



Environmental **LAW** Programme

No. 1/2001

The Precautionary Principle and the IUCN in Motion!

Amongst the draft resolutions submitted to the 1st World Conservation Congress in Montreal back in 1996 was one simply entitled 'The Precautionary Principle'. Proposed by a wide range of members from southern Africa, the draft noted that the Principle had "come to play an increasingly significant role in debates on the environment." It went on to note that "the Principle, *per se*, does not determine the proper course of action and that its misapplication could adversely affect local, national and international strategies for sustainable development." The main thrust of the draft was a request that the IUCN should engage in a process to provide its members with practical guidance on the application of the Precautionary Principle.

To the surprise of the southern African members, this draft resolution met with considerable resistance on the floor, with one US NGO member suggesting that, since the principle was fully accepted by everyone as underpinning environmental conservation, the IUCN should not be wasting its time revisiting the matter. A European NGO doubted that the

Principle could ever have a negative effect on sustainable development. To this, southern African members responded that if the principle really did underpin sustainable development, then it should be interrogated especially rigorously by the IUCN – an argument which seemed to strike a receptive chord with many members.

At the end of a fairly lengthy process of negotiation between these diverse perspectives, a revised draft was approved by the membership and subsequently appeared in the record as "Motion CGR 1.21." This motion requested the Director General "in conjunction with the Chair of the Commission on Environmental Law and in consultation with IUCN Members and Commissions, by July 1997, to examine the Precautionary Principle and advise on its use in an environmental context and with especial reference to IUCN programmes." The outcome of this process was to be disseminated widely.

Through the Regional Office for Southern Africa (ROSA), IUCN's southern African membership re-

sponded by organising a regional workshop on the Precautionary Principle in Cape Town in March 1997. Unfortunately, the region found itself paddling a lonely canoe as neither the Secretariat in Gland nor the Environmental Law Commission seemed able to engage meaningfully in the process. Indeed, no more was heard of the Precautionary Principle or CGR 1.21 until July 2000 when, following some prodding from southern Africa, the Africa Resources Trust, TRAFFIC International, the IUCN Environmental Law Centre and the IUCN Wildlife Trade Programme jointly organised a workshop to examine the Principle and scope-out the issues that would have to be clari-

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Farewell Message*

On this my last day with IUCN, I wish to note my thanks to the many IUCN colleagues and volunteers who have helped me during stay as Director of the IUCN Environmental Law Programme.

When I arrived, I was keenly aware that the IUCN Environmental Law Centre had been carefully nurtured into being one of the world's premier resources of environmental law. I hoped to add to this rich legacy, or at least keep it intact! If I have been able to constructively serve IUCN, it is thanks to the unwavering support of former ELC Head, Françoise Burhenne, two great Directors General, and all of the IUCN staff, both in Bonn and throughout the Union. In addition, Nick Robinson, as Chair of the Law Commission, and CEL members have enthusiastically carried out new activities for the law programme.

With limited funding and more than 40 regional and country offices, regionalisation of the law program is both a challenge and an opportunity. For the first time, there are more IUCN staff lawyers working in the regions than here in Bonn. Through the hard work of our legal officers and staff, and the support of the CEL regional Vice Chairs, and our excellent rapport with the Asia Regional Office, we are making great progress

in addressing regional needs. This co-operative approach offers great promise for the continued vitality of the ELP.

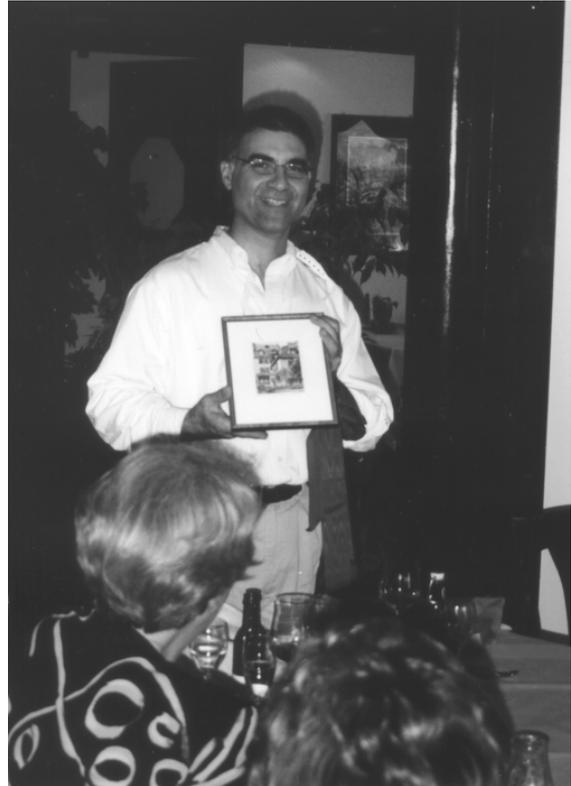
In the communications area, the development of the CEL forum in late 1999 has helped to connect us as never before, and it will continue to grow. The Newsletter has also expanded and improved its coverage. Our global electronic database, ECOLEX, is poised for significant growth, especially as we enter our new trilateral partnership with FAO and UNEP. We have been investing in our website, and hope to launch a new one quite soon. Perhaps most importantly, in line with the efforts to bring together a Union-wide program, we are on the verge of completing a unified environmental law program comprising the prospective four-year plan for both IUCN-ELC and the CEL.

I could not complete this farewell without thanking once more all of my colleagues here. I leave

with deep respect and admiration for their selfless commitment to the goals of IUCN. I know that their great work will continue under my successor John Scanlon.

– CDL (31 July 2001)

* Original title (as suggested by staff) "Leaving without Birkenstocks"



Charles Di Leva at his farewell luncheon with ELC staff and special guests

New Head of the ELP

On 23 August 2001, Achim Steiner, Director General of IUCN and Nicholas Robinson, Chair of the Commission on Environmental Law of IUCN, announced with great pleasure the appointment John Scanlon to lead the IUCN Environmental Law Programme (ELP).

John holds a Master of Laws (Environmental) obtained from the Australian Centre for Environmental Law, Adelaide and he was the founding

member of the National Advisory Board of the Australian Centre for Environmental Law. He has a strong reputation as a manager and has gained experience at the international, national and provincial/local levels, as well as in the public and private sectors, academic institutions and NGOs. A former Chief Executive of the Department for Environment, Heritage and Aboriginal Affairs of South Australia, John has been involved in conservation and sustain-

able development throughout his career.

We look forward to working with John in establishing a new level of collaboration with the Commission on Environmental Law (CEL), and developing the ELP as a dynamic component of IUCN and as a leader in the field of environmental law and policy.

John, welcome on board!

– IMV

FROM THE CHAIR: Precaution: Government's Sound Risk Management

In the 1960s and 1970s, many political leaders doubted the importance of the polluter pays principle. Inspired by industrial trade organizations and persuaded by their lobbyists, far too many economists, ministers and legislators argued that industry should not bear the cost of pollution control. Thirty-plus years later, at the dawn of the new century, these views sound quaint. However, the same voices now oppose the use of the Precautionary Principle, (Principle 15, Rio Declaration on the Environment and Development, (1992)) as a rule of law, arguing that this would harm the economy and body politic. The US State Department, under Presidents Bush, Clinton and Bush, has taken this view, and industrial trade organizations have lobbied to prevent enactment of the precautionary principle as law.

However, practical experience within States that accept the guidance of the Precautionary Principle is reaffirming its wisdom. Australia, for example, has enacted legislation to require use of the Principle in decision-making. (Environment Protection and Biodiversity Conservation ACT 1999, and Regulations 2000 (Statutory Rules 2000, No. 181.) As detailed in another article in this newsletter, the European Union has expanded the application of the Principle beyond environmental matters to any situation where "science is unable to give a clear answer," and envisions EU Member States acting to "establish a level of protection – particularly of the environment, human, animal and plant health – that it deems appropriate" as part of a structural approach to assessment, management and communication of risk.

Perhaps the best example of the important role for following the Precautionary Principle is the unfolding crisis about "mad cow disease," or Bovine Spongiform Encephalopathy (BSE), (known as "Scrapie" in sheep, "Chronic Wasting Disease" in deer and elk, or "Creutzfeld-Jakob Disease" in humans.) One species can infect another when a diseased animal is eaten by another. When bones, unused flesh and parts of slaughtered cattle were recycled into protein pellets and fed to other cattle, the disease was transferred. Humans, in turn, were infected by ingesting beef from cattle that were raised on the protein supplements. (See World Health Organization, "Report of WHO Consultation on Medical and Other Products In Relation to Human and Animal Transmissible Spongiform Encephalopathies" at www.who.org)

By 1985, the U.K. was exporting 5,000 tons of pellets annually, banning export only in 1989. The costs to the U.K. of efforts to control BSE have been substantial. To protect human and animal health in the U.K., 200,000 diseased head of cattle have been killed, and 4.5 million cattle less than 30 months old (which may have been fed the protein pellets) were slaughtered. Over 100 humans have died and with a 15-year latency period, others may well die also.

Policies and laws based on the Precautionary Principle averted this tragic pattern in Sweden, providing a sound example to other States – Sweden has had no instances of BSE. (See, Nicholas George, "Sweden's Caring Farmers Are Rewarded with Public's Trust," *The Financial Times* (London), 20 February 2001.) Beginning in the 1980s, Sweden began to limit the use of antibiotics and other additives in animal feed. In 1986, Swedish farmers agreed to ban the use of bone and other animal by-products in feed, and in 1988 Sweden banned the import of live cattle, embryos or semen from the U.K. In 1988 Sweden adopted the Animal Welfare Act and the government promulgated the Animal Welfare Ordinance to establish a clear basis for ethical agricultural practices. (Swedish Ministry of Agriculture, Food and Fisheries: "Safe, Sustainable, Ethical – A Holistic View of the Food Chain" (2000), and "Happy and Healthy Animals – Ethical and Moral Perspectives on Keeping Animals" (2001).)

