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THE DOMINANCE OF CLIMATE CHANGE IN ENVIRONMENTAL LAW: TAKING STOCK FOR RIO+20

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Abstract

The collection of working papers is a result of a conference, which aimed to consider the notion that the phenomenon of climate change has developed into a separate and overriding policy objective in the broader framework of environmental and sustainability issues. The papers reflect on the extent to which this perception is accurate, the effects of such a development and possible governance responses.

Keywords

Climate change, sustainability, UNCSD, Rio+20, governance.

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Introduction: Concerned with climate, concerned with change

Jerneja Penca*

Just as climate change as a physical process takes place, so does thinking about it in social terms. The present collection of working papers finds its origin in a candid curiosity about a particular aspect of the phenomenon of climate change – namely the perception of the concept by the body of International Environmental Law (IEL) which created the framework within which climate change was initially addressed, but from which it has since conceptually distanced itself.

Today, climate change is presented as one of the major challenges of contemporary global governance. The very existence of a specific climate research strand, "Climate Governance: Institution-Building and the EU" as one of six, within the Global Governance Programme emphasises the fact that, this is a crucial issue to address, within the international community.

The problem of global warming is of concern on a number of distinct fronts. Scientific evidence is increasing in both quantity and quality; predictions are ever more accurate and scepticism receives less public attention than it did some years ago. Public encouragement for action is often initiated by local knowledge about weather patterns and values, or as a consequence of perceived moral responsibilities towards nature and others. Support for action on climate change has been mobilised in forms as diverse as the creation of networks of cities devoted to energy-efficiency and renewable energy, the organisation of 'meat-free days', or more explicit policy initiatives. The language conveying the sense of urgency and the level of ambition has become popular in political rhetoric, and is frequently present in mass media: the coverage of the Rio+20 summit was not comparable to that dedicated to the Conferences of Parties to the UNFCCC treaty. At least symbolically, these aspects are significant when noting the 'omnipresence' of climate change. But beyond rhetorical debate, the issue has also been accepted within political and legal spheres, with a number of concrete programmes, tentative targets and laws which had been created with the aim of reducing carbon emissions or adaptation to them.

The focus on climate change is arguably greater than that placed on other environmental or developmental issues. In many ways, climate change is being isolated from the broader conceptual and political framework of sustainability, from which it had emerged. It is evolving into both an independent policy area and a distinct discipline of scholarly enquiry. This is manifested in an expanding variety of scientific and scholarly journals, conferences, university courses, and legislative/regulatory measures which focus on this problem area only. Many other environmental issues, such as water pollution, soil degradation or disappearance of habitats and species share much of the structural reasoning behind climate change and may deserve the same focus and detail, but are now treated as more marginal. In principle, the establishment of a governance field of climate change has supplemented, rather than eroded other issues. In practice, therefore, the attention placed on, and commitment given to 'the environment' as a whole, now appears to have been split between more areas of study.

It is due to the combination of these two trends – the increased attention placed on the subject of climate change, and its independence from other policy concerns – that we have come to think and speak of the *dominance* of a climate rhetoric. One area to explore in this regard is the empirical question of the extent to which this is actually taking place. Another is the pragmatic query as to what the IEL's (altered) perception of climate change implies.

These issues became particularly obvious as the international community as well as individual governments began preparing for the UN Conference on Sustainable Development ("Rio+20"),

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scheduled for June 2012. Rio+20 presented as a rare opportunity to look back and assess the IEL's progress and, just as crucially, determine what *progress* in this context actually means. It was now apt to ask and demand the answer to the crude question of "Has IEL failed or succeeded?". Its progress could be measured at least in the following ways: as physical improvements according to environmental indicators, as the imposition of ecological constraints and/or considerations onto other policy areas, or as the integration of environmental issues (so called 'mainstreaming') into any other discourse.

Against this backdrop, the dominance of climate change was a phenomenon that could neither be simply acclaimed nor criticised. On the one hand, its presence allowed for a focused space to investigate and understand a specific problem. It also raised the profile of other non-traditional governance themes, as far as they were affected by or affecting the warming climate (such as the vulnerability of the poor, the provision of climate regulations such as ecosystem services etc.). From a legal perspective, a number of lessons could be learnt from the responses to climate change: some innovative initiatives since 1992 provide refreshing examples of regulation.

On the other hand, the effectiveness of these same policies targeting climate change is highly contested by global emissions having reached the highest levels ever measured, and in view of visible social, economic and political results of this failure. Contrary to viewing the dominance of climate change as constructive for the articulation of environmental demands, it can also be argued that it is obscuring other equally pressing problems and setting harmful priorities, instead of initiating much needed systemic and structural changes to prevent further environmental degradation. The latter are believed to be characteristic of the much wider area of environmental or sustainable development law. Focusing on one issue only carries the risk of perpetuating the production of partial solutions that are beneficial to one specific challenge only, and are in conflict with others (as for example demonstrated by the experience with biofuels, afforestation projects, CO2 sequestration into geological formations, and proposals for geo-engineering). Finally, the dominance of climate change may lead not only to prioritisation, but also to a conflation of objectives, where different policy goals and fields are being equated, such as energy-climate, environment-climate, and low carbon-low environmental impact.

A significant influence on the considerations about the meaning of *progress* in environmental issues and the relationship between the environment and climate was exerted by the intention of the Rio+20 to revisit the sustainability paradigm. To that end, the process set in motion by the Rio+20 pioneered the concept of a 'green economy' and practically relegated to it the future of sustainability. However, destructive assumptions about the environment lie at the heart of the path depicted by the green economy, such as the concepts of market, economic growth, property and technology. Green economy seems to favour one particular interpretation of progress, namely that of the environment having instrumental value to the economic growth. Needless to point out, this understanding of the role of the environment came about on account of the more radical demands, which may also be (and have been) read into the IEL. To return to the concept of climate change – Rio+20 was an opportunity to question whether policies on this particular issue are part of the problem or a solution? Are they achieving or impeding the much-anticipated sustainability? Are they only a rhetorical cover for the perpetuation of the existing order that fuels 'business-as-usual', or is climate change an eye-opening phenomenon that will de-stabilise the harmful trajectory followed so far?

These concerns may form the basis for more detailed study, but they do not generate a sound framework for proper analysis of the issues involved. The conference, which stimulated the present working papers, felt very much like a pioneering project exploring the field, and closer to fencing the garden than sowing the seeds. Instead, we have aimed at putting (some of the) relevant questions on the table and let the discussion run its own course. It is a rare luxury not to have a preconceived agenda, but instead allowing the very questions worth addressing shape the debate.

We set off by evaluating the institutional, legal, policy and discursive mechanisms that have been used in tackling climate change, in no particularly structured manner. As lawyers, of course we were

inherently attracted to some aspects more than others, but attempted to allow for the analysis to be fairly broad in our selection of instruments, institutions, actors, science and ethics, and also in any other political and legal strategies that were used. We were keen on being both pragmatic and innovative, discussing both the positive and normative dimensions of present and future strategies. Equally, we wanted to include a critical perspective that draws attention to issues that have been obscured by the climate-centred agenda thus far, including power politics and the legal (and other) implications of this political prioritisation. Finally, we aimed at illustrating existing frustrations over certain frameworks and concepts that are being used by the IEL, amongst many other relevant questions.

In short, the working papers resulting from the conference are concerned with *climate* and *change*. They deal with the interplay between the change in climate and the change in the societal responses, as well as their effective and necessary causal relationship. The working papers build on the straightforward premise that there is generally no disagreement about the need to act on climate change, but that the effects of the legal and discursive activities in this area are important to evaluate. In other words, rather than just contributing to the analysis of the increasing laws on climate change, and simply calling for more law, the working papers consider the implications of the perception of climate change as an independent category. They ask whether the separation of climate change from the broader sustainability dilemmas is not exactly part of the problem we are trying to resolve by environmental law.

The Fantasy of Success: Climate Change as Discourse

Stephen Humphreys*

In this paper, I aim to think through the significance of what we might call the 'mainstreaming' of climate science. In doing so, I attempt to explain the apparent paradox that, despite the increasing success of climate change science at discursive level, the failure of that language to frame a viable solution to the problems climate change poses appear ever starker. The inquiry draws on notions of (Foucauldian) 'discourse' and (Lacanian) 'fantasy', which I introduce by reference to two very different stories to have emerged recently from Norway, a poster child for climate change policy.

A. Two Tales of Norway

(i) Saviour of Europe?

As I was writing a first draft of this paper in April 2012, the trial of Anders Breivik was underway in Norway. During this trial, as the reader will no doubt recall, Breivik claimed that Europe is in the grip of a pro-Islamic 'cultural Marxism'.[1] His evidence for this was the ubiquity of a certain kind of language promoting tolerance and multiculturalism, which he described as 'an anti-European hate-ideology designed to deconstruct European cultures and traditions, European identities, European Christendom and even European nation states.'[2] His seemingly senseless attacks on Norway's political youth was, therefore, intended to go directly to the heart of the problem.

It is certainly true that the language of multiculturalism sometimes seems to be ubiquitous, not only in Norway, but throughout Europe, a kind of official lingua franca presenting a distilled liberalism in the tradition of John Stuart Mill. Certainly Europe's twin institutional guardians of the good life – the European Union and the Council of Europe (Norway is only a member of the second) – have been at pains for many years to demonstrate their seriousness of intent by supporting, articulating and of course funding programs to promote an anti-racist, non-discriminating, hyper-'tolerant' utopia.[3] Indeed, the putative unity of a terminally fractious continent sometimes appears to depend on this formally ratified objective.

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* Lecturer in Law, London School of Economics. This essay is based on a paper presented at the workshop entitled 'The Dominance of Climate Change in Environmental Law: Taking Stock for Rio+20' at the European University Institute in Fiesole, May 18, 2012. My thanks to the other participants for discussion of this paper and related themes, and in particular to Moritz Hartmann, of the Freie Universität Berlin for his insightful response to the paper.

1 According to Breivik's manifesto, entitled The Rise of Cultural Marxism (http://www.youtube.com/watch?v=MEINEU1Czts), 'By active infiltration efforts since 1945, the Marxists … influence[d] the Labour movements, most universities, media and publishing companies, feminist movements, sexual emancipation movements, environmentalist movements, anti-discrimination movements, human right movements and other relating NGOs [sic].'

2 Ibid. He adds: 'And, as such, it is an evil genocidal ideology created for the sole purpose of annihilating everything European.'

3 What is known as 'fighting discrimination' remains the key focus of the European Union's human rights work, such as it is. See http://europa.eu/pol/rights/ ('… the EU funds a wide range of activities to combat racism and xenophobia within its borders. Nearly a quarter of PROGRESS' €743 million budget is going towards fighting discrimination.') See also the EU's External Action Service website: http://eeas.europa.eu/human_rights/discrimination/index_en.htm. The longest standing source of policy statements on 'tolerance' is to be found at the Council of Europe's European Commission Against Racism and Intolerance (ECRI): http://www.coe.int/t/dghl/monitoring/ecri/ ('ECRI … monitors problems of racism, discrimination on grounds of ethnic origin, citizenship, colour, religion and language, as well as xenophobia, antisemitism and intolerance, prepares reports and issues recommendations to member States.')

In this familiar register, Europe is, or aspires to become, a haven in which all religions and races are treated on a par, and in which a centuries-old Christian (not to mention aristocratic) hegemony has been effectively vanquished, so to speak, beneath a wave of substantive egalitarian 'tolerance'. But of course, we all know this 'multiculti' vision is neither 'Islamist' nor Marxist – except perhaps insofar as it embraces some aspirational collective solidarity – analogous to (but surely utterly dissimilar from) the Umma or the Workers of the World. And we also know that the multicultural register is very far from describing the Europe we actually live in – which remains not only a place of common and casual racism, but one in which wealth inequalities seemingly soar to new heights daily, and in which it sometimes seems we are at war with 'Islam'. Even formally, multiculturalism is generally thought, as Angela Merkel once put it, to have 'utterly failed'.[4]

So Anders Breivik, who explained that he had acted to 'save' Europe from itself, is a fantasist. By that I mean, Breivik acts as though he believes everything that is said to him is actually true, even though deep down he knows it is not. I will return to this notion of fantasy in a moment.

Breivik had a particular loathing for a popular Norwegian song, which precisely caught the spirit of the register I have been referring to – and that he despised. *Children of the Rainbow* by Lillebjørn Nilsen is a loose translation of a 1970 song *My Rainbow Race* by the American folk singer Pete Seeger. During Breivik's trial, 40,000 Norwegians gathered to sing this song outside the courthouse, led by Nilsen himself.[5] The chorus (of the original Pete Seeger song) goes like this:[6]

> One blue sky above us
>
> One ocean lapping all our shore
>
> One earth so green and round
>
> Who could ask for more?

The occasion was in many ways a wonderful affirmation of the principles of tolerance and solidarity in the face of an abhorrent and murderous neo-fascism. But at another level, one might wonder whether Norway too is living out a kind of collective fantasy.

(ii) Saviour of the World?

Viewed from the perspective of global climate change, Norway presents a fascinating case. The country is undoubtedly one of the world's leading greenhouse gas emitters, thanks to its immense oil and gas industry, reckoned to be the world's fifth largest oil exporter and second largest gas exporter in 2009 and 2010 respectively.[7] That said, it is difficult to get a sense of Norway's true contribution to global greenhouse gas emissions, as official figures do not record downstream emissions (i.e., those caused by people using Norwegian fossil fuels) from the country's sizeable exports do not appear in the data. As a result, only a quarter of Norway's total emissions are attributed to fossil fuels—those emitted in the extraction and transportation of oil and gas, which, at 13.4 million tonnes in 2011, are still sizeable, equal to the total emissions of neighbouring Lithuania.[8] Carbon emissions due to the

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4 Gavin Hewitt, '"Failure" of Multiculturalism, BBC News, October 18, 2010, online at: <http://www.bbc.co.uk/blogs/thereporters/gavinhewitt/2010/10/failure_of_multiculturalism.html>, accessed October 20, 2012.

5 Reproduced here: <http://www.youtube.com/watch?v=IkbI-50bKXA>, accessed October 20, 2012.

6 Lyrics online here: <http://www.peteseeger.net/Rainrace.htm>, accessed October 20, 2012.

7 According to the CIA Factbook: <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2176rank.html> and <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2183rank.html>, accessed October 20, 2012. See generally <https://www.cia.gov/library/publications/the-world-factbook/geos/no.html>, accessed October 20, 2012.

8 See Norway's official statistics on <http://www.ssb.no/english/subjects/01/04/10/klimagassn_en/>, accessed October 20, 2012. For Lithuania, see data of the US EIA in footnote 9.

consumption of Norwegian oil and gas exports do not appear at all in the country's carbon accounts. Thus, despite being an immense contributor to climate change, by simply mining and exporting the stuff, Norway consistently appears as a modest polluter in most lists of global emissions: ranked 68th in 2009 by the US Energy Information Administration.[9]

At the same time, Norway consistently presents itself as deeply serious about addressing climate change. The country has one of the world's longest running carbon tax regimes (dating from 1991—although its efficacy has been questioned)[10] and one of the sharpest emission reduction policies in the world, aiming to achieve carbon neutrality by 2030, with only one-third of those cuts to be achieved through offsets abroad.[11] Norway is a leading investor in the UN REDD+ programme, backing an immense project in Indonesia to the tune of US $1 billion.[12] Norway is moreover investing heavily in Carbon Capture and Storage (CCS), with an extensive programme currently underway in Mongstad, just north of the city Bergen, at a similar cost of US $1 billion.[13] (Norway's carbon tax had also spurred its state-owned oil company, Statoil to invest in CCS.[14])

Ironically enough, Norway can afford these investments in climate mitigation due to its oil and gas wealth. The country's sovereign investment fund, Norges Bank Investment Management (NBIM), founded on carbon tax proceeds as well as money derived from fossil fuel exports, and currently valued at over US $600 billion,[15] is among the largest in the world. It is also perhaps the world's most ethically strictured sovereign fund, refusing to invest in companies whose activities may produce, among other things, 'serious or systematic human rights violations' or (ever more ironically) 'severe environmental harms'.[16] Mining company Rio Tinto has thus been excluded from the Fund's 'investment universe' lest the NBIM be potentially funding environmental harm in, of all countries, Indonesia.[17] God forbid.

Add to this the fact that Norway is already feeling the effects of climate change,[18] with new weather patterns in the North of the country directly affecting the patterns of cycles of appearance and flourishing of flora and fauna, altering food chains and impacting ultimately on the lifestyles of

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9 US Energy Information Administration, Total Carbon Dioxide Emissions from the Consumption of Energy, online here: <http://www.eia.gov/cfapps/ipdbproject/IEDIndex3.cfm?tid=90&pid=44&aid=8>, accessed October 20, 2012.

10 Emissions subsequently rose 15% to 2008. See UNEP's Norway page: <http://www.unep.org/climateneutral/Default.aspx?tabid=231>, accessed October 20, 2012. See also Leila Abboud, 'An Exhausting War on Emissions', *Wall Street Journal* (September 30, 2008), Nicholas Choy & Caroline Chiu, 'FRE 525 Problem Set 3 – Carbon Tax in Norway' (February 28, 2012), <http://blogs.ubc.ca/cyl501/2012/02/>, accessed October 20, 2012.

11 See the Norwegian Finance Ministry website, <http://www.carbonneutralnorway.no>, accessed October 20, 2012. For analysis of this policy at the time of its introduction in 2008, see 'Green Ambitions', *The Economist* (January 21, 2008).

12 Letter of Intent between the Government of the Kingdom of Norway and the Government of the Republic of Indonesia on "Cooperation on reducing greenhouse gas emissions from deforestation and forest degradation", online here: <http://www.regjeringen.no/upload/SMK/Vedlegg/2010/Indonesia_avtale.pdf>, accessed October 20, 2012.

13 Andrew Ward, 'Norway launches carbon capture and storage scheme', *Financial Times*, June 28, 2011; Damien Carrington, 'Whatever happened to carbon capture in the fight against climate change?', *The Guardian*, May 9, 2012.

14 Choy and Chiu, above n 10.

15 According to the Fund's own website, <http://www.nbim.no/en/> (accessed October 20, 2012), its value on October 6, 2012 stood at 3.7 trillion NOK, or about US $650 billion.

16 See on the Fund's website (<http://www.nbim.no/en/>, accessed October 20, 2012) under 'Responsible Investments' and 'Companies Excluded from the Investment Universe'.

17 It is, perhaps, beyond ironic that one of the 8,000 companies in which the NBIM invests, Kuala Lumpar Kepong, has been accused of carrying out deforestation in the precise area protected by the Norway-funded REDD+ programme in Kalimantan, according to recent reports. See Jonathan Watts, 'Norway accused of hypocrisy over Indonesian deforestation funding', *The Guardian* (December 1, 2011).

