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LETTER FROM THE EDITORS

Dear Reader,

We welcome you to read the 2019 volume of the ELSA Law Review (ELR). The ELSA Law Review is a student-edited and peer-reviewed journal publishing contemporary pieces contributing to the legal debate. The current volume coincides with the 30th anniversary of the publication of the inaugural issue in 1989. 1989 was a tumultuous time for Europeans as the world that aspiring lawyers of that era knew underwent realignment. The ELSA Law Review's earliest volumes reflect this as they chronicled the controversies of legal systems that no longer exist 30 years on. Browsing through the wealth of articles published allows us to reflect on that time's critical junctures in human rights law and juxtapose them with the issues that law students and young lawyers are preparing to tackle today.

This publication is being prepared at a time that is no less tumultuous, as the world combats unprecedented crises of public health and climate change. Such crises present threats which undermine the rule of law and respect for human rights, principles on which the hundreds of thousands of previous and current members and European Law Students' Association (ELSA) have built their common platform. Reflecting on the world's pressing challenges and emboldened to amplify the voices of Europe's future lawyers, the Editorial Board wanted to honour two important initiatives within ELSA; the strong commitment to human rights as well as ELSA's International Focus Programme, which in 2019 raised awareness on environmental law. Hence, the 2019 ELSA Law Review features submissions on human rights law and on environmental law

The pieces featured in this ELR have been carefully chosen by the Editorial Board to allow the reader an interesting journey through the interplay between human rights and the environment as well as supplying an opportunity to analyse areas of these fields individually. The scene is set in the first piece, submitted by Natalia Kobylarz from the European Court of Human Rights. The article analyses human rights aspects of environmental litigation and highlights the importance of the Court in this field. With this understanding in mind, the second piece explores the field of human rights law deeper by examining the extent of human rights protection when it comes to freedom of expression for advertisers. The final human rights focussed piece explores the standards of extraditions as set out in the cases of the Court in order to draw larger conclusions regarding access to justice. Following this, the 2019 ELSA Law Review moves to the analysis of environmental law. In its fifth piece, the

relation between international investment law and environmental law is explored and it is concluded that the soft control mechanisms offered are not sufficient. Subsequently, the reader is invited to learn further about how regulation of aviation emissions can be utilised to reach environmentally positive change. In its final piece, the 2019 ELSA Law Review moves the focus away from Europe in analysing Japan's official withdrawal from the International Convention on the Regulation of Whaling.

We would like to thank the entire Editorial Board without whom this ELSA Law Review would have not been put together. Firstly, the Articles Editors, Maria Sofia Lourenco Ferreira and Ljubica Kaurin, who revised and recommended submissions for publication. Secondly, our Linguistic Editor, Madeleine Geerarts, whose keen eye for detail has improved the consistency and quality of the review. Finally, our Publications Editor, Nikoleta Symela Mavromati, who works eagerly on marketing the ELSA Law Review to external and ensuring its recognition.

We would, furthermore, like to extend gratitude to the partners of the ELSA Law Review. Academics from Católica Global School of Law have performed peer-review on all shortlisted submissions, and their expertise and guidance has been invaluable. Wolf Publishers has assisted us in the publication phase, and we have befitted greatly from the knowledge of Willem-Jan van der Wolf.

We hope you enjoy reading the 2019 ELSA Law Review, and we look forward to seeing what the next decade brings for the academic world.

Kind regards,

Sarah Ikast Kristoffersen
Editor in Chief

&

Hendrik Daði Jónsson
Deputy Editor in Chief

CONTRIBUTION FROM THE COUNCIL OF EUROPE – ELSA'S HUMAN RIGHTS PARTNER

On the following page, you will find an article submitted by ELSA's Human Rights Partner, the Council of Europe. ELSA has had a Human Rights Partnership with the Council of Europe since 2008 and conducts several activities in collaboration with the Council of Europe including an annual webinar, a human rights moot court competition and legal research reports.

The article below is drafted by Natalia Kobylarz who is a senior lawyer at the Registry of the European Court of Human Rights. Ms Kobylarz conducted a webinar with ELSA in 2019 in connection with ELSA's International Focus Programme on Environmental Law and subsequently submitted the article below.

The Editorial Board of the ELSA Law Review appreciates the collaboration with the Council of Europe and thank Ms Kobylarz for the article.

