iustus Förlag, Uppsala.

Westerlund S. (2003). Miljörättsliga grundfrågor 2.0 (Environmental legal basic issues 2.0) Åmyra förlag, Uppsala.

Westerlund S. (2008) Fundamentals of Environmental Law Methodology. In manuscript.

The Convention on Biological Diversity. Supporting Ecological Sustainability or Prolonging Denial?

Aðalheiður Jóhannsdóttir

Aðalheiður Jóhannsdóttir is a Professor of Law, Faculty of Law, University of Iceland. The largest part of this article was written during the author's stay at the Faculty of Law, Uppsala University, in October 2009.

Abstract

Rooted in and carved into the international legal system, the emergence and growth of modern international biodiversity law has brought on the scene important objectives, concepts and principles. Still, recent status reports indicate that regulatory developments have not been successful, and the decline of biodiversity continues all over the world. Against this background the article explores the main features of the Convention on Biological Diversity (CBD). Its objective is to theorise and discuss the CBD, particularly in light of some of the fundamental principles of international law. The principles focused on in this article are: (1) the sovereign right of states to utilise their own natural resources, and (2) their responsibility to prevent environmental damage in other states and in areas beyond their national jurisdiction. It will be argued that the main features of the CBD and its interaction with the above principles are prolonging international denial of what is really needed to support future biodiversity. The method used in the article builds upon some basic features of environmental law methodology (ELM).

1 Introduction

Although somewhat overshadowed by the climate issue, the current continuing decline in biodiversity, really caught the attention of the international community at the turn of the millennium. The international response was to agree to effectively reduce biodiversity losses and to achieve significant reduction of the current extinction rate by 2010.[1] Some venues went further and agreed to the objective of stopping and reversing the current losses at all levels by 2010.[2] Recent assessments and status reports indicate that the 2010 target will be missed.[3] During the 2008 meeting of the Conference of the Parties (COP 9) to the Convention on Biological Diversity[4] (1992) (CBD), new decisions were agreed, including a new multi-year programme for the period 2011-2022.[5] Thus, the forthcoming challenge facing the Conference of the Parties to be held in October 2010 (COP 10) in Nagoya, Japan, is the difficult task of deciding upon a new biodiversity target for the future that will hopefully be realised not only on paper but in nature.[6] To highlight even further the importance of the biodiversity issue, 2010 has been declared an International Year of Biodiversity. Due to this several events have been planned to stress biodiversity's importance and the challenges ahead.[7]

A new biodiversity target by itself, however, will not solve the problem of the current continuing decline in biodiversity. There are several hurdles along the way, some of which relate to law and legal systems. Thus, by applying some aspects of environmental law methodology (ELM), this article argues that particular fundamental principles of international law and the CBD are prolonging international denial of what is needed to support future biodiversity.

In line with the above, the article begins by outlining its methodological approach and basic hypotheses, *cf.* Section 2. Thereafter, Section 3 elaborates the scope and content of two fundamental principles of international law. Due to the importance and overarching character of the CBD, a considerable part of Section 4 will be devoted to the Convention's basic obligations and principles along with some features of the CBD's development. On the basis of Sections 3-4, and in light of the article's principal objective, Section 5 theorises on and discusses the article's objectives. Finally, Section 6 summarises the article's main conclusions.

2 Methodological approach

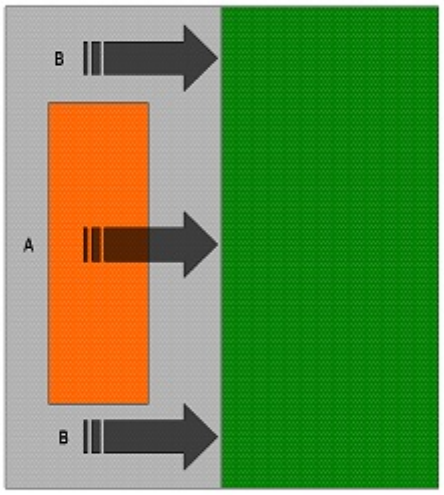
2.1 ELM's main purpose

As stated in Section 1, the article's methodological approach is founded upon some central features of environmental law methodology (ELM).[8] On the basis of the Rule of Law,[9] ELM reflects a proactive methodological approach taking its point of departure from how to reach and maintain ecological sustainability. Based on this foundation, ELM offers arguments, models and theories facilitating the understanding of environmental law, how the law functions in a legal system, and whether it actually works for the environment and

its components.[10] Thus, ELM's reasoning strives to identify and highlight weaknesses and counteractive factors in laws and legal systems as they are or are generally accepted to be. This is mainly done by bringing to the foreground arguments explaining how the establishment of law actually functions (or not).[11] ELM has an anthropocentric point of view towards the concepts of sustainable development and ecological sustainability. Human interests (social, economic and environmental) are all equally important and in the main, impossible to differentiate.[12] However, due to the nature of these interests, the environmental ones are viewed as fundamental perquisites for the successful realisation of both the social and economic ones.[13] This approach is sometimes labelled as strong or ecological sustainability.[14] Since international biodiversity law does not have one absolute or generally accepted definition of *ecological sustainability*, the definition underlying this article is borrowed from ELM. According to it, ecological sustainability is "the situations and conditions in the biosphere that are sufficient for sustaining mankind for innumerable generations to come with reliable and safe resilience, including full biodiversity."[15] To make this article's scope manageable, it focuses primarily on the conservation of biodiversity as being one part of several that are necessary to reach and maintain ecological sustainability.

2.2 The significance of the default

The following section explains one of ELM's models and the basic theory to be used for theorisation and discussion in Section 5. It is based on ELM's fundament and has been developed for international law research. It forms the core of the default theory of law and its significance.[16] The default theory[17] argues that particular international principles (see the following Section), on which international law relating to the environment is based, can, under particular circumstances, become the overriding applicable law. Both the content and the nature of these principles are right- and duty-orientated. Furthermore, they have marginal or even no ties to particular environmental objectives or targets. Consequently, their application is usually founded on the balancing of states´ rights and duties. Viewed from the perspective of ELM, they are thus not particularly supportive of ecological sustainability or biodiversity's future.[18] The circumstances in which the said principles would typically become active and overriding (the default syndrome) are basically the following: (1) when international treaty provisions are rather general (not unusual in the field of international biodiversity law); and (2) when no clear applicable treaty provisions are available on the problem at hand.[19] Moreover, international law does not clearly prohibit states from destroying their own biodiversity.[20] Finally, other states have to tolerate that their biodiversity is diminished to a certain degree by other states´ actions and activities.[21] Turning to the model, *cf.* Figure 1, the light gray area to the left reflects the abstract default where the fundamental principles B are situated. The box A, also on the left side of the model, reflects the available international environmental law (usually treaties) and, in the case of this article, the CBD. The arrows pointing towards the environmental side (right side) of the model reflect the basic fundamentals of the ELM's action-reaction model.[22] As also indicated above, the fundamental principles B are likely to become the active ruling principles under certain circumstances. This is further theorised in Section 6.



3 Fundamental principles

3.1 Generalities

As mentioned in Section 2, two fundamental principles of international law play a decisive role in the international law relating to the environment, including international biodiversity law. The principles relevant to the scope of this article are: (1) the sovereign right of states to utilise and control their natural resources (see further Section 3.2.1) and (2) the duty of states to prevent environmental damage to other states and areas that are beyond their national jurisdiction (see further Section 3.2.2). Although covered separately below, the principles are usually read in conjunction with each other, and the latter principle's scope limits the sovereign right of states stipulated in the former.