Moreover, according to one scientific hypothesis BSE's first appearances in cattle may have been triggered by the use of "phosmet," an organophosphate pesticide, in areas rich in manganese. (Mark Purdy, 57 *Medical Hypothesis* 29 (9 Jan. 2001), see www.ideal_library.com, or www.purdeyenvironment.com.) Here also, Sweden was at the forefront of precaution. In the 1990s, Sweden cut back on pesticide use nation-wide by 75%. The government was also a leader the world-wide effort to ban persistent organic pollutants (POPs) like phosmet. In addition to resulting in the finalisation and adoption of the new POPs Convention, this position led the Swedish Agriculture Minister, Margareta Winberg, to push for revision of the EU's Common Agricultural Policy, shaped in the 1950s; she has urged that "it is not the time to wait and see; now is the time to do something before the situation gets worse." (Dan Bilefsky, "EU's Women Farm Ministers Espouse 'Green' Agriculture." *The Financial Times* (London), 7 March 2001.)

Reliance on the Precautionary Principle can avert a BSE crisis in countries where it has not yet appeared. BSE presents "threats of serious or irreversible damage," and therefore the "lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation." Now is the time for further action. Once the Convention on Persistent Organic Pollutants is in force, the State Members would be well advised to ban "phosmet" as a precaution against the spread of BSE, under Appendix D.

Similarly, under the Phytosanitary Protocol to the General Agreement on Tariffs and Trade, there is a sufficient basis for States to ban import of protein pellets from recycled animal by-products. In Article 5.7, the GATT specifically notes that "In cases where relevant scientific evidence is insufficient, a member may provisionally adopt sanitary and phytosanitary measures on the basis of available pertinent information, including that from the relevant international organizations as well as from sanitary and phytosanitary measures applied by other members...."

Just as Sweden took the lead in advancing the POPs convention, Sweden and other States should urge the UN Environment Programme and the World Health Organization (WHO), and the UN Food & Agriculture Organization (FAO) to agree on a form of legislation appropriate to prevent BSE from spreading. The FAO this year issued guidelines for the control of BSE. Others, including IUCN's Species Survival Commission, should address the implications of the precautionary principle for transmission of BSE to deer and elk and other fauna. However, even in the absence of coordinated international action, individual States have the capacity to follow Sweden's example, especially those developing countries that have not yet a dependency on factory farming techniques, and can stabilize sustainable agriculture drawing upon Sweden's experiences. Precaution, as a rule of law, is sound risk management.



Nicholas Robinson, Chair, IUCN CEL

In this issue...

With this issue, IUCN-ELP (rather belatedly) begins its 2001 newsletter series by considering one of the seminal concepts in international and national environmental law – precaution. More than 10 years after its first introduction, this principle remains relatively undefined and surprisingly controversial. It would be impossible, of course, to include all of the myriad of current positions on this issue in a single newsletter. We are grateful to our contributors, who have provided an interesting mix of contrasting views.

Jon Hutton's opening article describes IUCN's involvement in and commitments to ongoing work on the issue, and challenges CEL to take the next steps in this important process. CEL Chair Nicholas Robinson, in his letter from the chair, offers a strong statement of the value of the principle, while a variety of regional perspectives are reflected in articles from Mark Christiansen (AustralAsia), Silvia Francescon (EU), and Jennifer Katerere (southern Africa). Rosie Cooney offers the perspective of development-focused international assistance organizations.

Other articles featured in this issue include

- a farewell note from Charles Di Leva, who has returned to Washington, D.C., after 2 years as Director of the ELP, and welcome to his replacement, John Scanlon, who will take up his post in October, and
- reports on continuing work in the ELP, including the CDG fellowship programme, and our work on alien invasive species,

as well as our regular features.

Our readers are reminded that this newsletter exists only through their interest and support. We encourage you to submit articles, opinions, and comments on any part of this newsletter. And take heart – issue 2/2001 (a very special issue) is already in process – COMING SOON.

– TRY

...The Precautionary Principle and the IUCN in Motion!

fied pursuant to CGR 1.2. A report of this meeting can be found on the website of TRAFFIC International at www.traffic.org/briefings/precautionary.html.

Sadly, the 2nd World Conservation Congress did not provide an opportunity for the workshop organisers to report this progress back to the membership owing to the cursory way in which past Motions were dealt with. Still, the meeting did result in a firm commitment from both the ELC and the SSC to continue with the process by working with TRAFFIC and members (in particular, the Af-

rica Resources Trust) to seek the funding and other support needed to launch a major project that can, hopefully, be completed by the 3rd WCC.

Although the response of the IUCN to CGR 1.21 has been disappointing to many members, recent progress embodied in the workshop and the WCC-2 commitment is very much welcomed.

This controversy has made a second, unexpected contribution, to the operations of IUCN – it has helped highlight many of the weaknesses

that have, over time, come to be associated with the WCC resolutions/motions process (both in their development and in their implementation.) Under the new Director General I wonder if we will finally see some progress in that direction too?

– Jon Hutton
Africa Resources Trust
World Conservation Monitoring
Centre
219 Huntington Road
Cambridge CB3 0DL
United Kingdom
fax: (44 1223) 277 136
e-mail: hutton@artint.force9.co.uk

THE PRECAUTIONARY PRINCIPLE AND GMOs: AN AUSTRALASIAN PERSPECTIVE

The practical difficulties in applying the precautionary principle at the domestic level have recently been demonstrated in New Zealand. New Zealand's Royal Commission on Genetic Modification has completed its Inquiry and is now preparing its report to the Government. The Commission's task was to receive submissions and evidence and report to the Government on

- strategic options available to New Zealand from the use or avoidance of genetically modified organisms, genetic modification techniques and genetically modified products; and
- appropriate policy and legislative responses to those options.

The inquiry considered thousands of pages of oral evidence from over 300

witnesses on its website from thousands of people and held a large number of public meetings throughout the country.

The Commission's report and the evidence received by the Inquiry can be found on the Commission's website at www.gmcommission.govt.nz.

One of the consistent themes throughout the course of the Inquiry was a concern about the extent of the unknown factors of GM technology – possible side effects, and unforeseen impacts. In this context, the role and application of the precautionary principle was the subject of much evidence and debate.

A number of interpretations of the precautionary principle were given. On the one hand, the principle was asserted as a reason in itself to pre-

vent the introduction to New Zealand of GMOs and GM products. The following extract from the evidence is typical of this view:

Zealand is a signatory. The most powerful guideline to come from Agenda 21, the precautionary principle, suggests that countries or consumers have the right to demand that a chemical, a crop or a technology be proven safe before it is released for public use. If there is any evidence to suggest that there may be negative human, environmental or cultural effects then any country or people have a right to avoid risk. The precautionary principle was upheld by the 1999 Montreal Biosafety Protocol which suggests that if, using the precautionary principle, any country deems the evidence of risk for genetically engineered organisms too great, then that country cannot be forced to accept GEOs.

On the other hand, witnesses pointed to the range of formulations of the principle at the international level and the inability of experts to agree on a single comprehensive definition. In light of that uncertainty, many witnesses preferred the application of a "cautious approach" rather than the precautionary principle. The following extract from the evidence is typical of that approach:

The so-called precautionary principle is constantly invoked as an argument for banning genetic modification. Whatever the precautionary principle means, it is not that we should stop learning and applying that knowledge in the real world. We will never know everything and it is impossible to create a world with zero risk. Of course, if we pursue genetic modification, or any other new technology, it must be done with great care and caution. This results in the adoption of a precautionary "approach" or a precautionary "attitude" rather than treating it as a "principle". The daily example of crossing the street is sufficient to explain the difference between the two interpretations. If we would only cross the street if we had a 100% certainty that nothing would go wrong during the crossing we would never leave the curb. But that doesn't mean we should cross without pausing and looking both ways before venturing into the roadway.

At the same time, the Commission had to consider how Section 7 of the Hazardous Substances and New Organisms Act 1996 applied to the issue. The Act requires all uses of GMOs to be expressly authorised by



Courtesy: GA

witnesses, over 13 weeks of formal sittings. In what may have been the first such procedure in the world, that evidence was formally tested by cross-examination. In addition, the commission received written submis-

sions on its website from thousands of people and held a large number of public meetings throughout the country.

The UN 1991 Rio Earth Summit produced the Agenda 21 document to which New

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a government agency, the Environmental Risk Management Authority. Section 7 states:

7. Precautionary approach – All persons exercising functions, powers, and duties under this Act ... shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects.

Interestingly, in the Parliamentary debate when Section 7 was being introduced, the Minister for the Environment, the Hon. Simon Upton stated:

[Another MP] said that he would have been unhappy with words "precautionary principle". He is happy with the words "precautionary approach". But I think he is right. The word "principle" imports a lot of baggage from all sorts of international negotiating for all sorts of academic treatises on the precautionary principle, which has assumed an almost artefactual existence when of course it does not really have any such existence at all. It is a question. It is a way of thinking. It is a way of approaching uncertainty. I really would be stunned if anybody could disagree with the words of this clause, which simply states that people "shall take into account the need for caution in managing adverse effects where there is scientific and technical uncertainty about those effects." I ask whether there is any business in New Zealand that would say: "Where there is technical uncertainty we shouldn't have any regard for caution." I think that would be a most unbelievably cavalier approach. I think it would run against the grain of good business practice in every respect. These are just plain common-sense words, and no baggage or superstructure is attached to them. We should apply due caution in the light of

our knowledge, and that is what everybody does every day of their lives.

During the course of the New Zealand Inquiry, the Australian Commonwealth Government passed the Gene Technology Act 2000. Section 4 of that Act, which is yet to be the subject of judicial consideration, borrows from Principle 15 of the Rio Declaration by providing:

4. Regulatory framework to achieve object

The object of this Act is to be achieved through a regulatory framework which: (aa) provides that where there are threats of serious or irreversible environmental damage, a lack of full scientific certainty should not be used as a reason for postponing cost-effective measures to prevent environmental degradation...

The Australian Act restricts the principle to the context of environmental damage. In the Senate debate on the Gene Technology Bill, the Australian Government stated that it strongly opposed the use of the precautionary principle in relation to human health.