THE EUROPEAN COURT OF HUMAN RIGHTS, AN UNDERRATED FORUM FOR ENVIRONMENTAL LITIGATION

Natalia Kobylarz*

Abstract

The ECHR organs have examined, since the 1960s, over 270 applications related to the protection or the degradation of the natural environment. The article offers a selective, systematised and up-to-date analysis of this vast body of case law and of applications pending the Court's examination. It explores the implications of the ECHR general principles for environmental litigation, in particular, the notions of "direct victim", "serious specific and imminent danger", "minimum level of disturbance", and "wide margin of appreciation". Whenever warranted, it applauds the Court's acceptance of surrogate protection of the environment through civil and political rights and the doctrine of positive obligations, or voices criticism of its conservative approach to giving precedence to economic considerations over environmental harm. The article then takes a forward-looking view on the work of the ECtHR, focusing on its dynamic and evolutive approach to the interpretation of the scope of the ECHR-protected rights and the cross-fertilisation of ideas which is occurring between the ECtHR and the IACtHR. The article ultimately predicts that wise and widespread environmental litigation can make the ECtHR start to employ ecological rationality in explaining the value of nature in cases in which its protection paradoxically seems to collide with conventionally-perceived anthropocentric rights.

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1. Introduction

The European Convention on Human Rights ("the ECHR" or "the Convention") does not guarantee a substantive right to a healthy environment[1] , and none of its provisions are specifically designed to ensure the general protection or the preservation of nature.[2] However, the link between the environment and human rights intrinsically exists.

The theoretical bedrock of this assertion was laid down in the 1972 Stockholm Declaration on the Human Environment and was developed over the years by various authorities, including the Inter-American Court of Human Rights ("IACtHR") in its most recent Advisory Opinion on the Environment and Human Rights.[3] A thriving natural environment is, therefore, a precondition to the enjoyment of human rights; human rights law can be used as a tool to address environmental issues from both a substantive and procedural stance;[4] both are necessary for sustainable development.[5]

This nexus is also clearly manifested in the practice of the ECHR organs which have regularly been seized to respond to grievances related to the protection or the degradation of the natural environment. Since the 1960s,[6] the European Court of Human Rights ("the ECtHR" or "the Court") and the previously existing European Commission of Human Rights, has issued, by the author's count, approximately 270 such environment-related

[1] Recommendations have been made to the member states of the Council of Europe (via the Council of Europe's Committee of Ministers) that an additional protocol to the ECHR be drawn up to create the right to a healthy environment as a basic human right and to enhance the environmental protection through procedural rights as set out in the Aarhus Convention (see, Recommendations of the Council of Europe's Parliamentary Assembly nos. 1431 (1999); 1614 (2003), 1883 (2009) and 1885 (2009)). The Committee of Ministers has invariably considered such an additional protocol redundant since the ECHR system already indirectly contributes to the protection of the environment through existing Convention rights and their interpretation in the evolving case law of the ECtHR.

[2] *Inter alia*, *X. v. Federal Republic of Germany* (dec.), no. 7407/76, 13 May 1976; *Kyrtatos v. Greece*, no. 41666/98, § 52, ECHR 2003-VI; *Hamer v. Belgium*, no. 21861/03, § 79, ECHR 2007-V (extracts); *Turgut and Others v. Turkey*, no. 1411/03, § 90, 8 July 2008; and *Dubetska and Others v. Ukraine*, no. 30499/03, § 105, 10 February 2011.

[3] Corte Interamericana de Derechos Humanos, Opinión Consultiva OC-23/17 "Obligaciones estatales en relación con el medio ambiente en el marco de la protección y garantía de los derechos a la vida y a la integridad personal – interpretación y alcance de los Artículos 4.1 y 5.1, en relación con los artículos 1.1. y 2 de la Convención Americana Sobre Derechos Humanos, §§ 47-70, del 15 de noviembre 2017.

[4] Manual on human rights and the environment, 2nd edition, 2012, Council of Europe Publishing, p. 8.

[5] Transforming our world: the 2030 Agenda for Sustainable Development, Resolution adopted by the General Assembly on 25 September 2015.

[6] The first environment-related case, Schmidt v. Federal Republic of Germany (dec.), no. 715/60, was decided by the Commission on 5 August 1960.

rulings. Some of these constitute foundational pronouncements of new principles which allow human rights law – which is traditionally ignorant of any environmental considerations - to address contemporary planetary conundrums.[7] Others are day-to-day decisions which test these legal precedents in a wide range of real-life circumstances and which offer solutions to often systemic or repetitive problems.[8] All in all, these environment-related rulings prove that the European system of human rights protection efficiently safeguards the environment by proxy of first-generation human rights, the scope of which is constantly evolving[9] and which are recognised as being interdependent and indivisible from economic and social rights.[10]