3.2 Several issues on scope and application

3.2.1 Sovereign right of states to utilise

Under Principle 2 of the Rio Declaration on Environment and Development (Rio Declaration),[23] states "have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies".[24] This is not an absolute right of states, nor is exercising the right without legal consequences. It is limited by, first, the general principle enshrined in the latter part of Principle 2; second, particular customary rules,[25] and third, existing treaty obligations.[26] International law does not have one definition of the term *natural resource,* and its contents have changed overtime; today it is thought by many to include biodiversity, *inter alia,* due to its intrinsic value.[27] In the principle's application, states would determine what natural resources to utilise and how, but should nevertheless respect relevant international law.[28] Finally, as previously pointed out, international law does not prohibit states from destroying their own natural resources,[29] including their land, soil, forests, fauna and flora and biodiversity, even though such activities may have both regional and global effects to the worse in the long run, as well as challenging to the possible realisation of ecological sustainability.[30] It remains to be seen whether the CBD's affirmation in the preamble that the *conservation* of biodiversity is a *common concern of humankind,* will eventually have the required legal force, *e.g.,* as an accepted customary rule, and in fact limit states in making choices having long-term negative effects on biodiversity. The necessity of taking particular actions in order to conserve biodiversity has been globally accepted. These actions are reflected, *inter alia,* in the CBD although the results have not yet been convincing.[31] Conserving biodiversity as such, presently and in the future, should be an issue that no state should neglect in the name of sovereign rights.[32]

3.2.2 Duty to prevent environmental damage

The latter part of Principle 2 of the Rio Declaration, *i.e.,* the "responsibility [of states] to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction"[33] is as important as the first part of Principle 2.[34] The principle's core includes states´ duty to take anticipatory measures to prevent environmental damage.[35] The standard of care is habitually a *due diligence* standard that includes the duty of states to take *reasonable measures* to protect its neighbouring states. Falling hereunder would, at least, be the duty to introduce the necessary national legislation to control public and private actors in order to protect other state's environmental interests as well as the global environment from environmental damage.[36] As Ebbesson argues, the principle accepts the balancing of environmental interests against economic and social ones.[37] In the absence of a particular treaty obligation, the above standard would be the applicable law.[38] It is a minimum standard and would most likely preclude application of any precautionary approach.[39] To complicate the issue further, international environmental law does not have a useable definition of the term *environmental damage,* nor does it contain any modern quality standards for biodiversity.[40] This lack channels the principle's application onto traditional grounds where the main emphasis is placed on the balancing of states´

rights and duties.[41]

3.2.3 Some concluding remarks

Both of the above principles play a decisive role in the fundaments of international biodiversity law. In the absence of clear treaty obligations to the contrary, they would be the law applicable to biodiversity under the international legal system. The above principles will be further discussed in Section 5.

4 Convention on Biological Diversity

As initially stated this article's objective is to theorise and discuss the CBD by relying on some of the basics of ELM introduced in Section 2. Accordingly much of this Section will be devoted to some of the CBD's basic features. This will provide specific background for the theorisation and discussion in Section 5. Over the years, much has been written about the CBD from many perspectives, and many scholars have analysed and evaluated the treaty and its individual functions.[42] In spite of critical views and several interesting approaches, the CBD has only marginally been viewed from the perspective of ELM.

4.1 CBD's importance

The CBD is widely accepted and at the time of writing, 193 states are parties to it.[43] Some view the CBD as a failure.[44] Moreover, CBD's existence may contribute to false security and prolong the denial of what is really needed to ensure future biodiversity. This is what this article argues. Nevertheless, the CBD's importance should not be underestimated although its existence has not managed to reduce or reverse the current trend of disappearing biodiversity.[45] The Convention should be accepted as a valuable tool in implementing and reaching generally accepted objectives and targets,[46] and, as such, providing a particular global control system. The CBD's parties have transparently recognised the vulnerable state of biodiversity as The Hague Ministerial Declaration (2002) reflects. There the ministers accepted "the commitment to have instruments in place to stop and reverse the current alarming biodiversity loss at the global, regional, sub-regional and national levels by the year 2010."[47] However, as will be argued below, concrete substantive provisions restricting or limiting states in their land use and utilisation of biodiversity are absent from the CBD. Furthermore, such limits are absent from international law relating to the environment. Instead, unfortunately – and in spite of the emergence of sustainable development policies several years before the acceptance of CBD's final text in 1992 – the CBD's principal obligations are carved into an old paradigm that was shaped under very different environmental and social circumstances, long before the political acceptance of sustainable development as an overall and global objective.[48] Moreover, most of the CBD's obligations are open-ended and subject to the discretion of individual parties when implemented at the national level.[49]

4.2 CBD's structure and main obligations

4.2.1 General description

Some scholars view the CBD as a framework convention,[50] and many of its provisions could be categorised as reflecting frameworks. The author of this article views the CBD rather as a mixture of a framework convention and a conventional one, where some of its provisions are frames.[51] On the other hand,[52] the CBD seems to be approached as a framework by its COP, which is best reflected in its active decision-making, as will be further commented on in Section 4.3. The Convention contains 42 substantive articles and two annexes.[53] The substantive provisions of importance to furthering conservation of biodiversity are found in Articles 1-22, and, in particular, in Articles 6-15 (see below in Section 4.2.6). Other provisions tackle international sustainable development policies, including the legal operationalisation of the principle of common but differentiated responsibilities,[54] or are of a formal, procedural or governing nature relating to the operation of the CBD. Some of these provisions are covered in this article.

4.2.2 Governing structure

In line with the development of international treaties in the field of the environment, the CBD creates a hierarchical governing structure. First, at the top is the Conference of the Parties, COP, *cf.* Article 23 of the CBD; second, a permanent subsidiary body (SBSTTA)[55] providing scientific advice,[56] in line with Article 25, and finally, a Secretariat under Article 24 that runs the CBD on a daily basis and provides particular services. This article will not further cover the roles of the SBSTTA, the Secretariat and the various working groups that have been established.[57] Instead the emphasis will be on the COP and its role. In line with Article 23, the COP has a defined role and is competent to take particular decisions to implement and develop the CBD (see further Section 4.3, below).

4.2.3 Objectives

The basic objectives of the CBD are found in Article 1 (1) the conservation of biodiversity; (2) sustainable use of biodiversity's components, and (3) fair and equitable sharing of the benefits arising from the utilisation of genetic resources. For the scope and objectives of this article, the first two objectives are of primary importance and the article views the CBD and its development as fundamental tools to reach and realise these objectives in nature.

4.2.4 Some important terms

As regards terms found in the operative text, tThe conservation of biodiversity relies upon several terms and principles, which the COP has in many instances further developed. However, the CBD's Article 2 provides the basic definitions. The following are the most important ones:[58]

Biodiversity or "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"; Biological resources that "includes genetic resources, organisms or parts thereof, populations, or any other biotic component of ecosystems with actual or potential use or value for humanity"; Ecosystem that is "a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit";Genetic resources or "genetic material of actual or potential value",[59] and Sustainable use is "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations".[60]

Several important terms are not included in Article 2; however, a few of them are present in other articles of the operative text of the treaty. An excellent example is sustainable development. Without any attempt to articulate the contents of sustainable development, direct and indirect references are present in both Article 8(e)[61] and Article 20(4).[62]

As regards further developments – COP decisions, the fact that the operative text of the CBD does not reflect important terms, such as the ecosystem approach, adaptive management, ecological sustainability and the precautionary principle, is perhaps more interesting for this article than the terms that are actually present in the treaty. The reason has to do with their legal status under international law, and whether individual parties actually implement them in their national legal systems and make the necessary changes to ensure their successful legal operationalisation. The CBD's COP has nevertheless elaborated these terms and they are present in the many COP decisions. The most important terms for this article are the following:

Ecosystem approach[63] "is a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way."[64] Adaptive management, see below, is a key element in applying the ecosystem approach. The ecosystem approach depends upon accurate scientific information and evaluations, long-time planning and adaption to the current situation. It does not exclude traditional nature conservation approaches, such as establishing nature reserves and national parks or altering traditional natural science definitions.[65]

Twelve complementary principles of the ecosystem approach as well as several focal points for its implementation have been identified.[66] On the basis of global assessments, the CBD COP noted, in its 2008 meeting, that the ecosystem approach had not been applied systematically in the battle against biodiversity loss, and more had to be done to strengthen its usage.[67] Adaptive management[68] constitutes a central element of the ecosystem approach, briefly outlined above. As the adjective indicates, the management method is tailored to "deal with the complex and dynamic nature of ecosystems and the absence of complete knowledge or understanding of their functioning."[69] Thus the fundamental rationale relates to the often non-linear nature of ecosystem processes; they often entail time-lags that may reflect uncertainties and surprises. Finally, particular management measures may be necessary even though certainties and knowledge of causes and effects is lacking.[70] The precautionary principle is not, in so many words, part of the CBD's operative text. The CBD's preamble, however, refers to its core element where the contracting parties note "that where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat."[71] Nonetheless, the CBD COP has elaborated several precautionary approaches, including the ecosystem approach, and particularly adaptive management, see above.[72] Several other COP decisions reflect precautionary approaches in particular areas, such as in the field of marine and coastal biodiversity[73] and the battle against alien species.[74]

The above terms will be further discussed in Section 5.