18 See the official State of the Environment website, <http://www.environment.no/Topics/Climate/Norways-climate/#D>, accessed October 20, 2012.

reindeer and their traditional herders among the Sami people living in the north of the country.[19] Norway is clearly not blind to the threats faced by 'indigenous' peoples, however: the country has been at the forefront of efforts at the UN to ensure Indonesia too protects the 'rights' of its 'forest dependent peoples', in particular 'regarding their rights to traditional lands, territories and resources'.[20] At home, too, Norway claims that its Arctic policy will, for example, 'safeguard the culture and livelihood of indigenous peoples'.[21]

As the ironies mount, one might wonder how all this is supposed to work. It is true that nothing in the UNFCCC or the Kyoto Protocol requires countries to include downstream emissions from oil and gas exports in their national inventories: Norway is therefore perfectly justified, from an international law perspective, in not doing so.[22] But the resulting picture must necessarily fail to describe the actual contribution to climate change Norway is making, and upon which the Norwegian economy in fact depends. The obvious unspoken question is whether it is really coherent to run a national economy on fossil fuel exports while still aiming to lead the world in climate change mitigation?

To achieve its ambitious carbon reduction goals, Norway will have to rely – as its current policies indicate – on copious quantities of carbon capture, on one hand, and of carbon offsets, on the other. So Norway is investing heavily in a technology that has yet to prove its longterm reliability, on one hand, and, on the other, on the promotion of REDD+ programs in developing countries and of carbon markets globally. In effect, Norway appears to reckon it can continue to mine its own principal local resource – fossil fuels – but only if it can use the proceeds to pay other countries not to mine *their* principal local resource – forests. Indeed, fossil fuel extraction is expanding in Norway: while overall emissions have been falling year-on-year, those produced in the oil and gas industry have been increasing annually (with occasional blips),[23] a trend set to continue with the discovery of vast new oil resources in 2011.[24]

Norway also sees itself as a 'steward' of the Arctic region.[25] The country regularly claims that its approach to what is termed the 'High North' is the cornerstone of its foreign policy, and that it is working hard with other circumpolar governments to ensure that any engagement with the region 'must be done in a way that takes account of the environment, climate and interests of indigenous peoples'.[26] But there is nevertheless general acknowledgement of the benefits that climate change may bring Norway due to its proximity to and links with the fast-melting polar cap. Here, in a talk largely

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19 Un Doc, A/HRC/18/35/Add.2, Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya, Addendum: The situation of the Sami people in the Sápmi region of Norway, Sweden and Finland, 6 June 2011, para. 60; Rachel Baird, 'The Impact of Climate Change on Minorities and Indigenous Peoples', Minority Rights Group International Briefing April 2008, 3.

20 A/HRC/21/7, Report of the Working Group on the Universal Periodic Review: Indonesia, July 5, 2012, para. 109.36

21 Norwegian Ministry for Foreign Affairs, *The High North - Visions and Strategies*, Meld. St. 7 (2011–2012) Report to the Storting (White Paper) (December 2011) [hereafter 'MFA White Paper 2011'], 38.

22 Norway is likewise keen to ensure that international law remains the relevant standard for assessing its actions (ibid., 21;33).

23 See official statistics 'Greenhouse Gases y Source' at <http://www.ssb.no/english/subjects/01/klima_luft_en/>, accessed October 20, 2012.

24 Marianne Stigset, 'Norway Sees Longer Oil Era as North Sea Find Offers Hidden Giant', Bloomberg (August 17, 2011). The article quotes Tim Dodson, Statoil's exploration chief: iThis shows Norway still has the capacity to deliver world-class discoveries. It's probably the largest offshore oil discovery anywhere in the world this year. It has given the entire oil industry renewed optimism.'

25 'The Government will seek to ensure that Norway is the best steward of the environment and the natural resources in the High North'. MFA White Paper 2011, 28. The report also speaks (at 11) of Norway as the 'manager' of 'abundant fish stocks'.

26 Ibid., 14.

devoted to mutual climate change efforts, is what Norway's Ambassador to Japan has to say on the subject of the Arctic:

> The melting of Arctic ice opens new perspectives for petroleum activity and new routes for maritime transport that will establish new commercial relationships. Opening the North East Passage brings Norway and Japan closer, shortening substantially your sailing routes to and from Europe. Increasing utilisation of the Arctic's rich endowment of valuable natural resources, living marine resources, pollution and climate change all merge in a challenge that governments and other stakeholders must deal with in a way that ensures sustainable development.[27]

Indeed: One ocean, one earth. Who could ask for more?

On a close reading, the 'High North' White Paper—the principal concern of which is with 'value creation' in the Arctic ('to ensure an integrated, ecosystem-based management regime that safeguards biodiversity and provides a basis for sustainable use of resources')—discloses an uncomfortable truth about Norwegian climate change policy. In a section entitled 'knowledge of the alarming pace of climate change', the report lists the evidence that climate change is wrecking the Arctic. 'At the same time', the Paper notes, echoing Norway's ambassador in Japan, 'the melting ice is providing greater access to resources in the High North and opening up new opportunities for shipping'. In conclusion, 'the rapid pace of climate change and growing economic activity mean that it will be even more important to integrate environmental policy into all sectors'. The White Paper, in short, views 'environmental policy' not in terms of arresting climate change, but as a means of managing—and indeed benefiting from—the ravages wreaked by climate change, as a means of retrieving 'value' from the cataclysm.

(iii) Fantasy

What is fantasy? My fantasy, to paraphrase the psychoanalyst-philosopher Jacques Lacan, is what I think you think about me; it is my idea about what I need to be in order to be desired by you, to be desirable, lovable, loved.[28] Slavoj Zizek refers to fantasy as 'the unknown known'[29]—something that drives us, that shapes our understanding of ourselves, that we bury 'deep down' (in our unconscious), but that we nevertheless remain ignorant of—indeed, something that drives and shapes us precisely because we don't recognise it as our own. It is to other people that we attribute the signal for us to behave in a certain way: our fantasy is that the signal induces our behaviour, it is a fantasy because we believe ourselves to be merely *re*acting to the object of our fantasy, rather than initiating the whole thing ourselves. Crucially (in Lacan's understanding), fantasy is 'intersubjective'; it is ultimately neither mine nor yours, but something that comes into being through the signalling between us, and our interpretation of that signalling.[30] It arises discursively.

In Breivik's fantasy, he has been called to 'save' (white, Christian) Europe from itself. By responding to the call, he demonstrates that he has understood the deeper (concealed) truth of European multiculturalism, a truth Europe dare not admit—that its vaunted 'tolerance' is 'actually' a destructive Marxist/Islamicist poison—but that has been disclosed to Breivik. Paradoxically, to save Europe he must destroy it. But deep down, we know the paradox is Europe's own, not Breivik's. By

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[27] Address by H.E. Arne Walther Norwegian Ambassador to Japan, Presentation of Norwegian perspectives at Norway-Japan Seminar on the Carbon Value Chain organized by the Embassy on 9 October 2009. <http://www.norway.or.jp/Embassy/english/ambassador/Ambassadors-Speeches/MitigatingClimateChange/>, accessed October 20, 2012.

[28] As Zizek explains Lacan's 'fantasy': I know I am incomplete, and I may be resigned to being incomplete; but I nevertheless believe that you may know how to be complete, and you therefore know how I too might be complete; the knowledge that I attribute to you is my fantasy. Slavoj Zizek, *How to Read Lacan* (Granta, 2006), Chapter 4.

[29] Ibid.

[30] Ibid.

acting out the contradiction in Europe's account of itself with deadpan dispassion, Breivik claims to save the 'real' Europe. Brevik's fantasy is, in part, Europe's own fantasy.

Norway's fantasy, we might add, is one in which the country saves the world from itself. Norway becomes the perfect world citizen by acting out the deeper truth about the global economy, a truth the world refuses to admit—that we cannot both continue to exploit fossil fuel resources and address climate change—but that it has been vouchsafed to Norway to recognise. By acting in a contradictory manner, becoming rich from fossil fuels while achieving 'carbon neutrality', stewarding the Arctic 'environment' by preparing for its destruction—Norway is merely acting out the contradiction in all climate change activities, in global climate policy as a whole. If, paradoxically, Norway actions would destroy the world in order to save it, that paradox is not Norway's; it is inherent in global climate change policy as a whole. Norway merely shows its fitness for the world by acting out the contradiction with deadpan dispassion. Norway's fantasy is, in fact, the fantasy of mainstream climate change discourse.

Brevik's fantasy is one in which the ubiquitous claim that Europe is a multicultural haven is, in fact, true: he can become Europe's saviour only by reading the common call for 'tolerance' as, in fact, an SOS for help and, paradoxically, destroying the thing he claims to be rescuing. Norway's fantasy is one in which the ubiquitous claims made for 'sustainable development' are, in fact, true: Norway can become the world's saviour by turning the leaden profits of its climate harms into the golden investments of climate mitigation (and, paradoxically, destroying the thing it claims to love).
I have referred here to 'mainstream climate change discourse'. Let me now explain what I mean by this.

B. The Paradox of Success

Today, we stand in a paradoxical place on climate change. Twenty years on from the original Rio Summit, the language of climate change is everywhere. Everybody has learned to speak it; politicians can't get by without it; we all count our carbon footprints and argue about the relative merits of REDD+. What we might call 'the discourse of climate change' has, we might say, been 'mainstreamed'. This is presumably a success.

By discourse, I mean two things. First, of course, the familiar register of climate change itself – the particular language and assumptions associated with the 'problem': that the earth is in fact warming; that this phenomenon is due to human economic activity; that carbon emissions are the immediate cause; that the immediate consequence will be various 'harms'; that to prevent 'dangerous anthropogenic interference' with the environment is a global good; and so on. But I also hope to retain, second, the specifically Foucauldian inflection in the term 'discourse': that any given discourse embeds a set of power relations; that discourses work through systems of inclusion/exclusion: by including certain 'objects' (words, ideas, acceptable enunciations, respectable authorities) and excluding others, and likewise, by privileging certain speakers, fora, and manners of speech, over others.[31] That climate change discourse was 'mainstreamed' ought to bode well in this scenario: questioning some of the basic assumptions would then become unacceptable, in at least some powerful places. And that seems to have happened.

Yet, despite the mainstreaming of climate change discourse, we seem no closer to figuring out how to fix the world. Indeed, in many respects, we seem further away from a solution than we did in 1992: in contrast to the mighty wind that filled the sails of the UNFCCC at that time, today we are scrabbling over a plethora of fragmented policy positions, with neither the will nor the capacity to agree on international measures that would effectively stop this metastasis even though its flowers are blooming all around us.

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[31] Michel Foucault, *The Archaeology of Knowledge* (Routledge, 2002).

In short, even as climate change discourse has become increasingly ubiquitous, effective action to resolve global warming has remained distant, locked forever, it seems, in a waiting room of incrementalism.

How to explain this paradox?

The problem is not ignorance or denial. The science remains solid, 'climategate' notwithstanding, even inside the United States.[32] Climate change denial, if it is better funded today than in the past, is now essentially a delaying tactic – as perhaps best illustrated by the Heartland Institute affair in 2012.[33] In truth, we know as much as we need to know about climate change. The problem is *not* that people need convincing and then action will follow; this is not a problem of *publicity* as so many NGOs appear to think (or 'awareness raising', as various UN agencies term it).[34]
Rather what has happened, I suggest, is that the discourse of climate change has, in the course of its 'mainstreaming', been reshaped and rearticulated to fit within a broader master-discourse (if I may be forgiven the term). Indeed, the 'mainstreaming' of climate change has depended upon its having adopted certain principles fundamental to other dominant discourses (economic, social, political) and discarding principles that had been specific to it (environmental). From this perspective, the success of 'climate change discourse' also marks its failure.

Let me illustrate this thesis with three example topics that abound in recent climate change discourse: technology transfer, human rights and 'the market'.

(i) Technology

Technology has always been a key element of climate change discussions. However, it is worth recalling that the term has undergone a dramatic shift over the past 20 years. At Rio, the point was something called 'transfer of technology', the term that entered the UNFCCC. It was never entirely clear what 'transfer of clean technology' was supposed to mean. But there is little doubt that for many of the smaller participants in the climate negotiations – the countries that had contributed nothing to the problem but stood to lose everything because of it – technology transfer meant the active delivery of capacity and technical skill from rich countries to poor, in order to accelerate 'development'.[35]

'Technology transfer' was premised on a number of quite powerful grounds. One was global solidarity, a common term of art in the early 1990s that has all but vanished in the meantime. Since climate change affected (almost) everyone, and since different countries' capacity to deal with it varied dramatically, the sensible approach seemed to be for everyone to pull together – this quaint principle underlay the UNFCCC.[36] A second was the strong sense of history that prevailed in the still new postcolonial era: it was still widely acknowledged that wealthy countries owed their wealth, at

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[32] See Gallup, 'In U.S., Global Warming Views Steady Despite Warm Winter', March 30, 2012, showing that the number of Americans who believe there is a 'scientific consensus' on climate change increased from 48% to 58% between 1998 and 2012, and that the number who believe it is 'already happening has moved upwards from 48% to 52% over the same period. Online at <http://www.gallup.com/poll/153608/global-warming-views-steady-despite-warm-winter.aspx>, accessed October 20, 2012.

[33] In early 2012, when a list of donors to the climate-denying Heartland Institute was published, a number of named companies, including Microsoft, GM Foundation, and Diageo, withdrew their funding, some publicly stating their acknowledgement of climate change. See, for example, Leo Hickman, 'Diageo to end funding of Heartland Institute after climate change outburst' *The Guardian*, May 6, 2012.

[34] See, for example, the websites of Greenpeace, OneWorld and 350.org as well as the UNFCCC, UNEP, and UNICEF.

[35] For a discussion of this notoriously slippery term, see ICHRP, 'Beyond Technology Transfer' (ICHRP, 2011).

[36] See the Preamble to the UNFCCC: '*Acknowledging* that the global nature of cimate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.'

least in part, on historical colonisation and exploitation. Technology transfer provided one way (among others) to redress that debt.[37] A third ground was old-fashioned social justice: since, as was becoming apparent, wealthy countries had effectively used up all the available atmospheric space for 'development', it seemed just to share the benefits of that overuse rather than to lock in massive wealth disparities for good. A fourth ground, possibly the most persuasive of all, invoked Keynesian economics sense of the post-Marshall Plan era: it is a solid investment for stronger economies to sponsor weaker ones, it was thought, as it facilitates international trade, ultimately benefitting the strong economies themselves.

These grounds may still appear compelling, but they no longer command authority. The virtue of 'solidarity' has long since ceased to animate global political negotiation, and looks in retrospect rather as a rhetorical sop to smooth the entry of newly independent states into a harsh, in practice, global economy. The soft decline of Keynesian economics in the post-Cold War era has also been well documented.[38] Colonial guilt too seems to be deeply unfashionable: if we speak about a 'colonial legacy' at all anymore it is mainly to speculate as to whether developing countries without one are worse off.[39] And as for the shrinkage of atmospheric space: well, now we are going to innovate our way out of it. This, of course, is how we talk about technology and climate change today: the responsible response is to invest in the green economy.

These are non-trivial changes of register. The language of 'technology transfer' was for a while a locus of much contestation in the international climate change negotiations.[40] But it has been slowly siphoned out of the climate change legal regime. Initially handed over to a (near powerless) Expert Group on Technology Transfer, whose mandate has constantly shifted, the term has over time, had less and less to do with 'transfer' and more and more to do with 'creating an enabling environment for foreign investment'.[41] The term 'technology transfer' has been dropped entirely from the UNFCCC regime's current technological hope, the Technology Mechanism.[42] So: fingers crossed for the green economy: a lot is riding on it!

(ii) Human rights

Since about 2007, a number of scholars and others have constructed a body of work on the human rights dimensions of climate change, in which it is regularly pointed out that climate change may, as a side-effect, undermine the grandiose claims that have been made for human rights since World War Two (and especially, perhaps, from the 1970s on).[43]

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37 Indeed, the notion initially arose as a key element (dating back to 1961) in the attempt by newly independent states to redress colonial injustices by means of international law, known as the 'New International Economic Order'. See Pedro Roffe (1985) 'Transfer of Technology: UNCTAD's Draft International Code of Conduct' 19 *International Lawyer* 689.

38 In, for example, John Eatwell and Murray Milgate, *The Fall and Rise of Keynesian Economics*, (Oxford University Press, 2011).

39 Another long-term trend, peaking, perhaps, with David Landes, *The Wealth and Poverty of Nations* (Abacus, 1999).

40 The high-point may have been the 13th Conference of the Parties held in Bali in 2007, where technology transfer was named as one of four 'pillars' of any future climate change architecture.

41 This story is told in International Council on Human Rights Policy, *Beyond Technology Transfer: Protecting Human Rights in a Climate Constrained World* (ICHRP, 2011), Chapter 3.

42 See the outcome documents from the Copenhagen, Cancun and Durban Conferences of the Parties.

43 Among the many recent contributions to this literature, see Stephen Humphreys, *Human Rights and Climate Change* (Cambridge University Press, 2009); International Council on Human Rights Policy [ICHRP], *Climate Change and Human Rights: A Rough Guide* (ICHRP, 2008); J.H. Knox, 'Climate Change and Human Rights Law', (2009) 50(2) *Virginia Journal of International Law* 163; J.H. Knox, 'Linking Human Rights and Climate Change at the United Nations', (2009) 33(4) *Harvard Environmental Law Review* 477; M. Limon, 'Human Rights and Climate Change: Constructing a Case for Political Action' (2009) 33(4) *Harvard Environmental Law Review* 439. On the 1970s dating of

The fact that climate change will have profound human rights consequences seems both strangely obvious and curiously irrelevant. After all, much of our human rights machinery has been lying in abeyance for decades; indeed, some of it looks as though it was never really intended to function. (I am thinking here, of course, of the cumbersomely-named International Covenant on Economic, Social and Cultural Rights (ICESCR), whose compliance mechanisms (principally a review committee) have never been regarded as especially effective.)[44]

Climate change will profoundly exacerbate harms to the set of human rights supposedly protected by this treaty – the predictions of increasing hunger, thirst, diseases, and homelessness are, of course, a mainstay of climate change discourse,[45] not to mention the disappearance of entire cultures, islands, and with them the traditions of the inhabitants, if not the inhabitants themselves.[46] However, the existing regime is not empowered to deal with this eventuality.[47] Why not? Because climate change harms are not, in the main, caused in the countries where they have worst effects, and, quite aside from its general redundancy, the ICESCR has no obvious way of holding extraterritorial actors accountable for the harms they cause.[48] Climate change is already well on the way to joining global poverty as something which may have international causes, but does not invoke inter-statal obligations. Regrettable, certainly, but sadly difficult to fix. It's complicated.[49]

One might expect that this state of affairs would raise the ire of human rights activists, or incite calls for improvement of the human rights regime, or at least add urgency to the climate change negotiations. One would be wrong. Climate change discourse has absorbed the human rights challenge much as human rights discourse has absorbed the ongoing reality of global poverty – that is, with little discernible effect.