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7 *Inter alia*, *López Ostra v. Spain*, 9 December 1994, Series A no. 303-C, concerning lack of response to pollution caused by a waste-treatment plant operating without licence; *Guerra and Others v. Italy*, 19 February 1998, Reports of Judgments and Decisions 1998-I, concerning failure to provide local population with information about risks of accident at a nearby chemical factory and about possible emergency procedures; *Chassagnou and Others v. France* [GC], nos. 25088/94 and 2 others, ECHR 1999-III, concerning obligation of land-owners to allow hunting on their property and obligatory membership of hunting associations; *Hatton and Others v. the United Kingdom* [GC], no. 36022/97, ECHR 2003-VIII, concerning noise nuisance due to night flies operated at Heathrow Airport; *Öneryıldız v. Turkey* [GC], no. 48939/99, ECHR 2004-XII, concerning loss of life and property resulting from an accidental explosion at a rubbish tip close to illegal shanty town; *Taşkın and Others v. Turkey*, no. 46117/99, ECHR 2004-X, concerning pollution due to sodium cyanide leaching used for gold extraction from a mine located in an earthquake zone, operating under invalidated permit; *Fadeyeva v. Russia*, no. 55723/00, ECHR 2005-IV, concerning failure to resettle a family living in a severely polluted area and to design or apply effective measures to reduce industrial pollution; *Giacomelli v. Italy*, no. 59909/00, ECHR 2006-XII, 2 November 2006, concerning lack of prior EIA and failure to suspend unlawful operation of a waste plant generating toxic emissions; and *Tătar v. Romania*, no. 67021/01, 27 January 2009, concerning failure to assess risks and consequences of hazardous industrial activity of gold and silver mining with sodium cyanide and to keep the public informed.

8 *Inter alia*, *Nikas and Nika v. Greece*, no. 31273/04, 13 July 2006, concerning revocation of exemption from reforestation without summoning affected land owners of farming land unsuitable for forestation, implying prohibition of future construction, and lack of suspensive effect of judicial review; *Ledyayeva and Others v. Russia*, nos. 53157/99, 53247/99, 53695/00 and 56850/00, 26 October 2006, similar to *Fadeyeva*, cited above; *Şatır v. Turkey*, no. 36192/03, 10 March 2009, concerning revocation of title to private land without compensation on grounds that it was part of public forest estate; *Kolyadenko and Others v. Russia*, nos. 17423/05 and 5 others, 28 February 2012, concerning loss of home and property and risk to life resulting from a flash flood caused by opening, without warning, of reservoir during heavy rain; *Frank Eckenbrcht and Heinz Ruhmer v. Germany* (dec.), no. 25330/10, 10 June 2014, concerning noise nuisance from Lepizig Halle Airport; and *Cuenca Zarzoso v. Spain*, no. 23383/12, 16 January 2018, concerning noise and night-time disturbances from private bars in Valencia.

9 *Inter alia*, *Marckx v. Belgium*, 13 June 1979, § 41, Series A no. 31 and *Stafford v. the United Kingdom* [GC], no. 46295/99, § 68, ECHR 2002-IV.

10 Separate opinion of Judge Pinto de Albuquerque in *Konstantin Markin v. Russia* [GC], no. 30078/06, ECHR 2012 (extracts), and IACtHR's OC 23-17, cited above § 57.

2. Overview of the Environment-related Case Law of the Court

The largest group of the environment-related judgments and decisions delivered by the ECHR organs, numbering well over 100, concerns the balancing of states' ecologically sound policies with individuals' rights to the peaceful enjoyment of property or respect for home and private and family life. Cases in this group arose out of measures such as the expropriation of private land or the demolition of dwellings in areas of protected coastline in Turkey,[11] or in areas designated for reforestation in Greece.[12] They also concern restrictions put in place by the governments of various European States to ensure a sustainable use of natural resources[13] or the protection of endangered species[14] and biological diversity.[15]

The remaining cases illustrate the other side of the coin - that is to say, ecologically unfriendly operations and urban development resulting in pollution, environmental disasters, occupational illnesses or nuisance in so far as they may threaten the right to life or the right to respect for home and private and family life. Thus, the Court has ruled forty-five times in respect of: toxic emissions caused by the operation of nuclear plants and power stations, for example, in Switzerland[16] and Georgia;[17] factories and smelters, mainly in Italy[18] and Romania;[19] gold and coal mines in Turkey[20] and Ukraine;[21] and of waste-treatment plants or dumpsters, in Italy[22], Norway[23] and Spain.[24] One group of ten cases

[11] *N.A. and Others v. Turkey*, no. 37451/97, ECHR 2005-X.

[12] *Papastavrou and Others v. Greece*, no. 46372/99, ECHR 2003-IV.

[13] *Pindstrup Mosebrug A/S v. Denmark* (dec.), no. 34943/06, 3 June 2008.

[14] *Paratheristikos Oikodomikos Synetairismos Stegaseos Ypallilon Trapezis Tis Ellados v. Greece*, no. 2998/08, 3 May 2011.