4.2.5 CBD's scope of application

The CBD's geographical scope, which is two-pronged, needs some explanation. In accordance with Article 4(1), and in the case of the components of biodiversity, the CBD's scope of application is confined to each contracting party's national jurisdiction. In practical terms this means that each state has full sovereignty within its national jurisdiction when implementing and applying the CBD. Some of these measures may benefit individual components of marine based biodiversity, such as particular fish stocks and marine mammals. Their utilisation, however, is subject to other conservation measures taken under the law of the sea and also limited by particular international treaties, such as the International Convention for the Regulation of Whaling[75] (1946) and the Convention for the Conservation of Salmon in the North Atlantic Ocean[76] (1982). See also the discussion of the CBD's Article 22. On the other hand, each contracting party, under the CBD or the general principles of international law, is not competent to control components of biodiversity when they are situated within the jurisdiction of other states. Moreover, national management schemes set up for particular fish stocks may control and manage their utilisation in individual cases.[77] In line with Article 4(2), however, the CBD applies to all effects, regardless of where they occur, from processes and activities carried out under the jurisdiction or control of the respective contracting party.[78] This scope of application is in line with the fundamental principles of international law relating to the environment. The effects included are at least the ones from polluting activities carried out or controlled by a contracting party. They probably also include some ecological effects, *inter alia,* the ones originating from the utilisation of shared water resources in border areas.[79] However, it is doubtful whether Article 4(2) adds anything new to international biodiversity law or international law in general. At the same time the CBD, in line with Article 3, stipulates the sovereign right of states to exploit their own resources according to their environmental policies, while bearing the responsibility of ensuring that activities carried out within their jurisdiction or control do not cause environmental damage to states or areas beyond the limits of national jurisdiction.[80]

4.2.6 Main conservation obligations

The CBD's principal conservation measures are found in Articles 6 through 15. Their wording is usually open-ended and no strict limits or bans are found in the CBD.

Several of the articles begin with the following phrase: "Each Contracting Party shall, as far as possible and as appropriate …" This approach weakens the effectiveness of the treaty since the parties have the possibility of balancing their individual economic and social conditions against the treaty obligations when they are being implemented. In light of international sustainable development policies and the principle of common but differentiated responsibilities, such an approach seems reasonable to the developing states. On the other hand, all contracting parties have a general obligation under international law to implement the CBD in good faith, and successful implementation will obviously not be realised without the introduction of new national legislation.[81]

The principal conservation obligations can be divided into two main categories:

Preparatory measures, including the development of strategies, plans and programmes for the conservation and sustainable use of biodiversity;[82] the identification and monitoring of components of biodiversity and the identification of activities that have, or are likely to have, significant adverse impacts on biodiversity.[83] See, furthermore, the provisions on project-related environmental impact assessments (EIA) and strategic environmental assessments (SEA).[84]

General and particular conservation measures, including traditional *in situ* measures, such as the establishment of protected areas, management or control of risk associated with the use of living modified organisms, prevention of the introduction of alien species and the regulation and management of processes and activities that can cause significant adverse effects on biodiversity,[85] and also several *ex situ* measures, including the establishment of *ex situ* conservation facilities;[86] measures to integrate conservation and sustainable use of biodiversity into national decision-making, and, finally, measures relating to the use of biological resources meant to avoid or minimise adverse impacts on biodiversity.[87]

Many of the preparatory measures are expensive, leaving the developing states vulnerable to biodiversity loss. However, although not yet delivering the necessary results, the CBD contains obligations that are particularly aimed at the developed states and tailored to facilitate implementation in the developing states.[88] On the other hand, the developed states have no excuse for not preventing further biodiversity losses subject to their control.

4.3 Role and status of the COP

4.3.1 Conference of the Parties – the COP

The role and status of the Conference of the Parties (COP) is important for furthering the CBD's substantive obligations. Over the years the COP has taken many decisions.[89] At the first meeting of the contracting parties to the CBD, and in line with Article 23 of the CBD, the COP adopted *Rules of Procedure for Meeting of the Conference of the Parties to the Convention on Biological Diversity*.[90] As a general rule, and in line with the CBD's Article 29 and rule 40 of the Rules of Procedure, CBD COP decisions are taken by reaching a consensus on a particular issue. If that is not possible, decisions can be taken by a two-thirds majority vote of the parties present and voting.[91] Neither the CBD nor the Rules of Procedure contain particular procedures to apply when consensus is not possible.[92] In accordance with the general rules of international law, contracting parties not present, abstaining or voting against a proposal would not be bound by the majority's decision.[93]

4.3.2 Role of the COP

As indicated earlier, the CBD COP plays an important role in the implementation of the treaty. Under Article 23, the COP is competent to take several kinds of decisions, many of which further the CBD's material scope. In line with Article 23(4) the COP has a mandate to keep under review the implementation of the CBD, and for that purpose it shall:

in accordance with Article 23(4)(a), the COP shall establish both the form and intervals for transmitting information in the form of reports from each of the Contracting Parties in line with Article 26 of the CBD;[94]

in accordance with Article 23(4)(b), the COP shall review scientific, technical and technological advice on biodiversity provided by the SBSTTA in line with

Article 25;

in accordance with Article 23(4)(c), the COP shall consider and adopt protocols[95] in line with Article 28;

in accordance with Article 23(4)(d), the COP shall consider and adopt amendments to the CBD and its annexes, *cf.* Articles 29-30;[96]

in accordance with Article 23(4)(e), the COP shall consider amendments to any protocol, any annex to them, and if so decided, recommend their adoption to the parties to the protocol concerned;[97]

in accordance with Article 23(4)(f), consider and adopt, in line with Article 30,[98] additional annexes to the CBD;

in accordance with Article 23(4)(g), establish subsidiary bodies deemed necessary for the implementation of the CBD;[99]

in accordance with Article 23(4)(h), contact the executive bodies of other conventions dealing with matters covered by the CBD, with a view to establishing forms of cooperation;[100] in accordance with Article 23(4)(i), consider and undertake any additional action that may be required to achieve of the purposes of the CBD in light of experience gained in its operation.

In line with the above, the COP's mandate is rather diverse. For this article, however, the open-ended discretion given to the COP and reflected in the last item is of prime interest.

4.3.3 CBD's COP decisions

The possibility for the CBD's COP to further and develop the individual objectives of the CBD, is of great importance. At the same time this approach reflects particular legal uncertainties. First, none of the above sources explicitly provides the COP a competence to stretch the CBD's material scope beyond its original objectives. That can only be done by relying on formal procedures and ratification processes, see further Article 23(4)(c)-(f) above. The power to enact COP decisions under Article 23(4)(i) to further and develop individual CBD objectives is herein deemed implicit.[101] Article 23(4)(i) allows the contracting parties to undertake *any* additional action required to achieve the purpose of the CBD in the light of the treaty's operation. This wording must be understood as allowing for any additional action not requiring changes to the treaty's operative text. An interesting problem is whether the CBD's COP has actually stretched the limits of operative the CBD's text beyond what was initially intended. This is likely to have taken place.[102] At the same time, some room for flexibility is necessary in order to ensure the CBD's effectiveness.

Second, the legal status of COP decisions under international law is not clear-cut. As a general rule such decisions are not legally binding under international law. They are not subject to ratification, and their subject matter is in many instances unknown to national legislatures although officials many have contributed to them. However, to deem COP decisions, including the CBD COPs, legally irrelevant under international legal law would be a methodological error, contrary recent developments in the theory and practice of international law.[103] First, such decisions may contribute to the formation of international customs, and second, some states – and international organisations[104] and other venues[105] – clearly take CBD COP decisions into account, and structure their strategies accordingly. These strategies may eventually influence legal developments and the application of law.

Third, scrutiny shows that CBD COP decisions nonetheless differ considerably. Some of them are typical soft law instruments, such as recommendations and other guidelines. Some are reflected in strategies and programmes that the contracting parties are urged to follow.[106] However, some contain general principles that are meant to be followed by both CBD's inner organs and the contracting parties at the national level when implementing the CBD's substantive obligations.[107] Several of the general principles need substantive national law to have the intended effects. Otherwise, they will not legally bind the diverse actors or shape the conditions of the different activities that affect biodiversity's future.[108]

In sum, although being of great importance, the vague legal status of CBD COP decisions causes problems, particularly if their subject matter requires legal operationalisation in national legal systems to have their intended effects. This article views most of the decisions

primarily as guiding the contracting parties in their effort to make the CBD's substantive provisions work for biodiversity; they are thus legally relevant.

4.4 Targets and tools

As previously outlined, since beginning to operate in 1994, the CBD COP has actively taken decisions. Included are decisions setting particular biodiversity targets and establishing strategies to further implement the CBD's objectives addressing the global biodiversity loss. This section will give a brief overview of the principal target and strategies.