(iii) The Market

Around about the time Lillebjørn Nilsen was composing 'Children of the Rainbow', just across the Skagerrak Strait, the nations of the world were gearing up for world's first environmental conference in Stockholm. The Stockholm Declaration on the Human Environment was largely concerned with the theme of environmental (mis)management. Here is the preamble:

> In our time, man's capability to transform his surroundings, if used wisely, can bring to all peoples the benefits of development and the opportunity to enhance the quality of life. Wrongly or heedlessly applied, the same power can do incalculable harm to human beings and the human environment. We see around us growing evidence of man-made harm in many regions of the earth.[50]

(Contd.)

the 'human rights movement', Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press, 2011).

44 The new Optional Protocol to the ICESCR, establishing a judicial body, may, it is widely hoped, change this, although there are as yet few Parties and the Protocol has not yet entered into force.

45 A list of predicted climate change impacts on social and economic rights, taken from the IPCC's Fourth Assessment Report, is provided in an Appendix to Humphreys (2009) above.

46 UN Doc., E/CN.4/Sub.2/2005/28 'The human rights situation of indigenous peoples in States and other territories threatened with extinction for environmental reasons', Working paper prepared by Mrs. Françoise Hampson, member of the Working Group on Indigenous Population (30 June 2006).

47 See: Stephen Humphreys, 'Climate Change and International Human Rights Law' in Rosemary Rayfuse and Shirley Scott (eds.), *International Law in the Era of Climate Change* (Edward Elgar, 2012).

48 For discussion see, M. Gibney and S. Skogly (eds.) *Universal Human Rights and Extraterritorial Obligations* (University of Pennsylvania Press, 2010).

49 For a critique of this position, Thomas Pogge, 'Recognized and Violated by International Law: The Human Rights of the Global Poor' 18 *Leiden Journal of International Law* 717.

50 Declaration of the United Nations Conference on the Human Environment, June 16, 1972 ('The Stockholm Declaration'). The preamble goes on to specify: 'dangerous levels of pollution in water, air, earth and living beings; major and

Principles 13, 14 and 15 are concerned with 'rational planning' which 'should be applied to all human settlements and urbanization'. According to Principle 13 of the Stockholm Declaration:

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

So far so Keynes. But alongside its technocratic bloodstream, there has also always been, of course, a neural strain of outright anti-capitalism running through the 'environmental movement', a strain going back at least as far as the English Romantics and reaching its peak, it seemed, with the increasingly irrefutable evidence of the reality of climate change.[51] Because climate change posited economic growth as *itself* the problem, it also appeared to hold out the promise of a truly radical politics: environmentalism. For environmentalists, what matters is *the thing in itself*. Biodiversity is to be conserved *for the sake of* our biologically diverse planet, for each individual species, special and valuable in its own uniqueness. Climate change is wrong because it damages 'the environment' *per se*, it destroys species and ecosystems, which are to be valued, to repeat, *in and of themselves*.

Needless to say, the latter sentiment did not make it into the UNFCCC (nor even, for that matter, the Convention on Biodiversity[52]). Still, we do find that less radical, more Keynesian language – of planning, coordination and redistribution for self-interest – coursing through the Rio treaties. And by the 1990s, this too was a language of resistance (or at least of rearguard action). Let's not forget this was the immediate aftermath of the Cold War period and a newer paradigm – today often referred to as 'neoliberal' – was already coursing through international affairs.[53] The UNFCCC seemed to tend in quite the reverse direction to this newly dominant neoliberal discourse: the Rio treaties appeared to be in part about countering the neoliberal trend; about keeping the ship on course.

Yet, here too, twenty years on, we find that the real reversal has been back to the 1980s (indeed, to the 1880s!). It is not necessary to read Friedrich Hayek and Milton Friedman to know that 'planning' *per se* has long been seen as the bureaucratic problem to which a faith in the market presents the apparently irresistible solution.[54] Today we turn to the markets for all our climate solutions.[55] This is the case even if no-one has explained, to my knowledge, how climate change can be addressed without, to paraphrase the Stockholm Declaration, 'an integrated and coordinated approach to [international] development planning'.[56]

(Contd.)

undesirable disturbances to the ecological balance of the biosphere; destruction and depletion of irreplaceable resources; and gross deficiencies, harmful to the physical, mental and social health of man, in the man-made environment, particularly in the living and working environment.'

51 Indeed, the 'green movement' has always had adherents on both the (far) right and left. For a short history, Anthony Giddens, *The Politics of Climate* Change, Polity Press (2009), Chapter 3.

52 The preamble 'acknowledg[es] that substantial investments are required to conserve biological diversity and that there is the expectation of a broad range of environmental, economic and social benefits from those investments'.

53 For one account of this story, see Humphreys (2010), especially Chapters 4 and 5.

54 Among the canonical texts in this trend have been Friedrich Hayek, *The Road to Serfdom* (University of Chicago Press, 1994) and Milton Friedman, *Capitalism and Freedom* (University of Chicago Press, 2002).

55 For a critique, see Giddens (2011), Chapter 5.

56 Admittedly I am being somewhat simplistic. The opposition between the 'market' and 'planning' is not as clearcut as Hayek and Friedman would have us believe. In fact, markets too take planning and are, at a minimum, entirely compatible with planning (see, for example, Roberto Unger, *Social Theory: Its Situation and Its Task - A Critical Introduction to Politics: A Work in Constructive Social Theory*, Cambridge University Press (1987)). Much planning is required for REDD+ and emissions trading to function at all. The principal point stands, however:

The secret is, of course, that it can't.[57] So even as we speak the language of climate change, and wring our hands with dismay at the difficulty of reaching agreement and the upward surge of global emissions, at the same time that very language is increasingly a repository of diminished expectations and attenuated goals, tending ultimately to accommodation with the awful consequences of our behavioural excesses.[58] That, it seems to me, is where we are headed.

So, I suggest, climate change discourse is primarily a repository of fantasy: it is what we ourselves believe is expected of us, what we need to do and say in order to be who we think we are supposed to be, in order to succeed, even though we know that, in fact, we are heading towards failure. Deep down we know that even if we got what we purportedly want – a functional carbon price, proliferating REDD+ projects, and a vibrant global emissions trading regime – we would still fail, at least if by success we mean 'preventing dangerous anthropogenic interference with the climate'.[59] On those terms, the system we are currently investing in is not designed to succeed.

C. Revelation, Retribution, Redemption

To conclude, I wish to make a final point about the recent evolution of climate change discourse and that is to connect it back to the Christian eschatology that appears to have fallen into desuetude in Europe, so much so that the fantasist Breivik apparently felt compelled to defend it. There are religious groups, notably in the United States today, who attack climate change along familiar lines of a staunch religious faith in the benevolence of God's will and intention, and in opposition to the profanity of a secular science.[60]

The reverse, however, is closer to the truth: to believe in climate change is much rather a leap of faith than to disbelieve. Climate science is, of course, extraordinarily complex. Those of us who believe in it rarely understand it fully. Certainly we are versed in the fundamentals; we can recount an apparently seamless narrative; and we can (increasingly) point to evidence in support of our claims. And yet, if pushed, few of us can vouch for the truth of climate science as a matter of examined empirical evidence – we lack the time or training to hold up to scrutiny the vast number of causal relationships and observations that, by now, constitute the truth-claim of climate science.

Were we to do so, we would be following in the footsteps of Descartes, carrying on a respected Enlightenment sceptical tradition that ultimately replaced faith in 'higher authorities' with the first-hand evidence of our senses (the same profaning move that, Nietzsche warned us, ultimately killed off God).[61] Instead, however, we must take the claims of science on faith: indeed, as the French philosopher Jean-Francois Lyotard pointed out long ago, scientific authorities now enjoy the claim on our faith that religious authorities have ceded.[62] Contrariwise, it is climate change denial, today, that increasingly appears in the respectable garb of Enlightenment scepticism, unafraid to query the

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57 For a relatively conservative articulation of this conclusion, see Nicholas Stern, 'Climate Change and the New Industrial Revolution - How we can respond and prosper', Lecture at the London School of Economics, February 22, 2012.

58 As articulated by the Bolivian delegation in opposing the Cancun Agreements at the 16th COP in Cancun, 2010. See Pablo Solon, 'Why Bolivia stood alone in opposing the Cancún climate agreement', The Guardian, December 21, 2010, online here: <Lhttp://www.guardian.co.uk/environment/cif-green/2010/dec/21/bolivia-oppose-cancun-climate-agreement>, accessed October 20, 2012.

59 The quotation is from the United Nations Framework Convention on Climate Change, Article 2.

60 See, for example, the Evangelical Declaration on Global Warming of the Cornwall Alliance, online here: <http://www.cornwallalliance.org/articles/read/an-evangelical-declaration-on-global-warming/>, accessed October 20, 2012.

61 See Anthony Giddens, *Modernity and Self-identity: Self and Society in the Late Modern Age* (Polity, 1991); Gianni Vattimo, *The End of Modernity* (Polity, 1991).

62 Jean-Francois Lyotard, *The Postmodern Condition* (Manchester University Press, 1984).

received ideas of the present and to expose the irrationality of a knowledge accepted on the basis of the authority of its source.[63]

But its reliance on faith is not the only debt climate discourse owes to the secularisation of our former religious traditions. From the outset, climate change presented an unmissably apocalyptic narrative, whose appeal lay partly in its strong overtones of a divine wrath best understood (ironically) in the Evangelical Protestant tradition: we will be punished for the ills we have wrought on our planet and on our fellow man and animals. What's more, we deserve it. Revelation then (climate change is foretold) and retribution (it is a form of punishment), but also redemption. We can redeem ourselves by desisting from our sinful ways and returning to the path of righteousness. Indeed climate change discourse began by marrying the radicalism of religious heresy to the enlightened idealism of scientific certainty. Hence its tremendous early appeal. And its appearance – in 1988 – could not have been better timed to provide a replacement master-narrative for the fading Cold War story.

Now, however, partly because climate change discourse has been adopted at most centres of authority, it can no longer present itself as radical or challenging: today climate change functions *primarily* as discourse; that is, it provides a mechanism that serves fundamentally to restabilise the grounding principles of a dominant political economy it is no longer capable of resisting. As such, it now has no more chance of success (other than at a discursive level) than other such discourses, such as the 'wars' on drugs and terror, human rights, or the 'eradication of poverty'.

[63] The position is perhaps most clearly expressed by Bjorn Lomborg, *The Skeptical Environmentalist* (Cambridge University Press, 2001).

Children of the Rainbow (Lillebjørn Nilsen, 1973)

A sky full of stars.
Blue sea as far as you can see.
A land where flowers grow.
Could you want more?

Together we will live
every sister and every brother.
Small children of the rainbow
and a flourishing world.

My Rainbow Race (Pete Seeger, 1967)[64]

One blue sky above us
One ocean lapping all our shore
One earth so green and round
Who could ask for more

And because I love you
I'll give it one more try
To show my rainbow race
It's too soon to die.

[64] See Pete Seeger's website: <http://www.peteseeger.net/Rainrace.htm>, accessed October 20, 2012.

Climate Change, Major Groups and the Importance of a Seat at the Table: Women and the UNFCC Negotiations

Karen Morrow*

Abstract

This paper considers the approaches adopted towards developing international environmental law rooted in the 1992 UNCED, comparing the typical 'top-down' approach to international environmental law exhibited in the UNFCCC with the 'bottom-up' approach espoused by Agenda 21. It will be argued that, while adopting such widely differing approaches was explicable at that time, the continuing failure to characterise the climate change regime more coherently within the sustainability context has had important ramifications in its development. Not least, the initial narrow state-centric and technocratic approach taken towards climate change excluded the voices of important stakeholders from the debate shaping the international law regime, an issue that has been one of the less discussed factors impeding legal progress in this area.

The paper considers the position of women as an example of a stakeholder/major group that has, until very recently, been both accorded privileged participant status in the international sustainable development context and yet overlooked in the climate change regime. It will examine the impact of activist and theoretical ecofeminism in prompting and shaping women's engagement with the international polis in these areas and practical reasons for according broad participation rights to women (and by implication, given the inclusive approach taken by ecofeminism, to other stakeholder groups) in these contexts. It will look at how women's participation has developed in sustainable development and climate change contexts and consider the ramifications of this including: benefits of and barriers to wider participation in the climate change regime and how the latter could be addressed.

Introduction: International Environmental Law and the UNCED 1992 – Sowing the seeds of a revolution?

This paper considers the intersections between ecofeminism and sustainability and the mechanisms that seek to address them (notably rights and gender mainstreaming) in the contexts of Agenda 21[1] and the UNFCCC climate change which will, for these purposes, be viewed in the guise of a sustainability issue.

Early commentary on the first Rio Earth Summit presented sustainable development as the UNCED's most revolutionary output. Indeed the apparent ambition of the now commonplace Brundtland conception of: '...development which meets the needs of the present generation without jeopardizing the ability of future generations to meet their own needs'[2] was enormous, if with the benefit of hindsight, overweening. In reality, while it was open to a variety of potential interpretations, in operational terms its ambit has been determined by the fact that, insofar as its primary target audience, States, was concerned, it offered no real threat to their ability to conduct 'business as usual'. Its appeal lay in the promotion of what was presented as an apparently straightforward balancing of social, economic and environmental concerns, essentially allowing sustainable development to operate

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1 UN: *Earth Summit: Agenda 21: The United Nations Programme of Action from Rio* (1992) at http://www.un.org/esa/dsd/agenda21/res_agenda21_00.shtml (last accessed 22/06/10).

2 WCED, *Our Common Future* (Brundtland Report), Oxford University Press: Oxford, (1987).

without fundamentally challenging the dominance of capitalist economics.[3] As attaining broad State support was of course necessary to breathe life into the concept of sustainable development in international law, this type of lowest common denominator approach was explicable, but in consequence it is hardly surprising that sustainable development praxis to date is far from being the 'game changer' required to tackle anthropogenic environmental degradation.

That said, if sustainable development has proved disappointing in tackling environmental degradation and its attendant social ills, there are a number of ways in which it has begun to alter the way in which the business of international environmental law is done that may ultimately better equip humanity to face the multi-faceted challenges posed by global-scale existential threats. Arguably the most important of these lies in its re-fashioning of the international polis, extending its direct reach well beyond traditional state actors and giving non-state actors, in particular in the guise of major groups, a more pronounced, broad and consistent role[4] than had been the case in international law hithertofore. The reason for this development lies not in any altruism on the part of states, rather it is prompted by the unique nature of sustainable development as a concept which, as acknowledged in the Brundtland Report's methodology and eventual approach,[5] is as dependant on grassroots buy-in and bottom up action as it is on statecraft. Thus, from the outset, advancing sustainability has been understood as requiring not only the engagement of states that is the traditional province of international law, but also the active involvement of civil society. By signing up to the UN's 'blueprint' for sustainable development, Agenda 21,[6] states were effectively 'buying in' to this approach, though perhaps not fully taking on board its implications at the time.

At its most fundamental level, the bottom up view of sustainability necessitates engagement with individuals, which is necessarily and normally mediated through the representative function of civil society as stakeholders in an international law context. In the sustainability context this has been highly formalised and institutionalised through facilitating the participation of a number of recognised 'major groups'. The willingness and ability of civil society to engage with the sustainability agenda plays an important (though far from straightforward[7]) role in both principle and practice in translating the global to the local and *vice versa*. In this regard fostering engagement with civil society, as undertaken by the Rio-mandated Commission for Sustainable Development (CSD), is instrumental in both the attempt to advance sustainability and achieve its societal mainstreaming. This strategy recognises that civil society actors undertake multifarious roles: as communicators, educators, opinion formers and facilitators. In so doing civil society ideally serves and expresses the views of grass-roots constituencies, acting to some extent as a conduit for their two-way engagement with states and intergovernmental organisations (IGOs) to provide impetus to the developing sustainability agenda.

Thus it can be argued that, for all of its limitations, this approach to sustainability did indeed sow what may well prove to be, in the words of the poet Simon Armitage: 'The seeds of the world for the world after this',[8] by laying down one of the foundations for innovative modes of expanded societal engagement in international environmental law and policy. This is a necessary response to the 'new world' that we now seem set on an inexorable course toward; one that is now recognised in a way that was not the case in 1992, as being significantly shaped by a compromised global climate system.

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3 S.B. Banerjee, 'Who Sustains Whose Development? Sustainable Development and the Reinvention of Nature', *Organization Studies* 24(1) (2003) 143-180.

4 This is not to say that non-state actors have not played an important part in a variety of international law contexts before this point, this is well-documented in a number of areas, for example in human rights and gender equality.

5 N 5, *passim.*

6 N 2.

7 See, for example, H. Cullen and K. Morrow, 'International Civil Society in International Law: The Growth of NGO Participation' 1(1) Non-State Actors and International Law, (2001) pp 7-39.

8 S. Armitage, *Climate of Change*, screenplay, 2008

Ecofeminism – a (very) brief introduction

The concepts of personal agency and civil society activism that underpin bottom up approaches to sustainability intersect to a degree with the principles and priorities of ecofeminism. We can see this expressed in concrete terms in the context of Agenda 21. First though we will look briefly at the concept of ecofeminism.

As its name suggests, ecofeminism is ultimately the progeny of both ecological/environmental and feminist ideologies and now contributes to each of these areas of social inquiry and beyond. That said, ecofeminism enjoys a degree of hybrid vigour and has not been limited in its development to synthesising its conceptual inheritance, but has arguably developed beyond this into a rich (if contentious) area of discourse in its own right. It has made its impact felt in, for example, such diverse fields as sociology, ecology and philosophy and it is latterly beginning to generate significant impacts in the context of international environmental law and policy.

It was inevitable that feminism would turn its gaze on environmental affairs as these became a prominent issue of societal concern.[9] The application of feminist scrutiny to the multiplicity of impacts of environmental degradation prompted the development of ecofeminism, the term itself being first used by Francois d'Eaubonne[10] in 1974 and passing into wider usage soon after. The 1960s also saw an escalation in the development of human ecology, the branch of the broader discipline focused on human/ecosystem interaction, which subsequently came to accommodate gender-based perspectives as part of its own expansive scholarly agenda.[11]

In the simplest terms, ecofeminism focuses on the shared approaches toward women and nature that are founded on the application to post-Enlightenment dualism to each of them. This involved the construction of both women and nature in terms of being 'other' to the male and rational, resulting in them being deemed inferior and therefore ripe for exploitation. One consequence of the social praxis that resulted was the conception of the notion of 'disadvantage' that applied to them as a result.[12]

Much of the early development of ecofeminism thought and theory took place in the US and was rooted, not as one might expect, in environmental activism, but rather in spiritual/theological and artistic (notably poetic) inquiry.[13] As a result, in its initial incarnation, ecofeminism was rather narrowly focussed. Nonetheless, it developed broadly and rapidly as a result what has come to be identified as of one of its core characteristics – from the outset ecofeminism was as much concerned with practice as with theory. In consequence it came to accommodate an extensive range issues through developing broader conceptualisations of the intersections between gender and environmental concerns. One particularly significant development for present purposes, embracing grassroots activism from the developing world, and also theorising it, was soon made manifest in ecofeminist contributions to the contentious law and development debate.[14] In this arena, ecofeminist approaches demonstrated connections between the feminisation of poverty and environmental degradation as intimately interconnected consequences of the export of the dominant western-capitalism-oriented

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9 S. Goudie and D. Kilian, 'Gender and Environmental Impact Assessment' *Agenda* No. 29 Women and the Environment (1996) pp43-54, at 43.

