

OTHER INTERNATIONAL DEVELOPMENTS

Elizabeth Haub Prize

2008 Prize for Environmental Law

As crisp autumn weather settled upon Stockholm, an intimate group of family, friends and colleagues gathered in the Spökslottet on 22 October, 2009 to confer the



Gustaf Lindencrona, Acting President of the International Jury
Courtesy: Stockholm University

Elizabeth Haub Prize for Environmental Law on Professor Laurence Boisson de Chazournes for her exceptional contribution to the development of international environmental law. Sponsored by the International Council of Environmental Law and Stockholm University, the ceremony proceeded as follows:

Introductory Statements

Prof. Gustaf Lindencrona opened with the following remarks:

"In my capacity as the Acting President of the International Jury for the Elizabeth Haub Prize for Environmental Law and former Vice-Chancellor of Stockholm University, it is my great pleasure to welcome you to this year's award ceremony for the Elizabeth Haub Prize for Environmental Law. It is the second year that the Prize is awarded in Stockholm. The agreement between Stockholm University and the International Council of Environmental Law for the transfer of the Prize from its original seat in Brussels to Stockholm was concluded in February 2008. No need to say that Stockholm University considers this

Prize as a very important and special international distinction. We are happy to have the possibility to provide a unique and special building for this important ceremony, the Haunted House or Scheffer's Palace. It was built in 1699 and bequeathed to Stockholm University in 1925. It harbours an important collection of ancient art in Stockholm, second only to that of the National Museum.

During the last 36 years, the Prize has been awarded to the most prominent environmental lawyers of the world. In this way, the Elizabeth Haub Prize has established itself as the most prestigious recognition of those who have contributed most through their exceptional accomplishments to the development of international environmental law. As has been the tradition for this Prize, the ceremony of each year is to award the Prize to the laureate of the previous year. The International Jury decided in November last year to award the 2008 Prize to a prominent expert of international environmental law, Professor Laurence Boisson de Chazournes from the University of Geneva. We are very pleased that she is with us today to receive her Prize.

Before giving the floor to Professor Lena Gerholm, Deputy Vice-Chancellor of Stockholm



Lena Gerholm, Pro-Vice-Chancellor of Stockholm University
Courtesy: Stockholm University

University for a welcome speech, I would like to inform you that the International Jury had its meeting this afternoon and reached a decision. To keep you in suspense I will inform you of that decision at the end of this ceremony. Now, I would like to invite Deputy Vice-Chancellor Gerholm to take the floor”.

Following applause, Professor Lena Gerholm, Pro-Vice-Chancellor of Stockholm University gave the following address:

“I am very pleased to welcome you to this year’s ceremony for awarding the Elizabeth Haub Prize for Environmental Law. We at Stockholm University are very glad to have been entrusted with the task of administering the Prize together with the International Council of Environmental Law.

The decision to move the seat of the Prize after 35 years from Brussels to Stockholm was a thoroughly premeditated one. Stockholm as the birthplace of one of the most fundamental documents in international environmental law, namely the 1972 Stockholm Declaration on Human Environment, and Stockholm University as the leading academic centre in the Nordic countries for environment-related research, explain the reason for this move.

Many of the institutions at Stockholm University have a long-standing and well established research tradition in the field of environment. These research projects used to be carried out predominantly within the Faculty of Natural Sciences. However, during the last two decades even social scientists, lawyers and researchers in humanities have intensively engaged themselves in projects relating to the environment. In the meantime, focus from individual research projects has been moved to more integrated, comprehensive and multi-disciplinary projects.

The University has established several centres of excellence when it comes to environmental research and education. Mention should particularly be made of the Stockholm Resilience Centre – a well-known trans-disciplinary centre with outstanding research on many of today’s environmental problems.

During the last few months, two important events have happened at our university. After several years of deliberations, Stockholm University formally decided to apply for the ECO-auditing registration. Given the size and the intensity of its activities, it will be a costly enterprise that is planned to be completed within six years. The other important piece of news relates to the decision of the Swedish Government to award a grant of 11 million kronor to the University’s excellent research programme on the marine environment. This was in hard competition with several other prominent academic centres.

When it comes to the Elizabeth Haub Prize, I must of course say a few words about the outstanding teaching and research programmes on environmental law at the Faculty of Law of Stockholm University. The elective course on international environmental law, which was given for the first time in 1988, was

one of the very first ones on that subject in Europe. The Department of Environmental Law, with five full-time researchers and over 100 students at various levels, is a modern and progressive academic centre for research and education on environmental law. The main areas of research are access to justice in environmental matters and public participation in environmental decisions.