[15] *Annika Jacobson v. Sweden* (dec.), no. 59122/08, 22 May 2012; *Valle Pierimpiè Società Agricola S.P.A v. Italy*, no. 46154/11, 23 September 2014; and *O'Sullivan Mc Carthy Mussel Development Ltd v. Ireland*, no. 44460/16, 7 June 2018.

[16] *Balmer-Schafroth e.a v. Switzerland* [GC], no. 22110/93, 26 August 1997 and *Athanassoglou and Others v. Switzerland* [GC], no. 27644/95, ECHR 2000-IV.

[17] *Jugheli and Others v. Georgia*, no. 38342/05, 13 July 2017.

[18] *Guerra and Others*, cited above; *Smaltini v. Italy* (dec.), no. 43961/09, 24 March 2015; and *Cordella and Others v. Italy*, no. 54414/13 and *Lina Ambrogi Melle and Others v. Italy*, no. 54264/15, 24 January 2019.

[19] *Băcilă v. Romania*, no. 19234/04, 30 March 2010.

[20] *Taşkın and Others*, cited above; *Öçkan and Others v. Turkey*, no. 46771/99, 28 March 2006; *Lemke v. Turkey*, no. 17381/02, 5 June 2007; and *Genç and Demirgan v. Turkey*, nos. 34327/06 and 45165/06, 10 October 2017.

[21] *Dubetska and Others*, cited above.

[22] *Giacomelli*, cited above and related, *Di Sarno and Others v. Italy*, no. 30765/08, 10 January 2012.

[23] *Moe and Others v. Norway* (dec.), no. 30966/96, 14 December 1999.

[24] *López Ostra*, cited above.

concerns environmental disasters - natural and human-made - such as flash floods[25] or the explosion of methane generated by decomposing refuse in a city landfill.[26] The Court has also examined eight applications brought by people from countries such as the United Kingdom, France and Malta who claimed to be the victims of nuclear or military gas tests,[27] or who worked with hazardous substances.[28] A group of close to sixty rulings concern nuisance (mainly noise, smell or general disturbance) resulting from urban development. These cases range from judgments on the inconveniences of large-scale airport traffic across Europe[29] to more trivial problems such as fireworks displays in Malta[30] or the operation of private night bars in residential areas in Spain.[31]

An analysis of the Court's environment-related case law would not be complete without the last group of over forty judgments and decisions concerning various forms of ecological activism. These were mainly argued under the right to exercise free speech,[32] freedom of assembly[33] or under procedural rights to obtain information[34] or judicial review of policies threatening the environment.[35]

On top of this, dozens of communicated and newly registered applications concerning the environment are currently pending before the Court.[36] Many of these involve sizeable

[25] *Murillo Saldias and Othes v. Spain* (dec.), no. 76973/01, 28 November 2006; *Kolyadenko and Others*, cited above and related, *Hadzhiyska v. Bulgaria* (dec.), no. 20701/09, 15 May 2012.

[26] *Öneryıldız*, cited above.

[27] *Tauria and 18 others v. France* (dec.), no. 28204/95, 4 December 1995; *McGinley and Egan v. the United Kingdom*, 9 June 1998, Reports of Judgments and Decisions 1998-III; *L.C.B. v. the United Kingdom*, 9 June 1998, Reports of Judgments and Decisions 1998-III; and *Roche v. the United Kingdom* [GC], no. 32555/96, ECHR 2005-X.

[28] *Howald Moor and Others v. Switzerland*, nos. 52067/10 and 41072/11, 11 March 2014 and *Brincat and Others v. Malta*, nos. 60908/11 and 4 others, 24 July 2014

[29] *Inter alia*, *Hatton and Others*, cited above.

[30] *Zammit Maempel v. Malta*, no. 24202/10, 22 November 2011.

[31] *Inter alia*, *Moreno Gómez v. Spain*, no. 4143/02, ECHR 2004-X.

[32] *Inter alia*, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, ECHR 2009.

[33] *Inter alia*, *Zeleni Balkani v. Bulgaria*, no. 63778/00, 12 April 2007 and *Schneider v. Luxembourg*, no. 2113/04, 10 July 2007.

[34] *Sdruzeni Jihoceske Matky v. the Czech Republic* (dec.) 19101/03, 10 July 2006 and *Guseva v. Bulgaria*, no. 6987/07, 17 February 2015.

[35] *Štefanec v. the Czech Republic*, no. 75615/01, 18 July 2006; *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox and Mox v. France*, no. 75218/01, 12 June 2007; *L'Erablière A.S.B.L. v. Belgium*, no. 49230/07, ECHR 2009 (extracts); *Lesoochranarske zoskupenie Vlk v. Slovakia* (dec.), no. 53246/08, 2 October 2012; and *Valentina Viktorovna Oglobina v. Russia* (dec.), no. 28852/05, 26 November 2013.