10 F. D'Eaubonne, *Le feminism ou La Mort*, P. Horay, Paris, 1974.

11 For a brief overview, see D. Rocheleau, B. Thomas-Slayter and E. Wangari, 'Gender and the Environment: A Feminist Political Ecology Perspective' pp27-33 in N. Haenn and R. Wilk (eds.): *The Environment in Anthropology: A Reader in Ecology, Culture and Sustainable Living'*, New York University Press, New York 2006.

12 C. Merchant: *The Death of Nature: Women, Ecology and the Scientific Revolution* Wildwood House, London, 1981.

13 M. Mellor *Feminism and Ecology* (1997, Polity Press, Cambridge); E.J. Hughes: 'Fishwives and Other Tails: Ecofeminism and Environmental Law' 1995 *Can J. Women & L.* Vol. 8 502.

14 V. Shiva: 'The Impoverishment of the Environment: Women and Children last', in M Mies and V. Shiva *Ecofeminism* Zed Books, London, 1993, 70.

development paradigm to the developing world.[15] This saw poverty, pollution and unsustainable resource exploitation excluded from the indicators of (mal)development[16] and characterised in effect as mere externalities in the prevailing economic model, resulting in them being largely ignored in political practice and excluded from the province of legal concern.

Over time, ecofeminism has seen the development of a number of distinct strands. For the sake of brevity (and indeed manageability), as ecofeminism is an inherently inclusive and malleable concept which manifests itself in myriad forms, the resulting spectrum can be broadly represented as falling between essentialist and social ecofeminisms. At one end of the range, essentialist perspectives are founded on views of biology and/or spirituality[17] that result in women supposedly exhibiting a stronger identification with the environment than men; obviously this is a controversial position. Social ecofeminist approaches on the other hand are based on the much less contested premise that a special relationship exists between women and the environment due in part to women's reproductive functions, as broadly understood, extending beyond procreation to include the full range of activities necessary to sustain life, which fall to their lot (albeit to varying degrees) in many parts of the world. Social ecofeminist theories also view the sphere of the 'personal' as extending into the surrounding world and reflect the complex interrelating influences that situate women in a variety of ways – most significantly race/ethnicity, class and age, as expressed through the recognition of a compound conception of disadvantage. Thus social ecofeminist approaches view the relationships between women and the environment as socially rooted and enforced/reinforced by a complex interlinked web of societal mechanisms. In this view, it is recognised that women feature prominently amongst those subjected to the greatest burden by all classes of environmental degradation, but at the same time they are also identified as potentially powerful agents of change in tackling them.

In sum, ecofeminism, for all of its diversity, is perhaps best viewed as attempting to articulate those areas of human/environment relationships that are particularly relevant to women, providing a necessary corrective to the dominant patriarchal world view and the structures that it inhabits.[18]On this view, the relationship between women and the environment is, in part, biologically determined, in that the whole of humanity is part of and depends upon the biosphere for life itself and for its subsistence. This dependence of course manifests itself fundamentally for each of us, but our experience and appreciation of it is highly variable and dependant on a host of more or less obvious societal factors ranging from geography and economics through culture, politics and law and the various intersections between them. Each of these components raises gender-specific considerations and thus ecofeminism insists that gender is a cross-cutting issue that inevitably touches on all aspects of our being and agency.

Core ecofeminist concerns encapsulate a number of strategies for tackling dualism and its implications. For example, ecofeminists view viable decision-making processes as needing to accommodate gender (female and male) perspectives and the concerns of nature, is so doing stressing difference but also equality and these initial foci remain foundational. Areas identified as appropriate for ecofeminist concern have however expanded beyond gender to include multiple disadvantage/oppressions, notably race (embracing the concerns of people of colour and indigenous peoples), class, sexual orientation, and non-human nature and this approach to equally apply to other factors such as age and disability.

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15 Ibid, 77.

16 Ibid, 74.

17 L. Marina: 'Woman & the Land' (2002) www.ecofem,org/journal at http://www.lancs.ac.uk/staff/twine/ecofem/linda.pdf (last accessed 28/06/2010).

18 Merchant, n 13.

Strategies, Techniques and Approaches

Ecofeminism advocates and embraces a number of strategies, techniques and approaches[19] to advance the societal transformation that it seeks in addressing these multiple, intertwined oppressions. While agenda setting may be the ultimate goal, for a relatively disempowered group, this can be problematic and more incremental approaches therefore tend to predominate. Central to ecofeminist approaches to policy and decision-making is the promotion of inclusiveness through adopting open, inclusive and participatory decision-making. In light of this, ecofeminism, in response to its activist roots, accords respect to lived experience in decision-making – not to the exclusion of scientific/technical concerns, but as an important source of relevant material in its own right, ensuring that the decisions arrived at are based on the most complete information possible.

In pursing the participation agenda, ecofeminist activism feature skills and well-worn approaches gleaned from women's long, (pro)active civil society engagement in both domestic and international arenas,[20] notably: focussed campaigning; broader consensus building activities; general network and specific coalition construction around matters of shared concern; and sharing skill sets. These occur both within the women's movement but also in reaching out to other civil society actors, utilising traditional means and enthusiastically harnessing new technologies. Pressing forward on participation strategies are useful up to a point to critique systems from which women are excluded but to be fully realised they need to be harnessed to winning substantive participation rights (and as we shall see when we look at the UNFCCC these are by no means guaranteed), the impact of which falls ultimately be evaluated in qualitative terms. It is not sufficient to allow participants to feed into processes; in order to be meaningful participation must secure proportionate influence on outcomes. Even where participation rights are accorded, this is not the end of the story as their exercise may be hampered by a host of factors, structural and procedural, including: lack of resources to facilitate participation; lack of representation; lack of access to information; lack of technical capacity to engage with scientific materials; limited advocacy skills; financial and procedural barriers to litigation etc. Women experience an additional range of gendered social, economic, cultural, legal and educational barriers that serve to make their participation particularly problematic.[21] The problems encountered with participation can only be amplified by the additional complexities that arise where gender and sustainability overlap.

Even if problems with participation are ostensibly addressed, tokenism is always a danger: where the public is allowed (or even encouraged) to participate in decision-making processes, such entitlements are rendered moot if they do not deliver commensurate influence. In order to attempt to address these issues where gender is concerned, latterly feminist approaches have extended to advocating the adoption of ambitious gender mainstreaming strategies, a product of the 'third wave' of political and technical initiatives[22] which attempt to address gendered policy concerns in a holistic way. It may be defined as:

> … the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in all areas and at all levels. It is a strategy for making women's as well as men's concerns and experiences an integral dimension of the design, implementation, monitoring and evaluation of policies and programmes in all political, economic

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19 K. Morrow: 'Ecofeminism' in M. Davies and V. Munro (eds.) *Ashgate Companion to Feminist Jurisprudence*, Ashgate, (forthcoming).

20 R.R.M. Verchick, 'In a Greener Voice: Feminist Theory and Environmental Justice' 1996 *Harvard Women's Law Journal* Vol. 19, 23.

21 A. Brody, J. Demetriades and E. Esplen: *Gender and climate change: mapping the linkages*, BRIDGE, Brighton, 2008 at http://www.bridge.ids.ac.uk/reports/Climate_Change_DFID_draft.pdf (last accessed 24/06/2010).

22 G. Bhatta: 'Of Geese and Ganders: mainstreaming gender in the context of sustainable human development', Journal of Gender Studies, Vol. 10 No.1 2001, 17-32.

> and societal spheres so that women and men benefit equally and inequality is not perpetuated. The ultimate goal is to achieve gender equality.[23]

In practical terms mainstreaming approaches comprise internal mechanical organisational change and at the same time seek a more profound enculturation of gender at an institutional and societal level. For gender mainstreaming to succeed, both attitudes and practices need to change. While attempts to generate changes in institutional culture of this kind are usually the province of specific initiatives, concrete changes in practice may also, as a by-product of their primary purpose, simultaneously serve to bring about changes in institutional values that are one characteristic of culture change.

Ambitious as it is, gender mainstreaming does have limitations. In the first place, innovative as it is in many ways, it is less radical than agenda-setting, involving the integration of gender considerations into existing policy areas rather than requiring or constituting a full-scale re-orientation of policy agendas.[24] Furthermore gender mainstreaming does not, in and of itself, actually overcome the impacts of pre-existing power differentials.[25] While it does potentially open policy and decision-making processes to women as a hitherto a disadvantaged and/or excluded group, its actual impact is dependent on the extent to which it is embraced by policy and decision-makers. Thus at each end of the scale, mere lip-service to gender mainstreaming will deliver little, but fully taking what it has to offer on board is potentially revolutionary. However, organisational cooperation is not necessarily guaranteed in gender mainstreaming endeavours and any potential for constructive dialogue, let alone action, can be fatally compromised by wildly differing interpretations of key concepts once analysis passes beyond the superficial.[26] In addition, while it is often characterised as a 'dual agenda' (or 'win win') concept, gender mainstreaming can, as with other cross-cutting agendas, be perceived as a threat to a multiplicity of entrenched institutional values and practices, conflicting with established mainstream policy goals.

Two Contrasting Approaches Rooted in the UNCED 1992: Women, Agenda 21 and the UNFCCC

In considering its multifaceted emphasis on participation, ecofeminism can be presented as promoting a conception of a broader feminist conception of engaged citizenship, [27] both individual and collective, that potentially sits rather well with the bottom-up stakeholder approaches that are a feature of sustainability rhetoric, an observation that appears to be borne out by the role played by women in the development of Agenda 21. Extending like understanding to climate change, arguably the most pressing of the many challenges to human sustainability at present, would seem to be inevitable, as it too is underpinned by an understanding of the location of humans within an inescapable (though mutable for good and ill) ecological context and the necessary constraints that these place on individual and collective human activity. That said, political factors and the shape that they have given to international environmental law in this area has, as will be shown below, meant that even beginning to bow to this inevitability has been a long, drawn out and painful process.

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23 ESCOR Res. 1997/2, 4, UN Doc. E/1997/LO (July 17, 1997).

24 Bhatta n23.

25 Y. Benschop and M. Verloo: 'Sisyphus' Sisters: Can Gender Mainstreaming Escape the Genderedness of Organizations' Journal of Gender studies Vol. 15 No.1 2006, pp19-33.

26 Ibid.

27 R. Lister: *Citizenship: A Feminist Perspective* (2nd edn.) Washington Square N.Y., New York University Press (2003).

Sustainability, Agenda 21 and Gender

The prominent role forged by women in Agenda 21 did not come out of the ether – the UN by this stage had already gained considerable experience of engaging with the complex cross-cutting issues raised by gender. Broadly speaking, the UN's approach to gender prior to 1992 had been a top-down process (albeit an innovative one that was highly responsive to grassroots input), with intergovernmental organisations (IGOs) institutions and states taking the lead in fostering first the inclusion, then the prioritisation and ultimately the mainstreaming agenda in the search for more effective policies and programmes.[28] Sustainable development, as alluded to above, is however a rather different proposition, for while it is promoted and facilitated by IGOs and states in a similar fashion to engagement with gender issues, at the same time, just as importantly, it is explicitly predicated on grass-roots involvement. Thus sustainable development with its expansive socio-political, economic and environmental grounding demands the adoption of a broad approach to the relationship between humanity and the environment in order to fundamentally re-fashion it. This inevitably requires engagement with societal complexity in its multifarious forms and this necessitates re-envisioning the global polis and its governance, in order to harness bottom-up/grassroots activity to established top-down political processes in an unprecedented manner.[29] Key mechanisms in facilitating the radical degree of engagement that such wholesale change requires included nurturing and developing the role of civil society, a central element in the UNCED's blueprint for change - Agenda 21[30] and the ongoing work of the UN's Commission for Sustainable Development (CSD). The latter was charged with fostering the ongoing sustainability agenda and in so doing it actively cultivated the 'major groups' identified in Agenda 21 as instrumental in forging and taking forward developing the sustainability agenda. Women were numbered among these major groups, undoubtedly a significant development in principle, but not a surprise. The women's movement was already a well-established actor within UN system by this time and had gained considerable experience in engaging with international policy and law agendas as a result. Furthermore, and this was to prove particularly valuable in the sustainability context, the women's movement drew support and influence from an established global grassroots network. These factors combined to see the women's movement excellently positioned to push its priorities to the fore in the sustainability context. This is exemplified in the development of Agenda 21 itself.

By the time of the UNCED process, in addition to their international profile on gender matters, women already played an established role in the rank and file of grassroots environmental organisations and (to some degree) their leadership[31] and enjoyed both considerable expertise and wide networks of contacts as a result. This meant that they well relatively well positioned to exploit the opportunities offered by the need to inculcate bottom up participation in the sustainability agenda in the run-up to the UNCED. The highest profile initiative in this period was taken by a leading women's environmental NGO, the Women's Environment and Development Organisation (WEDO)[32]. It set up the World Women's Congress for a Healthy Planet in Miami in 1991, which involved a practical demonstration of several traits the feature in the core values and strategies of ecofeminism. Thus WEDO built on and developed existing women's networks to ensure that the broad spectrum of women's opinion from the developed and the developing world was represented at the Congress in an open and inclusive participatory process. The Congress proved a significant milestone in both the praxis of ecofeminism and in strengthening the platform for women's engagement with international

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28 K. Morrow: 'Not so much a meeting of minds as a coincidence of means: Ecofeminism, gender mainstreaming and the United Nations' Thomas Jefferson Law Review, Vol. 28 No.2, (2005) pp185-204.

29 Brundtland Report, n3.

30 J. Cock: 'The World Women's Congress for a Healthy Planet' *Agenda* No. 12 Rural Politics (1992) pp 63-66.

31 Verchick, n21.

32 See http://www.wedo.org/about (accessed 04/09/12).

environmental law and policy. In concrete terms it produced its own Women's Action Agenda 21,[33] which in turn influenced redrafting of the original supposedly 'gender neutral' text of Agenda 21, integrating gender issues throughout, which remain in the document as finally agreed at the UNCED itself.[34]

The women's movement's position in the sustainability context, notably under the auspices of the CSD has been augmented by the potent coincidence of priorities enjoyed by this strand of sustainability opinion-making activity and the broader gender mainstreaming agenda espoused by the UN and its institutions. Having said this, it is also the case that major groups must be viewed as part of a whole, and not simply in isolation from one another in the broader sustainability context and women necessarily fall into each of the other major groups in addition to that constructed by their gender. Ecofeminism accommodates this in its recognition of and readiness to accommodate the complex and multi-faceted real-world identities of women through compound conceptions of disadvantage.

The recognition of the intersection of sustainability with gender that flavours Agenda 21 is an important development but should not be allowed to mask the fact that they each raise complex issues in their own right and that the intricacies involved are necessarily aggravated when these already composite fields overlap. Engaging effectively with such intersections is challenging, to say the least but it is beginning to happen, for example in the OECD[35] which has done some ground-breaking work in examining its own internal sustainability agenda both as part of its institutional 'housekeeping' and in its contribution to the work of the CSD.[36] The OECD is attempting to tackle hybrid issues in this area by 'engendering' its analytical, statistical and policy work,[37] with the aim of garnering qualitative improvement in its adopted policies and actively fostering sustainability. While predominantly focussed on practical matters, it also points to deeper problems of inbuilt and pervasive institutional gender bias, generated by and expressed in the deepest assumptions and practices that underpin modern society's substructure. Significantly, the need to secure the effective exercise of rights in general and political and legal participation rights (key ecofeminist concerns) in particular, are identified as being of particular concern and as requiring conscious institutional engagement and action.

The UN, Climate Change and Gender

In contrast to the innovative stance taken with sustainable development, the international community's approach to climate change, at the UNCED in the United Nations Framework Convention on Climate Change (UNFCCC)[38] invoked a typical state-centric multilateral environmental agreement. This was perhaps explicable given the highly technical nature of what was still very much emerging science at that time and its controversial and contested status. It could also perhaps be ascribed to a general failure to fully appreciate the extraordinary ramifications of climate change, of which more below. In any event, the adoption of a framework convention at the Rio conference enabled the UN to avoid having to include inevitably contentious substantive emission reduction targets in the document

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33 At http://www.iisd.org/women/action21.htm (accessed 05/09/12).

34 K. Morrow: 'Gender, International Law and the Emergence of Environmental Citizenship' pp 33-61 in S. Buckingham-Hatfield *et al.*: *In the Hands of Women - Women, Human Rights and the Environment*, Manchester University Press, 2006.

35 Ibid.

36 OECD: *Gender and Sustainable Development: Maximising the Economic, Social and Environmental Role of Women* (2008) at http://www.oecd.org/dataoecd/58/1/40881538.pdf (last accessed 06/04/2010).

37 Ibid, 7.

38 At http://unfccc.int/resource/docs/convkp/conveng.pdf (accessed 04/09/12).

itself.[39] These had to wait for the Kyoto Protocol to the Convention in 1998,[40] and, hard won as they were, their patent inadequacy in light IPCC's scientific opinion on what was actually required to address climate change, was the subject of trenchant criticism from the outset.[41] Ongoing attempts to hammer out a successor to the Kyoto Protocol have proved even more fraught as the process founders on the rocks of the entrenched North/South[42] positions adopted on the core issues.

In addition to the substantive shortcomings of the climate change regime, it seems also to have suffered from a crippling lack of vision from the outset. In common with gender and sustainability, climate change is a complex and cross-cutting issue made manifest in a variety of areas and on a vast scale. It raises issues in its own right but it is also interwoven with other major issues which are also problematic in themselves, including, but not confined to: health; resource scarcity; food security, environmental disasters, conflict and migration and of course the aforementioned gender and sustainability concerns. When these issues conjoin, the complexities involved are inevitably compounded and the search for solutions becomes correspondingly problematised and arguably requires greater creativity than has been demonstrated hithertofore. One manifestation of such creativity would involve viewing climate change not only as a traditional international environmental law issue but also as a sustainability issue, based on the understanding that it requires not only state engagement but also action by individuals in order to generate the behavioural change that is necessary to respond to the altered social, economic and environmental realities that it involves. Given the scope and pervasive nature of climate change issues, it would seem logical to suggest that a synthesis of the top-down and bottom up approaches discussed, in particular through the organised and active agency of NGOs, offers the most viable mechanism to improve and extend the range of responses to this core aspect of participation problems. This would mandate the adoption of an open, inclusive stakeholder type of approach, underpinned by a mainstreaming component, to correct inbuilt institutional bias that excludes many cogent voices from the law and policy debate thus enriching it through inclusivity.