It is my firm understanding that hosting the Elizabeth Haub Prize for Environmental Law will confirm even more than before the genuine interest for environmental matters that characterises all activities at Stockholm University. We look forward to close and long cooperation with the International Council for Environmental Law in administering this important prize”.

Prize Presentation

The laureate was then invited to the podium by Pro-Vice-Chancellor Gerholm who read the certificate



From left to right: Helga Haub, Wolfgang E. Burhenne, and Laurence Boisson de Chazournes
Courtesy: Stockholm University

conferring the prize upon Professor Laurence Boisson de Chazournes:

“In reaching its decision, the International Jury has noted Professor Laurence Boisson de Chazournes’ significant contributions to the development of international environmental law. This has been through her outstanding scholarship and teaching, her practical work in various international organisations and institutions including the World Bank, the World Health Organization, the United Nations Development Programme, the International Labor Organization and the United Nations Environment Programme, and her advisory role in several important international environmental law cases”.

Following conferment of the certificate, Dr Wolfgang E. Burhenne, as Executive Governor of the International Council of Environmental Law, bestowed the laureate with her solid gold medal. Helga Haub, in her capacity as Chair of the Karl-Schmitz-Scholl-Fonds and Elizabeth Haub Foundations then presented her with a cash prize to be used toward advancing efforts in environmental law.

Remarks to the Laureate

After vigorous applause, Dr Wolfgang E. Burhenne made the following remarks:

“Comme je n’ai pas eu le plaisir de travailler avec vous, je dépends de nos amis communs pour les remarques que je vais faire.

The interdisciplinary character of international environmental law is well-known. In Laurence’s case, she has been involved in several environment-related cases during her career where scientific, technical and economic questions were at the heart of reaching a legal solution. In one specific case – where there is little or no precedent – such as questions regarding the consequences of armed conflict, she was a member of the expert team that dealt with the obligations of the United Nations Claims Commission to settle compensation for environmental damages following the first Gulf War. Even in my journal *Environmental Policy and Law*, this team was referred to as an “array of top-rate international environmental lawyers”! This was the same for our friend Peter Sand who is here with us tonight.

During her tenure at the World Bank, a team consisting of Laurence and my friends Mohammed Beckhechi, Charles Di Leva and David Freestone was referred to by some as the “Dream Team”. I heard that during this time, although working on a wide range of issues and under great pressure, Laurence never lost her cool, was always smiling and was of course always immaculately dressed!

A mutual colleague told me that “Laurence brings not only scholarly talents to her work but also an impressive ability to network among those in the international and international environmental law communities”. It was added that “she knows everyone and is the ‘must see’ person to find out what is happening”.

I also learned with admiration that not only is she extraordinarily effective at networking and identifying experts on crucial subjects, but also extremely adept at selecting the best mixture of landscape and cuisine as an essential backdrop for successful meetings!

An additional colleague pointed out her fearlessness and independence of spirit. A perfect example of this was when she appeared for Samoa, led by Neroni Slade (a laureate of the Elizabeth Haub Award for Environmental Diplomacy) against the interests of her home country in proceedings before the International Court of Justice on the legality of the use of nuclear weapons.

Staying in touch with her academic roots, Laurence has made special efforts to develop the talents

of younger lawyers, including those from developing countries.

She has involved young scholars in specific cases before the International Court of Justice, as well as in preparing principles on ethical standards for counsel



The Laureate with her medal

Courtesy: Stockholm University

and advisers appearing before international courts and tribunals.

In conclusion, I hope that I have provided ample evidence for Laurence being honoured this evening. We have all learned that there is not only one person, but many people who admire and respect her, and are not only proud to be her colleague, but her friend as well!

Although I missed working with Laurence in previous years, I look forward to cultivating our relationship from now on.

Once again, congratulations! ”

Presentation by the Laureate

Following more applause, Professor Boisson de Chazournes was invited to the podium to deliver her remarks (printed in this issue on pages 293–298). Before beginning her address she said:

“It is a great privilege to be here tonight and I would like to thank the University of Stockholm and the International Council of Environmental Law. I feel very privileged to be awarded the Elizabeth Haub Prize. Some friends are present today and I would like to thank them. Some are present in spirit, I think in particular of

Edith Brown Weiss and Philippe Sands. I would also like to pay tribute to three of my mentors, Georges Abi-Saab of the Graduate Institute of International and Development Studies, Luigi Condorelli of the University of Geneva and the University of Firenze, and the late Ibrahim Shihata of the World Bank: each of them has taught me in his own way how legal method and legal reasoning can be used to grasp and order everyday international relations, and how the rule of law can bring an answer to social and political needs”.