In recent years, Australian and New Zealand courts have considered the application of the precautionary principle in the context of domestic environmental legislation. Leading expositions of the New Zealand Environment Court's view of the relevance of the precautionary principle approach are found in the cell-phone tower cases of *McIntyre v Christ-*

church City Council and Shirley Primary School v Telecom Mobile Communications.

McIntyre distinguished between the policy of the Resource Management Act 1991 and a general precautionary principle of environmental law. The Court stated in relation to the general precautionary principle:

Like all elements that contribute to the ultimate judgement, the weight to be given to the precautionary principle would depend on the circumstances.... The circumstances would include the extent of present scientific knowledge and the impact on otherwise permitted activities. However, we think that in an appropriate case they would also include the gravity of the effects if, despite present uncertainty, they do occur.

The *McIntyre* decision has been criticised by commentators who argue that because of the uncertainty introduced by the many (and sometimes conflicting) formulations of a general precautionary principle and the comprehensive nature of the Resource Management Act which contains provisions of a precautionary nature, there is no place under the Act for the consideration of a separate general precautionary principle.

Subsequently, in the *Shirley Primary School* case, the Environment Court held that if a precautionary approach is relevant at all under the Resource Management Act, it is as part of an implicit policy in the Act, and not by reference to the general precautionary principle:

There is some confusion apparent over the applicability of the precautionary principle. We hold that the correct position is that the RMA is precautionary and thus justifies a precautionary approach. We consider, without deciding, that the precautionary principle is a limited consideration introduced by international law...

In summary, we do not consider it is appropriate to apply the "precautionary principle" or the other policies suggested by witnesses and supported by counsel, for three reasons. First, a precautionary approach is already implicit in the Act and emerges in the flexibility of the standard of proof applied by the Court and (as we shall see) in the weight given to evidence that has only been "proved" to a low standard (probability). Second, such a



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The Precautionary Principle: Implications for Development and Poverty Alleviation in Southern Africa

The development of shared values and principles for environmental management is critical for achieving meaningful levels of international co-operation. Despite an ever-increasing number of multilateral environmental agreements, consensus on the meaning of key terms and their implications remains elusive.

The precautionary principle is one such shared value, and is widely accepted as a principle of customary international law. It has been recognised in several recent international conventions and policy agreements. However, beyond a vague understanding of its baseline – that “environmental degradation should be avoided as opposed to redressed” – there is no meeting of minds on the implications of the principle. Some advocate interpreting it as “in the face of uncertainty – don’t”; while others hold that it means “in the face of scientific uncertainty – assess the risk and then act.”

This failure to reach global consensus on the principle’s meaning has been at the heart of disputes concerning the listing of species under CITES, for example. In this forum, the disputes raise many issues including the relationship of CITES to the CBD, the interpretation of the principle itself, and the nature of evidence and the burden of proof. This brief article considers one central issue/ concern for southern African countries – the relationship of the precautionary principle to other principles and objectives.

Development and Poverty Alleviation

For many southern African states the precautionary principle is seen as a guide to action, as opposed to a hard and fast rule. Indeed the pattern of discourse at the international level,

including state declarations, treaties, national legislation, international and national cases and policy statements, indicate a strong acceptance of this view of the principle.

There is broad acceptance in the region of the Rio approach, as expressed in Principle 15 of the 1992 Rio Declaration:

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

Under this statement, the principle requires a threat of damage, as opposed to a mere supposition, as well as scientific uncertainty about cause and effect, before the precautionary principle must apply. As such, the principle is a guide to action – one guide among many.

The critical question is – what weight should the precautionary principle carry *vis á vis* other principles and objectives? In this context, a distinction may be made between overriding principles or norms and those that are of equal weight. From their perspective, for example, southern African states perceive their development objectives to be over-riding.

Southern African states have consistently argued that their global commitments must be understood in the context of their sovereign rights, as the basis for all co-operation. This perspective is supported within international environmental law. Through the 1992 UNCED process and the conventions adopted there, we witnessed a resurgence of the concept of state sovereignty and responsibility,

at the global level, as the basis for co-operation – a significant step away from the notion of common heritage as the key factor. These conventions and agreements essentially recognised the right of states to manage resources according to their own laws and policies pursuant to their national interests. Consequently, global co-operation (and the principles that set the basis for it) must not only be about meeting shared global objectives but also about the realisation of national objectives, goals or interests.

For developing countries, this focus on sovereign rights is particularly important. It sets the basis for acceptance of their policy determination that “development is an over-riding objective”, and hence that environmental management and conservation concepts must be viewed within a development framework. This perspective finds expression not only in regional agreements, such as the SADC Treaty and its Protocol on Wildlife, but also in global agreements such as the Convention on Biological Diversity (CBD). SADC’s key objectives, as expressed in its founding Treaty, include poverty alleviation, raising people’s standard of living and economic development. The CBD recognises that development is a priority for developing countries. Additionally the CBD objectives and approach to environmental management support a managerial approach based on the interconnectedness between conservation and the sustainable use of biological diversity.

Clearly from this perspective, the precautionary principle should not be used to place unwarranted restraints on wildlife uses that undermine economic and development opportuni-

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ties and consequently conservation. This is particularly so where local livelihoods and economies are dependent on wildlife natural resources. In these circumstances, beneficial use is a key element of conservation.

CITES and Precaution

Disputes about how CITES is implemented provide an excellent example of the divergent approaches to the precautionary principle. In 1997, at the CITES COP 10, the issue of the relationship between precautionary principle and development rights in the context of sustainable use came to the fore for southern African states. Zimbabwe, Namibia, and Botswana wanted their elephant population downlisted from the CITES Appendix 1 (which completely prohibits international trade in a listed species), to Appendix II (which allows trade within specified parameters). The controversy at that meeting revolved in part around the supposed use of the precautionary principle by CITES COP to justify the refusal to downlist.

The Fort Lauderdale resolution – CITES-COP's statement of the precautionary principle – proclaims that "by virtue of the Precautionary Principle, in cases of uncertainty, the Parties shall act in the *best interest of the conservation of the species* when considering proposals for amendment of Appendices I and II." While southern African states accept this, they do not accept the assumption underlying critical listing decisions such as the elephant issue described above that actions that seriously undercut local livelihoods can indeed be in the best interest of a threatened species.

Debate around elephant downlisting is polarised between those states

claiming that the precautionary principle requires that trade in elephants must be curtailed as the impact of trade on them is not known, and those that argue that the precautionary principle requires a careful assessment of different management options as a basis for ensuring the viability of elephant species.

The southern African states argued that the uncertainty about the impact of trade on elephant populations generally was an excuse to limit opportunities to sustainably use elephant



resources, undermining economic development notwithstanding the viability of particular elephant populations. In the absence of rights to trade, communities may well be pushed to convert wild land to other more profitable use such as agriculture.

Although these arguments were successful at CITES COP 10, further proposals to downlist failed at COP 11. For many, the failure to downlist these populations seems unjustifiable and indicative of a basic unwillingness of the CITES parties to use the tool of trade restrictions, and indeed the precautionary principle, in a way that supports the overall sustainability of human and elephant populations.

This CITES approach is seen to be out-of-step with the modern environmental managerial values and concepts. This is attributable to the fact

that CITES was adopted during a period in which the international environmental law focused on the "principle" of common heritage as the basis for collaboration – a time when conservation was thought to take priority over human sustainability.

Other Principles

It is increasingly recognised in law and policy that one environmentally relevant principle may affect the interpretation and application of another such principle. As stated pre-

viously the precautionary principle is but one of several international law principles that are significant for environmental management. It exists alongside other established and emerging principles and values. These include recognition of "the close and traditional dependence of many indigenous and local communities embodying traditional lifestyles on biological resources," "sustainable use," "inter-generational rights," "environmental rights" and "rights of public participation." Consequently it may be argued that it is inappropriate to interpret the precautionary principle in an *a priori* manner, with an invariable specified consequence. Instead, it must be interpreted in relation to other principles and objectives.

Additionally, precaution is increasingly seen as just one aspect of a multi-faceted approach to environmental management. Education, in-

formation, recycling, clean production, waste management and adaptive management are other approaches.

The impact of one principle on another may vary considerably. Some principles like that of intergenerational equity may increase commitment to protect a resource or the environment from irreversible or significant harm; whereas principles of human rights might impel one to err on the side of protecting human interests, and elevating the need for stronger action to safeguard human health, human development rights, or traditional resource rights.

Conclusion

The issue for southern Africa is not that the precautionary principle should not be applied, but that its application needs to take place within the context of the region's overriding commitment to development, as well as to other principles and key environmental management objectives. Issues of human sustainability and well-being need to be placed at the fore. Given the centrality of development, any interpretation that sim-

plistically depicts any change in the environment as necessarily damaging or negative is not acceptable.

In fulfilment of the precautionary principle, any decision pertaining to species use would need to be based on an assessment that takes into account not only issues of uncertainty and conservation, but also the objectives of resource management. As formulated under international law, the concept of precaution does not require that the relevant party must necessarily avoid all action where there is scientific uncertainty. Avoidance is but one of a number of possible courses of action. The nature of action required must be based on consideration of the risks involved.

In this context, the identification of specific criteria for determining whether or not to engage in a given activity will be important. Such criteria should be elaborated with regard to specific situations or areas of management. Through the application of the principle over a period of time, a set of clear criteria may become ascertainable. From this perspective, it would be both unnecessary and inopportune for the for-

mulation of the principle to be so tight as to prevent its effective application as a management tool. The value of the principle lies in its adaptive, as opposed to prescriptive, status.

Nothing in any of the relevant international formulations of the precautionary principle would prevent any parties from entering into stronger formulations of the principle as to matters within their jurisdiction. They might even adopt a preventative principle in appropriate circumstances, such as where the risk of irreversibility might be greater and alternative conservation options narrower (e.g., in areas of human health and the management of marine environments.) It is, however, increasingly unlikely that Southern African States will accept a very narrow interpretation of the principle, or choose to apply one generally within their jurisdictions.

– Jennifer Clare Mohamed-Katerere
Environmental Lawyer
Zimbabwe
phone/fax 263 4 498244
E-mail address:
katerere@africaonline.co.zw

A CITES anniversary

In June, the government of Germany held ceremonies commemorating the 25th anniversary of Germany's accession to the Convention on International Trade in Endangered Species of Fauna and Flora.