As anthropogenic climate change has progressed from hotly contested theory into something approaching broadly accepted orthodoxy, the fact that it is having and will continue to have a disproportionate impact on the most vulnerable in society (of which women form the majority[43]) has become increasingly recognised.[44] Due to wide-ranging and deep-set societal inequalities, women stand among both the most disadvantaged in practical terms by the impacts of climate change and the least well placed socially, legally and economically to resist and/or address and adapt to them.[45] In light of this, women's specific priorities in climate change have been identified as: mitigation; adaptation; sustainability, participation and realising the Millennium Development Goals.[46] Furthermore, women through the operation of double or compound disadvantage are also among the

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39 See M. Grubb at al.: *The Earth Summit Agreements: A Guide and Assessment: An Analysis of the Rio 92 UN Conference on Environment & Development*, Earthscan, London, (1993).

40 At http://unfccc.int/resource/docs/convkp/kpeng.pdf (accessed 04/09/12).

41 See, for example, F. Yamin: 'The Kyoto Protocol: Origins, Assessment and Future Challenges' *Review of European Community & International Environmental Law,* Volume 7, Issue 2, pages 113–127, 1998.

42 P. Bond, *Politics of Climate Justice: Paralysis Above, Movement Below*, Pietermaritzburg: University of KwaZulu, Natal Press, 2012.

43 UN Office of the High Commissioner for Human Rights, 'Combating discrimination against women', at http://www.ohchr.org/EN/Issues/Discrimination/Pages/discrimination_women.aspx (accessed 04/09/12).

44 Intergovernmental Panel on Climate Change (IPCC): *Climate Change: Impacts, Adaptation and Vulnerability* (2007) at http://www.ipcc.ch/ipccreports/ar4-wg2.htm (last accessed 24/06/2010).

45 J. Parikh: 'Is Climate Change a Gender Issue?'UNDP India (Draft) at http://www.disasterwatch.net/climatechange/gndr_climt07.pdf (last accessed 21/06/10).

46 G. Alber: 'The Women and Gender Constituency in the Climate Negotiations' (2009) at http://www.gendercc.net/fileadmin/inhalte/Dokumente/Network/2wia09_15talkpoints_gotelind.pdf (last accessed 28/06/10).

most adversely affected members within other disadvantaged categories, notably indigenous peoples and refugees.[47] However, viewing women as victims of climate change provides only a partial and therefore inaccurate picture; women are also drivers of and contribute to the societal practices that generate climate change. At the same time, through gendered societal roles and responsibilities, women are holders of considerable (though often latent/under-exploited) capacity to offer practical insights into addressing environmental problems and are therefore also potentially powerful agents for change. Thus participation for women in the climate change context is not only important in principle, but also in practice, as women have significant contributions to make to the climate change debate in general and in particular on the 'sharp-end' issues of adaptation to and mitigation of climate change.[48]

To this end, and given the now moribund state-centric UNFCCC process,[49] it would seem at least prudent to consider what we have already learned about better engaging with complex cross-cutting issues from experience in the other areas, such as where gender and sustainability intersect. As indicated above, while the sustainability agenda is promoted and facilitated by IGOs and states it is, just as importantly, also explicitly predicated on grass-roots involvement. Therefore civil society buy-in, not least that of the major groups, (including women) plays a crucial, if not unproblematic role in translating and mediating the global to the local and *vice versa*. In this regard the role of civil society is instrumental in both the attempt to engage sustainability and the societal mainstream (in acting as educators, opinion formers and facilitators serving and expressing the views of their communities) and also in looking upward and outward, engaging with states and IGOs to provide impetus to the agenda. Given the paucity of progress in the international law of climate change[50] in recent years, the theory and practice of sustainability shows that there are potential synergies to be exploited in such complex debates that it would be wise to consider exploiting in order to reinvigorate this sphere.

In light of the current glacial rate of progress, it is unsurprising that many parts of the UN (though notably not until very recently the UNFCCC regime itself) have recognised the significance of giving women a voice in the climate change context and have dedicated resources to capacity building in order to facilitate their engagement. Important contributions have been made by the Commission on the Status of Women, which has stated in an issues paper that: 'Women tend ... to be underrepresented in decision-making on sustainable development, including climate change, and this impeded their ability to contribute their unique and valuable perspective and expertise on climate change.'[51] The Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) too has taken a position on climate change, setting up a committee to address its links with gender, and drawing attention to the 'absence of a gender perspective' in the UNFCCC and the consequent need to address the manifold issues that this raises, including gender mainstreaming and participation.[52] Recognition of the links between the gender issue and climate change within the UN system also extends beyond its specifically gender-oriented elements, thus the UN Development Programme has been active in this area, notably in adopting a comprehensive *Resource Guide on Gender and Climate*

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47 Brody el al. n22.

48 Ibid.

49 See, for coverage of the very limited progress made of late, See E. Burleson, 'Climate Change Consensus: Emerging International Law', 34 William and Mary Environmental Law and Policy Review 543 (2010).

50 See, for example, Bond, n43.

51 CSW: 'Gender Perspectives on Climate Change', 52nd session of the Commission on the Status of Women, 2008 at http://www.un.org/womenwatch/daw/csw/csw52/issuespapers/Gender%20and%20climate%20change%20paper%20final.pdf (last accessed 30/06/2010).

52 CEDAW: 'Statement of the CEDAW Committee on Gender and Climate Change' (adopted at the 44th session of CEDAW 20 July to 7 August, New York 2009) at http://www2.ohchr.org/english/bodies/cedaw/docs/Gender_and_climate_change.pdf (last accessed 30/06/2009).

Change.[53] This document underlines the paucity of women's participation in the climate change arena, noting that: 'There can be no effective and efficient battle against climate change if there is not equitable representation of all segments of society in decision-making at all levels.'[54] The *Resource Guide* seeks to support and facilitate change by providing guidelines for action for actors, practitioners and consumers, promoting the development of a more integrated and proactive policy agenda in the gender/climate change arena. The World Conservation Union (IUCN) has also given specific consideration to these issues.[55]

In marked contrast to these developments, progress in tackling gender matters within the main UNFCCC regime has been comparatively limited. The reasons for this are several and complex. First, until very recently, the institutional actors have not been moved to engage pro-actively engage with the women's movement, though interestingly they had reached out to many of the other Agenda 21 major groups, specifically, Environmental, Business and Industry NGOs; Local Government and Municipal Authorities; Indigenous Peoples; and Research and Independent Organisations and Trade Union NGOs.[56] This could be taken as indicating that the UNFCCC itself was already recognising that a traditional international environmental law state-centric and technocratic approach was insufficient – though the choice of stakeholder groups with which to engage speaks volumes on its failure to appreciate the significance of gender to its activities.

In fairness, it could be said that the state-centric, technocratic form taken by the climate change negotiations at Rio left scant opportunity for women to engage with the process. Though the need to pursue gender issues in the climate change regime became apparent fairly early on, it took some time for the women's movement to build up the necessary momentum to do so and a failed early attempt to initiate a women's NGO forum at the first FCCC Conference of Parties (COP1) in 1995[57] left the issue in the wasteland for a number of years. Interest was eventually rekindled by discussion of gender issues more generally in the run up to the World Summit on Sustainable Development (WSSD) in 2002.[58] The work of the CSD on energy and sustainable development prior to the WSSD specifically demonstrated the need for a multi-pronged attack on the gender/climate change issue, as it revealed this as an area in which women as a major group exercised little effective influence. This development in turn prompted the G77 to raise gender as a concern in the FCCC process. Thus at FCCC COP7 in 2001 a draft resolution was finally adopted advocating improved representation for women among participants. However, the first women's parallel caucus in the FCCC process was not held until COP 11 in 2005, though it did prove crucial in sparking the momentum required to further advance gender concerns in the climate change context, prompting more consistent practice and prolonged pressure to these ends in its wake. Thereafter, the debate developed relatively quickly and discussion on applying for constituency status for women emerged at COP13 (Bali) in 2007 and with agreement being reached on pursuing this course at COP 14 in 2008. Gaining constituency status augments the position of those groups to whom it is accorded in general terms and also allows them to access various

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53 UNDP: *Resource Guide on Gender and Climate Change* (2009) at http://www.un.org/womenwatch/downloads/Resource_Guide_English_FINAL.pdf (last accessed 30/06/2010).

54 Ibid, XV

55 L. Aguilar, A. Araujo and A. Quesada-Aguilar: *Gender and Climate Change*, IUCN, at http://www.gdnonline.org/resources/IUCN_FactsheetClimateChange.pdf (last accessed 30/06/2009).

56 Latterly all nine major groups recognised in Agenda 21 have finally been accorded UNFCCC constituency status, see nrg4SD 'Rough Guide: The UNFCCC and the Kyoto Protocol' (2011) at http://nrg4sd.org/sites/default/files/default/files/content/public/29-climatechange/background/general/rough_guide_unfccc_and_kyoto_protocol_09052011.pdf (accessed 04/09/12).

57 N. Wamukonya, and M. Skutsch, 2001. 'Is there a Gender Angle to the Climate Change Negotiations' 2001. [Online]. Available at http://www.unep.org/roa/amcen/Projects_Programme/climate_change/PreCop15/Proceedings/Gender-and-climate-change/IsthereaGenderAngletotheClimateChangeNegiotiations.pdf (accessed 12/05/2011).

58 D Okello, 'WEDO's Analysis of the WDDS Plan of Implementation' 2002 Available at http://www.pamoya.com/node/1131 (accessed 13/05/2011)

intervention rights in the UNFCCC process. A successful application for such status depends on the putative constituency's membership being able to demonstrate that it can make a sustained and significant contribution to UNFCCC activities. The application process for the women/gender grouping was led by Gendercc – Women for Climate Justice,[59] a global network of women, gender activists and experts representing all world regions, with specific expertise on gender and climate justice issues. The stated goal of the women/gender grouping in seeking constituency status clearly identifies its agenda as being:

> ... to formalise the voice of the women's and gender civil society organisations present and regularly active in UNFCCC processes, and to debate, streamline and strengthen the positions which these organisations put forth. The Constituency draws upon global commitments to gender equality and women's rights, especially as they relate to climate change, and toward the achievement of the Millennium Development Goals and related commitments and Conventions. The Constituency works to ensure human rights and a gender perspective is incorporated into UNFCCC negotiations, plans and actions.[60]

In building its case for constituency status, the women/gender grouping employed a number of strategies that fit with those identified above as characterising an ecofeminist approach. Notable among these was the collaborative negotiation and drafting of the Charter of the Women's and Gender Constituency under the UNFCCC[61] by a global coalition of women's groups comprised of: Women in Europe for a Common Future (WECF);[62] ENERGIA (International Network on Gender and Sustainable Energy);[63] WEDO and Gendercc. The Charter expresses commitment to a number of the core ecofeminist principles outlined above, specifically: democratic and participatory governance; respect for divergent positions; broad, equitable and representative membership by age, region, ability and affiliation; and inclusive and enabling procedures (notably utilising electronic communications).[64] The Charter's objectives also fit an ecofeminist agenda, as they include: making women's voices and experiences heard; feeding women's views into ongoing discourse; and co-operation with other constituencies and caucuses,[65] thereby addressing gender and other oppressions through finding 'common ground'.

The FCCC secretariat approved the women/gender grouping's application for provisional constituency status in 2009. COP16 in 2010, while disappointing in substantive terms, did see a degree of progress on gender issues, notably exhibiting greatly improved visibility for them in the conference outcomes.[66] COP16 also saw determined promotion of a rights-based approach to participation by the women/gender constituency.[67] The women/gender movement did not however confine its efforts to gain a voice in the FCCC regime to these rights arguments, and significant parallel developments

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59 For details about this grouping see http://www.gendercc.net/about-gendercc.html (accessed 04/09/12).

60 Gendercc: 'Women and Gender Constituency in the UNFCCC' at http://www.gendercc.net/about-gendercc/activities/women-gender-constituency-in-the-unfccc.html (last accessed28/06/10).

61 Gendercc: 'Charter of the Women's and Gender Constituency under the UNFCCC' [Online] Available at http://www.gendercc.net/fileadmin/inhalte/Dokumente/UNFCCC_conferences/Constituency/Women_Gender_Constituency_Charter_final.pdf (accessed 24/06/2011).

62 See http://www.wecf.eu/english/about-wecf/ (accessed 04/09/12).

63 See http://www.energia.org/who-we-are/ (accessed 04/09/12).

64 N 61, Article 2.

65 Ibid, Article 3.

66 'Women and Gender - References in the Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention (advance Unedited version, Draft Decision - /CP. 16) at http://www.gendercc.net/fileadmin/inhalte/Dokumente/UNFCCC_conferences/COP16/references_Cancun.pdf (last accessed 13/05/2011)

67 Specifically by Ana Agostino in a statement to the High Level Segment of the COP at http://www.gendercc.net/fileadmin/inhalte/Dokumente/UNFCCC_conferences/COP16/COP16_Women_gender_final_intervention.pdf (last accessed 12/05/2011).

emerged to go beyond this in pressing a leadership role for women in respect of climate justice.[68] This initiative was pursued through the establishment of an informal women's leadership network, which drew together representatives from the UN, governments, civil society, philanthropy and the private sector, under the auspices of the Mary Robinson Foundation's Climate Justice Initiative (MRFCJ), in the run-up to COP16. The approach the emerged from the MRFCJ process also exhibits ecofeminist characteristics,[69] notably in advocating: gender equality in FCCC sub-programmes; full participation for women in decision-making; collaborative sharing and extrapolation of good practice; and networking. Further progress on developing women's leadership at COP16 was made by establishing a troika[70] consisting of the three female ministers holding the relevant portfolios from the states hosting COP 15, 16 and 17, in order play an additional role in promoting the women's agenda at COP17.

Full constituency status was finally granted to the women/gender constituency just in time for COP17 in 2011, allowing women official observer status in the negotiations.[71]Thus women, admittedly late in the day, joined other recognised civil society groupings in this area though it beggars belief that it took fifteen years to reach this point in a UN process where an ostensible institutional commitment to gender mainstreaming should make their involvement a given priority rather than a seeming afterthought. Hard won though the battle for constituency status was, it represents only one step, albeit an important one, along the road to effective participation for women in the FCCC regime. In light of this the Charter of the Women's and Gender Constituency under the UNFCCC identified 'Fostering the wide participation of women and women's issues in these processes and supporting their views and perspectives'[72] as a key consideration in the ongoing work of the women/gender constituency. Realising effective participation requires that policies, procedures and processes are put in place that are capable of addressing women's general lack of power in respect of both policy and decision-making processes.[73] Failure to adequately address these structural problems acts not only to the detriment of women's exercise and enjoyment of the rights of equal citizenship but also goes to the viability of societal responses to the substantive issues themselves. A number of factors have been identified which specifically affect both the sustainability and the effectiveness of women's participation in climate change governance. Law plays a specific role in this regard through: raising awareness of rights and how to access them and providing rights of access to both general and specific legal and policy information.[74]

Rio+20, Gender and Climate Change

While the UNFCCC regime had, by 2011, finally come to accommodate gender and women's participation in the climate change negotiation process, these issues also fell to be considered in the more general forum provided by the United Nations Conference on Sustainable Development (UNCSD) 2012, the Rio+20 Conference. The Rio+20 process, rather than producing a new legal agreement, in the end confined itself to issuing a non-binding outcome document entitled 'The Future

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68 See, for example, S. Jackson (Mary Robinson Foundation (Climate Justice)/Realizing Rights (The Ethical Globalization Initiative)) 'Women's Leadership on Climate Justice: Planning for Cancun and Beyond' 17/09/2010 at http://www.mrfcj.org/pdf/Meeting_Report_Womens_Leadership_on_Climate_Justice_17Sep2010.pdf (last accessed 16/05/2011).

69 Ibid, p6.

70 J Sebastian and D. Ceplis (CARES) 'Perspective on Gender and Climate Change at Cancun' at http://www.aic.ca/gender/pdf/Gender_and_Climate_Cancun.pdf (last accessed 16/05/2011).

71 For a fuller account of this process, see Morrow, n 20.

72 N 61, Article 4.

73 Bhatta, n 23

74 Brody, n 22 at p17.

We Want' (TFWW),[75] that, for the most part, reiterated the commitments made at the original Rio summit in 1992. While the fact that the run-up to Rio+20 arguably saw even the limited UNCED legacy under threat[76] made it useful to underline areas agreed upon two decades before, given the signal lack of progress in most areas of environmental concern in the interim and the mounting matrix of environmental crises, much more was needed.[77]

On the gender front, UN Women,[78] the UN's Entity for Gender Equality and the Empowerment of Women which was (significantly from the point of view of adding coherence to gender issues within the UN system) constituted in 2010, had a very visible presence at Rio+20. Its activities included co-hosting a high level meeting, entitled 'The Future Women Want' for female heads of states where a call to action on integrating gender equality and women's empowerment in all sustainable development frameworks was signed. This was supported by a suite of concrete policy recommendations.[79] In addition to its broader aspiration to secure culture change on gender[80] UN Women set itself three specific goals for the summit. These were to ensure that: '… all international agreements reference the key role of women in achieving sustainable development; women at grassroots level participate in future international talks and conferences; and gender equality is fully integrated into any new mechanisms to measure sustainable development'. [81] Women's civil society groups too were very palpably present in Rio, working with the avowed aim of ensuring that women's issues were 'firmly embedded' in the summit's outcomes. [82] Nonetheless, despite the efforts of those promoting the women/gender cause, TFWW offers somewhat mixed coverage of gender issues – while it contains a considerable quantity of coverage for these issues, but the quality of that coverage is open to question. At the outset, the international community's agreed 'common vision' as expressed in TFWW reaffirmed: '...the importance of ... gender equality and women's empowerment'.[83] Gender also featured in the symbolically important section of the document dedicated to 'Renewing Political Commitment' which stated that:

> '... We recognize that gender equality and women's empowerment are important for sustainable development and our common future. We reaffirm our commitments to ensure women's equal rights, access and opportunities for participation and leadership in the economy, society and political decision making.'[84]

The specific emphasis on rights, participation and leadership in a gendered context that features here chimes well with the earlier coverage given to these issues in the realm of sustainability, considered

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75 At http://www.uncsd2012.org/content/documents/727The%20Future%20We%20Want%2019%20June%201230pm.pdf (TFWW) (accessed 03/07/12)

76 See, for example, J. Watts: 'Rio+20 must 'unenvironmentalise' green issues, says G77 negotiator' The Guardian 12/09/11 and J. Thomas: 'Will Rio+20 squander green legacy of the original Earth summit?' at http://www.guardian.co.uk/environment/2011/sep/12/rio-20-earth-summit-global-climate-talks (accessed 05/09/12).

77 See, for example, F. Ullah: Executive Director Designate of the Stakeholder Forum, 'Rio +20: Dig Deep, Prepare to act and have hope' 02 Jul 2012 at http://sd.defra.gov.uk/2012/07/rio20-dig-deep-prepare-to-act-and-have-hope/?utm_source=email&dm_i=A78,U015,135DGZ,2GJA2,1 (accessed 03/07/12) and Elders Plus Youngers: Rio+20 is not the response we need to safeguard people and the planet at http://theelders.org/article/rio20-not-response-we-need-safeguard-people-and-planet (accessed 05/07/12).