Conclusion of the Ceremony

After more applause, Prof. Lindencrona thanked Prof. Boisson de Chazournes and all those in attendance for another wonderful ceremony amongst such impressive surroundings. He then announced that the International Jury had unanimously selected Donald W. Kaniaru as the winner of the 2009 Elizabeth Haub Prize for Environmental Law. The 2008 ceremony was officially closed and all participants proceeded to the reception. (ATL)



Environmental Treaties in Time

by Laurence Boisson de Chazournes*

A “treaty is not static, and is open to adapt to emerging norms of international law” when it contains “evolving provisions”,¹ to use the terms of the International Court of Justice in the *Gabčíkovo-Nagymaros* case. This is one of the many facets of the interpretation and application of treaties in the course of time. Treaties are undoubtedly facing a paradox in that they must be stable as well as flexible. It is interesting to note that the International Law Commission decided in 2008 to include in its programme of work the topic “treaties over time”.² What is at issue under this topic is the determination of how the evolution of facts and law is accommodated by treaty law, and consequently how to identify legal mechanisms that have been or must be established to allow treaties to adapt to new contingencies.

Sometimes compared to a “snapshot”,³ an international treaty might fail “to capture the important changes that occur over time”. As has been pointed out, “sometimes change is continuous; and other times, treaties may remain more or less the same for years, then begin a period of change”.⁴ Environmental issues are undoubtedly one of these areas in which change is continuous. The development and evolution of environmental treaties – as of all treaties – are influenced by factors which are mostly of an “extra-legal character”.⁵ Environmental treaties are more than other treaties conditioned by the evolution of scientific knowledge and the introduction of new technologies. Environmental treaties must be developed, updated and adapted to changing circumstances given that environmental and scientific knowledge is constantly expanding.⁶

In other words, environmental treaties are *per se* living legal “animals” in the meaning of Aristotle.⁷ They evolve over time. Their dynamic nature also forces other, non-environmental, treaties to evolve. Interpretation plays an important role in this respect. So does the principle of mutual supportiveness. Finally, treaty-based techniques such as the adoption of protocols and amendments, as well as the decisions of Conferences of the Parties, also serve to bring about the necessary adaptation. I will deal with each of these techniques in turn.

Treaty-based Procedures as Instruments for the Evolution of Environmental Treaties over Time

Environmental treaties have spawned several procedures which allow them to evolve and react dynamically to new needs.

The Adaptation of Environmental Treaties through the Adoption of Protocols

First, it is quite common that additional protocols to agreements are negotiated, in particular to treaties that were drawn up in the form of framework conventions. A framework convention establishes broad commitments for its parties and a general system of governance for a specific issue or area but does not provide for detailed obligations. The framework agreement design is particularly used in environmental law. From a policy as well as an effectiveness standpoint, as the parties to an environmental treaty may have difficulties to agree from the outset on an instrument that takes into account many diverse interests and to formulate specific commitments, they might prefer to agree on a framework first and leave the details to further negotiations than not to have any, not even basic, standards and principles that guide the subsequent negotiations.⁸

The function of protocols is thus to lay down more specific commitments, that find their basis in the parent framework agreement. In that respect, one of the primary functions of the initial framework convention is to establish procedures for subsequent protocols. Within this scheme, the framework convention is clearly the “beginning of an on-going law-making process”.⁹

Protocols can for example be adopted in order to add obligations for the parties, such as emission reduction commitments (*e.g.*, Montreal Protocol on Substances that Deplete the Ozone Layer), or to break down the larger problem tackled by the framework convention into “more manageable sub-issues”¹⁰ (*e.g.*, Protocols of the 1979 Convention on Long-Range Transboundary Air Pollution).

This being said, a so-called additional protocol can also play the role of another framework convention, as is

* Professor of International Law, University of Geneva. This lecture delivered on the occasion of the Haub prize-giving, page 290.

the case with the Kyoto Protocol.¹¹ It is to be recalled that an entirely new and complex regime dealing with climate change had to be elaborated and this endeavour started in the early 1990s. The framework climate change convention (UNFCCC) and the Kyoto Protocol are but two milestones in this endeavour, laying the foundation for a regime to be further developed. It is not yet clear which form the agreement for the post-2012 period will take. There are indications that tend to show that the general framework of regulation is yet to be consolidated, but how? The question is whether there is sufficient consensus among all parties for a further specification of commitments in the climate change area in a truly additional protocol, which would specify in detail the commitments to be followed.