The meeting featured presentations by Willem Wynstekkers (Director General of the CITES Secretariat), Jürgen Trittin (German Minister of the Environment) and Prof. Dr. Hartmut Vogtmann, (President of the German Federal Agency for Nature Conservation). Dr. Vogtmann recognised at length the contribution of the ELC and especially of Françoise and Wolfgang Burhenne to the creation of the convention, and Germany's commitment to it.

The speakers' presentations also noted the evolution of international law of conservation in the intervening years, and predicted a similar evolution for CITES in the future.

– TRY

The precautionary principle in development context: natural resource management, conservation, livelihoods and trade

For many developing countries, and particularly for the least developed countries, natural resource management and utilisation form a crucial foundation for sustainable development and the expansion of trading opportunities. In particular, livelihoods and incomes are often dependent on some level of use of wild species of plants and animals.

The precautionary principle has become an increasingly prominent principle governing legal, policy and management approaches to conservation and natural resource management. However, the ambiguous content of this principle, its unclear legal status, and the wide discretion it allows decision-makers have provoked considerable concern within some developing countries that widespread reliance on this principle may conflict with development priorities or impede access to markets.

Conceptions and applications of the precautionary principle can influence resource users in many ways. It may, for instance, be asserted as a basis for the erection of trade barriers based on conservation grounds. Decision- and policy-making processes within major MEAs may place legal and/or ethical obligations on member states that influence or otherwise shape national and sub-national choices. Environment-related disputes before legal tribunals may be decided with reference to the principle in one of its forms. In addition, the conservation policies of domestic government bodies, civil society or donor organisations may be imbued with decision-makers' views of the nature and meaning of the principle. The discussion that follows here refers primarily to the Convention on International Trade in Endangered Species (CITES), but the is-

ssues raised are of general relevance and are likely to eventually emerge in other policy or legal fora.

The precautionary principle has an almost unassailable basic logic, particularly in the context of conservation: species extinctions are both serious and irreversible. However, considerable problems currently surround the operationalisation and application of the principle, as it relates to the conservation and utilisation of wildlife. The figure (see next page) provides a graphical illustration of these. Underlying ambiguities as to the meaning and status of the principle, linked with poor comprehension of the impacts of the principle's application, and insufficient incorporation of developing country perspectives into its formulation, leads to potentially poor and inequitable decision making.

Problems of Ambiguity

Underlying the operation of the precautionary principle are some basic ambiguities, many of which apply across the various contexts in which the principle is used:

1. The wording of the principle does not prescribe a particular course of action, and may differ widely between formulations in different legal agreements and policy statements in which it appears, as well as in the various contexts in which it is applied or construed. For instance, the formulation in the Rio Declaration introduces consideration of the "cost-effectiveness" of actions taken to avoid harm, which is absent from many other formulations.
2. The legal status of the principle is unclear: some commentators argue that the principle has at-

tained the status of customary international law, while others see it as more circumscribed.

3. The relationship of the principle to other values and principles, such as equity and development, remains ambiguous, providing little guidance when these concerns must be balanced when responding to uncertainty. Should the level or extent of precaution applied be affected by impacts on equity? Might precaution be "trumped" by the "right to development"?

These ambiguities mean the precautionary principle provides little guidance to decision-makers, who are left with wide leeway when attempting to apply the principle.

Compounding Factors

The potential for problematic application is further complicated by institutional factors and assumptions at the international level. First, the ongoing international policy debate on the meaning and relevance of the precautionary principle has not been matched by any systematic investigation of its practical impacts in terms of conservation, development and trade. What are the impacts on resource users and for development generally? Has reliance on the principle delivered positive conservation outcomes?

Second, the debate around the precautionary principle is overwhelmingly dominated by developed country voices, chiefly those of conservation NGOs or corporate interests. The resulting (increasingly polarised) debate typically fails to incorporate or address the concerns, perspectives and experiences of developing countries.

Application of the Principle to Wildlife Trade

Several issues highlight these failings. In the conservation context, application of the precautionary principle usually implies restricting utilisation of and trade in wildlife. So, for instance, within CITES, the listing of a species on Appendix I – effectively banning international trade – is often argued for in explicitly precautionary terms. Being careful means restricting utilisation.

While it may be strategically sound in some circumstances, this application of precaution might not always result in optimum conservation outcomes. Conservation in developing countries may often be better served by strategies that are usually considered non-precautionary, such as sustainable utilisation.

The overwhelming cause of species extinctions in developing countries is

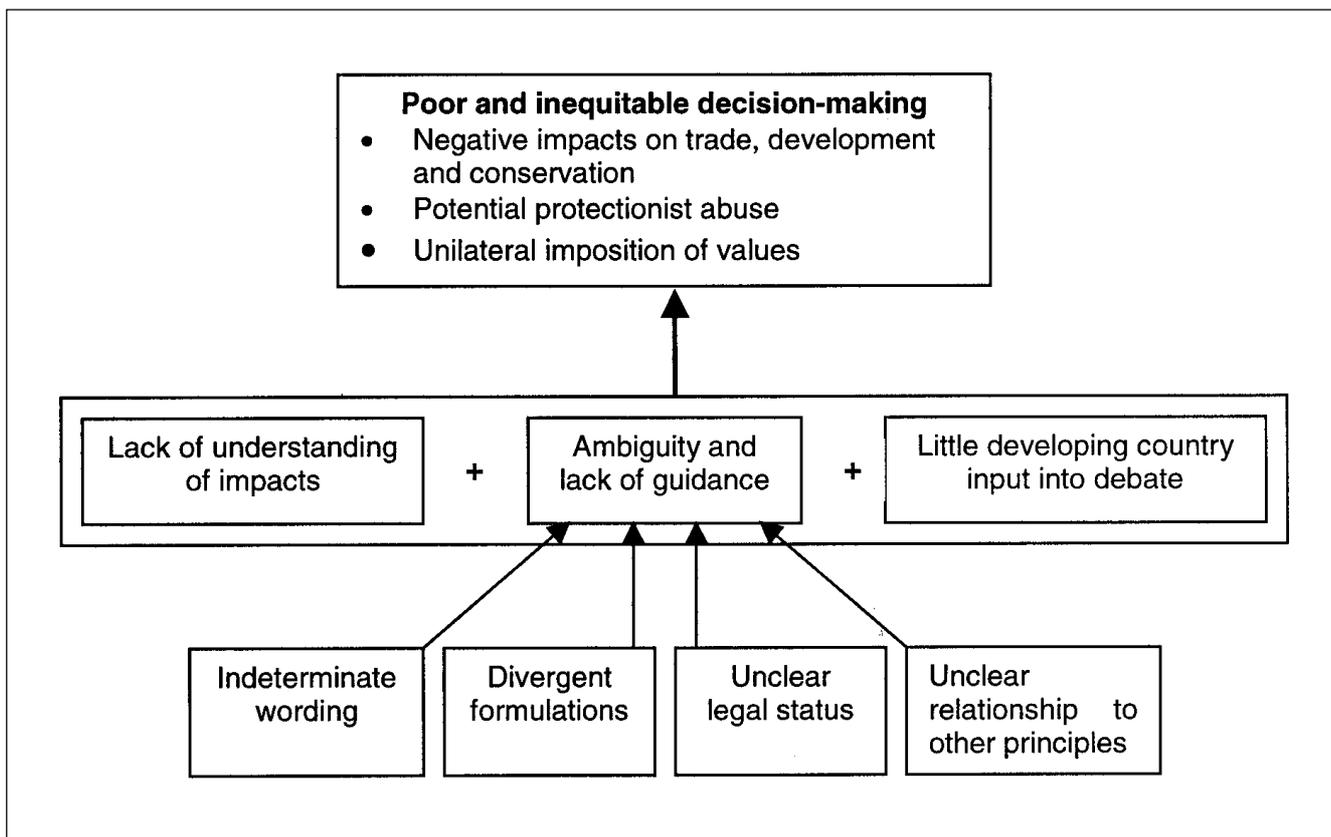
the conversion of habitat to agricultural purposes, so utilisation can provide a positive incentive to weigh against the benefits so derived. Furthermore, precaution-based trade restrictions can have serious development impacts. For resource users, particularly poor rural ones, loss of markets can mean serious detriment to income and livelihoods.

Reliance on the precautionary principle to restrict trade raises further concerns. The wide leeway afforded by the principle may lead to abuses, by which the principle is utilised to disguise “green protectionism”. Such unilateral imposition of particular value systems (e.g. protectionism rather than sustainable utilisation, of forests or wildlife), through trade restrictions, may support arguments about infringement of state sovereignty. At all events, for developing countries that already face barriers to market access, these restrictions are very serious obstacles.

The precautionary principle is clearly a fundamental guide for assessing and implementing approaches to the conservation and sustainable use of wildlife. However, it is not a principle that translates in any obvious fashion from theory to practice, or automatically leads to desirable outcomes, for people or for wildlife. Application of the principle must be careful and critical, and in the context of wildlife trade should be guided by a much more comprehensive understanding of the impacts of the principle and the perspectives, priorities and experiences of developing countries.

– Dr. Rosie Cooney
 Lauterpacht Research Centre for
 International Law
 5 Cranmer Rd Cambridge
 CB3 9BL
 United Kingdom
 Fax: +44 (0) 1223 300 406
 Email: mrc21@cus.cam.ac.uk

Figure: Problems with the operationalisation of the precautionary principle in the context of conservation and wildlife utilisation



Info needed:

The Chair and the ELC would be pleased to hear from CEL members who plan to attend or participate in any of the following meetings.