4.4.1 Target setting

In 2002 the CBD's COP agreed the 2010 biodiversity target. More accurately, the parties agreed "to a more effective and coherent implementation of the three objectives of the convention, to achieve by 2010 a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on earth."[109] Due to the fact that around 90% of all states are parties to the CBD, the present target has considerable legal weight even though it will not be achieved. However, during the 2008 meeting of the CBD COP, the parties approved several new decisions, including a new multi-year programme for the period 2011-2022.[110] It will be the task of the 2010 meeting next October to take this further and agree a new target. The tools supporting realisation of the 2010 target (and future targets) are reflected in several strategies and approaches agreed by the COP, see below. This includes the ecosystem approach, adaptive management and precautionary approaches, see further Section 4.2.4.2.

4.4.2 Strategies

Particular long-term strategies play an important role in the implementation of the CBD. They are also the basic tool for achieving biodiversity targets. The most important is the *Strategic Plan for the Convention on Biological Diversity*, adopted during COP 6 in 2002. It is now under revision. The Strategic Plan's beginning specifically states that its purpose is to effectively halt biodiversity loss as well as to secure biodiversity's beneficial uses through sustainable use and conservation.[111] Apart from the 2010 target as such, the Strategic Plan builds upon several prerequisites, including: (a) biodiversity provides the living foundation for sustainable development; (b) the rate of biodiversity loss is still accelerating; (c) the threats to biodiversity must be addressed; (d) the CBD is an essential instrument for achieving sustainable development, and (e) the implementation of the CBD has met several obstacles. Moreover, the main thrust of the Strategic Plan is reflected in four strategic goals and the identification of the main obstacles to the implementation of the CBD. The goals are: (1) The CBD is fulfilling its leadership role in international biodiversity issues. (2) CBD parties have improved their financial, human, scientific, technical, and technological capacity for implementation. (3) National biodiversity strategies and action plans, as well as the integration of biodiversity concerns into relevant sectors, serve as an effective framework for CBD's objectives. (4) There is a better understanding of the importance of biodiversity and of the CBD, and this has led to broader engagement across society in its implementation. The main categories of obstacles are identified as: (i) political and societal, including the lack of political will, limited participation by the public and stakeholders and lack of precautionary and proactive measures; (ii) the lack of necessary institutional and technical capacity; (iii) the lack of accessible information and knowledge, including scientific knowledge; (iv) economic policies and lack of financial and human resources; (v) lack of sufficient collaboration and cooperation; (vi) legal and juridical impediments and lack of appropriate policies and laws; (vii) several socio-economic factors, such as poverty and population pressure; and, finally, (viii) natural phenomena and environmental changes, such as climate changes.[112] At COP 9, in 2008, it was emphasised that national biodiversity strategies, action plans, policies and legislative frameworks were the key implementation tools of the CBD, and that they played an important role in achieving the 2010 target. The parties were furthermore urged to develop national biodiversity

strategies and plans as soon as possible and no later than before COP 10.[113] It remains to be seen what will be decided upon for the future.

4.5 Relation to other regimes

Although the CBD was first intended as an umbrella, under which several other biodiversity conventions were to fall, this was not realised.[114] The CBD, at the best, is a semi-framework convention with active decision making on behalf of the COP. Nevertheless, the CBD's Article 22 tackles the relationships with other treaties in this field. Under Article 22(1) the CBD is not to have any effect on the rights and obligations of contracting parties that have been established by existing international agreements. The inter-temporal limit under international law would typically be December 29, 1993, which is when the CBD came into force.[115] This means, as a general principle, that treaties older than the CBD[116] are not affected by it and this would be the legal situation even though this was not stipulated in Article 22(1). This is subject to one exception, where the CBD is to have the status of *lex superior,* and that is when exercising the rights and obligations would cause serious damage or threat to biodiversity. On the other hand, the CBD does not outline how this is to be done or who is competent to evaluate the damage or threat to biodiversity. Most likely, however, this could be argued before international courts, if necessary.

In line with Article 22(2), the CBD is to be implemented with respect to the marine environment in accordance with the rights and obligations of states under the law of the sea. In Ulfstein's view, reference to the "law of the sea" is basically confined to the rights and obligations under the UNCLOS, but in his view it excludes particular fisheries agreements.[117] This conclusion, which is probably correct, does therefore not subject fisheries management to the basic obligation of the CBD.[118] Finally, the exemption mentioned above does not seemingly apply to the law of the sea.[119] On the other hand, it would be a wrong to conclude that the law of the sea allows states to pose a significant threat to biodiversity.[120]

In accordance with the above, and apart from the one possible exemption mentioned, the CBD does not have any legal effect on other international biodiversity treaties that were in effect prior to December 29, 1993. The same also applies to younger treaties even though they implement particular issues relating to biodiversity.[121] In order to strengthen international biodiversity law, extensive international cooperation has been established between the different regimes.[122]

4.6 Compliance mechanism

To no one's surprise, and like many other international treaties in the field of biodiversity, the CBD does not have very effective compliance mechanisms. No particular article contains any substantive compliance requirement or reaction mechanisms that could be used against contracting parties failing to implement the CBD adequately.[123] At the same time, it must be kept in mind that the CBD's substantive obligations are relatively open-ended and far from being precise. Consequently, parties could argue that they are fulfilling CBD's substantive obligations to the best of their capabilities and as they deem necessary.[124] Thus, individual contracting parties have broad discretion when implementing the treaty, making it difficult to argue that its substantive obligations have not been adequately implemented or applied.

In this respect the powers conferred to the COP under Article 23 need further scrutiny, particularly Article 23(3). The general heading of Article 23(3) reads as follows: "The Conference of the Parties shall keep under review the implementation of the Convention, and, for this purpose, shall:" Thereafter, sections (a)-(i) of paragraph 3 outline the several tasks of the COP, as set out in Section 4.3.2. What they have in common is that they dictate particular tasks, and none of them indicates that the COP will directly address a particular contracting party in the case of inadequate implementation of the CBD.[125] Finally, and in line with Article 26,[126] each contracting party is under a duty to submit reports on the measures taken to implement the provisions of the CBD and their effectiveness in meeting CBD's objectives.[127] If, however, a particular contracting party does not hand in reports, or if they are inadequate, the

CBD as such does not have any particular procedure to ensure compliance.[128] For example, the due date for the fourth National Report was March 30, 2009. In the beginning of March 2010, only 96 of 193 contracting parties had handed in their fourth report, including Denmark, Finland, Norway and Sweden. Iceland, on the other hand, has not yet done so or submitted the third one. The national reports are important tools for both evaluating the current status of biodiversity and setting the course for future actions. They also form the foundation for the Biodiversity Outlooks. Finally, the CBD's parties have been slow in developing and submitting their National Biodiversity Strategy and Action Plans (NBSAPS).[129]

4.7 Dispute settlement

On the basis of international law, Article 27 of the CBD provides the principles for dispute settlement. The contracting parties are to seek solution by negotiation in the event of a dispute concerning the interpretation or application of the CBD, as outlined in Article 27(1). If an agreement by negotiation is not possible, then the contracting parties may jointly seek or request mediation by a third party, *cf.* Article 27(2). Otherwise, the dispute will be either brought into arbitration, in line with Article 27(3)(a) and Part 1 of Annex II to the CBD, or submitted to the International Court of Justice (ICJ). It is, however, up to individual states, one or both of them, to decide whether these means of dispute settlement are compulsory pursuant Article 27(3). If states do not accept the same or any procedure, which is a possibility, the dispute is to be submitted to a conciliation procedure provided for in Part 2 of Annex II to the CBD. This does not apply if the parties agree otherwise, as stipulated in Article 27(4). Apparently, no contracting party to the CBD has yet invoked Article 27.

4.8 Overall assessment and concluding remarks

The CBD provides a particular, international control system for the conservation of biodiversity. Although being of high importance for the development of both international and national biodiversity law, the control system is in many respects weak and ineffective. Until now, it has only partially managed to bring about the changes necessary in the battle against biodiversity loss. In the view of the author of this article, there are several reasons for this failure. First, there is the structure of individual substantive provisions of the CBD and its lack of effective control mechanisms. Second, the CBD and the many COP decisions offer a soft approach that has not delivered the results sought after. Furthermore the provisions are not backed up by clear-cut restrictions or limitations. Third, one of the fundamental principles of modern environmental law, the precautionary principle, is not part of the CBD's operative text. Fourth, the CBD builds upon and is carved into a particular international legal environment emphasising above all the sovereign rights of states to do things their way, imposing only minimal duties on states to prevent environmental damage in other states and in areas beyond national jurisdictions. This legal environment does not particularly support environmental objectives or targets or the realisation of ecological sustainability and is likely to prolong the denial of what is needed.

5 Theorisation and short discussion

As introduced in Section 1, the article's main argument is that some fundamental principles of international law and the CBD as such are prolonging international denial of what is needed to support the future of biodiversity. The main thrust of the default theory is that under certain circumstances some international principles can take precedence and become the applicable law. The principles, the theory is particularly focused on, are (1) the sovereign right of states to utilise their own natural resources, and (2) their duty to prevent trans-boundary environmental damage.