The Adaptation of Environmental Treaties through Amendments

Amendments refer to the formal alteration or modification of existing treaty provisions.¹² In the absence of specific provisions concerning the amendment process in the treaty itself, Article 40 of the Vienna Convention on the Law of Treaties specifies the procedure to be followed.

The amendment process plays an important role for allowing the taking into account of changes of a scientific, economic or political nature. Consequently, almost all environmental treaties make express provision for a formal amendment procedure.¹³ The 1971 Ramsar Convention on Wetlands was a pioneering instrument in that regard, being one of the earliest examples of environmental treaties that established an amendment procedure.¹⁴ It must be noted, however, that no amendment procedure was foreseen in the original text of the Ramsar Convention. Such a mechanism was established almost 12 years after the conclusion of the Convention, during the 1982 meeting of the contracting Parties, which was dedicated to inserting a new provision into the Convention, an Article 10 *bis* dealing with the amendment procedure.¹⁵

The 1985 Vienna Convention for the Protection of the Ozone Layer has created new ways to amend treaties, an example which has been subsequently followed in other environmental agreements. It establishes the rules for its own amendment as well as that of any protocol taking "due account, *inter alia*, of relevant scientific and technical considerations".¹⁶ According to the 1985 Vienna Convention, if there is no consensus, amendments to the convention are to be adopted by a "three-fourths majority vote of the parties present and voting", whereas amendments to protocols require only a "two-thirds majority vote of the parties to that protocol present and voting". The difference between the amendment procedures of the Vienna Convention and its Montreal Protocol might be explained by the difference in nature of the obligations that are defined by these two instruments. Commitments contained in protocols are generally more precise and specific than those of the parent convention, and consequently need to be updated more frequently.

Most environmental treaties provide for amendment procedures, which are broadly similar. However, procedures of adoption and entry into force may vary from

one treaty to another. Amendments are only binding on the parties having accepted them.

Interestingly, the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer provides for an innovative alternative mechanism to formal amendments with the adoption of so-called adjustments by the Parties.¹⁷ The adjustment process allows for substantive changes in obligations, possibly more quickly than by any other treaty adaptation technique. An adjustment procedure "allows for changes when new information on environmental damage or technological options suggest that faster phase-out [of an ozone-depleting substance] is necessary or possible".¹⁸ Failing consensus, adjustments are adopted by a two-thirds majority of the Parties present and voting which represent at least 50 percent of the total consumption of the controlled substances. Adjustments are then binding on all Parties without the possibility of objection. To date, the Montreal Protocol has been amended on four occasions (London 1990,¹⁹ Copenhagen 1992,²⁰ Montreal 1997²¹ and Beijing 1999),²² whereas it has been adjusted six times (during the Second, Fourth, Seventh, Ninth, Eleventh and Nineteenth Meetings of the Parties).²³

Let us take the London 1990 Amendments as an example of important changes being introduced by the amendment technique.²⁴ The Preamble of the protocol was amended to include a reference to the need to take into account the "developmental needs of developing countries", the provision of "additional financial resources and access to relevant technologies". The definitions of "controlled substances" and "production" contained in the treaty were also amended, and a definition of "transitional substances" was introduced.²⁵

The last adjustment to the Montreal Protocol, which was agreed at the Nineteenth Meeting of the Parties (2007), was aiming to accelerate the phase-out of production and consumption of hydrochlorofluorocarbons (HCFCs) and to encourage Parties to promote the selection of alternatives to HCFCs that minimise environmental impacts, in particular impacts on climate, as well as meeting other health, safety and economic considerations. This adjustment entered into force on 14 May 2008.²⁶