[36] *Ningur Noyanalpan and Others v. Turkey*, no. 26660/05; *Erol Cicek and Others v. Turkey*, no. 44837/07; *Locascia and Others v. Italy*, no. 35648/10; *Vecbaštika and Others v. Latvia*, no. 52499/11; *Ivan Kozul and Others v. Bosnia and Herzegovina*, no. 38695/13; *Kapa and 3 others v.*

groups of applicants and stem from large-scale environmental harm. At the moment, Italy and Turkey are the two countries which face the most environmental litigation before the ECtHR in the form of "class action" applications concerning pollution caused by waste disposal or the mining and steel industry.

How many of these 270 plus environment-related rulings were actually on nature's side can only be judged after a thorough analysis, of not only the operative part of each decision, but also of the reasoning in so far as it may contain newly formulated general principles - possibly leading to the evolution of the Court's own jurisprudence and inspiring the development of domestic case law. It is also equally important to study the process by which the relevant judgments were executed and to look beyond the particular circumstances of each case because the general measures, which are ordered for environmental human rights violations, benefit not only individual applicants but also other members of current and future generations.

3. Implications of the ECHR General Principles for Environmental Litigation

The Strasbourg system aims at ensuring the genuine and practical exercise of rights guaranteed by the Convention.[37] This is why the state parties must not only refrain from interfering with the exercise of these rights but also (under the well-established and widely operating doctrine of positive obligations) take the necessary legal and/or practical measures to actively safeguard them.[38] Moreover, the protection of most Convention rights depends on the balancing of various interests which may be at stake in a democratic society. To this end, the Court accepts that the protection of the environment is an increasingly important consideration in society[39] and that it should not be subservient to financial imperatives or,

Poland, no. 75031/13; *Aleksandar Mastelica and Others v. Serbia*, no. 14901/15; *Josef Kukla and Jitka Kukulová v. the Czech Republic*, no. 67480/16; and *Di Caprio and Others v. Italy, no. 39742/14*.

37 *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, Series A no. 6; *Marckx*, cited above, § 31; and *X and Y v. the Netherlands*, 26 March 1985, §§ 23, 24 and 27, Series A no. 91.

38 *Airey v. Ireland*, 9 October 1979, Series A no. 32, p. 17, § 32; *Guerra and Others*, cited above, § 60; and *Öneryıldız*, cited above, §§ 89 and 90.

39 *Inter alia*, *Fredin v. Sweden* (no. 1), 18 February 1991, § 48, Series A no. 192; *Fadeyeva*, cited above, § 103; *Hamer*, cited above, § 79; *Turgut and Others*, cited above, § 90; and *Rimer and Others v. Turkey*, no. 18257/04, § 38, 10 March 2009; *Ivan Atanasov v. Bulgaria*, no. 12853/03, § 66, 2 December 2010; *Matczyński v. Poland*, no. 32794/07, § 101, 15 December 2015; and *S.C. Fiercolect Impex S.R.L. v. Romania*, no. 26429/07, § 65, 13 December 2016.

even to certain fundamental rights, such as ownership.[40] The rulings of the Convention organs, especially in the largest "balanced protection" category, clearly demonstrate – what may surprise the critics of the human rights approach to the protection of the environment – that, as much as the ECHR grants to humans a right to benefit from a decent environment, it also assigns ecological responsibilities to them. The Court will thus assent to conservation measures undertaken by states which otherwise interfere with someone's Convention rights, as long as they do not result in an excessive individual burden.[41]

To recapitulate, the ECHR holds the states responsible if environmental harm is caused by the authorities' own actions, or – under the doctrine of positive obligations - by their omissions or by activities carried out by private parties (i.e. individuals or companies).[42] However, the issue will only arise if such harm directly affects the applicant's Convention rights.[43] In the specific context of the right to respect for home and for private and family life, such harm would also have to interfere with the enjoyment of these rights to a distressing degree.[44]

The way in which the Convention organs have, over the years, understood these notions are often criticised as allegedly incompatible with what is necessary to defend ecological sustainability. I will now address these issues one by one - not as inherent and irreparable deficiencies, but rather as ideas which need reconditioning to fit the expectations and the needs of modern European societies in so far as they are affected by environmental pollution and climate change. This article will also try to demonstrate that the ECHR system is readily equipped to undertake a more significant role in the field of environmental litigation - even if, as in any other area of concern, it is not at all inclined to practice any strategic judicial activism.

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[40] *Hamer*, cited above, § 79; *Turgut and Others*, cited above, § 90; *Varnienė v. Lithuania*, no. 42916/04, § 54, 12 November 2013; and *S.C. Fiercolect Impex S.R.L.*, cited above, § 65.