As outlined in Section 3, the principle of the sovereign right of states to utilise their natural resources and states´ responsibility to ensure that activities within their borders or under their control do not cause environmental damage make up the foundation of international environmental law, and international biodiversity law is carved into their realm. These principles are in

principle, however, right- and duty-oriented. In applying them, the respective rights and duties are usually balanced against state's social and economic considerations. The respective state does the balancing. The right to utilise, however, is not absolute and can be limited by particular customary rules and international treaty law, *inter alia,* international treaties in the field of biodiversity. To date, slim evidence supports an international custom dictating that states bear a duty to conserve and even protect biodiversity within their borders. International law does not explicitly prohibit states from destroying their own biodiversity, and as long as no trans-boundary effects are apparent from such actions, no other state could argue that the necessary preventive measures had been neglected by a particular state. The duty to take preventive measures is not particularly demanding upon states, and, as a rule, it relies upon a *due diligence* standard, which is a minimum standard probably excluding general application of precautionary approaches. Moreover, all states have to tolerate some biodiversity damage within their jurisdiction, even though the causes could be tied to actions and activities that took place in another state.

From the point of view of ELM, the above principles do not particularly support the realisation of ecological sustainability. They have little environmental orientation and lack orientation to effects. However, under which circumstances do these principles become overriding and the applicable law? Under the default theory, this is thought to happen when: (1) no particular treaties or treaty provisions are available and applicable to the problem at hand, and (2) international treaty provisions are rather generally and openly structured. When this is the legal situation, the above principles could be expected to be the applicable law. As will become more apparent below, this is rather likely to take place in the implementation of the CBD. However, this would also be the case when no particular biodiversity law is available.

Although sustainable development policies have been promoted since the early nineties, and several new environmental regimes have become international law, including the CBD, none of them really limits states when it comes to land use policies. Such policies and the protection of particularly defined areas are likely to be among the most effective measures for the future of land-based biodiversity falling under the scope of the CBD. Thus, under international law states can legally continue to diminish their natural resources, including their land and its biological resources. As touched on earlier, the principle of state responsibility is of limited value unless a state has neglected to take preventive measures when trans-boundary effects can be expected. Whether ecological effects apply here generally is doubtful, but they probably do in the case of shared resources. To conclude, it can at the least be stated that the scope and general acceptance of these two principles are not particularly supportive of the future of biodiversity and they are likely to be the law shaping the permissibility of states´ actions, if no clear treaty obligations dictating otherwise exist.

What about the CBD then? Is the CBD as such likely to prevent the default principles from becoming the applicable law? As outlined in Section 4, the CBD forms a particular international control system. However, it is carved into the legal realm of the two fundamental principles mentioned above. In addition, the CBD's substantive obligations are reflected in a rather soft and open-ended system, where the contracting parties have the possibility of implementing them into their national legal systems by balancing their economic and social interests against environmental ones. As such, the CBD's substantive obligations do not directly restrict or limit the contracting parties in their environmental planning or when planning their economic development. For example, the CBD's parties are expected to undertake EIA if adverse impacts on biodiversity are anticipated from particular activities. However, they are not prevented from carrying out the same activities even if an EIA report demonstrated adverse negative impacts on biodiversity.

On the other hand, the CBD is a forum for active development of further biodiversity measures reflected in the various COP decisions. The CBD operative text offers several new terms relating to the conservation of biodiversity. Quite a few others are available in COP decisions, such as the ecosystem approach, adaptive management and the precautionary approach. In order

the bulk of CBD's substantive obligations (including CBD COP decisions) to steer particular actions and activities, their substance needs to be positively reflected in national law. Otherwise they will not have the necessary legal effect and influence actors at the national level. Due to the unclear status of the CBD COP decisions, it can at the least be argued that national legislatures have little or, in some cases, no information on their content and how important they are for the implementation of the CBD in general. Their substance, however, usually requires express and binding legal frameworks to deliver the necessary results for conserving biodiversity. This is particularly important if the substance of decisions necessitates some kind of restrictions on how land is planned and eventually used; if, in the light of adverse environmental effects, frequent revaluation of the permissibility of particular actions is necessary, or if the implementation requires reversal of the burden of proof where an operator or a land owner would have to limit actions that were previously allowed. Generally speaking, the CBD's contracting parties can legally continue particular land uses and activities even though they impoverish biodiversity in the long run and continue to contribute to the current biodiversity loss. This can be done legally under international law as long as no trans-boundary biodiversity damage is caused.

6 Conclusions

As proposed in Section 1, both the fundamental principles of international law and the CBD as such are prolonging and supporting an international denial of what is needed to support the future of biodiversity. As argued in this article, the core of the denial is reflected in the fact that recent international regulatory efforts have not delivered the results sought. Biodiversity continues to decline. As far as the CBD is concerned, its soft, open-ended approach, even though the CBD's COP is active and taking important decisions and developing international biodiversity law further, it is obviously not the right regulatory method in this respect. Furthermore, if the default theory has any merits, then, in order to minimise the effects of the default principles, the CBD's conservation provisions necessitate a different structure and should, *inter alia*, include some clear restrictions and limits on how far states can go when planning their land uses and in utilising biodiversity under their control. Instead of simply promoting sustainable use, the CBD should promote sustainable use within defined safe ecological limits. The precautionary principle and several precautionary approaches need to become part of the operative text of the CBD. To the extent that international law, including international biodiversity law, has contributed to the current state of biodiversity, the CBD and its implementation at the national level has not yet managed to make a difference, and the 2010 target will be missed.

Notes

[1] Decision VI/26 (2002), items 2 and 11, Annex. UNEP/CBD/COP/6/20, p. 317; Johannesburg Plan of Implementation of the World Summit on Sustainable Development (2002), para. 44. *Report of the World Summit on Sustainable Development*. Johannesburg, South Africa, 26 August - 4 September 2002, (WSSD), A/CONF.199/20 and A/CONF.199/20/Corr.1, and, *e.g.* Articles 2(2) and 6(1) of Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2001 laying down the Sixth Community Environment Action Programme: *Our future, our choice.* OJ L 242, 10.9.2002, pp. 1-15.

[2] Hague Ministerial Declaration (2002). *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety.* 3rd edition. Secretariat of the Convention on Biological Diversity, Montreal 2005, p. 1452.

[3] Including: The Millennium Ecosystem Assessment series. *Millennium Ecosystem Assessment, 2005. Ecosystems and Human Well-being: Synthesis.* Island Press, Washington DC 2005, pp. 1-131; *Global Biodiversity Outlook 2.* Secretariat of the Convention on Biological Diversity, Montreal 2006, pp. 9-73, and finally Nomander, B., Levin, G., Auvinen, A-P., Bratli, H., Stabbetorp,

O., Hedblom, A., Gudmundsson, G. A.: *State of biodiversity in the Nordic countries. An assessment of progress towards achieving the target of halting biodiversity loss by 2010.* TemaNord 2009:509, pp. 15-121. See furthermore: Communication from the Commission *Halting the Loss of Biodiversity by 2010 – and beyond. Sustaining ecosystem services for human well-being*. COM(2006)216 final, and also Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions. *A Mid-term Assessment of Implementing the EC Biodiversity Action Plan*. COM(2008)864 final. See finally the IUCN initiative: *The IUCN Red List of Threatened Species.* www.iucnredlist.org/news/species-of-the-day.

[4] Convention on Biological Diversity (CBD). 31 ILM 818.

[5] Decision IX/8 (2008) and Decision IX/9 (2008). UNEP/CBD/COP/9/29, p. 30 and 36.

[6] Several other venues are contributing to the discussion, see *e.g.* the European Platform for Biodiversity Research Strategy (EPBRS). Further information on EPRBS activities are available on http://www.epbrs.org/

[7] The International Year of Biodiversity was formally launched on January 11, 2010 in Berlin. See further: http://www.cbd.int/2010/welcome/

[8] Originally developed by Dr. Staffan Westerlund, Professor, Faculty of Law, Uppsala University, Sweden. See, *e.g.* titles such as *En hållbar rättsordning. Rättsvetenskapliga paradigm och tankevändor*. Iustus förlag, Uppsala 1997; *Miljörättsliga grundfrågor 2.0*. IMIR Institutet för miljörätt. Åmyra förlag Björklinge 2003, and "Theory for Sustainable Development. Towards or Against?" *Sustainable Development in International and National Law*, eds. Bugge, H. C. and Voigt, C. The Avosetta series 8, Europa Law Publishing, Groningen 2008, pp. 47-66. ELM's original framework was developed by theorising a typical national legal system and environmental law. As the time has gone by, some of its features have been further developed in international environmental law research. See *e.g.* Ebbesson, J.: *Compatibility of International and National Environmental Law,* Iustus förlag AB, Uppsala 1996, and Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* Uppsala University 2009.