The Adaptation of Environmental Treaties through Annexes

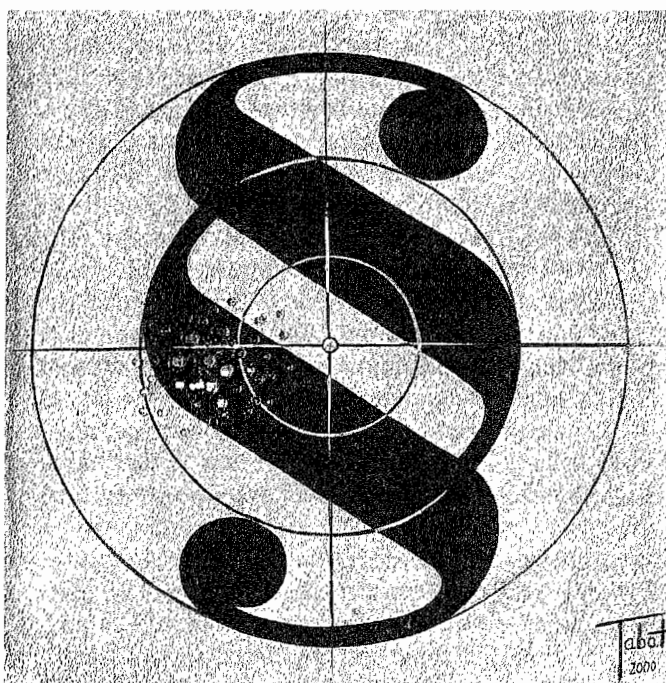
Unlike adjustment, amendment or protocol processes, the purpose of annexes is not to add or modify the obligations of the parties to an agreement, but is to "provide technical detail that fleshes out the terms in the treaty, such as generic references to regulated substances or applicable procedures".²⁷

However, although annexes aim to clarify "technical details", they may play an important role in broadening and adjusting the scope of application of a treaty. For example, annexes to the Montreal Protocol contain lists of regulated substances. Consequently, if the annex is enlarging, it will have the effect of significantly increasing the scope of the obligations contained in the protocol text itself.²⁸ The same can be said about Annex I (industrialised countries and economies in transition) and Annex II (developed

countries which pay for costs of developing countries) of the UNFCCC, which respectively identify the Parties that undertook to stabilise greenhouse gas emissions and the Parties that are obliged to provide financial resources and other forms of assistance to developing countries Parties.

Annexes are binding on all parties, except for the parties which have notified their non-acceptance. An opt-out technique is thus used. Amendments to annexes are subject to the same rules. As with adjustments, one can note the virtues of the annex technique for adjusting a said treaty to new needs and developments without going through the traditional treaty-law techniques based on the expression of the consent to be bound.

The treaty and its annexes as a whole form an evolving instrument. While the technical character of annexes may lead one to consider them as less important, the role of annexes should not however be underestimated.



The target

Courtesy: Uwe Tabat

Annexes are for example taken into account by judges for the interpretation of environmental treaties. In the OSPAR Convention case (*Ireland v. United Kingdom*),²⁹ the terms of the treaty were interpreted in the light of the convention's articles and of the five annexes, which were read as forming a whole.³⁰

The Adaptation of Environmental Treaties through the Decisions of the Conferences of the Parties

Secondary legislation also plays a key role in the building of an environmental regime.³¹ In some instances, specific provisions of an environmental treaty enable the Conference of the Parties to adopt new rules. For example, Article 17 of the Kyoto Protocol authorises the Conference of the Parties to adopt rules regarding the operation of the system for trading in emissions of greenhouse gases. The Conference of the Parties of the Kyoto Protocol is also responsible for defining the relevant principles,

modalities, rules and guidelines, in particular for verification and reporting.

Through the supervisory and regulatory powers of the Conference of the Parties, the parties are in a position to respond to new problems and priorities through new forms of regulation. The legal profile and the effects of decisions of Conferences of the Parties are subject to different interpretations, although no-one denies that they produce legal effects, whether as an interpretative instrument or from a law-making viewpoint. In the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case which is pending before the International Court of Justice, several references were made to the decisions of the Conferences of the Parties to the Biodiversity Convention and the Ramsar Convention. It will be interesting to see if and how the Court will refer to them.³²

The binding effect of decisions of Conferences of the Parties is beyond doubt, when provided for by the primary treaty instrument. However, beyond the bindingness issue *per se*, which is linked to each specific regime, Conference of the Parties' decisions produce other types of legal effects. They play a crucial role in shaping and building common understandings of principles, norms and standards. In addition, a Conference of the Parties plays a key role as trustee of a regime. It constitutes a framework which provides (political) legitimacy to the process of evolving interpretation.

The Adaptation of Environmental Treaties through the Role Played by Subsidiary Bodies

Although the role played by Conferences of the Parties, as the "supreme bodies" of environmental treaties, is crucial for the adaptation of treaties in time, the function of subsidiary bodies should also not be underestimated. These bodies give advice to the Conference of the Parties and each has a specific mandate. Such bodies may be established by the convention, or may be created at a later stage by a Conference of the Parties.