78 See http://www.unwomen.org/about-us/ (accessed 05/09/12).

79 UN Women: 'Women leaders in Rio call for action to prioritize gender equality for a sustainable future' at http://www.unwomen.org/2012/06/women-leaders-in-rio-for-action-to-prioritize-gender-equality-for-a-sustainable-future/ (accessed 05/09/12).

80 L. Ford (Guardian Poverty Matters Blog): 'Can Rio+20 bring change for women?' at http://www.guardian.co.uk/global-development/poverty-matters/2012/jun/19/rio20-bring-change-women (accessed 05/07/12).

81 Ibid.

82 Ibid.

83 TFWW, para 8.

84 Ibid, para 31.

above, and perhaps speaks also, alongside developments such as those that have occurred of late in the FCCC regime, to a degree of mainstreaming of gender issues in the culture of international environmental law.

While the coverage given to gender in TFWW was criticised by some as 'vague' (this accusation could actually be levelled at much of the content of the document);[85] gender did at least receive quite prominent and indeed pervasive coverage in its own right in the 'Framework for Action and Follow-up' section of TFWW which treated it as a thematic/cross-sectoral issue. Further references were made at this point to participation and leadership and to women's only partially realised potential in this regard[86] and a decision was recorded to 'accelerate the implementation' of existing commitments in CEDAW, Agenda 21, the Beijing Declaration and Platform for Action and the Millennium Declaration.[87] While this all sounds very well, like much of the rest of TFWW, it does not involve anything new, but rather points to the need to address failures to give effect to already often long extant commitments.

Resolutions are also recorded in TFWW to help to create an environment conducive to women's participation in sustainability governance, including: repealing discriminatory laws; promoting equal access to justice and legal support; and undertaking institutional reform: '... to ensure competence and capacity for gender mainstreaming'.[88] The reference to gender mainstreaming in this context represents a degree of progress, as its inclusion in a UN international environmental law and policy document of this prominence is undoubtedly significant and an indication that the concept has gained considerable currency. TFWW also contains explicit resolutions to undertake legal and administrative reform to ensure that women have equal access to: economic resources;[89] education; basic services and '...health care services, including addressing women's sexual and reproductive health, and ensuring universal access to safe, effective, affordable and acceptable modern methods of family planning'.[90] Again, these are not new developments but serve to underline systemic failures in addressing existing commitments. Furthermore, the absence of specific reference to women's reproductive rights (caving to pressure from conservative religious lobbying) is one of the most controversial elements in TFWW and is described by Gro Harlem Brundtland as a 'step backwards' from previous agreements.[91]

Gender issues also benefitted indirectly from the more general coverage of the role of major groups and stakeholders that featured in the 'Renewing Political Commitment' section of the TFWW. The acknowledgement that the 'meaningful and active participation' of major groups and other stakeholders is a requirement of sustainable development and commitments to work more closely with these entities in order to 'encourage' such participation 'as appropriate in processes that contribute to decision making, planning and implementation of policies and programmes for sustainable development at all levels' is significant.[92] Civil society engagement is also promoted in this regard[93] and, significantly, gender is accorded discrete coverage again at this stage in the document, which states that:

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85 L. Ford: 'Gro Harlem Brundtland censures Rio+20's gender equality outcomes' at http://www.guardian.co.uk/global-development/2012/jun/22/gro-harlem-brundtland-rio20-gender-equality (accessed 05/07/07).

86 TFWW, para 237.

87 Ibid, para 236.

88 Ibid, para 238. There is also a general invitation to donor organisations including international financial institutions, major groups and the private sector to ensure effective participation for women and to undertake gender mainstreaming, para 244.

89 Ibid, para 240.

90 Ibid, para 241.

91 Ford, n 81.

92 Ibid, para 43.

93 Ibid, para 44.

> We underscore that women have a vital role to play in achieving sustainable development. We recognize the leadership role of women and we resolve to promote gender equality and women's empowerment and to ensure their full and effective participation in sustainable development policies, programmes and decision-making at all levels.[94]

That TFWW includes gender issues is to be expected given that role of women as a major group has been actively fostered in the sustainable development context since the first Rio summit and in particular through the development of Agenda 21 and the work of the CSD. The significant element is the degree of engagement that is exhibited in TFWW – gender concerns appear frequently in the document, both discretely and as a cross-cutting concern in other areas, such as participation. This can be viewed as evidence of the successful entrenchment of gender issues in the UN's conception of sustainability at least in principle - though practice is of course a very different matter and it is equally significant that limited progress in these issues on the ground has necessitated so much reiteration of existing

TFWW also, inevitably given the omnipresence of the issue in international environmental affairs touched on climate change, though its role in this area is tangential and any observations to be made would necessarily be in deference to the main UN climate change regime. Nonetheless, perhaps in part due to the slow progress of the UNFCCC process, climate change appears first in the 'Renewing Political Commitment' section of the document, which recognises it as a '... cross-cutting and persistent crisis' and underscoring the fact that it requires '... urgent and ambitious action, in accordance with the principles and provisions of the UNFCCC.'[95] This view does however fail to acknowledge that the necessary political will to give substantive legal effect to this supposed urgency appears to be signally lacking in the climate change regime.[96] Further coverage for climate change appears in the Framework for Action and Follow-up section of TFWW where climate change, likgender, is identified among the thematic areas and cross-sectoral issues. In contrast with sustainability, which is very much the province on the UNCSD and is therefore treated at some length, the coverage of climate change is necessarily limited as it falls under the remit of the UNFCCC. Thus TFWW is more or less confined to handwringing, for example, noting with:

> '...grave concern the significant gap between the aggregate effect of Parties' mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with having a likely chance of holding the increase in global average temperature below 2 °C or 1.5 °C above pre-industrial levels.'[97]

This is accompanied by various exhortations to the UNFCCC signatories (this is at best somewhat disingenuous as these are broadly the same states) regime, to act for example to operationalise the new Green Climate Fund[98] and urging them to fully implement their UNFCCC and Kyoto Protocol commitments and subsequent decisions.

In conclusion, TFWW did offer some reassurance that women's/gender issues are now established in principle in international environmental law and policy, even if it underlines the fact that their realisation in practice is a good deal more problematic. Rio+20 understandably had less to say about climate change and did not really consider the interface between climate change and gender issues, and though it did at least serve to reiterate calls for urgent action, in this regard it has little of substance to offer as this is really a matter for the UNFCCC regime.

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94 Ibid, para 45.

95 Ibid, Para 25.

96 Bond, n 43.

97 TFWW para 191.

98 Ibid.

Conclusion

Recognition of the need to address gender inequality, sustainability and climate change and the participation rights and practices that comprise a significant means of engaging with them has, in principle at least, become part of mainstream international environmental policy and law, though its practical impact to date remains questionable. Nonetheless the debate which has been generated in these complex and intersecting areas has at least given both cause and opportunity to reflect on the issues that they raise in a more sophisticated and nuanced, less simplistic fashion than policy debate of yore. Considering the undoubted overlaps, conflicts, tensions and synergies that exist between them it is imperative that we devote careful consideration to the challenges posed by attempting to address these crucial crosscutting themes and their ramifications. Taking each of them forward from recognition in principle to fully engaging with them in practice will require the development of coherent, connected and undoubtedly hotly contested policy initiatives. These are necessary in order to generate and support new, sustainable and therefore viable (in the fullest sense of the word) laws that can and will fundamentally alter societal practice. This remains our great(est) challenge and rising to it will not be easy, but then again, it would be naive to think that such complex problems are likely to be adequately addressed by simplistic solutions.

In our response to the challenges of sustainability and climate change (and indeed to climate change as a sustainability issue) one of the core priorities must be that we act in full recognition of the universal nature of the governance gender gap which applies across all areas of state-craft and not least those under consideration here. It applies (though to varying degrees) at state level regardless of economic status, religion or institutional arrangements.[99] The governance gender gap is however arguably just as manifest at transnational and international levels, (though it differs in magnitude according to the ethos and practices of the particular IGOs concerned).However, lest it should be thought that addressing the issues involved is merely a narrow sectoral concern, it is worth observing that women's equal involvement in governance generally improves the ability of policies to deliver for all citizens.[100] In addition, where environmental governance is concerned, women tend to bring a distinctive and valuable perspective to the table;[101] one that on even the most conservative predictions of the scope of the impacts of climate change impacts is likely to be crucial. Women are, and this would seem to be borne out by the weight of societal experience since the industrial revolution, are often unconvinced by technological optimism and the resultant belief that science can solve all of the problems that we face. As a result, they, place a premium on individual responsibility and behaviour change as central to addressing environmental degradation.[102] Given that climate change seems set, even if only the most minimal predictions are realised, to challenge not just international and national governance, but ultimately individual lifestyle choices, there is much to be said for giving heed to this perspective. Starting with the successor to the Kyoto Protocol, the core question that needs to be posed is: how are we rising to the challenge posed by shaping 'a world after this'? Experience thus far, and particularly latterly, with the FCCC seemingly in what amounts to little more than a holding pattern (as signified by the insufficiently ambitious Cancun Agreements[103] and the adoption a promise of only

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99 See, for example, OECD Issues Paper: Mind the Gap: Fostering Open and Inclusive Policy Making (2008) at http://search.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=GOV/PGC/OPEN(2008)1&docLanguage=En <ww.olis.oecd.org/olis/2008doc.nsf/LinkTo/NT00000CC6/$FILE/JT03241960.PDF> (06/09/12).

100 Ibid.

101 R. Jahan: *The Elusive Agenda: mainstreaming women in development* London, Zed Books, 1995.

102 M. Hemmati: *Gender & Climate Change in the North: Issues, Entry Points and Strategies for the Post-2012 Process and Beyond*, Genanet/Focal Point Gender Justice and Sustainability, 2005 at http://www.gendercc.net/fileadmin/inhalte/Dokumente/UNFCCC_conferences/Gender_Post-Kyoto.pdf (accessed 06/09/12).

103 FCCC: The Cancun Agreements at http://unfccc.int/meetings/cancun_nov_2010/items/6005.php (accessed 06/09/12).

deferred action at Durban in 2011)[104] is less than encouraging given the acknowledged urgency of the challenges that we face. For the purposes of the concerns raised in this paper, these repeated delays may however actually prove fortuitous in allowing time for a mainstreamed approach to gender to gain traction in the UNFCCC process, which, while not without its difficulties, would ultimately serve to improve any outcomes generated.

[104] FCCC: 'Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011' at http://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf (accessed 06/09/12)

Instrument Choice and Replication

Christina Voigt*

Abstract

In climate law, we have witnessed the establishment of innovative market-based instruments, such as emissions trading, the Clean Development Mechanism, Joint Implementation and REDD+. The aim of these instruments is the increase in cost-effectiveness in climate mitigation. These innovative instruments, while having attracted significant interest from economic actors, have shown significant shortcomings in terms of certainty of result and potential for circumvention, misuse and negative side-effects. At the same time, there is ongoing discussion of replicating some of these instruments in the new international climate agreement currently negotiated under Durban Platform for Enhanced Action (ADP). Moreover, the replication of market-based instruments is also being considered to other environmental challenges, most prominent among them biodiversity and ecosystem conservation.

This paper brief discusses both the possibilities and dangers of replicating market-based climate mitigation instruments in other areas of environmental law. In particular, it identifies lessons that can be learned from climate instruments and ways to avoid some mistakes from being made in other fields. Such lessons include the need for clear rules and the need for robust methodologies and data, the challenges to design market-based instruments in a way which secures that the largest part of available financial resources goes to the environmental project or good and is not captured during the process, and the need for strong legal rules that protect non-financial benefits. The market itself will not naturally deliver non-financial benefits or address non-economic interests. Rather, these interests and benefits have to be "regulated in" the mechanism. Finally, financial transfers should be based on monitored, reported and verified results (both on the primary, but also secondary/indirect market-impacts). Result-based ex-post payments not only reflect the true value of the environmental "good" which is being paid for, they can also keep corruption and fraud at bay.

Still, markets are means – not ends. As means they are just one tool in the toolbox. While for some environmental policies, suitable market-solution can be designed, with care required. For other environmental ends, such as nature conservation and ecosystem protection, traditional command-and-control approaches might lead to more secure, predictable and effective results.

1. Introduction

Climate change has triggered the establishment of a number of innovative market-based instruments, such as emissions trading, the Clean Development Mechanism, Joint Implementation and REDD+. The aim of these instruments is the flexible and cost-effective reduction of greenhouse gases (GHGs). While the establishment of market-based climate change mitigation instruments has been hailed as the "cutting edge"[1] of international environmental law and an innovative approach to solving the biggest challenge of our time, implementation and practice has shown significant shortcomings in terms of certainty and permanence of result as well as a potential for circumvention, misuse and undesired, negative side-effects.

Yet, there is ongoing discussion of replicating some of these instruments in the new international climate agreement currently negotiated under Durban Platform for Enhanced Action (ADP). Moreover, the replication of market-based instruments is also being considered to other environmental

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1 P. Sands and J. Peel, *Principles of International Environmental Law*, 3rd ed. (Cambridge: Cambridge University Press, 2012) 302.

challenges, most prominent among them biodiversity and ecosystem conservation, by, e.g. payments for ecosystem services (PES).[2] The use of market-based approaches is also envisaged to spur renewable energy. Energy+, an initiative to increase access to renewable energy and to drive low-carbon development modeled on the results-based financial support schemes for the protection of tropical forests, is being promoted by Norway.[3]

This policy brief will discuss both the possibilities and dangers of replicating market-based climate mitigation instruments in other areas of environmental law. It is divided in five parts: After, first, briefly describing market-based climate instruments, we, second, look at the *replicability* of climate instruments. Third, we discuss the *desirability* of a market-approach to other environmental issues, before, fourth, we ask what lessons can be learned from market-based climate instruments and, fifth, how to avoid some mistakes being made in the climate field.

2. Market-based instruments for climate change mitigation

Developed countries - the Parties included in Annex I to the UNFCCC - can make use of so-called 'flexible mechanisms' of the Kyoto Protocol. These flexible mechanisms are market-based tools that allow for meeting emissions reduction obligations by means of joint projects among Annex I countries (Joint Implementation – JI, Article 6 Kyoto Protocol), projects in developing countries (Clean Development Mechanism – CDM, Article 12 Kyoto Protocol) and emissions trading among Annex I countries (Article 17 Kyoto Protocol). While CDM and JI are project-based mechanisms, enabling Annex I countries to cooperate on specific greenhouse gas reduction projects with other countries where abatement costs are lower, international emissions trading aims at the establishment of an international market for buying and selling emission credits, which can be used to comply with the specified reduction targets. Tradable emission units can be the assigned amounts units (AAUs) accorded to Annex B countries of the Protocol or the rights derived from project-based activities, i.e. Certified Emission Reductions (CERs) from CDM activities and Emission Reduction Units (ERUs) from JI. Emission units can be traded freely on the market and their price will depend on demand and supply. Each Government can issue as many emission certificates as quantified by its assigned amounts and allocate them to public and private entities according to its national climate change policy. In order to prevent overselling, a country is required to hold a certain minimum of units in its national registry at any time (so called Commitment Period Reserve, CPR).[4] This system is supposed to stimulate policy changes since polluting entities have to decide whether it is more costly to buy emission certificates or reduce the amount of GHG emissions.

By introducing a quantitative cap on emissions from a number of developed countries together with flexible trading mechanisms, a tradable commodity or currency was created (1 unit= 1 t CO2 eqv.). In

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2 For an overview over financing mechanisms for global environmental protection see K. Miles, 'Innovative Financing: Filling in the Gaps on the Road to Sustainable Environmental Funding' (2005) 14:3 *RECIEL*, 202–211; see also P.A.U. Ali and K. Yano, *Eco-Finance: The Legal Design and Regulation of Market-Based Environmental Instruments* (The Hague: Kluwer Law International, 2004).

3 D. Reed and P. Gutman, *Energy+: Opportunities, Challenges and Options*, 1 March 2010. See also: *Norway launches international energy and climate partnership*, Office of the Prime Minister, Press release 10.10. 2011, http://www.regjeringen.no/en/dep/smk/press-center/Press-releases/2011/norway-launches-international-energy-and.html?id=660292. *Norway plans billion-dollar clean energy initiative for poor*, http://www.reuters.com/article/2011/05/24/us-climate-norway-idUSTRE74N3KO20110524.

4 The Commitment Period Reserve is set at 90 per cent or above of a Party's assigned amount or 100 per cent of five times its most recently reviewed inventory, whichever is the lowest. (Decision 5/CP.6) This reserve can be composed of any Kyoto units valid for a commitment period. The limit adopted is supposed to protect against non-compliance by overselling without limiting the liquidity of the market. The Marrakesh Accords require that 'a Party shall not make a transfer which would result in these holdings [of AAUs, CERs, ERUs, and/or RMU's] below the required level of the commitment period reserve'. (Decision 18/CP.7, Annex, paragraph 8).

other words, the Kyoto Protocol, as well as the regional implementation in the EU (the European Union's Emissions Trading System- EU ETS[5]) and national emission trading systems *creates* an artificial market – both in terms of supply and demand. Assigned amounts (AU) can be divided up into *units* (Assigned Amount Units – AAUs) allowing Annex I Parties (37 and the EU) to participate in the flexibility mechanisms. The same applies to ERUs (JI) and CERs (CDM), which in sum amounts to a combination of cap&trade and baseline&credit systems.

A more recent development in climate mitigation instruments is the establishment of a mechanism to reduce emissions from deforestation and forest degradation in developing countries, usually referred to as REDD+.[6] The framework for such mechanism was negotiated under the 15th Conference of the Parties (COP) to the UNFCCC in Copenhagen in 2009 and adopted at the 16th COP in Cancun in 2010.[7] Under REDD+, tropical developing countries shall be provided with financial incentives to slow, halt and reverse forest cover and carbon loss, in accordance with national circumstances, consistent with the ultimate objective of the Convention, as stated in Article 2 UNFCCC. These incentives are typically financed by more developed countries. REDD+ is an incentive system as payments can be linked to performance. In addition, REDD+ can offer developing countries substantial financial benefits for protecting their forests, and may be more cost-effective than other emission-reduction policies. At the current stage, REDD+ is not linked to a market-approach. The framework for the mechanism, however, allows for the elaboration of a market-link.[8] Such link, although opposed by a number of forest countries, such as Bolivia and Venezuela, might be an unavoidable requirement for making available and scaling up financial resources necessary for a functioning, results-based REDD+ mechanism.

3. Rationale

The establishment of market-based mechanisms is a political and regulatory choice. Traditionally "command and control" legislation was for a long time the practiced approach to reducing pollution of environmental media. In recent years, a move to incentive-based regulation ("carrot and stick") could be observed, in particular with respect to climate mitigation policies. Here, market "thinking" in terms of demand and supply are used as a *means* to pursue environmental *ends*, e.g. reduction and limitation of GHG emissions. Carbon markets have the advantage that they harness market power for climate mitigation and create a direct incentive for private sector investment.