[9] ELM, however, does not take any particular stand on which philosophical view on the Rule of Law it favours. It is simply the underlying principle of the *Rule of Law* as a paradigm that ELM places an emphasis on. Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 177-181, *et passim*.

[10] See further Westerlund, S.: *Miljörättsliga grundfrågor 2.0*, p. 1, *et passim.*

[11] Westerlund, S.: *Miljörättsliga grundfrågor 2.0*, as such.

[12] See further Westerlund, S.: "Theory for Sustainable Development. Towards or Against?" in *Sustainable Development in International and National Law*, pp. 47-66, and Westerlund, S.: *Miljörättsliga grundfrågor 2.0*, pp. 23-32, *et passim.*

[13] Problems relating to the implementation of sustainable development and its legal operationalisation, have given rise to different approaches and views. For this article however, some fundamentals need to be clear. First, a different must be made between general policies (strategies, programmes, objectives, goals and targets) on sustainable development and particular legal solutions that are meant to define particular rights and duties of sustainable development and that are reflected in positive law (international treaties, EU Acts and national legislation, depending on the level of governance). Second, to equate all sustainable development's factors on a policy level can generally be accepted. However, when it comes to positive law, substantive rules that are the fundament for decision-making in individual cases, a stand must be taken on whether all factors should be equal or whether the environmental one (ecological) is to function as limitation for the other ones. In this respect, "one size fits all" is unacceptable, and each legislative act may necessitate a particular legal solution. See further Jóhannsdóttir, A.: "Considerations on the Development of Law in the Light of the Concept of

Sustainable Development", *Miljöjuridik* 2/2005, pp. 27-48.

[14] On approaches to sustainability, including weak and strong, see, *inter alia,* Backer, I. L.: "Miljöskydd och ekonomiskt utnyttjande – principen om hållbar utveckling" in *Förhandlingarna vid Det 36 nordiska juristmötet i Helsingfors 15-17 augusti 2002,* Del I, utgivna av lokalstyrelsen för Finland 2002, pp. 113-141, and "Miljöskydd och ekonomiskt utnyttjande – principen om hållbar utveckling" in *Förhandlingarna vid Det 36 nordiska juristmötet i Helsingfors 15-17 augusti 2002,* Del II, utgivna av lokalstyrelsen för Finland 2002, pp. 477-490; Winter, G.: "A Fundament and Two Pillars. The Concept of Sustainable Development 20 Years after the Brundtland Report" in *Sustainable Development in International and National Law,* eds. Bugge, H. C. and Voigt, C. The Avosetta series 8, Europa Law Publishing, Groningen 2008, pp. 23-45; Westerlund, S.: "Theory for Sustainable Development. Towards or Against?" in *Sustainable Development in International and National Law,* pp. 47-66; and Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 153-169.

[15] Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* p. 68.

[16] *Ibid*., pp. 170-198.

[17] The default refers to a preset option. When a system operates and when no particular order is given then the default principles become the ruling principles.

[18] Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 230-233, *et passim*.

[19] See *inter alia,* the legal status within the Area, United Nation Convention on the Law of the Sea (1982), (UNCLOS), 21 ILM 1261, in particular Articles 1(1), and 133-185. See further: Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 238-241. For a different view based upon an analogy from particular UNCLOS principles, see, Bonney, S. A.: "Bioprospecting, Scientific Research and Deep Sea Resources in Areas Beyond National Jurisdiction: A Critical Legal Analysis", in *New Zealand Journal of Environmental Law,* Faculty of Law the University of Auckland, Volume 10, 2006, pp. 43-91.

[20] See, further Article 1 and 3 of the CBD.

[21] Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 208-218.

[22] Westerlund, S.: *Miljörättsliga grundfrågor 2.0,* pp. 33-81 and 122-126.

[23] *Report of the United Nations Conference on Environment and Development* (1992) (UNCED), A/CONF. 151/26 (Vol. I).

[24] The principle is generally accepted to have the status of an international custom. See further, *e.g.* Schrijver, N.: *Sovereignty Over Natural Resources. Balancing Rights and Duties*, Cambridge studies in international and comparative law, Cambridge University Press, Cambridge 1997, pp. 3-12. See also: UNGA Resolution 1803 (1962), *Permanent Sovereignty over Natural Resources,* UN Doc. A/5217 (1962) and also UNGA Res. 1831 (XVII) (1962), and finally, Article 30 of the *Charter of Economic Rights and Duties of States*, UNGA Res. 3181 (XXIX) (1974). International biodiversity law is carved into and reflects the principle, see, *inter alia,* Article 3 of the CBD, Article 2(3) of Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention) (1971), 11 ILM 963, and Article 6(1) of Convention for the Protection of the World Cultural and Natural Heritage (1972), 11 ILM 1358. See furthermore Principle 1.a of the Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (1992). *Report of the United Nations Conference on Environment and Development.* A/CONF. 151/26 (Vol. III).

[25] There is slim evidence that many preventative principles have a customary status under international environmental law. It seems that the strongest claim for customs is in the field of the protection of the marine environment. Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 227-230.

[26] International treaties in the field of biodiversity are usually flexible in the sense that they do not ban particular actions or activities although they may diminish or contribute to the biodiversity loss. For example when States have designated Ramsar sites, in line with Article 2 of the Ramsar Convention, they can all the same, in the name of *urgent national interest*, decide to delete or restrict their boundaries, *cf.* Article 4(2), but have to follow particular criteria in the decision-making. See further: *Resolution VII.20 on Articles 2.5 and 4.2 of the Convention. General guidance for interpreting "urgent national interests" under Article 2.5 of the Convention and considering compensation under Article 4.2.* Conference of the Contracting Parties to the Convention on Wetlands, Valencia, Spain, 18-26 November 2002. See also Jóhannsdóttir, A.: "Þegar dregið er úr verndun náttúruverndarsvæða" in *Afmælisrit Björn Þ. Guðmundsson sjötugur 13. júlí 2009,* eds. Stefánsson, S. M., Jóhannsdóttir, A., and Örlygsson, Þ., Codex, Reykjavík 2009, pp. 1-25.

[27] The term was for long only considered relevant for natural resources with traditional economic value, including fish stocks, minerals and water, see, *e.g.* Schrijver, N.: *Sovereignty Over Natural Resources. Balancing Rights and Duties,* pp. 12-19, and in particular pp. 14-16. See also, *e.g.* CBD Article 2 defining biological resources; Principle 2 of the Stockholm Declaration on the Human Environment, *Report of the United Nations Conference on the Human Environment.* UN Doc. A/CONF. 48/14/Rev.1 (1972) (Stockholm Declaration), and Jans, J. H. and Vedder, H. H. B.: *European Environmental Law*, 3rd edition, Europa Law Publishing, Groningen 2008, pp. 30-31.

[28] For example states have a duty under international law to cooperate. Cooperation is particularly relevant in the case of shared resources and transboundary pollution. See further: UNEP's draft principles: Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States (1978), 17 ILM 1097; Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention) (1991), 30 ILM 800. See furthermore: *Case Concerning the Gabčíkovo-Nagymaros Project*, (Hungary/Slovakia). Judgement of 25 September 1997, p. 7. ICJ Reports 1997.

[29] Jóhannsdóttir, A.: *Significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 205-207. Kokko is of another opinion and argues that states bear a duty to protect biodiversity regardless of other states and areas beyond states jurisdiction. Kokko, K.: "Biodiversity law" in *Working Papers of the Finnish Forest Research Institute 1,* 2004, pp. 157-168. His conclusion should be viewed in the light of the fact that the Finnish Constitution particularly provides biodiversity protection, *cf.* it's Article 20. The same or similar legal situation could be the reality under Norwegian law due to Article 110b of the Norwegian Constitution.

[30] Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 203-208.

[31] See further note no. 3 above on the status of biodiversity.

[32] See further: Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 24 and 243-244, and also Birnie, P., Boyle, A. and Redgwell, C.: *International Law and the Environment,* Oxford University Press 2009, particularly pp. 128-130 and 657-659, drawing, *inter alia,* attention to the importance of the *common concern* principle and international cooperation in the field of biodiversity conservation, but at the same time outlining the principle's uncertain legal status under international law.

[33] *Report of the United Nations Conference on Environment and Development* (1992) (UNCED), A/CONF. 151/26 (Vol. I).

[34] For the principle's foundation, see note 24.

[35] Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 208-214.