[41] *Inter alia*, *Muriel Herrick v. the United Kingdom* (dec.), no. 11185/84, 11 March 1985; *Philip and Annie Lay v. the United Kingdom* (dec.), no. 13341/87, 14 July 1988; *Matos e Silva, Lda., and Others v. Portugal*, 16 September 1996, Reports of Judgments and Decisions 1996-IV; *Bahia Nova S.A. v. Spain* (dec.), no. 50924/99, 12 December 2000; *Coster v. the United Kingdom* [GC], no. 24876/94, 18 January 2001; *Papastavrou and Others*, cited above; *Posti and Rahko v. Finland*, no. 27824/95, ECHR 2002-VII; *Coopérative des agriculteurs de la Mayenne and Coopérative laitière Maine-Anjou v. France* (dec.), no. 16931/04, 10 October 2006; *Valico S.R.L. v. Italy* (dec.), no. 70074/01, 21 March 2006; *Hamer*, cited above; *Depalle v. France* [GC], no. 34044/02, ECHR 2010; and *Matczyński*, cited above.

[42] *Inter alia*, *Hatton and Others*, cited above, § 98; *Fadeyeva*, cited above, §§ 89, 92 and 94; *Borysiewicz v. Poland*, no. 71146/01, § 51, 1 July 2008; and *Leon and Agnieszka Kania v. Poland*, no. 12605/03, § 100, 21 July 2009.

[43] *Inter alia*, *Fadeyeva*, cited above, § 68; *Borysiewicz*, cited above, § 51; *Leon and Agnieszka Kania*, cited above, § 100.

[44] *Inter alia*, *López Ostra*, cited above, § 51.

3.1. Direct victim requirement vs general interest in a healthy environment

The requirement that the harm complained of must have a direct effect on the alleged victim's Convention rights excludes from the Court's jurisdiction any *actio popularis.*[45]
This means that the Court refuses to examine the merits of any case that aims at defending the environment in general without specifying that there is an individual civil right at stake guaranteed by the Convention or its protocols. The Court has admittedly rejected the argument, which was put forward in a number of public-interest applications, concerning illegal development of conservation areas or deforestation, that there was a civil right to an undisturbed panoramic view;[46] to private life in the surroundings of scenic beauty or wild habitats;[47] or to the peaceful enjoyment of one's possessions in a pleasant environment.[48]
Yet the Court has entertained cases in which, in addition to a collective concern for nature, applicants were also defending their specific interests in patrimony, in participation in a decision-making process or in a gathering of information with a view to its subsequent provision to the public. Article 6 of the Convention can indeed guarantee the right to a fair judicial review of decisions concerning urban or industrial development, or the management of nature sites if it is shown, inter alia: (i) that the resulting loss of important features (such as a picturesque view) was likely to affect the applicant's economic interest (for example, to cause a drop in the market value of his or her real property);[49] and (ii) that the procedure of which the applicant complains could effectively bring about the restoration of the previous characteristics[50] or offer the applicant compensation.[51] A "civil right" (within the meaning of Article 6 of the ECHR) can also exist irrespective of any pecuniary loss incurred. For example, in a case concerning lack of access to a court to challenge a permit to dump refuse on land adjacent to that on which the applicants lived and drew water from, the Court agreed that the ability to use water in the applicants' well for drinking purposes was one facet of

[45] *Klass and Others v. Germany*, 6 September 1978, § 33, Series A no. 28 and *Crash 2000 Ood and Others v. Bulgaria* (dec.), no. 49893/07, § 84, 17 December 2013.

[46] *Ünver v. Turkey* (dec.), no. 36209/97, 26 September 2000.

[47] *Kyrtatos*, cited above, §§ 46 and 53 and *Valentina Viktorovna Oglobina*, cited above, §§ 20-22 and 28.

[48] *Ünver*, cited above.

[49] *Dactylidi v. Greece* (dec.), no. 52903/99, 28 February 2002; *Sofia Kyrtatou and Nikos Kyrtatos v. Greece* (dec.), no. 41666/98, 13 September 2001; and *Karin Anderson and Others v. Sweden*, no. 29878/09, §§ 46 and 47, 25 September 2014.

[50] *Dactylidi*, cited above; *Sofia Kyrtatou and Nikos Kyrtatos*, cited above; *Gorraiz Lizarraga and Others v. Spain*, no. 62543/00, §§ 46 and 47, ECHR 2004-III and, by contrast *Fotopoulou v. Greece* (dec.), no. 66725/01, 10 April 2003.