The rationale behind market-mechanism is to increase the cost-effectiveness of climate mitigation measures. Market actors have an interest in reducing the cost of regulatory compliance. Therefore, they will search for the least-cost alternative. Cost-effectiveness is a general principle mentioned explicitly in Art. 3.3 UNFCCC: "policies and measures should be cost-effective so as to ensure global benefits at the lowest possible costs". The use of market-mechanisms purports to reach a certain emission reduction goal at the least possible costs. As a consequence, market-based measures are considered an optimal use of financial *and* environmental resources – corresponding to the adage of "buying more climate for the same (or less) money".

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5 Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC.

6 REDD+ is the acronym for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.

7 Decision 1/CP.16. The Cancun Agreements: Outcome of the work of the Ad Hoc Working. Group on Long-term Cooperative Action under the Convention, paras 68-79.

8 Decision 1/CP.17, in particular para 65, stating that results-based finance "may come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources"; and para 65, which considers that" appropriate market-based approaches could be developed …to support the results-based actions by developing country Parties".

The flexible instruments of the Kyoto Protocol are thus intended to serve two goals: first, to significantly lower compliance costs of the Kyoto Annex-I Parties with their emission reduction and limitation obligations. Since 1990 many of the Annex I Parties to the Kyoto Protocol have substantially increased their emissions. The commitment to collectively reduce emissions by 5% below 1990 levels by 2012 has therefore become commensurably more rigorous, and the potential economic impact of these obligations unparalleled in international law. The second goal is to provide incentives for sustainable development. It has been warned however that these mechanisms need to be governed by clear rules for emission reduction measurement and compliance procedures to ensure that measures taken by developed countries are accompanied by genuine emission reductions.[9]

The flexibility mechanisms are based on the global geographic availability of mitigation efforts and the theory of 'marginal abatement costs'. The cost of financing emission reduction is relatively lower in countries with lower levels of industrialization. Because location of abatement measures is climatically irrelevant, global cost-effectiveness prescribes basically that measures should be implemented where they are cheapest.

Key developed countries considered the introduction of flexibility in the way they could implement their commitments as a requirement of *equity*. Part of the argument for flexibility was that marginal costs vary from country to country, from sector to sector and source to source.[10] To require all countries to meet their targets by using a prescriptive list of policies and measures was considered insufficient and ineffective. Equity considerations therefore demanded flexibility in sharing the burden of meeting commitments. This flexibility is premised on the idea that countries with high costs for meeting their environmental obligations and countries that can provide low cost opportunities should benefit by cooperating and thereby exploiting comparative advantages.[11]

While strong arguments can be made in favour of the use of flexible instruments, their implementation is all but plain sailing. Based on ethical arguments, emissions trading in particular has been characterized as 'turning pollution into a commodity to be bought and sold', thereby removing the 'moral stigma that is properly associated with it … rendering pollution just another cost of doing business, like wages, benefits and rent.'[12] The 'legitimacy' of such criticism depends on whether one considers all emissions of greenhouse gases to be 'wrong' by definition or whether to accept some

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9 See X. Wang and G. Wiser, 'The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol' (2002) 11:2 *RECIEL* 187. Also Ch. Voigt (2009) *The Deadlock of the Clean Development Mechanism: Caught between Sustainability, Environmental Integrity and Economic Efficiency*, in: B. Richardson, S. Wood, H. McLeod-Kilmurray and Y. Le Bouthillier (eds.) 'Climate Law and Developing Countries: Legal and Policy Challenges for the World Economy' (Edward Elgar Publishing) 235-261 and Ch. Voigt (2008) *Is the Clean Development Mechanism Sustainable? Some Critical Aspects*, 8 Sustainable Development Law and Policy (SDLP) 2, 15-21.

10 D. Stowell, *Climate Trading – Development of Greenhouse Gas Markets* (Basingstoke: Palgrave Macmillan, 2005) 15.

11 See P. Cullet, 'Equity and Flexibility Mechanisms in the Climate Change Regime: Conceptual and Practical Issues' (1999) 8:2 *Review of European Community & International Environmental Law*,171.

12 See generally, M. Sagoff, *Controlling Global Climate: The Debate over Pollution Trading*, Report from the Institute for Philosophy and Public Policy, 1999, available at: <http://www.puaf.umd.edu/IPPP/winter99/controlling_global_climate.htm>. See also C.D.Stone, *The Gnat is Older than Man: Global Environment and Human Agenda* (Princeton, N.J.: Princeton University Press, 1993) 141–149. Also: C. Blumm, 'The Fallacies of Free Market Environmentalism' (1992) 15 *Harvard Journal of Law and Public Policy*, 371, and G. Torres, 'Who Owns the Sky? Seventh Annual Lloyd K Garrison Lecture on Environmental Law' (2001) 18:2 *Pace Envtl. L. Rev*., 227. Torres argues that the 'privatization of the atmosphere results in an abuse of the global commons, for which States have the responsibility to protect, not to give away'. By treating the atmosphere as though it were a common resource of no substantial public interest other than the protection of its quality and by dividing it in little pieces that get distributed to States and industries, governments have taken too narrow a view and neglected their duty as trustees towards public resources by transferring significant public resources to private hands, especially where this happens free of charge. See also G. Winter, Climate is no Commodity: Taking Stock of the Emissions Trading System, *J Environmental Law* (2010) 22 (1): 1-25.

level of pollution. With regard to the emission of greenhouse gases, which also occur naturally, such absolute ethical positions are somewhat difficult to sustain.

Another critical argument concerns the overall focus on economic efficiency and cost-minimization for Annex I Parties which may consolidate the economic dominance of industrialized countries by allowing them to 'buy their way out of their obligations'. This argument can be met with reference to the 'price tag' that is put on emissions by a cap-and-trading system. 'Buying out', in fact, entails *internalizing* the costs of emitting greenhouse gases. Furthermore, incentives to circumvent domestic reductions and to avoid necessary technological changes by Annex I Parties would be drastically reduced by a stringent regulatory framework for emissions trading coupled with a strong emission cap, the avoidance of 'hot air' as well as robust methodologies for baseline scenarios and additionality, and monitoring and reporting requirements backed up by an effective compliance and enforcement mechanism.

Prior to the Kyoto Protocol, the use of market-based mechanisms as a tool in international agreements to address environmental concerns had not been widely tested. The primary focus of environmental regulation was on traditional command and control or voluntary approaches. Thus, only a very few countries had experience of emissions trading.[13]

The application of economically motivated mechanisms on a global scale is thus unprecedented in international law. Project-based mechanisms that enable countries to carry out projects abroad in order to receive credits that could assist them in meeting their national commitments at the same time as they support development in host countries are absolutely novel. The regulation of these mechanisms therefore has been described as the 'cutting edge of international environmental law'.[14] It might not be too far off the point to generalize this statement to international law, at least as far as the complex and novel procedural and technical challenges as well as the moral, economic and environmental considerations which these new mechanisms as well as REDD+ raise are concerned. That the far-reaching and speedy developments entailed by the mechanisms have attracted the close attention of States, the scientific community, business and environmental organisations alike is therefore not surprising.

The clear advantage of flexibility mechanisms, such as emissions trading and joint implementation, is the finite number of emission units, clearly defining the environmental goal. This 'absolute cap', if combined with a strong compliance mechanism,[15] ensures that it will become unattractive for States to emit more than they are allowed to under the Kyoto Protocol.

The climate regime must – and the flexibility mechanisms make it more likely to – progressively convince a wide range of currently hesitant or resistant actors to reframe climate protection as the (only) sustainable way forward. This shift in conviction, however, involves not only legal measures, but complex and dynamic social processes. Still, as *Mitchell* supposed, 'the flexibility mechanisms … may, over time, initiate social processes that lead to deep seated normative changes that, in turn, may produce the dramatic, long-term changes in human behaviour that are necessary to avert climate change.'[16]

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[13] Examples include the US SO2 trading system (aka Acid Rain Program) which began in 1995 and the Ontario SOx and NOx Trading Scheme under the Environmental Protection Act, entered into force 31 December 2001 and the UK Emissions Trading Scheme (see http://www.defra.gov.uk/environment/climatechange/trading/ukets.htm# rules>).

[14] Sands, fn.1.

[15] See for a comprehensive overview of the compliance system under the Kyoto Protocol: J. Werksman, 'The Negotiation of a Kyoto Compliance System' in O. Schram Stokke, J. Hovi and G. Ulfstein (eds.) *Implementing the Climate Regime: International Compliance* (London: Earthscan, 2005) 17–37.

[16] R.B. Mitchell, 'Flexibility, Compliance and Norm Development in the Climate Regime'in Stokke, Hovi and Ulfstein (eds.) 2005, 81.

The use of economic flexibility instruments, in particular the JI and CDM, can promote the development and distribution of new technologies, generating capital flows and transfer of technologies into regions with cheaper, older technologies or limited financial means and capacities to implement climate friendly technologies, promoting not only emission reductions at reduced costs but also positive feedback across the whole, global economy.[17]

4. Replicability

The main justification for these instruments in the field of climate change mitigation is the climatic irrelevance of the location of emissions cuts as well as the increased cost-effectiveness of a flexible approach. This approach may not necessarily be applicable to other environmental threats such as biodiversity loss or accumulating chemical and other pollution, which can create so-called "hot spots". A market-approach based on tradable quotas can be particularly problematic for:

4.1 Non-accumulative environmental problems: Some environmental challenges are the accumulative effect of a wealth of different contributions. Climate change is a prime example, where the accumulated greenhouse gases in the atmosphere are caused by a myriad of anthropogenic and non-anthropogenic sources, spread over the entire globe and covering decades, if not centuries, of activities. A global market system of emission reductions thus mirrors the fragmented and wide-spread nature of emission sources. Some environmental challenges, however, occur locally, caused by local drivers. For these environmental challenges it is important to address the cause of the problem where it is located, not where it is cheapest to mitigate, e.g. endangered species only exist in a particular area.

4.2 Accumulative environmental problems with local effects: Emissions of GHGs do not have local climate effects (as such), although they can contribute to local air pollution. In terms of climate change mitigation, actions can be dispersed globally. In other words, the creation of "local hotspots" of greenhouse gas emissions as a result of the concentration of mitigation measures in some places and the absence of such measures as well as high levels of emissions in others do not create 'local climate change'. Other pollutants (sometimes by-products of GHGs) can create local pollution, which needs to be remedied at the location of release, e.g. emissions of sulfur dioxide, nitrogen oxides, carbon monoxide, fine particulate matter, organic compounds like benzene, toluene and poly-aromatic hydrocarbons (PAH), and heavy metals in particulate matter (lead, cadmium) can cause local concentrations to reach levels which are harmful to human health and the environment.

4.3 MRV-ability: In order for market-instruments to be effective in terms of reaching the environmental end they are supposed to support, it is important that they function with a high degree of accuracy.[18] In other words, the environmental 'good' which corresponds to the tradable unit needs to be reliably measured and verified. Arguably, 'end of the pipe' industrial emissions of GHG can be accurately measured, reported and verified ("MRV-ability"). However, this situation already becomes much more difficult when it comes to baseline and crediting systems like the CDM. Here, emission reductions need to be measured and verified against hypothetical baselines (of what would have happened in the absence of the project). Such counterfactuals can never be proven with certainty and thereby create a challenge to the measurability of emissions reductions and the accuracy of the quota. The same applies to systems with intensity targets, e.g. CO2 emissions per kwh or carbon intensity per dollar of GDP.[19] Intensity targets lack the quantifiability of the overall emission reduction goal. Translating them into tradable quotas comprises of inherent calculation and measurement challenges, which can affect the effectiveness of the market instrument. This situation becomes even more

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17 See J. Lefevre, 'The EU Greenhouse Gas Emission Allowance Trading Scheme' in Yamin (ed.) 2005, 92.

18 See David Driesen, Trading and its Limits, 14 *Penn St. Envtl. L. Rev*, 2006, 169ff.

19 For a criticism of intensity targets see: Tim Herzog, *China's Carbon Intensity Target*, World Resources Institute, available at: http://www.wri.org/stories/2007/04/chinas-carbon-intensity-target#.

difficult when it comes to measuring the functioning of complex natural systems (ecosystems), as required for a "payment for ecosystem services (PES)"-system. In REDD, which in a sense is a specific PES for "forest carbon services", this problem is attempted being solved by a complicated combination of remote sensing (by satellite) and on the ground checks of anthropogenic forest-related greenhouse gas emissions by sources and removals by sinks, forest carbon stocks and forest area changes.[20] Extending payment systems for ecological services to, for example, water or air filtration might hold insurmountable technological challenges in terms of strict monitoring and verification of such services. Moreover, attempts to extend the REDD+ system to cover all terrestrial carbon, including agricultural activities, might still find their limit in technologies suited for capturing and measuring comprehensive carbon (stock) changes.

5. Desirability of replicating market-based instruments

This part discusses the desirability of replicating a market approach to addressing other environmental challenges than climate change. In a non-exhaustive manner, some critical arguments launched against a market-based approach on the basis of experiences made with climate instruments will be discussed.

5.1 No market without rules: As said above, market mechanisms are means to an environmental end, not an end in themselves. Therefore, it is important that the legal framework for market instruments ensures the capacity of the mechanism to reach the desired environmental end, or in other words, safeguard the market instrument's environmental integrity. As a strategy for revenue maximisation, market actors will always strive to find the least-costly way for complying with regulatory requirements. Law therefore has an important role in "staking the field" for market players. This applies, in particular to clear definition for eligibility and possible conditionality criteria for participation, clear rules for acquisition and transfers of tradable quotas, requirements of robust measurement, monitoring, reporting and independent verification systems as well as transparency in all stages of market transactions. Moreover, legal rules need to be in place for addressing and protecting the interests and rights of *all* relevant stakeholders, whether they are market-actors or not. Protecting interests of stakeholders requires not only ensuring procedural rights, such as public participation and civil involvement. It also demands the respect of substantial rights, such as land tenure and property rights.[21] Finally, the system needs to be safeguarded against misuse by control, review and enforcement measures as well as sanctions for violations and circumventions.

5.2 Cap-and trade markets and innovation: Emissions trading has been criticised for not stimulating technological innovation.[22] As we identified above, the purpose of the "trade" is to minimize the costs of reducing emissions. Emission reduction is not achieved by the trading; it is achieved by capping emissions at a certain level. However, experiences with the early EU ETS have shown that the cap has been set too high, giving in to the demands of affected industries. As a result, surplus allowances partly due to faulty baseline data and partly to lack of political will, watered out the environmental effectiveness of the early regime. Insufficient targets, carve-outs for particularly exposed, competitive industries and 'low-hanging fruit' solutions which required no technological changes lead to unexpectedly low prices and created no or very limited stimulus for innovation.

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[20] Decision 4/CP.15 requests forest countries to "To establish…robust and transparent national forest monitoring systems…that: (i) Use a combination of remote sensing and ground-based forest carbon inventory approaches for estimating, as appropriate, anthropogenic forest-related greenhouse gas emissions by sources and removals by sinks, forest carbon stocks and forest area changes".

[21] For a discussion of control mechanisms with regard to REDD see: Simon West, Command Without Control: Are Market Mechanisms Capable of delivering Ecological Integrity to REDD? *6 Law, Environment and Development Journal* 3, 2010, 298 ff. Stephen M. Johnson, Economics v. Equity: Do Market-Based Environmental reforms Exacerbate Environmental Injustice? 56 Wash & Lee L. Rev, 1999, 111 ff.

[22] For a critical discussion see: David Roberts, Does cap-and-trade produce technological innovation?, available at: http://grist.org/climate-policy/does-cap-and-trade-produce-technological-innovation.

Moreover, the notion of flexibility inherent in a cap-and-trade approach lead, for instance, the Norwegian regulator to abstain from setting technology requirements (for example the use of best available technology) for those installations which are covered by the Norwegian emissions trading scheme, when granting them pollution licenses under the Norwegian Pollution Control Act. Innovation is spurred by high carbon prices and by regulation (or - in the absence thereof - incentives) for innovation. But if the cap is too weak (speak too high), prices of emission allowances will be low. Low prices coupled with no regulatory requirements for technological standards will lock-in the technological status quo.

5.3 The three E's: There is an inherent difficulty to avoid balancing what we can call the "three E's": Environmental integrity, Equity, Effectiveness. Focus on one element often goes to the detriment of one or both the other. The difficult relationship of equity and effectiveness lies in the inherent trade-off that those measures that are effective may not be equitable or those that are equitable may not lead to significant emissions reductions. In other words, creating an equitable system by taking account of differences, e.g. compensating the burden of highly emitting, competitive industries or exempting certain sectors from the scope of emissions trading, in order to protect competitiveness of certain industries can take away the incentive to reduce GHGs and thereby affects the effectiveness of the regime. The same applies to grandfathering, i.e. benefitting of polluting industries by allocating allowances free of charge. From 2013 onwards the EU ETS foresees auctioning of allowances. This change in allocation modality is intended to remedy the before-mentioned concerns. However, also the new trading system will provide certain exemptions for competitive industries. Moreover, the focus on economics and equitable allocation of emission rights can divert attention from the environmental integrity of the measures and possible negative side effects on the environment. Environmental integrity depends on (i) stringency of the target (political decision), (ii) MRV (accurate and verifiable data), (iii) ensuring that regulation is not circumvented, i.e. robust and credible national laws and institutions, and enforcement possibilities, and (iv) avoiding of negative side-effects and enhancing positive co-benefits. Environmental integrity, however, may reduce cost-effectiveness because it requires accurate data and strong regulation, which may lead to longer lead times, additional checks and balances, as well as verification of the outcome.

5.4 Clear policy objective: Regulations for carbon markets need a clear policy objective. The reality of flexibility instrument, in particular the CDM, but also the new REDD+ mechanism, however, is very different. Here, a multitude in objectives is sought pursued, with the effect that none is effectively safeguarded. The CDM example is meant to illustrate this point: At the heart of the CDM lies a tridimensional problem: the pursuit of at least three different and often competing policy objectives: environmental integrity, sustainable development and economic efficiency.

First, the CDM is supposed to deliver real, measurable and lasting climate benefits; this capacity is often referred to as its environmental integrity. So far, the environmental integrity of the CDM rests largely on the 'integrity of the process' carried out by the UN institutions and organs involved in the CDM and corresponds to the technical and administrative capacity of the EB to develop and apply methodologies that validate projects and certify emissions that are additional to those which would have occurred in the absence of the CDM. The integrity of the CDM thus depends on applying conservative methods on accuracy and transparency (allowing for a safe margin of error). Moreover, it depends on the confidence of the EB to not certify registered projects that fail to meet agreed criteria. It also requires decision making that is not politically biased or influenced or under the threat of legal claims for compensation of financial losses of project participants.[23]

[23] J. Werksman, Werksman, J. (2008), 'The "Legitimate Expectations" of Investors and the CDM: Balancing Public Goods and Private Rights under the Climate Change Regime', *Carbon and Climate Law Review* 1, 95. 2008, 95–104; Flues, F., A. Michaelowa and K. Michaelowa (2008), *UN Approval of Greenhouse Gas Emissions Reduction Projects in Developing Countries: The Political Economy of the CDM Executive Board*, CIS Working Paper No. 35 (Center for Comparative and International Studies).