[36] See further, *e.g.* Tinker, C.: "Responsibility for Biological Diversity Conservation Under International Law" in *International Law Classic and Contemporary Readings,* 2. ed. Ku, C. and Diehl, P. F., eds. Lynne Rienner London 1998, pp. 418-419, and Ebbesson, J.: *Internationell miljörätt,* second edition, Iustus förlag AB, Uppsala 2000, p. 53.

[37] See further: Ebbesson, J.: *Compatibility of International and National Environmental Law,* pp. 106-107.

[38] Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 212-214.

[39] *Ibid.,* p. 209.

[40] *Ibid.,* pp. 214-217.

[41] *Ibid.,* pp. 227-233.

[42] See an interesting overages in *Biodiversity and International Law,* ed. Bilderbeek, S., Netherlands National Committee for the IUCN, IOS Press Amsterdam, Oxford, Washington DC, Tokyo 1992; *International Law and the Conservation of Biological Diversity,* International Environmental Law and Policy Series, eds. Bowman, M. and Redgwell, C., Kluwer Law International, London, The Hague, Boston 1996; *Protection of Global Biodiversity. Converging Strategies,* eds. Guruswamy, L. D. and McNeely, J. A., Duke University Press, Durham and London 1998; Louka, E.: *Biodiversity & Human Rights. The International Rules for the Protection of Biodiversity,* Transnational Publishers, Ardsley NY 2002; *Accessing Biological Resources. Complying with the Convention on Biological Diversity,* International Environmental Law and Policy Series, ed. Stoianoff, N. P., Kluwer Law International, The Hague, London, New York 2004, and *Biodiversity, Conservation, Law + Livelihoods. Bridging the North-South Divide,* IUCN Academy of Environmental Law Research Studies, eds. Jeffery, M. I., Firestone, J. and Bubna-Litic, K., Cambridge University Press 2008.

[43] http://www.cbd.int/convention/parties/list/

[44] See, *e.g.* the views of Guruswamy on CBD's shortcomings. Guruswamy, L. D.: "The Convention on Biological Diversity: A Polemic" in *Protection of Global Biodiversity. Converging Strategies,* eds. Guruswamy, L. D., and McNeely, J. A. Duke University Press, Durham, and London 1998, pp. 351-359.

[45] See Section 1.

[46] See further on the implementation of the millennium development goals, *e.g.* Díaz, C. L.: „Biodiversity for Sustainable Development: The CBD's Contribution to the MDGs", *RECIEL* 15 (1) 2006, pp. 30-38.

[47] *Handbook of the Convention on Biological Diversity Including its Cartagena Protocol on Biosafety.* p. 1453. CBD's parties have taken this further with the acceptance of several decisions, see further: Decisions VII/30 (2004) *Strategic Plan: further evaluation of process*, UNEP/CBD/COP/7/21, pp. 379-387, and Decision VII/32 (2004), *The Programme of work of the Convention and the Millennium Developmental Goals*, UNEP/CBD/COP/7/21, pp. 391-392. See furthermore: Decision VIII/15 (2006), *Framework for monitoring implementation of the achievement of the 2010 target and integration of targets into the thematic programmes of work*, UNEP/CBD/COP/8, pp. 153-179; Decision IX/8 (2008), *Review of implementation of goals 2 and 3 of the Strategic Plan*, and Decision IX/9 (2008), *Process for the revision of the Strategic Plan*, UNEP/CBD/COP/9/29, pp. 36-39.

[48] See, CBD's Article 3 stipulating that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction", and *inter alia,* scarce mentioning of the

term sustainable development in the CBD's operative text. See also, *e.g.* Le Prestre, P. G.: "The CBD at ten: the effectiveness. (Comments). (Convention on Biological Diversity)", *Journal of International Wildlife Law & Policy*, Kluwer Law International, September 22, 2002, volume 5, issue 3, pp. 269-288, arguing that the CBD is lacking all binding obligations and being supporting the sovereign right of states over their biological resources.

[49] See further, Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 234-272.

[50] See, *e.g.* Louka, E.: *Biodiversity & Human Rights. The International Rules for the Protection of Biodiversity*. , pp. 129-130.

[51] See, *inter alia,* Articles 6 and 7 are rather frameworks while Article 8 is less so.

[52] On the other hand CBD's Article 23 does not particularly support an active framework function.

[53] Annex I, *Identification and Monitoring*, and Annex II, in two parts the first on *Arbitration* and the second, *Conciliation*.

[54] See further: Article 15, *Access to Genetic Resources,* Article 16, *Access to and Transfer of Technology*, Article 17, *Exchange of Information,* Article 18, *Technical and Scientific Cooperation,* Article 19, *Handling of Biotechnology and Distribution of its Benefits,* Article 20, *Financial Resources,* and Article 21, *Financial Mechanism.*

[55] Subsidiary Body on Scientific, Technical and Technological Advice, for short: SBSTTA.

[56] The COP is competent to create other subsidiary bodies. See further CBD's Article 23.

[57] See furthermore: Working Group on Access and Benefit-Sharing (ABS); Working Group on Article 8(j); Working Group on Protected Areas, and Working Group on the Review of Implementation of the Convention (WGRI).

[58] See further Article 2 of the CBD.

[59] Excluding human genetic resources, however. Decision II/11 (1995), *Access to Genetic Resources*, UNEP/CBD/COP/2/19, p. 22.

[60] See further developments in, *inter alia,* the following COP decisions: Decision VI/13 (2002), *Sustainable use,* UNEP/CBD/COP/6/20, pp. 181-183, and, Decision VII/12 (2004), *Sustainable use,* UNEP/CBD/COP/7/21, pp. 209-226, and providing a more detailed approach with particular emphasis on Article 10 of the CBD on the sustainable use of component of biodiversity. The decision is accompanied with the *Addis Ababa Principles* and *Guidelines for the Sustainable Use of Biodiversity*. Included are fourteen principles that provide an import foundation for planning and decision making.

[61] Article 8(e) stipulates that environmentally sound and sustainable development is to be promoted in areas adjacent to protected areas with a view to furthering protection of the areas.

[62] Financial resources are the subject of CBD's Article 20. Article 20(4) stipulates, *inter alia,* economic and social development and eradication of poverty being the first and overriding priorities of the developing countries that are parties to the CBE. This gives particular information on sustainable development and how the three components are or could be prioritised in particular areas of the world. This, on the other hand, does not change the conclusions on sustainable development that were brought forward in Section 2. The question of interest here is rather if biodiversity will survive this approach and at what ecological cost, presently and in the future.

[63] See, Decision V/6 (2000), UNEP/CBD/COP/5/23, pp. 103-109; Decision VI/12 (2002), UNEP/CBD/COP/6/20, p. 180; Decision VII/11 (2004), UNEP/CBD/COP/7/21, pp. 186-208, and Decision IX/7 (2008), UNEP/CBD/COP/9/29, pp. 28-30.

[64] Decision V/6 (2000), UNEP/CBD/COP/5/23, pp. 103-104.

[65] *Ibid.,* p. 104.

[66] See further, *ibid.,* pp. 104-109.

[67] Decision IX/7 (2008), UNEP/CBD/COP/9/29, p. 28, *et seq.*

[68] Decision V/6 (2000), UNEP/CBD/COP/5/23, p. 104; Decision VI/12 (2002), UNEP/CBD/COP/6/20, pp. 180-182; Decision VII/11 (2004), UNEP/CBD/COP/7/21, pp. 186-208, and Decision IX/7 (2008), UNEP/CBD/COP/9/29, pp. 28-30.

[69] Decision V/6 (2000), UNEP/CBD/COP/5/23, p. 104.

[70] *Ibid.*

[71] See further CBD's preamble.

[72] See, *inter alia,* Decision II/10 (1995), UNEP/CBD/COP/2/19, pp. 16-21; Decision IV/5 (1998), UNEP/CBD/COP/4, pp. 32-43, and Decision V/3 (2000), UNEP/CBD/COP/5/23, pp. 74-80.

[73] Decision II/10 (1995), UNEP/CBD/COP/2/19, p. 20; Decision IV/5 (1998), UNEP/CBD/COP/4, pp. 32-43, and Decision V/3 (2000), UNEP/CBD/COP/5/23, pp. 74-80.

[74] Decision V/8 (2000), UNEP/CBD/COP/5/23, pp. 111-119. See also on the precautionary principle and the necessary means for implementing into national legal systems, Jóhannsdóttir, A.: "Not Business as Usual. A study of the Precautionary Principle", in *Afmælisrit til heiðurs Gunnari G. Schram sjötugum 20. febrúar 2001,* Almenna bókafélagið, Reykjavík 2002, pp. 2-15.

[75] 161 UNTS 72.