In this context the role played by scientific bodies is particularly interesting as a means to inform the decision-making process and the evolving interpretation of a said treaty. For example, the Subsidiary Body for Scientific and Technological Advice (SBSTA)³³ of the UNFCCC provides the Conference of the Parties with advice on scientific, technological and methodological matters. The Convention on Biological Diversity also has a Subsidiary Body on Scientific, Technical and Technological Advice (SBSTTA),³⁴ which has *mutatis mutandis* a similar mandate.³⁵

The role of non-compliance mechanisms should also be highlighted. In exercising their function, they contribute to the reinforcement of the understanding of the content of obligations, as well as somehow to their development.³⁶ This is even more so when these mechanisms present strong jurisdictional features as is the case with the procedures and mechanisms relating to compliance under the Kyoto Protocol.³⁷

Besides treaty-based procedures, there are other means for treaties to be adjusted over time. ➡

About Evolving Interpretation: The Environmental "Contamination" of Other Treaties and the Self-contamination Effect of Environmental Treaties

Like for other treaties, when a problem concerning the meaning of a term or an expression of an environmental treaty arises, interpretation may help to resolve the issue. Subsequent practice and relevant rules of international law play an important role, as set out by Article 31 (3) of the Vienna Convention on the Law of Treaties.³⁸

The adaptation of a treaty to contemporaneous norms through judicial interpretation has become a classical feature. One of the interpretative methods used by judges is to interpret a particular treaty with regard to other norms of international law, to go beyond the interpreted treaty in placing it in its context and in a temporal perspective.³⁹ In recent years, we have seen a clear willingness of international courts and tribunals to have regard to rules of international environmental law, while interpreting another treaty with the help of the rule of interpretation of Article 31 (3) of the Vienna Convention.⁴⁰ This shows the important function environmental treaties fulfil as a source for interpretation of other treaties. For example, the International Court of Justice, in the *Gabčíkovo-Nagymaros* case, has pointed out that "such new (environmental) norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past".⁴¹ The WTO Appellate Body in the case of *US – Import Prohibition of Certain Shrimp and Shrimp Products* considered that Article XX (g) of the GATT 1994 must be interpreted "in the light of contemporary concerns of the community of nations about the protection and the conservation of the environment".⁴² Taking into account the evolution in the area of technology and the appearance of new standards and practices also played a role in the interpretation of a treaty dating back to 1839 in the *Iron Rhine Railway* case.⁴³ The International Court of Justice has recently followed the same interpretative path with respect to a treaty concluded in 1858 in its decision concerning the dispute regarding navigational and related rights (*Costa Rica v. Nicaragua*).⁴⁴

All these cases illustrate the use of principles of international environmental law in the interpretation of a treaty, and this is especially due to the adoption of a large number of environmental treaties since the early 1970s. Principles of environmental law derived from environmental treaties are now considered as forming a part of the "background of the general principles of international law".⁴⁵ This trend towards "systemic integration" implies that a treaty must be deemed to "refer to such principles for all questions which it does not itself resolve expressly and in a different way".⁴⁶

The issue of interpretation pursuant to the rule of Article 31 (3) of the Vienna Convention also arises with respect to environmental treaties. There is a sort of environmental self-contamination effect. Environmental treaties sometimes contain words or notions for which States could not reach an agreed definition or for which no definition was considered necessary at the time of their

negotiation.⁴⁷ Furthermore, the definition of the same word may differ from one convention to another.⁴⁸ There are, for example, different definitions of the notion of "pollution" in the 1979 Convention on Long-range Transboundary Air Pollution or in the 1982 United Nations Convention on the Law of the Sea. In that context, interpretation methods as foreseen in Article 31 of the Vienna Convention may play an important role in harmonising the interpretation of environmental treaties and avoiding contradictions among them. The reference to generic notions such as the notions of standards and best practices in several environmental treaties also leaves room for the technique of evolving interpretation.

It is interesting to note in this context that some environmental treaties have foreseen this need for adaptation through a specific interpretative technique. The Conference of the Parties of a treaty has in some cases been specifically endowed with interpretative powers. The Montreal Protocol on the Ozone Layer, for example, in its Article 10(1), has authorised the Meeting of the Parties to interpret the term "agreed incremental costs" by establishing "an indicative list of incremental costs".⁴⁹ In these cases, the interpretation given by a Conference of the Parties, when it is authorised by a treaty, is clearly intended to be legally binding.

Even if a treaty does not expressly mandate a Conference of the Parties to give an authoritative interpretation to a treaty, the treaty body is not necessarily prevented from doing so. For example, the CITES Conference of the Parties has adopted interpretations of the provisions of the Convention relating to the conditions of the entry into force of amendments⁵⁰ or to the criteria for amending the appendices.⁵¹ The Consultative Meeting of the Parties of the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter has done so with respect to the definition of "dumping" under the Convention by deciding that the term covers "the disposal of (...) waste into sub-sea-bed repositories accessed from the sea",⁵² but not from land by tunnelling.