[51] *Ivan Atanasov*, cited above, §§ 94-96.

their ownership right.[52] In another case, the Court agreed that the applicant legal entity was entitled to the right to protect the quality of the private lives of its members, who resided in municipalities threatened by an allegedly harmful project. An important element of that case was that the association's statutory aim was limited (in space and in substance), to protecting the environment in the region concerned.[53]

What is important in this context is that the Court has always referred to the "living" nature of the Convention, which must be interpreted in the light of present-day conditions[54] and has considered that a failure on the part of the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement.[55]

Moreover, the Court does not consider the provisions of the ECHR to constitute the sole framework of reference for the interpretation of the rights and freedoms enshrined in it. It takes into account elements of international law other than the Convention (including soft law) and it does not distinguish between sources of law on the basis of whether or not they have been signed or ratified by the respondent state in question.[56]

The Court can thus draw, among other sources, on the jurisprudence of the IACtHR which has expertly established a connection between individual and collective rights and even acknowledged intergenerational rights in the context of ecological sustainability specifically defended through the assertion of the rights of indigenous communities.[57]

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52 *Zander v. Sweden*, 25 November 1993, §§ 26 and 27, Series A no. 279-B.

53 *L'Erablière A.S.B.L.*, cited above.

54 *Marckx*, cited above, § 41 and Vo v. France [GC], no. 53924/00, § 82, ECHR 2004-VIII.

55 *Stafford*, cited above, § 68.

56 *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 76-84, ECHR 2008.

57 Although the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (known as the "Protocol of San Salvador") expressly recognises a right to a healthy environment, alleged violations of this right cannot not give rise to an individual petition governed by the American Convention. In result, there are no decisions of the American Convention organs making findings directly under the right to a healthy environment. The IACtHR has nevertheless found violations of the first-generation human rights guaranteed by the American Convention in relation to land grabbing linked to concessions for large-scale animal husbandry, mining, logging, construction of hydroelectric dam or for crude oil exploitation on the lands of indigenous and tribal peoples. The IACtHR has thus identified whole panoply of rights of indigenous and tribal peoples that states must respect and protect when they undertake measures of economic development. Such rights include the right to a safe and healthy environment; the right to prior consultation and to free and informed consent; the right to derive reasonable benefit from development activities; and the right of access to justice and reparation. See, *inter alia*, *Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, Judgment of August 31, 2001; *Yakye Axa Indigenous Community v. Paraguay*, Judgment of June 17, 2005; *Saramaka People v. Suriname*, Judgment of November 28, 2007; *Kichwa Indigenous People of Sarayaku v. Ecuador*, Judgment of June 27, 2012; *Kaliña and Lokono Peoples v. Suriname*, Judgment of November 25, 2015; and the IACtHR's OC 23-17, cited above § 57.

A general interest in having a healthy environment may also be defended under the ECHR through the proxy of participatory or procedural rights which have been taken up by the Court not only in respect of applicants with a personal interest,[58] in keeping with the 1998 Aarhus Convention.[59] Article 6 of the ECHR has therefore been applied to proceedings which were brought by environmental-protection associations to challenge the authorisation of activities dangerous to public health and the environment. In one such case, the Court held that, while the purpose of the impugned proceedings had fundamentally been to protect a general interest, there was a sufficient link between the "civil right" which the applicant association was claiming and its right to enable the public to be informed and to participate in the decision-making process.[60] Independently of Article 6, a general environmental interest often comes into play within the context of Article 10 of the ECHR which guarantees the freedom to impart and seek information,[61] and of Article 11 of the ECHR which grants the right to freedom of assembly.[62]

The "direct victim requirement" also implies that the Court will not entertain applications in which a legal entity relies on a Convention right, such as to respect for private life or for home, which is inherently attributable to natural persons only.[63] However, the Court may readily grant victim status to people directly threatened by an environmentally harmful project, even if they defended their interests before national courts not personally but instead through an intermediary of an environmental-protection association that was set up for the specific purpose of protecting its members from the consequences of the project in question.[64] The Court thus acknowledges the important role of non-governmental

58 *Inter alia*, *Guerra and Others*, cited above; *Taşkın and Others*, cited above; *Di Sarno and Others*, cited above.

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

60 *Collectif national d'information et d'opposition à l'usine Melox – Collectif Stop Melox and Mox*, cited above; contrast with *Lesoochranarske zoskupenie Vlk*, cited above, §§ 77, 78, and 88.

61 *Appleby and Others v. the United Kingdom*, no. 44306/98, ECHR 2003-VI; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts); *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, ECHR 2001-VI; *Verein gegen Tierfabriken Schweiz (VgT)* (no. 2), cited above; and *Guseva*, cited above.

62 *Chassagnou and Others*, cited above; *Geert Drieman and Others v. Norway* (dec.), no. 33678/96, 4 May 2000; *Zeleni Balkani*, cited above; and *Costel Popa v. Romania*, no. 47558/10, 26 April 2016.