Second, in addition to environmental integrity, the CDM must promote the sustainable development of host countries. As mentioned above, a number of uncertainties exist in this respect. Yet, the requirement of additionality is intricately related to the sustainable development goal. In practice, projects that are clearly additional have proven to contribute very little to the sustainable development of host countries. Projects that are undoubtedly additional are those that would not be economically feasible without the CDM, such as HFC23 and projects involving other industrial gases. Yet these projects use end-of-pipe technology that does not bring about any technological changes in terms of avoiding the generation of GHGs or any other sustainable benefits. Some of those projects even give incentives for producing more GHG gases. On the other hand, projects that do contribute to sustainable development (e.g., renewable energy projects, fuel-switch projects) are often not additional. The CDM does not play any, or only an insignificant, role in the investment decision. Investment in these kinds of projects is often based on 'business as usual' economic calculations.

Third, the CDM needs to be economically interesting. In order for the CDM to play a role in the climate market while being a significant response to climate change, it must succeed in attracting a 'critical mass' of participants, especially project developers and investors, which are willing to participate in 'good' CDM projects, namely projects that are both additional and contribute to sustainable development. This will require transparency, consistency, certainty and predictability of the process, reduction of lead times (especially the duration of review) and transaction and administrative costs, and increased overall efficiency and cost-effectiveness.[24]

The dilemma, however, is that projects that both are additional and contribute to sustainable development are extremely rare and often have to go through a long, opaque and very bureaucratic process before registration, which affects their economic efficiency. In this context, Werksman[25] noted that '[a]t issue is the tension between the care required to ensure the environmental quality of projects, and the bureaucratic efficiency and technocratic precision required by the demands of the market'. The crisis described above indicates an imbalance of interests tilting towards market demands and surrendering to market imperatives. It also indicates that the care required to ensure environmental integrity and to deliver on all three objectives of the CDM is not systematically built into its design.

"If it is feasible to establish a market to implement a policy, no policy-maker can afford to do without". If J.H. Dales was right in this statement, then a market-mechanism needs to correlate to "a policy" as in "one" – not many. However, given the complex regulatory landscape in which modern market-mechanisms are established, the identification of just one policy objective might not only be impossible, it might in fact be ignorant of the many crossing objectives inherent in climate and other environmental policies, which pay tribute to legitimate expectations of different stakeholders, both market and non-market, private and public.

5.5 Limited regulatory capture: Non-market/indirect causes of environmental destruction: With cap-and-trade systems for climate gases, the regulatory capture reaches no further than stationary emission sources, largely industrial installations, and lately some mobile sources, i.e. air carriers. In other words, emissions trading is an "end of pipe" mechanism. Industrial installations responsible for emissions need to account for their pollution by measuring their "smoke stack emissions" and by having an equivalent number of quotas. However, GHG emissions outside the regulatory scope of an emissions trading system, indirect drivers of emissions or global drivers are not captured. Moreover, other environmental problems, such as deforestation or the destruction of ecological systems and functions can have diverse actors and causes which may not be captured by a trading scheme.

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[24] C. Streck (2007), 'The Governance of the Clean Development Mechanism: The Case for Strength and Stability', *Environmental Liability* 15(2), 91.

[25] Werksman, 2008, 99,

6. Lessons learned

What lessons can be learned from climate instruments and how to avoid some mistakes made in the climate field from being made in other fields?

6.1 Clear rules and the need for robust methodologies and data: If market mechanisms are introduced, the market has a tendency "to grab the ball and run with it". The creation of market-based solutions to environmental problems and the introduction of flexibility and cost-effectiveness does not mean a "lawless" space. Markets are means – not ends. Rather, care and foresight must be exercised in the drafting of the legal framework, including binding rules, which define the legitimate scope for activities. These include, for example, rules that safeguard against perverse policy incentives, against violations of various human rights, but also against high transaction costs and logistic and administrative bottlenecks. While the rules must be strong and clear, they should not be too complex or lead to lengthy, bureaucratic processes. The challenge is that monitoring, reporting and validation (MRV) of GHG emissions – while necessary - already is difficult. MRV of avoided emissions (REDD+) is yet on the limit of technological feasibility, and even more so when it comes to create a robust accounting system for ecosystem services. In fact, for reasons of technical difficulties of how to measure avoided deforestation, this issue was not included in the Kyoto Protocol. The functioning and effectiveness of any market-based mechanism and its capacity to deliver the expected outcome depends on careful design, implementation and control.

6.2 Bureaucracy and Overall efficiency: Pioneering research has suggested that an average of approximately 30% of the money spent on the open market buying CDM credits goes directly to project operating and capital expenditure costs.[26]The largest part goes to broker's premiums (about 30%, understood to represent the risk of a project not delivering) and the project shareholders' dividend (another 30%). The researchers noted that the sample of projects studied was small, the range of figures was wide and that their methodology of estimating values slightly overstated the average broker's premium. The challenge, therefore, is to design market-based instruments in a way which secures that the largest part of available financial resources goes to the environmental project or good and is not captured during the process.

6.3 Avoiding negative side effects – enhancing co-benefits: Market-instruments pursue the goal they are designed for and accord to least-cost demands. This can lead to situations where unintended side-effects occur, which may be harmful to non-market interests. As we discussed above in the context of the CDM, projects might be successful in terms of emission reductions. Whether they also provide sustainable development benefits or are harmful to the environment or people affected by a project, remains (largely) outside the scope of UN-based registration and verification of projects.

Different from the CDM, in the framework for REDD+, a number of safeguards exist which are meant to ensure that REDD+ activities do not harm, but enhance positive impacts on the conservation of biological diversity, human rights, in particular indigenous peoples, forest governance.[27] While

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[26] Kahya, Damian, *30% of carbon offsets' spent on reducing emissions*, BBC News, 2009-12-07.

[27] Decision 1/CP.16, Annex I: "When undertaking REDD+ activities, the following safeguards should be promoted and supported: (a) Actions complement or are consistent with the objectives of national forest programmes and relevant international conventions and agreements; (b) Transparent and effective national forest governance structures, taking into account national legislation and sovereignty; (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the UN General Assembly has adopted the UN Declaration on the Rights of Indigenous Peoples; (d) The full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities, in actions referred to in paragraphs 70 and 72 of the decision; (e) Actions are consistent with the conservation of natural forests and biological diversity, ensuring that actions referred to in paragraph 70 of the decision are not used for the conversion of natural forests, but are instead used to incentivize the protection and conservation of natural forests and their ecosystem services, and to enhance other social and environmental benefits; (c) Respect for the knowledge and rights of indigenous peoples and members of local communities, by taking into account relevant international obligations,

these safeguards have been negotiated with great care and controversy, it still remains somewhat unclear how they are supposed to work, how they are financed, and how they are monitored and reported. So far, a system for providing information on how the safeguards are being addressed and respected is all that is in place for ensuring their implementation. In the latest negotiation rounds, however, it became clear that when market-approaches are considered, safeguard compliance must become conditionality for financial transfers. In this context, the evolving financing framework for REDD+ notes that "in the light of the experience gained from current and future demonstration activities, appropriate market-based approaches could be developed..., *ensuring* that environmental integrity is preserved, that the provisions of decisions 1/CP.16, appendix I and II are fully respected and should be consistent with the relevant provisions of decision 1/CP.16."[28]

In order to have a market-based instrument delivering on non-market benefits requires strong legal rules that protect such benefits. As the market itself will not naturally provide for such non-financial issues, they have to be "regulated in" the mechanism. Moreover, transparency in these issues by robust MRV systems also for safeguard compliance increases the possibility for extra-market players, e.g. NGOs, to keep track of market impacts on people and the environment. In addition, where safeguard compliance occurs as a conditionality or eligibility requirement for financial transfers – as we may see in the development of REDD+ - the internalization of non-market values would be based both on legal as well as economic rationales – making compliance with non-market requirements all the more likely.

Finally, financial transfers should be based on monitored, reported and verified results (both on the primary, but also secondary/indirect market-impacts). Such ex-post payments not only reflect the true value of the "good" which is being paid for. A results-based-approach can also keep corruption and fraud at bay.[29]

7. Conclusions

Market-based climate instruments are an unprecedented experiment; a game that the world cannot afford losing. Given the severity of the challenge, it must be asked whether this is the right way to go.

Regulatory ecosystem service markets[30] are established through *legislation* that creates demand for a particular ecosystem service by setting a 'cap' on the damage to, or investment focused on, an ecosystem service. The users of the service, or at least the people who are responsible for diminishing that service, respond either by complying directly or by trading with others who are able to meet the regulation at lower cost. Buyers are defined by the legislation, but are usually private-sector companies or other institutions. Sellers may also be companies or other entities that the legislation allows to be sellers and who are going beyond regulatory requirements.

Carbon markets have the advantage that they harness market power for climate mitigation and create a direct incentive for private sector investment. But it is an artificial market; it must *create*

(Contd.)

national circumstances and laws, and noting that the UN General Assembly has adopted the UN Declaration on the Rights of Indigenous Peoples."

28 Decision 2/CP.17, para 66.

29 Payment for result is an approach which has been discussed with regard to development aid. See, for example, World Bank, *A New Instrument to Advance Development Effectiveness: program-For-Results Financing*, 29. November 2011, available at: http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2012/01/01/000333037_20120101223631/Rendered/PDF/661930BR0R201100282.pdf.

30 Examples include: Tradable wetland mitigation credits (credits from wetland conservation or restoration that can be used to offset obligations of developers to maintain a minimum area of natural wetlands in a defined region), tradable development rights (rights allocated to develop only a limited total area of natural habitat within a defined region) or tradable biodiversity credits (credits representing areas of biodiversity protection or enhancement, which can be purchased by developers to ensure they meet a minimum standard of biodiversity protection.

demand *and* supply. Functioning markets depend on sustained demand. Demand depends on regulation and ambitious (climate) targets. Targets must also be dynamic and react to changing economic realities. Recent experiences with the EU ETS show that even in the context of comparatively ambitious and strong rules and institutions, incentives for investments can vanish as the broader economic context changes. In order to guard against vanishing demand, transactions had to be backed by funds or minimum price guarantees. In a market where supply is artificially created, there is the danger of oversupply by over-allocation (grandfathering), or of economic downsizing which lead to threatening the market of flooding with quotas and falling prices. The mobilization of large amounts of private sector funding depends on sustained demand for credits and hence ambitious, long-term targets and effective links to national compliance markets.

Here lies the problem for REDD+. Price levels must be high enough to create incentives for alternative land use (e.g. conservation). Large drivers of deforestation and destruction of ecosystems, by, e.g., infrastructure and housing developments, palm oil plantations, beef soy, mineral extraction etc., drive up prices for REDD+ and other ecosystem services. A functioning market-instrument would need to address destructive policies and drivers and enhance the market-value of those policies which protect the environmental objective pursued by the mechanism.

However, in order to establish market-based instruments which pursue environmental goals, the demand side of the market has to be created. With regard to REDD+, the overarching question of who would buy REDD+ credits or units (if they were to be issued) still remains unanswered. There is, as of today, no compliance market and the voluntary market for REDD+ credits has minimal volume. What remains is investment into REDD+ policies for reasons of Corporate Social Responsibility (CSR) or pure altruism and philanthropy. While the latter are "nice to have" – their volume will never sum up to the financial flows necessary for successfully fighting tropical deforestation (and resulting GHGs emissions).

Coming back to the Dale's adage "If it is feasible to establish a market to implement a policy, no policy-maker can afford to do without", we can conclude that the feasibility may be the problem with environmental market-based instruments. While good arguments can be made in favour of such instruments, experiences made so far with climate related market instruments show significant shortcomings. If markets are to work for the environment, then strong regulation has to be in place ensuring both the environmental end and guarding against negative side-effects. Markets are means – not ends. As means they are *a* tool in the toolbox, but not the only one. While for some environmental policies, suitable market-solution can be designed, with care required. For other environmental ends, such as nature conservation and ecosystem protection, traditional command-and-control approaches might lead to more secure, predictable and effective results.

Concluding remarks: climate change in the aftermath of Rio+20

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The workshop that originated this collection of working papers aimed at taking advantage of the momentum generated by the Rio+20 Summit, and all the debate it generated about sustainable development, the transition to a green economy and related issues, to analyze the question of the dominance of climate change in International – Environmental and Sustainable Development – Law. Our intention was to create a framework to exchange ideas about climate change from several perspectives: analyzing the climate discourse and how it became so prominent within the global governance scenario nowadays, the evolution of the climate change policy framework and the way it related to all the stakeholders concerned, how the instruments/policy measures designed within the climate change regime have been operating in practice, and whether they could be replicated in other policy areas. We expected that, by addressing these issues, we would be able to achieve conclusions about the arguable dominance of climate change in global environmental governance and whether this could be portrayed as positive or negative. Further, we hoped that, after the Rio+20, the discussions that took place during the workshop could be evaluated in a comparative perspective regarding the outcomes reached at the Summit.

We invited four legal experts from different institutions to discuss with us some of these topics. The three working papers presented here are the result of our discussions at the workshop. The first presentation, by Stephen Humphreys, addressed the issue of the evolution of the public discourse regarding climate change. Stephen's paper aims to think through the significance of what can be called the 'mainstreaming' of climate science. It addresses the paradox that, despite the increasing success of climate change science at discursive level, the failure of that language to frame a viable solution to the problems climate change poses appear ever starker. Stephen concludes that today climate change functions *primarily* as discourse; that is, it provides a mechanism that serves fundamentally to restabilise the grounding principles of a dominant political economy and, as such, it now has no more chance of success.

The second presentation, by Karen Morrow, aimed at discussing what kind of issues could be argued to be obscured by the climate regime and its dominant role within IEL. Her paper considers the position of women as an example of a stakeholder/major group that has, until very recently, been both accorded privileged participant status in the international sustainable development context and yet overlooked in the climate change regime. It examines the impact of activist and theoretical ecofeminism in prompting and shaping women's engagement with the international polis in these areas and practical reasons for according broad participation rights to women (and by implication, given the inclusive approach taken by ecofeminism, to other stakeholder groups) in these contexts. It looks at how women's participation has developed in sustainable development and climate change contexts and consider the ramifications of this including: benefits of and barriers to wider participation in the climate change regime and how the latter could be addressed.

The third presentation, by Christina Voigt, aimed at discussing the innovative legal instruments developed with the climate regime and how/if these could be replicated in other policy areas as adequate tools to face sustainability challenges. Her paper considers that, in climate law, we have witnessed the establishment of innovative market-based instruments, whose aim is the increase in cost-effectiveness in climate mitigation. She argues that these innovative instruments, while having attracted significant interest from economic actors, have shown significant shortcomings in terms of certainty of result and potential for circumvention, misuse and negative side-effects. Moreover, she discusses both the possibilities and dangers of replicating market-based climate mitigation instruments in other areas of environmental law. In particular, her paper identifies lessons that can be learned from

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climate instruments and ways to avoid some mistakes from being made in other fields. Such lessons include the need for clear rules and the need for robust methodologies and data, the challenges to design market-based instruments in a way which secures that the largest part of available financial resources goes to the environmental project or good and is not captured during the process, and the need for strong legal rules that protect non-financial benefits.

In short, the working papers resulting from the conference are concerned with *climate* and *change,* as stated in the introduction to this volume. Ate the same time, they provide us with a somewhat negative view about climate governance. We can infer that the climate discourse, while in fact playing a relatively strong or dominant role in global politics nowadays, functions more as discourse than actual leadership towards changing the (unsustainable) status quo of environmental governance. Further, the discussions we had pointed out that climate governance, while allowing the emergence of non-traditional governance issues, is not always an inclusive process and that many relevant stakeholders might be left out of this process. Finally, while several innovative instruments have been created to address the challenge of climate governance, its peculiar characteristics make it difficult to be easily replicable in other policy areas. In this regard, the conclusion of our discussions was that climate change can be considered as a relatively dominant policy objective, but one that does not necessarily provide a positive view of how a problem area can be best managed within a complex international institutional framework. It is this important to now ask ourselves where can climate change, as this ambiguous policy area, be situated within the global governance scenario in the aftermath of Rio+20.

The Rio+20 outcomes can offer some guidance on how to view the relationship between climate change and two other relevant policy objectives which are key in global governance nowadays, namely sustainable development and the green economy, another major policy goal and broad concept that has been highjacking the international agenda. Rio+20 was not only marking twenty years since the UN Earth Summit in 1992, but also forty years since the UN Stockholm Conference on the Human Environment, a long process throughout which the concept of sustainable development was coined, mainstreamed, and discredited by many as a conflation of objectives. However, Rio+20 renewed sustainable development as a major goal of the international community. The Rio+20 Outcome Document, 'The Future We Want', states that the parties renew the commitment to sustainable development and to ensuring the promotion of an economically, socially and environmentally sustainable future for our planet and for present and future generations, acknowledging that mainstreaming sustainable development at all levels is needed, integrating economic, social and environmental aspects. Further, it states that 'poverty eradication, changing unsustainable and promoting sustainable patterns of consumption and production and protecting and managing the natural resource base of economic and social development are the overarching objectives of and essential requirements for sustainable development. [We] also reaffirm the need to achieve sustainable development by promoting sustained, inclusive and equitable economic growth, creating greater opportunities for all, reducing inequalities, raising basic standards of living, fostering equitable social development and inclusion, and promoting integrated and sustainable management of natural resources and ecosystems that supports, inter alia, economic, social and human development while facilitating ecosystem conservation, regeneration and restoration and resilience in the face of new and emerging challenges'. (para. 3-4).

Climate change, on the other hand, is portrayed as 'a cross-cutting and persistent crisis', which can 'undermine the ability of all countries, in particular, developing countries, to achieve sustainable development' (para. 25). Further, climate change is said to be 'one of the greatest challenges of our time (…) threatening food security and efforts to eradicate poverty and achieve sustainable development. In this regard we emphasize that adaptation to climate change represents an immediate and urgent global priority.' (para. 190)

Finally, the document states that 'that there are different approaches, visions, models and tools available to each country, in accordance with its national circumstances and priorities, to achieve

sustainable development in its three dimensions, which is our overarching goal. In this regard, we consider green economy in the context of sustainable development and poverty eradication as one of the important tools available for achieving sustainable development and that it could provide options for policymaking but should not be a rigid set of rules. We emphasize that it should contribute to eradicating poverty as well as sustained economic growth, enhancing social inclusion, improving human welfare and creating opportunities for employment and decent work for all, while maintaining the healthy functioning of the Earth's ecosystems.' (para. 56)

As it can be inferred, climate change is portrayed by the Rio+20 outcomes not as a dominant but rather as an interlinked policy objective, which presents as serious challenge and threat to sustainable development. The green economy, on the other hand, is reaffirmed as a policy concept providing alternatives and setting goals to pursue sustainable development, including moving towards a low carbon society. Finally, sustainable development was reaffirmed by the international community as an overarching goal, perhaps the broadest goal to be pursued at all levels of governance. It remains also as a recognized norm operating in international law (despite not being recognized as a customary IL principle) and informing the operation of its regimes. Viewed in these ways, these three issues can be seen as complimentary and mutually supportive.


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