[76] OJ L 378, 31.12.1982, p. 25.

[77] See, *e.g.* the Icelandic fisheries management act, Act No. 116/2006.

[78] This is also in line with the latter part of Principle 2 of the Rio Declaration.

[79] See *e.g., Case Concerning the Gabčíkovo-Nagymaros Project,* (Hungary/Slovakia). Judgment of 25 September 1997, p. 7. ICJ Reports 1997.

[80] The core of these principles was tackled in Section 3.

[81] See the legal developments that have taken place in Scandinavia recently, *e.g.* the new Norwegian legislation Relating to the Management of Biological, Geological and Landscape Diversity, the Nature Diversity Act No 100/2009. See also: Backer, I. L.: "Naturmangfoldloven – en milepel i norsk miljølovgivning", *Nordisk Miljörättslig Tidskrift,* 2009, pp. 35-56.

[82] In line with CBD's Article 6.

[83] *Ibid.,* Article 7.

[84] *Ibid.,* Article 14.

[85] *Ibid.,* Article 8.

[86] *Ibid.,* Article 9.

[87] *Ibid.,* Article 10.

[88] See further CBD's Articles 16-21.

[89] All decisions are available on CBD's homepage http://www.cbd.int/decisions/

[90] See further: Decision I/1 (1994), UNEP/CBD/COP/1/17, and amendments, *cf.* Decision V/20 (2000), UNEP/CBD/COP/5/23, p. 153.

[91] The CBD hold particular exceptions and demands consensus on particular decisions which are not of relevance for this article.

[92] Individual contracting parties have submitted formal objections during the decision-making process that have lead to the adoption of particular decisions. See, UNGA/CBD/COP/6/20, paras. 294-324, Decision VI/23 on *Alien species that threaten ecosystems, habitats or species*.

[93] See further CBD's Article 29 and 30, and also the Rules of Procedure.

[94] See further http://www.cbd.int/reports/search/ where submitted reports are available.

[95] One protocol, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000), has been adopted. 39 ILM 1037.

[96] At the time of writing, no amendments have been made to the CBD or its annexes.

[97] At the time of writing, no amendments have been made.

[98] No additional annexes have been accepted.

[99] See *e.g.* the various working groups that have been established, including Working Group on Access and Benefit-Sharing (ABS); Working Group on Article 8(j); Working Group on Protected Areas, and Working Group on the Review of Implementation of the Convention (WGRI)

[100] See further Section 4.5.

[101] See further: Churchill, R. R., and Ulfstein, G.: "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law", *The American Journal of International Law,* Oct. 2000, 94, 4, pp. 623-659, at *e.g.* pp. 631-643.

[102] See *e.g.* decisions on the precautionary approach, note no. 74 above, but the CBD only refers to the approach in its preamble.

[103] See, Churchill, R. R., and Ulfstein, G.: "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-noticed Phenomenon in International Law", pp. 623-659; Röben, V.: „Institutional Developments under Modern International Environmental Agreements", in *Max Planck Yearbook of United Nations Law,* eds. Frowein, J. A., and Wolfrum, R., Kluwer Law International, the Hague 2000, pp. 363-443, and *e.g.* Klabbers, J.: "The Redundancy of Soft Law", *Nordic Journal of International Law* 65:1996, pp. 167-182.

[104] See, *e.g.* Articles 2(2) and 6(1) of the Sixth Community Environmental Action Programme: *Our future, our choice.* OJ L 242, 10.9.2002, pp. 1-15.

[105] For example programmes that are carried out under the auspice of the Arctic Council, *inter alia,* the Arctic Biodiversity Assessment (ABA) which purpose is to respond to the CBD's 2010 biodiversity target (Decision VI/26 (2002), UNEP/CBD/COP/6/20).

[106] See, *e.g.* Decision VI/27 (2002), UNEP/CBD/COP/6/20, pp. 232-324.

[107] See further decisions relating to the ecosystem approach and the precautionary principle. Decision II/10 (1995), UNEP/CBD/COP/2/19, pp. 16-21; Decision IV/5 (1998), UNEP/CBD/COP, pp. 32-43; Decision V/3 (2000), UNEP/CBD/COP/5/23, pp. 74-80; Decision V/6 (2000), UNEP/CBD/COP/5/23, pp. 103-109; Decision VI/12 (2002), UNEP/CBD/COP/6/20, p. 180; Decision VII/11 (2004), UNEP/CBD/COP/7/21, pp. 186-208, and Decision IX/7 (2008), UNEP/CBD/COP/9/29, pp. 28-30.

[108] See further: Jóhannsdóttir, A.: *The significance of the default. A study in environmental law methodology with emphasis on ecological sustainability and international biodiversity law,* pp. 129-132.

[109] Decision VI/26 (2002), UNEP/CBD/COP/6/20, p. 319.

[110] See, Decision IX/8 (2008), UNEP/CBD/COP/8/29, and Decision IX/9 (2008), UNEP/CBD/COP/9/29, pp. 30-38.

[111] Decision VI/26 (2002), UNEP/CBD/COP/6/20, pp. 317-322, see also Decision IX/8 (2008), UNEP/CBD/COP/9/29, and Decision IX/9 (2008), UNEP/CBD/COP/9/29, pp. 30-38.

[112] See further the text of Decision VI/26 (2002), UNEP/CBD/COP/6/20, pp. 317-322.

[113] See, Decision IX/8 (2008), UNEP/CBD/COP/9/29, and Decision IX/9 (2008), UNEP/CBD/COP/9/29, pp. 30-38.

[114] See further Koester on several aspects of the preparations for the CBD final text. Koester, V.: "The Biodiversity Convention Negotiation Process And Some Comments on the Outcome" in *Environmental Law. From International to National Law,* ed. Basse, E. M., GadJura, Copenhagen 1997, pp. 205-258.

[115] Obviously, the legal situation needs to be investigated for each contracting party as the CBD, and other relevant international treaties, did not bind all contracting parties the same day.

[116] In de Klemm's view this is not confined to international environmental agreements. That view is logical also from an ELM's point of view. de Klemm C. in collaboration with Shine, C.: *Biological Diversity Conservation and the Law. Legal Mechanisms for Conserving Species and Ecosystems*. IUCN Environmental Policy and Law Paper No. 29. IUCN Gland 1993, pp. 24-25.

[117] Ulfstein, G.: "Fisheries Management and The 1992 Convention on Biological Diversity" in *Afmælisrit til heiðurs Gunnari G. Schram sjötugum 20. febrúar 2001*. Almenna bókafélagið, Reykjavík 2002, pp. 491-505, at pp. 502-503.

[118] See on the other hand Agreement for the Implementation of the Provisions of the United Nations Convention of the Law of the Sea of 10 December 1982, Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995). 34 ILM 1542.

[119] See further de Klemm, C. in collaboration with Shine, C.: *Biological Diversity Conservation and the Law. Legal Mechanisms for Conserving Species and Ecosystems,* pp. 24-25.

[120] See further the UNCLOS; *inter alia,* Articles 61-67, 116-120, and 192-194.

[121] See *e.g.,* International Treaty on Plant Genetic Resources for Food and Agriculture (2001). Text available on ftp://ftp.fao.org/ag/cgrfa/it/ITPGRe.pdf.

[122] See a list of these arrangements on http://www.cbd.int/cooperation/ and, also Joint Web Site of the biodiversity related conventions: www.cbd.int.blg/

[123] When such mechanisms are in place, international regimes in the field of the environment are, in Louka's view, all the same inadequately monitored. See further on this point coverage by Louka, E.: *Biodiversity & Human Rights. The International Rules for the Protection of Biodiversity*, , pp. 109-110.

[124] Most of them would fall under the term *balancing norms.* See further Ebbesson, J.: *Compatibility of International and National Environmental Law*, pp. 86-89 and 103-135.

[125] See for comparison the Ramsar Convention. Under its Article 6(2)(d) its COP has the power "to make general or *specific* [italics added] recommendations to the Contracting Parties regarding the conservation, management and wise use of wetlands and their flora and fauna". In addition the establishment of the Ramsar Montreux Record, Recommendation 4.8: *Change in ecological character of Ramsar sites.* 4th Meeting of the Conference of the Contracting Parties – Report of the Conference 1990, exerts political and moral pressures on the states where an endangered Ramsar site is situated. See also Article 10 and 23 of the Convention for the Protection of the Marine Environment of the North East Atlantic, (1992), (OSPAR Convention), 32 ILM 1069, and the powers of the OSPAR Commission (equalling to a COP) under that Convention's regime.

[126] And also Article 23(4)(a) of the CBD.

[127] A common report format was first introduced in 2000.

[128] See further information on http://www.cbd.int/reports/

[129] *Ibid*.