1-4 Oct	Reykjavik, Iceland	Conference on Responsible Fisheries in the Marine Ecosystem Contact: Grimur Valdimarsson; e-mail: grimur.valdimarsson@fao.org ; Internet: http://www.refisheries2001.org/
1-5 Oct	Madrid, Spain	The World Congress on Conservation Agriculture – A Worldwide Challenge Contact: Armando Martinez, Institute for Sustainable Agriculture, Córdoba, Spain; tel.: (34-957) 760797; e-mail: conservation.agriculture@ecaf.org ; Internet: http://www.ecaf.org/English/englis.htm
1-5 Oct	Nairobi, Kenya	2 nd Meeting of the Intergovernmental Committee for the Cartagena Protocol Contact: CBD Secretariat, Montreal, Canada: tel.: (1-514) 288-2220; fax: (1 514) 288-6588; e-mail: secretariat@biodiv.org ; Internet: http://www.biodiv.org
1-12 Oct	Geneva Switzerland	5 th Session of the Conference of the Parties to the UN Conference to Combat Desertification Contact: UNCCD Secretariat; tel.: (49 228) 815-2800; fax: (49 228) 815-2898/99; e-mail: secretariat@unccd.int ; Internet: http://www.unccd.int/cop/cop5/menu.php
3-4 Oct	venue to be determined	WTO Committee on Trade and Environment Contact: WTO, tel.: (41 22) 739-5111; e-mail: enquiries@wto.org ; Internet: http://www.wto.org/english/news_e/meets.doc
8-10 Oct	Algiers, Algeria	Southern NGO Summit (to prepare for the World Summit on Sustainable Development) Contact: Esmeralda Brown, Southern Caucus Chairperson, New York; tel.: (1-212) 682-3633; fax: (1-212) 682-5354; e-mail: ebrown@gbgm-umc.org
9-11 Oct	Kalmar, Sweden	1 st UNEP/GEF Global International Waters Assessment (GIWA) General Assembly Contact: GIWA Coordination Office, Kalmar; tel.: (46-480) 447350; fax: (46-480-447355); Internet: http://www.giwa.net
15-18 Oct	Nairobi, Kenya	2002 World Summit on Sustainable Development Regional Preparatory Meetings: The Africa Regional Meeting Contact: Hiroko Morita-Lou, DESA, New York; tel.: (1-212) 963-8813; fax: (1-212-963-4260); e-mail: morita-lou@un.org ; Internet: http://www.johannesburgsummit.org/
15-19 Oct	Berlin, Germany	International Water Association (IWA) 2001 World Water Congress Contact: http://www.iwa-berlin.de
23-24 Oct	Rio de Janeiro, Brazil	2002 World Summit on Sustainable Development Regional Preparatory Meetings: The Latin American and Caribbean Regional Meeting Contact: Hiroko Morita-Lou, DESA, New York; tel.: (1-212) 963-8813; fax: (1-212-963-4260); e-mail: morita-lou@un.org ; Internet: http://www.johannesburgsummit.org/
23-25 Oct	Cairo, Egypt	2002 World Summit on Sustainable Development Regional Preparatory Meetings: The West Asia Regional Meeting Contact: Hiroko Morita-Lou, DESA, New York; tel.: (1-212) 963-8813; fax: (1-212-963-4260); e-mail: morita-lou@un.org ; Internet: http://www.johannesburgsummit.org/
31 Oct– 1 Nov	venue to be determined	WTO Committee on Sanitary and Phytosanitary Measures Contact: WTO; e-mail: enquiries@wto.org ; Internet: http://www.wto.org/english/tratop_e/sps_e/sps_e.htm
9-13 Nov	Doha, Qatar	4 th World Trade Organization Ministerial Meeting Contact: WTO, tel.: (41 22) 739-5111; e-mail: enquiries@wto.org ; Internet: http://www.wto.org/english/news_e/meets.doc
19-21 Nov	Montreal, Canada	Open-ended Intersessional Meeting on the Strategic Plan, National Reports and the Implementation of the Convention on Biological Diversity Contact: Mr. H. Zedan, CBD Secretariat; tel.: (1-514-) 88-2220; fax: (1-514) 288-6588; e-mail: secretariat@biodiv.org
21-25 Nov	Jinja, Uganda	Pan-African Bicycle Conference: “The Changing Role of the Bicycle in Africa” Contact: First African Bicycle Information Office; tel.: (256 43) 121-468; e-mail: fabio@source.co.ug ; Internet: http://www.jugendhilfe-ostafrika.de/e_index.htm
26-30 Nov	Montreal, Canada	Intergovernmental Meeting on Protection of the Marine Environment from Land-Based Activities Contact: http://www.gpa.unep.org

Info needed:
Please inform us of important meetings on environmental law and policy that are not reflected in this list.

27-29 Nov	Siem Reap, Cambodia	2002 World Summit on Sustainable Development Regional Preparatory Meetings: The Asia and Pacific Regional Meeting Contact: Hiroko Morita-Lou, DESA, New York; tel.: (1-212) 963-8813; fax: (1-212-963-4260; e-mail: morita-lou@un.org; Internet: http://www.johannesburgsummit.org/
29 Nov– 2 Dec	Brisbane, Australia	2001: Asia-Pacific Earth Charter Conference Contact: Clem Campbell, Conference Coordinator; tel.: (617) 5429 5401; e-mail: clemcampbell@optusnet.com.au; Internet: http://www.gu.edu.au/centre/kceljag/eljag/04_events/nov2001earthcharter/earth_charter.htm
3-7 Dec	Bonn, Germany	International Conference on Freshwater Contact: Angelika Wilcke, Conference Secretariat; tel.: (49 228) 28046-57; fax: (49 228) 28046-60; e-mail: info@water-2001-de; Internet: http://www.water-2001.de
3-7 Dec	Gland, Switzerland	26 th Standing Committee Meeting of the Ramsar Convention on Wetlands Contact: Ramsar Secretariat, Gland, Switzerland; tel.: (41 22) 999-0170; e-mail: ramsar@ramsar.org; Internet: http://www.ramsar.org/meetings.htm
Date to be determined	Rome Italy	9 th Session of the Commission on Genetic Resources for Food and Agriculture (CGRFA-9) Contact: FAO; tel.: (39-6) 5705-2287; Internet: http://www.fao.org/WAICENT/FAOINFO/AGRICULT/cgrfa/meetings.htm

2002

28 Jan– 8 Feb	New York, USA	2 nd Preparatory Session for the 2002 World Summit on Sustainable Development Contact: Andrey Vasilyev, DESA; tel.: (1 212) 963-5949; fax: (1 212) 963-4260; e-mail: vasilyev@un.org; Internet: http://www.johannesburgsummit.org/
4-8 Feb	Montreal, Canada	Meeting of the Ad Hoc Intersessional Working Group on Article 8(j) of the Convention on Biological Diversity Contact: CBD Secretariat, Montreal, Canada; tel.: (1-514) 288-2220; fax: (1-514) 288-6588; e-mail: secretariat@biodiv.org; Internet: http://www.biodiv.org
3-8 March	Cape Town, South Africa	Conference on Environmental Flows for River Systems Contact: Cate Brown; e-mail: cbrown@botzoo.uct.ac.za; Internet: http://www.southernwaters.co.za/
4-15 March	San José, Costa Rica	2 nd Session of the UNFF Contact: the Secretariat, tel.: (1 212) 963-6208; fax: (1 212) 963-3463; e-mail: vahanen@un.org; Internet: http://www.un.org/esa/sustdev/forests.htm
11 -15 March	Geneva, Switzerland	46 th Meeting of the CITES Standing Committee Contact: CITES Secretariat; tel.: (41 22) 917-8139; fax: (41 22) 797-3417; e-mail: cites@unep.ch
18-22 March	Monterrey, Mexico	International Conference on Financing for Development Contact: Financing for Development Coordinating Secretariat, United Nations Headquarters, New York, Harris Gleckman, tel.: (1 212) 963-4690; e-mail: gleckman@un.org or Federica Pietracci, tel.: (1 212) 963-8497; e-mail: pietracci@un.org; Internet: http://www.un.org/esa/ffd
8-26 April	The Hague, The Netherlands	6 th Conference of the Parties to the Convention on Biodiversity (CBD COP 6) 1st Meeting of the Parties to the Cartagena Protocol (MOP-1) Contact: CBD Secretariat, Montreal, Canada; tel.: (1-514) 288-2220; fax: (1-514) 288-6588; e-mail: secretariat@biodiv.org; Internet: http://www.biodiv.org
13-24 May	New York, USA	12 th Meeting of the States Parties to the UN Convention on the Law of the Sea Contact: UN Division for Ocean Affairs and the Law of the Sea; tel.: (1 212) 963-3968; e-mail: doalos@un.org; Internet: www.un.org/Depts/los/index.htm
22-24 May	Victoria, British Columbia	4 th UNEP International Children's Conference on the Environment Contact: Theodore Oben, Programme Officer, Children, Youth and Sport Programmes, UNEP, Nairobi, Kenya; tel.: (254 2) 623262; e-mail: theodore.oben@unep.org; Internet: http://www.unep.org/children_youth/

The Precautionary Principle in the European Union

The European Union (EU) policy on the environment aims throughout at a high level of protection. Where there are grounds for concern that potentially dangerous effects on the environment may be inconsistent with such a level of protection, and scientific evidence is insufficient, inconclusive or uncertain, precautionary measures are justified.

In 1987, the Single European Act introduced the principle of preventive action, the polluter-pays principle, the rectification at source principle, and the integration principle. At that time, the precautionary principle was not yet well recognised internationally. Hence it was the Treaty of Maastricht (1993) which introduced the precautionary principle into EC environmen-

tal law. (Article 130R.) This provision was subsequently incorporated as Article 174.2 of the Treaty of Amsterdam. (1999). It provides that Community policy on the environment 'shall be based on ... the precautionary principle'.

tal law. (Article 130R.) This provision was subsequently incorporated as Article 174.2 of the Treaty of Amsterdam. (1999). It provides that Community policy on the environment 'shall be based on ... the precautionary principle'.

Development of precaution in EU law and practices

Even before it was incorporated as a principle in the European Community Treaty, a precautionary approach appeared in European Directives and Regulations. For example, Directive 90/220/EEC on the deliberate release of genetically modified organisms (GMOs) into the environment expressly refers only to the "principle of preventive action," (23

April 1990, last amended by Commission Directive 97/35/EC of 18 June 1997, (1997)). It was successfully argued, prior to 1993, that this language necessarily encompasses precaution, by requiring the prevention of harms that are scientifically uncertain. Directive 2001/18/EC, repealing Directive 90/220/EEC, resolves any doubts on this point, by explicitly incorporating the precautionary principle.