Mutual Supportiveness between Environmental Treaties and Other Treaties: About Mutual Adjustments in Time

Environmental treaties and other international agreements are part of international law as a legal system. These different bodies of law cannot operate in clinical isolation from each other. The evolution of environmental treaties in time has generated a process of "accretion"⁵³ through which other international treaties have to adapt themselves by incorporating environmental norms and principles. Such an adaptation is based on the principle of mutual supportiveness.

The principle of mutual supportiveness gives a special dynamic and rationale to the interface between environmental treaties and other international agreements.⁵⁴ Mutual supportiveness excludes the very idea of conflict between environmental treaties and other international agreements. It means that while focusing on their own tasks and competencies, environmental treaties and other treaty regimes should be applied and interpreted in a

coherent manner. What does coherence imply in the light of the principle of mutual supportiveness? The answer is a complex one, but can be summarised as follows: the fact that environmental treaties and other treaty regimes should each focus on their primary competence does not mean that non-environmental treaties cannot deal with principles and rules that affect the environment. At the same time, environmental treaties are not, and should not, be prevented from including rules and principles that affect for example, trade. Rules and principles on international trade may indeed affect environment and health; similarly, environmental treaties may have an impact on trade. Therefore, whilst each regime should focus on its primary competence, it is not prevented from adopting measures which affect the other regime. However, the concerns and interests of each regime should be taken into account by the other one and deference should be paid to the primary competence of either regime. Mutual supportiveness thus implies mutual adjustment between environmental treaties and other treaties.

The legal drafting of mutual supportiveness clauses varies depending on the instrument at stake. For instance, the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC Convention) and the 2000 Cartagena Protocol on Biosafety to the CBD recognise “that trade and environmental policies *should be* mutually supportive with a view to achieving sustainable development”. The 2001 Stockholm Convention on Persistent Organic Pollutants (POPs) goes further and is much more affirmative when recognising that the POPs Convention “and other international agreements in the field of trade and the environment *are* mutually supportive”. Some other treaties, such as the 2001 International Treaty on Plant Genetic Resources for Food and Agriculture, stress the need for a “synergy” between environmental treaties and other international agreements.

In the light of these provisions, mutual supportiveness appears to be the key which would enable different treaty regimes to pass through the same door, that of sustainable development. For the time being, the principle of mutual supportiveness has not been implemented on a large scale outside environmental treaty regimes or with regard to the relationship between environmental and non-environmental treaties.⁵⁵ However, looking carefully at the practice of the WTO dispute-settlement bodies, one cannot ignore the “spirit” of mutual supportiveness which seems to inspire some reports. Let us recall the decision of the Appellate Body in the *Brazil – Tyres* case. There the Appellate Body clearly recognised that “certain complex public health or environmental problems may be tackled only with a comprehensive policy comprising a multiplicity of interacting measures. In the short term, it may prove difficult to isolate the contribution to public health or environmental objectives of one specific measure from those attributable to the other measures that are part of the same comprehensive policy. Moreover, the results obtained from certain actions – for instance, measures adopted in order to attenuate global warming and climate change, or certain preventive actions to reduce the inci-

dence of diseases that may manifest themselves only after a certain period of time – can only be evaluated with the benefit of time”.⁵⁶ In my view, this acknowledgment of the complexity and of the importance of time in environmental questions by the Appellate Body should play a vital role in building bridges between environmental treaties and other international treaties such as trade agreements. The “sustainable” future of mutual supportiveness may perhaps depend on a sort of informal integration of that principle but with a formal purpose which is to strengthen the ties between environmental treaties and other international agreements through mutual adjustments.

Concluding Remarks

Environmental treaties are truly living instruments. The lifespan of many of these instruments has been relatively short thus far, but this has not prevented them from absorbing, through various legal techniques, new scientific, technological, economic and political considerations. Equally remarkable is the role environmental treaties play in the interpretation of other treaties and thus, by the same token, contribute to their “environmental modernization”. The adoption of environmental treaties also pushes existing treaties towards mutual supportiveness and thus to adjustment and adaptation to new environmental needs. Environmental treaties most certainly have a life of their own, with endogenous dynamic features, while serving as a driving force for the interpretation and adaptation of other treaties.

Are environmental treaties unique in this respect? The answer is “yes” and “no”. Human rights treaties have also been characterised as “living instruments”, for instance by the European Court of Human Rights.⁵⁷ However their capacity for change and adaptation is mostly driven by the courts, both domestic and international.