Defining Applying and Extending the Principle

Although the EU has utilised a precautionary approach for many years, the actual definition of the precautionary principle is still lacking. Recent caselaw, supplemented by guidance documents of the European institutions is available to shed some light on the exact parameters of the principle.

Caselaw

Both the European Court of Justice (ECJ) and the Court of First Instance (CFI) have ruled on the validity of precautionary measures in several circumstances. In the 1993 *Driftnets case* (Case C-405/92, *Etablisements A. Mondiet v. Armement Islais*, ECJ 24 November 1993, ECR I-6133), the ECJ held that precautionary conservation measures are justified when available scientific advice is still inconclusive.

The *Bovine Spongiform Encephalopathy (BSE) cases* (Case T-76/96 R, *National Farmers Union and Others v. Commission*, (1996) ECR II-815) extend the concept beyond environmental issues. Both the ECJ and the CFI have ruled that the precautionary measures adopted by the Com-

mission to protect humans against the potential risks of the BSE were 'effective' and 'adequate', notwithstanding the applicants claimed that the Commission's decision was not based on science and was disproportionate.

Thereafter, the extensions of the principle have been solidly upheld in cases related to *antibiotics in animal feed* (Case C-329/99 P (R) of 18



November 1999, *Pfizer Animal Health SA v. Council*, Case T-70/99 R of 30 June 1999, *Alpharma Inc. v. Council*, [1999] ECR P. II-2027; Case C-13/99 R, *Pfizer Animal Health v. Council*, [1999] ECR P. II- 1961). The CFI upheld a Council decision to withdraw the authorisation of the use of several antibiotics in animal feed as an interim protective and precautionary measure. Where there is uncertainty as to the existence or extent of the risks to human health, institutions may legitimately decide to take protective measures, without having to wait until the reality and seriousness of those risks become fully apparent.

In *Hydrochlorofluorocarbons (HCFCs)* (Cases C-284 and 341/95 of 14 July 1998, *Safety Hi-Tech v. S. & T. and Gianni Bettati v. Safety HI-Tech*, [1998] ECR I-4301 and I-4355), the ECJ examined the decision of the Council in adopting Regulation 3093/94 on substances that deplete the ozone layer (15 December 1994). The Court held that the Council did not commit 'a manifest error of appraisal regarding the conditions for the application of Article 130R of the Treaty'.

Most recently, in *Genetically modified maize* (ECJ 21 March 200, Case C-6/99, *Association Greenpeace France v. Ministère de l'Agriculture et de la Pêche*, [2000] ECR I-6031), the ECJ reviewed the application of the precautionary principle in several stages of the authorization procedure established by Directive 90/220/EEC for the introduction of GMOs into the environment. Notably, this decision includes consideration of the post-marketing phase, holding that a Member State has the right to provisionally restrict or prohibit the marketing of a GMO within its territory.

These cases clearly demonstrate how the precautionary principle continues to influence the outcome of disputes. Therefore, it can be stated that, in the EU, the precautionary principle is not a mere emerging principle, but rather a legally binding norm.

EU Documents

Commission Communication of 2 February 2000 on the precautionary principle, (COM (2000)1) follows the



Commission Guidelines of 17 October 1998 on the application of the precautionary principle. The Communication from the Commission intends to solidify the precautionary principle in European environmental policy, to outline its use, to establish guidelines for its application, and to set a standard that avoids unwarranted recourse to the principle, i.e. its utilisation to justify disguised green protectionism.

The texts of both the Commission Communication and the subsequent Council Resolution (Council Resolution of 7-9 December 2000 on the precautionary principle, Annex III of the Presidency Conclusions) refer to international trade obligations. In conformity with the principles set by the World Trade Organization (WTO) body of laws, the Commission document declares that precautionary measures must be proportionate, non-discriminatory, consistent, provisional, and should involve a cost-benefit analysis of action vs. lack of action.

To be proportionate, measures must be commensurate with the level of

protection desired. In certain cases a total ban will be the only possible response. In other situations, less radical measures such as, for example, the decision to fund more re-

search or to inform the public, will result to be more appropriate. Measures are non-discriminatory when similar situations are treated as such; they are consistent when the same measures have already been adopted in similar circumstances and provisional when they are subject to scientific review. Finally, cost-benefit analysis must also take into account non-economic interests, for example social and environmental costs and acceptability to the public.

The determination of the acceptable level of risk is considered 'an eminently political responsibility'. Both the Communication and the Resolution note that decision-makers should strike a balance between conflicting aims, such as the freedom and rights of individuals, industry and organizations with the need to reduce the risk of adverse effects to the environment, human, animal, or plant health. It notes the inappropriateness of striving for 'zero risk' that is, in reality, rarely to be found.

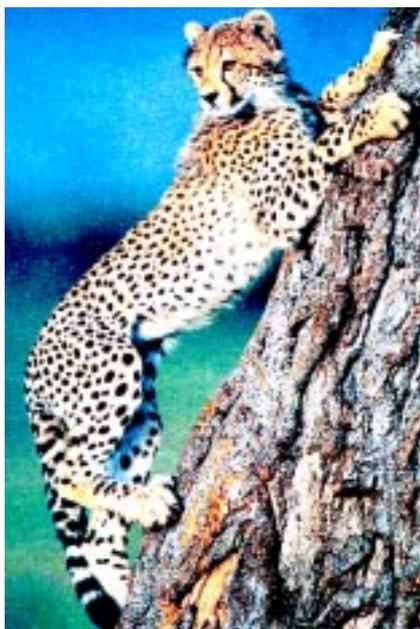
The Commission also clarifies its position on the burden of proof. Gen-

continued page 19

UPDATE: the Global Invasive Species Programme

At the March meeting of the Subsidiary Body on Technical and Technological Advice (SBSTTA) of the Convention on Biological Diversity (CBD), the unique and difficult problems of invasive alien species took "centre stage." As a result, the Global Invasive Species Programme (GISP) was once more the focus of international attention.

GISP is co-ordinated by IUCN in partnership with CABI Bioscience, UNEP and DIVERSITAS. The IUCN Environmental Law Programme is a charter member of its Executive Committee. Since its formation in 1997, the GISP has sought to assist governments and other institutions and stakeholders by sharing best practices for prevention and management of invasive alien species problems and stimulating the development of new tools in science, policy, information and education. Contributors to GISP include scientists, lawyers, environmentalists, educators, policy makers, economists, and resource managers from multiple sectors, worldwide. GEF and other sponsors have provided financial support.



GISP Phase I (1997-2000)

During Phase I, eleven thematic working groups compiled and analysed information on different invasive species issues and prepared several technical volumes and reports. The ELC managed the component on Legal and Institutional Frameworks, supported by CEL members from all regions. Outputs included:

- an international workshop with thematic and country-specific reports (Bonn, December 1999, downloadable from the ELP website at <http://www.iucn.org/themes/law/>);
- a *Guide to Designing Legal and Institutional Frameworks on Alien Invasive Species* by Shine, C., Williams, N. and Gündling, L. (IUCN Environmental Policy and Law Paper No. 40; also downloadable from the ELP website, or from the CBD website as SBSTTA-6-inf-8-e.doc (<http://www.biodiv.org/doc/meeting.asp?lg=0&wg=sbstta-06>));
- contribution of a legal/institutional chapter to the GISP synthesis volume, *Invasive alien species: searching for solutions* (in press).

At the end of Phase I, a Synthesis Conference was held in Cape Town (September 2000), attended by participants from 42 developing and developed countries, 15 international organisations (including the FAO, the International Maritime Organisation and the World Trade Organisation) and 15 non-governmental organisations. It reviewed and finalised the following cross-cutting outputs:

- *Global Strategy on Invasive Alien Species* (available as SBSTTA-6-inf-9-e.doc);
- Toolkit of Best Prevention and Management Practices (SBSTTA-6-inf-10-e.doc);
- *Global Invasive Species Database* (currently in pilot form)

SBSTTA-6 and the work of the CBD

Meanwhile, the CBD identified alien invasive species issues (Article 8(h)) as cross-cutting matters of high priority. At SBSTTA-5 (January 2000), a set of guidelines was proposed, which, through the meeting were reviewed, revised and intensively ne-



gotiated. By the end of that meeting, an agreed text was prepared for submission to the COP, which were to be styled "*Interim Guiding Principles for the Prevention, Introduction and Mitigation of Impacts of Alien Species*," rather than guidelines. CBD COP-5 adopted the interim guiding principles as an annex to Decision V/8, which noted the urgency of the alien invasive species problem and identified components for a plan of action for the CBD's continuing work on the issue.

At SBSTTA-6 (Montreal, 12-16 March 2001), the Parties took the first steps toward implementing Decision V/8. An entire Working Group was devoted to addressing invasive alien species issues. The GISP assumed a very prominent role within these deliberations. At the CBD Secretariat's request, GISP specialists prepared information documents for that meeting, including a *Review of the Efficiency and Efficacy of Existing Legal Instruments Applicable to Invasive Alien Species*, and a *Report on Procedures, Criteria and Capacities for Assessing Risk from Alien In-*

vasive Species (UNEP/CBD/SBSTTA/6/INF/5 and 6). They also provided written comments on the Interim Guiding Principles. The SBSTTA Chair asked delegates to use GISP's contributions as an input to their deliberations. GISP members were given the opportunity to make presentations both in the Working Group and in plenary, on a variety of issues including scientific trends, implementation of Art. 8(h), the Global Strategy on Alien Invasive Species and future GISP work. While some participants cavilled at the Working Group's focus on "arguing about minor linguistic details of the interim guiding principles," it was generally agreed that the meeting had been of great value to the parties, and provided much information that would be useful with regard to the invasives issue.

The outcome of these deliberations was SBSTTA Recommendation VI/4, which supports continuation of the GISP into Phase II with a much broader role than that which it assumed in Phase I. Recommendation VI/4 encourages Parties, countries and other organisations to support GISP's work, and requests the Executive Secretary to explore arrangements for continued CBD-GISP co-operation.

During the meeting, the GISP circulated a Call to Action, inviting broader engagement within the GISP frame-

work. Endorsements were received from 46 governments, two industry associations, seven NGOs, seven academic/scientific institutions and the Ramsar Convention. The Call to Action is still available for additional endorsements.

Development of GISP Phase II (2001-2003)

Currently, the GISP Executive Committee is in the final stages of development of its work plan for Phase II. The program is intended to focus on seven elements: (i) national and regional facilitation and capacity building; (ii) communication, (iii) outreach and education; (iv) global information management; (v) pathway management; (vi) research; and (vii) law and policy.

The ELP will co-ordinate the Law and Policy element, with the goal of supporting the development and strengthening of instruments and institutional capacity, and providing legal input to other Elements. Several possible components of the Law and Policy element are currently under discussion including –

- (a) support for development and/or strengthening of regional, national and sub-national legal and institutional frameworks;
- (b) provision of technical advice and assistance to international organisations and conventions

- (c) to support guidelines, standards, or legal protocols; further review of existing international instruments, including especially the identification of operationally important gaps in their collective coverage;
- (d) provision of legal/policy assistance in the ongoing processes directed at development of new standards or codes of conduct on alien invasive species; and
- (e) assistance with the legal issues involved in the preparation of a guide on relevant terminology in international conventions as a contribution to clarification and harmonisation.

The GISP Executive Committee will be meeting in September to finalise the workplan, as well as a business plan. Several interim projects have already been scheduled including:

- technical work on scientific assessments and impacts;
- capacity-building workshops for the Nordic Baltic, Austral Pacific, Southern Africa and South America and South and SE Asia and West Africa (2001-3);
- an Islands Initiative currently being organised by the IUCN Invasive Species Specialist Group and New Zealand;
- an Indian Ocean Islands pilot project, co-ordinated by the Seychelles; and
- support for Ramsar's development of a guidance document on management of invasives species in wetlands.

The GISP Secretariat is planning to relocate to South Africa soon, where logistical support will be provided by the Working for Water Programme, a public/private partnership for invasive weed control that has delivered significant additional benefits for the rural poor and women.

– Clare Shine
 37 Rue Erlanger
 75016 Paris
 France
 e-mail: clare.shine@noos.fr



NEW CDG FELLOWS AT THE ELC

This summer, (May-July 2001), the IUCN-ELC hosted two new Carl Duisberg Gesellschaft (CDG) fellows – Gladys Gitahi from Kenya and Larsey Mensah from Ghana. Both are CEL members, who were happy to have the opportunity to spend time at the ELC.

Gladys, a Legal Officer of the African Wildlife Foundation, is the youngest CDG fellow to work at the ELC so far. She holds a Bachelor of Laws (LL.B) from Moi University Kenya.

Her strong commitment to conservation issues in Africa provided the incentive for Gladys's research on "Legal Tools for Conservation in Private Lands." She hopes that her work can contribute to the general discussions on biodiversity conservation on private land. She has found that a variety of tools are currently in use for conservation on private land, and that they are evolving and developing based on experiences around the world. She noted the importance of information-sharing, which enables the exchange of experiences and case studies and facilitates the establishment of best practices. She recommends, based on her research, that information about legal tools of this type be widely shared among all stakeholders in private land conservation to create awareness and generate support for biodiversity conservation on private land.

Larsey is Deputy Director of Ghana's Environment Protection Agency (EPA). He holds a LLB (Hons); a BL; a LLM (London), and a Certificate in Environmental Management (Tufts University - Centre for Environmental Management).

Larsey's research produced a paper entitled "Environmental Impact As-

essment (EIA) as a legal tool for environmental protection and sustainable development: Reflections of the Legal Framework on selected African Countries." This paper highlights the experiences of several African countries that have adopted EIA laws, noting that while some of the countries have gone beyond the framework laws to enact implementing regulations, the greater number have not done so. He underlined that this omission can affect the effectiveness and utility of EIA as a tool for environmental protection and sustainable development. He pointed out that there is an urgent need for African countries to formulate implementing regulations to their framework environmental laws.

About the CDG

The Carl Duisberg Gesellschaft (CDG) is a non-profit organization

international and expert experience in their fields. IUCN-ELC has been a designated partner in the CDG fellowship programme since November 2000.

In addition to professional experience in their fields, CDG fellows receive an induction into life in another culture. For a month prior to their work at the ELC, for example, Larsey and Gladys were resident at the Carl Duisberg Centre in Saarbrücken, where they learned about German culture, studied the German language, received valuable advice about the practical aspects of daily life in Germany, and interacted with other fellows from all over the world.

Looking to the future

The fellows noted that their stay at the ELC would continue to be beneficial, both to them individually, and to their work. Gladys acknowledged the usefulness of this research, since private land conservation is becoming a more active part of Kenya's conservation toolkit. Larsey agreed that, without a doubt, his research skills had been sharpened, and added that this has been an intellectually fulfilling and professionally satisfactory period.

Both of the fellows felt that the Law Centre provided an excellent and enabling environment for concentration and intel-

lectual work and, sincerely thanked IUCN-ELC staff (particularly the Library and Documentation Unit) for their support.

The ELC hopes to continue to build its relationship with CDG, and to utilise the fellowship programme to promote the ELC's objectives of outreach and capacity-building in environmental law around the world.

– IMV



CDG fellows: Larsey Mensah (Ghana) and Gladys Gitahi (Kenya)

dedicated to international advanced training and human resource development with its headquarters in Cologne. Since CDG's founding in 1949, over 300,000 people from all over the globe have participated in its various programmes. Through this experience, young professionals and executives from all over the world (especially developing countries) are able to gain practical, professional,

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erally, the onus of proving that an activity damages the environment falls on the one who opposes that activity and parties accused of environmental degradation must be proven wrong. By contrast, the most recent approach to the precautionary principle shifts the burden of proof by requiring those who wish to carry out an activity to prove that it will not harm the environment or human health. According to the Communication, the possibility of reversing the burden of proof is not a general rule, but should be examined on a case-by-case basis.

A European Parliament Opinion was also developed on this point. (European Parliament's Opinion of December 2000.) This document also broadly supports the Commission's approach. At international level, the EU is seeking a wide recognition of the principle, but there is as yet no common agreement on its acceptability as a binding principle of international law.

Precaution in International Trade

In the WTO context (EC - Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R (AB-1997-4)), the EC argued that the pre-

cautionary principle is 'a general customary rule of international law', or at least 'a general principle of law'. (Paragraph 91 EC's Appellant Submission.) The United States repeatedly denied that the principle represents customary international law and suggested in that context that it is more an 'approach' rather than a 'principle'. (Paragraph 92, US "Appellee's Submission.") Canada shared the same view of the United States, even if it acknowledged that the 'precautionary principle' or 'concept' is 'an emerging principle of law recognised by civilised nations'. (Paragraph 34, Canadian "Appellee's Submission.")

The Appellate Body of the WTO reporting specifically on this point, noted only its uncertainty. Noting that 'the precautionary principle is regarded by some as having crystallised into a general principle of customary international law,' the Report concluded that it is not clear whether precaution has yet been widely accepted as such. (Paragraph 123, Appellate Body Report.)

The recognition of the precautionary principle as a binding norm, at least at European level, is significant. Its inclusion in the European Community Treaty influences the way in which even provisions of the Treaty that do not refer directly to precau-

tion, should be interpreted. By including precaution in Directives, the Council mandates that Member States must base their policy on it and translate the principle into national legislation.

Both the Communication from the Commission and the above case law have certainly stimulated the debate over the precautionary principle. However, as the recent BSE, epizootic afta and poultry dioxin crises show, more needs to be done. The EU should agree on a clear definition of the principle accompanied by coherent guidelines to be followed systematically while exercising the legislative powers and to promote in the international contexts.

(Silvia Francescon (LL.M, University of London, J.D. University of Ferrara) is stagiaire at the European Commission, DG Agriculture. This article reflects the personal view of the author and in no way represents the official position of the European Commission.)

– Silvia Francescon
OECD, Environment Directorate
Global and Structural Policies Division
2, rue André Pascal
75775 Paris Cedex 16
France
Fax (+33-1) 45 24 78 76
Email: Silvia.Francescon@oecd.org
Internet: www.oecd.org

Preserving the Fellowship: The first publication of the CDG Fellowship papers

The ELC is happy to announce that a publication of the research papers prepared by the first team of CDG Fellows (Ikechi Mbeogi, Nazrul Islam, Wang Xi, and Isabel Martínez, whose fellowship is described in issue 3/2000 of this Newsletter) is nearing completion. Featuring in-depth studies on current trends in environmental law in developing countries, this book will preserve the excellent work of this first team, and make it possible to disseminate their conclusions and results throughout the world.

This publication, funded by the CDG, is expected to be available by the end of 2001. Interested persons may contact the ELC, or the IUCN Publications Unit at info@books.iucn.org. The ELC hopes that this is the first of a series of publications of the insightful and original work produced by the CDG fellows.

– TRY

Bhutanese Study Tour

At the request of the Government of Bhutan, eight Bhutanese Government officials visited Bonn for a short program of study at the ELC last February. The delegation was very high-level, including two regional justices, a representative of the High Court, the Deputy National Public Prosecutor, and responsible members of the National Environmental Commission and other bodies.

Building on Bhutan's recently adopted Environmental Assessment Act, 2000, the Government now proposes to develop a Framework Environmental Law. This delegation's objective was, with information and advice from the ELC, to take the first steps in mapping out their plan of action. The study tour included a review of ELC's literature and legislation libraries, locating relevant documents regarding these issues, and other countries' experiences. ELC legal officers provided a series of lectures and guided discussion sessions.

One of the most interesting aspects of this process is the fact that Bhutan does not really have current environmental problems that it needs to address. Hence, this law will really be designed to ensure that they have a framework in place to avoid or solve problems, when they begin to crop up.