What is particularly striking in the case of environmental treaties is the crucial role of political forces and treaty institutions in handling the treaty mechanisms for change and adaptation. The interface between law and science also plays a key role. International law cannot but adjust itself to new scientific developments. The drafters of environmental agreements were seemingly of the view that adjustment in this area is an issue of legitimacy and accountability and should therefore be in the hands of Conferences of the Parties and other treaty bodies. These bodies were granted different treaty techniques to that end. As stated earlier, these political and legal adjustments are important as they feed the interpretative process of both environmental treaties and non-environmental treaties. In effect, courts and tribunals play an important role in mainstreaming them. The International Court of Justice as well as other courts and tribunals, by their judgments, support this evolutive process.

Notes

1 *Gabčíkovo-Nagymaros Project (Hungary v. Slovakia)*, Judgment, *I.C.J. Reports*, 1997, para. 112, p. 68.

2 See Annex A to the International Law Commission's Report of the Sixtieth Session (2008) A/63/10, available at <http://untreaty.un.org/ilc/reports/2008/2008report.htm>. ➤

- 3 Brown Weiss, E., 1998, "The Five International Treaties: A Living History", in: Brown Weiss, E. and Jacobson, H.K. (Eds), *Engaging Countries, Strengthening Compliance with International Environmental Accords*, Cambridge MA: The MIT Press, p. 157.
- 4 *Ibid.*
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- 46 McLachlan, *ibid.*
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- 49 Article 10 (1) of the Montreal Protocol (as amended in 1990): "The Parties shall establish a mechanism for the purposes of providing financial and technical co-operation, including the transfer of technologies, to Parties operating under paragraph 1 of Article 5 of this Protocol to enable their compliance with the control measures set out in Articles 2A to 2E and Article 2I, and any control measures in Articles 2F to 2H that are decided pursuant to paragraph 1 *bis* of Article 5 of the Protocol. The mechanism, contributions to which shall be additional to other financial transfers to Parties operating under that paragraph, shall meet all agreed incremental costs of such Parties in order to enable their compliance with the control measures of the Protocol. *An indicative list of the categories of incremental costs shall be decided by the meeting of the Parties*" (emphasis added).
- 50 Resolution 4.27 (April 1983) of the CITES Conference of the Parties: "The Conference of the Parties to the Convention recommends that the meaning of Article XVII, paragraph 3, of the Convention be interpreted in its narrow sense so as to mean that the acceptance of two-thirds of the Parties at the time of the adoption of an amendment is required for the coming into force of such amendment". Available at: <http://www.cites.org/eng/res/all/04/E04-27.pdf>.
- 51 Resolution 9.24 (November 1994) of the CITES Conference of the Parties. Available at: <http://www.cites.org/eng/res/all/09/E09-24R14.pdf>.
- 52 London Consultative Meeting of the Parties Res. LDC.41 (13) (1990) reprinted in "International Organisations and the Law of the Sea" (1990) *Documentary Yearbook*, p. 332. Available also at: [http://www.imo.org/includes/blastDataOnly.asp/data_id%3D15967/LDC41\(13\).pdf](http://www.imo.org/includes/blastDataOnly.asp/data_id%3D15967/LDC41(13).pdf).
- 53 "The current range of international legal obligations benefits from a process of accretion and cumulation [...]", *Southern Bluefin Tuna Case, Australia and New Zealand v. Japan*, Award on Jurisdiction and Admissibility, August 4, 2000, rendered by the Arbitral Tribunal constituted under Article VII of the United Nations Convention on the Law of the Sea, para. 52, available at: <http://worldbank.org/icsid/bluefintuna/award080400.pdf>.
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- 55 However see Article 20 of the Convention on the Protection and Promotion of the Diversity of Cultural Expressions which states: "Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster *mutual supportiveness* between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention. 2. Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties".
- 56 AB-2007-4, 3 December 2007, Report of the Appellate Body, para. 151, p. 60. Available at: [http://www.worldtradelaw.net/reports/wtoab/brazil-tyres\(ab\).pdf](http://www.worldtradelaw.net/reports/wtoab/brazil-tyres(ab).pdf).
- 57 According to the Court, the European Convention on Human Rights is "a living instrument which must be interpreted in light of present-day conditions" (*Tyrer v. United Kingdom*, 25 April 1978, Series A, No. 26, 2 EHRR 1, para. 31). More recently see *Selmouni v. France*, 28 July 1999, Reports 1999-V and *Leyla Şahin v. Turkey*, Grand Chamber, 10 November 2005, ECHR 2005-XI.