During their two days in Bonn, valuable and workable ties were forged with both libraries and all of the professional staff. The officials left with a great deal of information – both oral and written, and plans for –

- Continued contact with ELC professional staff, libraries and informational resource team;
- CEL membership (five of the eight members of the delegation were lawyers) and the development of links and networks from the Asia region, and from other regions, who may serve as advisors or participate in cross-regional exchanges; and
- Possible future participation in ELC programs including the CDG or other fellowships.

Virtually every member of our staff "went the extra mile" to try to make this visit a success. We were particularly grateful to Mr Entele Teklu Sisay (then studying at the ELC under the CDG fellowship programme) for his many contributions concerning his experiences in Ethiopia.

Discussions are currently underway for a second study tour this winter.

– TRY



...The Precautionary Principle and GMOs an Australasian Perspective

“principle” is an unnecessary complication in an already complex statutory and factual matrix. Third, application of the precautionary principle (or any of the other rules of thumb) to our decision under s105(1) would lead to double-counting of the need for caution.



The Court observed that there were scientific uncertainties and said:

The application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should outweigh all other issues.

Whether or not the Commission's report which was released on 30 July 2001 resolves any of the debate is itself a moot point. In reporting on the precautionary principle the Commission stated:

Although we heard much discussion of the precautionary principle and the precautionary approach from those who opposed the release of genetically modified organisms into the environment, there was no consensus on the meaning of either term. The meaning of precaution often rests in the values held by the speaker.

The Commission considers there is more merit in hearing and responding to the message contained in the words than in seeking to define the meaning or determine how the principle should be applied. In any event, we were not convinced that a single principle could be applied across the board to the use of genetic modification in New Zealand. Decisions on the use of the technology must rest on a range of factors, including the risks and acceptability to the public of the proposed use. They are factors that should inform the process of managing genetic modification.

(Mark Christensen was counsel in the Inquiry for the NZ Life Science Network, an umbrella group of universities, private institutions and industry organisations.)

– Mark Christensen
Anderson Lloyd
P.O. Box 13-831
Christchurch
New Zealand
e-mail: mark.christensen@
andersonlloydcaudwell.com

The approach adopted by the New Zealand Environment Court is consistent with Australian cases. In *Leatch v National Park & Wildlife Service & Shoalhaven City Council* the Land and Environment Court held:

In my opinion the precautionary principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.

In *Greenpeace Australia v Redbank Power Company* an appeal was made against consent for a new power station on the grounds that emissions of carbon dioxide would contribute to the greenhouse effect.



New Parties to Major International Environmental Treaties

Ratification Status received as of August 2001*

Stockholm Convention on Persistent Organic Pollutants, 22.05.2001:

Canada - 23.05.2001
Fiji - 20.06.2001

Total number of Parties: 2

Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 10.09.1998:

Germany - 11.01.2001
Mongolia - 08.03.2001

Total number of Parties: 14

Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, 25.06.1998:

Albania - 27.06.2001
Armenia - 01.08.2001
Estonia - 02.08.2001
Hungary - 03.07.2001
Italy - 13.06.2001
Kazakhstan - 11.01.2001
Kyrgyzstan - 01.05.2001
Tajikistan - 17.07.2001

Total number of Parties: 17

This Convention will enter into force on 30th October 2001 for the first 16 countries. (Estonia was the 17th country to sign, hence its entry into force will be 1 day later – 31 October 2001.)

Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11.12.1997:

Gambia - 01.06.2001
Mauritius - 09.05.2001
Romania - 19.03.2001
Samoa - 27.11.2001
Uruguay - 05.02.2001

Total number of Parties: 35

Convention on Biological Diversity, 05.06.1992:

Malta - 29.12.2000

Total number of Parties: 180

Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 29.01.2000:

Fiji - 05.06.2001
Norway - 10.05.2001
Saint Kitts and Nevis - 23.05.2001

Total number of Parties: 5

Convention on the Conservation of Migratory Species of Wild Animals, 23.06.1979:

Jordan - 01.03.2001
Malta - 01.06.2001
Moldova - 01.04.2001
Tajikistan - 01.02.2001
(Entry into force dates)

Total number of Parties: 74

Agreement on the Conservation of African-Eurasian Migratory Waterbirds, 16.06.1995:

Kenya - 01.06.2001
Mauritius - 01.01.2001
Moldova - 01.04.2001
Slovakia - 01.07.2001
(Entry into force dates)

Total number of Parties: 31

Convention on International Trade in Endangered Species of Wild Fauna and Flora, 03.03.1973:

Moldova - 29.03.2001
Qatar - 08.05.2001

Total number of Parties: 154

Inter-American Convention for the Protection and Conservation of Sea Turtles, 01.12.1996:

Honduras - 01.02.2001
Netherlands - 29.11.2000

Total number of Parties: 9

This Convention entered into force 2 May 2001.

• *Except where otherwise indicated, all dates shown are dates of deposit of instruments of consent to be bound*

– RAN

* *Dates shown are dates of deposit of instruments of consent to be bound*

Regional

Mesoamerica

On 26-27 April a workshop on the Mesoamerican Wetlands Policy took place in San José, **Costa Rica**, within the framework of a Regional Meeting called "Dialogue for the Establishment of a Regional Agenda for the Implementation of Actions of the Central American Waterplan (PACADIRH)".

The Mesoamerican Wetlands Policy has been technically and financially supported by the ELC through the Project BMZ 98 Regionalisation.

Last May, the ELC participated in the first meeting of the Wider Caribbean Hawksbill Turtle Dialogue, in **Mexico City**. Hunted to near extinction at the turn of the century, Hawksbill turtles have been considered a highly endangered species, which continues to have a market in a few countries. They are a prototypical example of the variety of concerns that are arising with regard to endangered and threatened species. This meeting was very significant, both by addressing hawksbill conservation issues in the region, and as a further evolution of the mechanism ("the

CITES/IUCN-facilitated dialogue process pioneered in the recent African elephant dialogues.) Senior Legal Officer Tomme Young presented a background paper on the "International Instruments relating to the Conservation of Hawksbill Turtles and their Habitats," and served as a rapporteur and legal adviser during the meeting.

Africa

The third OAU-UNEP-IUCN inter-agency meeting took place in **Addis Ababa** from July 25 to 27, to consider the draft revisions to the African Convention. This document, prepared by experts from the ELC, IUCN and UNEP, will be finalised within the next few weeks. A meeting of governmental experts will be convened by OAU early December at UNEP HQ in **Nairobi**. A final text, available in English and French, will be available shortly.

Based on the evaluation mission recommendations, the ELC is negotiating an addendum to the contract, in order to restart the project on environmental legislation in **Guinea-Bissau**.

West Asia

The 2nd Biodiversity Planning Support Programme (BPSP) for the Arab States took place in Beirut, **Lebanon**, on 26-28 February. The recommendations of the Workshop included one stating that legal consideration needs to be an integral part of both the NBSP's and of regional co-operative efforts to conserve biodiversity. The ELC was represented on the programme by Alejandro Iza who gave a presentation on biological diversity and national legislation, and co-ordinated a session on legal issues related to the National Biodiversity Strategies and Action Plans (NBSAPs).

East Asia

The ELP participated in a project in **Cambodia** aimed at assisting the government with the development of a new forestry law. The work was done in conjunction with a drafting team from the Ministry of Forestry, Fisheries and Agriculture.

Europe

The ELP is participating in IUCN's Forestry Sector and Public Participation project (spearheaded by IUCN-Canada). Most recently, the ELC has participated in a workshop on public participation, held in **St. Petersburg**, initiating the development of a work plan.

Last May, the ELP participated in a seminar on Financial Instruments for Conservation in Central and Eastern Europe and the CIS, jointly sponsored by Bundesamt für Naturschutz (BfN) and IUCN-CIS. The ELP's presentation on Environmental Taxes, Levies & Surcharges, was very well received and will be included in a BfN publication on this topic.

– FBG, AOI, TRY



Staff News

Isabel Martínez has become an official member of our legal staff, and will be with us under a short-term contract through the end of September. We are fortunate to have Isabel with us, and grateful for her many contributions of ability, enthusiasm, time, efforts, ideas, and experience.

Our best wishes go to **Marie-Luise Philippsenburg** (Secretariat), who is now the proud mother of a daughter, Amelie (born in February), and to **Monica Pacheco-Fabig** (Legislation Library), whose son, Simon, was born in June. Both babies and mothers are doing well.

Following a recruitment process started this past January, **Maria Socorro Manguiat** will start as legal officer, as of the beginning of September. She is a native of the Philippines who has served as Philippine representative in meetings related to the United Nations Framework Convention on Climate Change, and assisted on drafting and analyzing environmental legislation pertaining to biodiversity, marine and coastal protection, and natural resources management.

IUCN's Environmental Law Programme is carried out jointly by the Commission on Environmental Law (CEL) and the Environmental Law Centre (ELC), an outposted unit of IUCN headquarters located in Bonn, Germany. CEL is a network of more than 650 international and environmental law specialists in 120 countries. The ELC administers all Law Programme activities, develops and manages projects, and serves as the Secretariat for CEL.

The IUCN Environmental Law Programme's Newsletter welcomes short articles and news items on international, regional,

and national developments in environmental law. Contributions may be submitted in English, French or Spanish. All contributions will be proofread and, if necessary edited. Please send material to: Newsletter Editor, IUCN Environmental Law Centre, Godesberger Allee 108-112, 53175 Bonn, Germany; tel: (49-228) 2692-231; fax: (49-228) 2692-250; e-mail: secretariat@elc.iucn.org.

The ELP welcomes the opportunity to present a variety of viewpoints in these pages. In doing so, however, inevitably some of the views expressed will not be those of IUCN, the ELP or the Environmental Law Centre.

Editor:

Tomme Young (TRY)

Managing Editor:

Ann DeVoy

ELC Staff Contributors:

AOI - Alejandro Iza

FBG - Françoise

Burhenne-Guilmin

IMV - Isabel Martínez

RAN - Raymond Narine

Typesetting and Layout:

Barbara Weiner

IUCN-ELC

Godesberger Allee 108-112

53175 Bonn

Germany

E-mail: Secretariat@elc.iucn.org

CALENDAR OF MEETINGS

As of 1 October 2001