63 *Federation of Heathrow Anti-noise Group v. the United Kingdom*, (dec.), no. 9310/81, 15 March 1984; *Association des Résidents du Quartier Pont Royal, la commune de Lambersart and Others v. France* (dec.), no. 18523/91, 8 December 1992; *Asselbourg and 78 others and Greenpeace Association-Luxembourg v. Luxembourg* (dec.), no. 29121/95, ECHR 1999-VI; *Aly Bernard and 47 others and Greenpeace – Luxembourg v. Luxembourg* (dec.), no. 29197/95, 29 June 1999; *L'Association des Amis de Saint-Raphael et de Frejus and Others v. France*, no. 45053/98, 29 February 2000; and *Greenpeace e. V. and Others v. Germany* (dec.), no. 18215/06, 12 May 2009

64 *Gorraiz Lizarraga and Others*, cited above, § 39.

organisations in environmental litigation. The underlying premise is that "in modern-day societies, when citizens are confronted with particularly complex administrative decisions, recourse to collective bodies such as associations is one of the accessible means, sometimes the only means, available to them whereby they can defend their particular interests effectively".[65]

3.2. Serious specific and imminent danger requirement vs precautionary principle

Irrespective of the above considerations, the doctrine of "direct harmful effect" can also appear to hinder the operation of the precautionary principle of international environmental law, in so far as it requires a direct and immediate link between the impugned situation and somebody's Convention right,[66] or, within the context of Article 6, that the applicants concerned be personally exposed to a serious, specific and imminent danger.[67] Such stringent tests, especially if taken against the Court's own observation that the exercise of the right of individual petition cannot have the aim of preventing a violation of the Convention,[68] led to scholarly disapproval of international human rights litigation in the field of environmental protection, as being deprived of the essential preventive and, even less so, precautionary character.[69] The "serious, specific and imminent danger" requirement under Article 6, which came to be known as the "Balmer test", was even criticised by some of the Court's own judges, as unattainable.[70]

The Court has indeed emphasised that it is only in wholly exceptional circumstances that the risk of a future violation may confer the status of "victim" on an applicant. It is only if the applicant produces reasonable and convincing evidence of the probability of the occurrence of a violation concerning him or her personally. Mere suspicions or conjectures are not enough for the Court in this respect.[71] But when stripped of all wording aimed at

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65 ibid., § 38.

66 *Ivan Atanasov*, cited above, § 66 in fine.

67 *Balmer-Schafroth e.a*, cited above, § 40; *Tauria and 18 others*, cited above; *Asselbourg and 78 others and Greenpeace Association-Luxembourg*, cited above; *Athanassoglou and Others*, cited above, § 51.

68 *Tauria and 18 others*, cited above and *Aly Bernard and 47 others and Greenpeace – Luxembourg*, cited above.

69 Boyle, Alan: Human Rights and the Environment: Where Next? in the European Journal of International Law, Vol. 23, no. 3, 2012, pp. 613-642.

70 Dissenting opinion of Judge Petiti and six other judges in *Balmer-Schafroth e.a.*, cited above and dissenting opinion of Judge Costa and four other judges in *Athanassoglou and Others*, cited above.

71 *Tauira and 18 others*, cited above; *Asselbourg and 78 others and Greenpeace Association-Luxembourg*, cited above; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014.

posing a deterrent, what rests is the principle that the Court will examine the merits of cases in which applicants can assert, arguably and in a detailed manner, that for lack of adequate precautions taken by the authorities their Convention rights are at, not too remote, risk of being harmed.[72]

The case record shows that, on the one hand, the Court will dismiss applications if it considers that the risks invoked in them are too unspecific or too remote to justify the applicants' assertion that they are the victims of a violation of the Convention. Such were the risks which were supposed to be inherent in, for example, the production of steel from scrap iron even before the steelworks in question had been built[73] or in the undetermined consequences to health of electromagnetic emissions caused by a mobile phone antenna.[74] In sum, the Court does not require scientific certainty, but it does require a degree of validation of a claim that a particular activity threatens the environment and somebody's Convention rights. The Court was very much divided on this issue when the "Swiss nuclear plants cases" were the first to develop and to fail the "Balmer test" on the grounds that the risks of the use of nuclear energy were only hypothetical.[75] In all such cases, the Court still engaged in a multifaceted analysis of the case material and the applicants' arguments. For example, in the steelworks cases mentioned above and in the most recent "nuclear" case against the Czech Republic,[76] it carefully looked at the conditions of operation imposed by the authorities and only then concluded that the norms dealing with the discharge of air-polluting wastes or the risk of a nuclear accident, respectively, did not appear to be so inadequate as to constitute a serious infringement of the principle of precaution.

On the other hand, the Court does not eschew the precautionary environment rulings if the alleged future or potential harm is rendered less speculative. State responsibility under the ECHR was very well engaged where the dangerous effects of an activity to which the individuals were likely to be exposed had been determined as part of an environmental impact assessment procedure in such a way as to establish a sufficiently close link with a Convention-protected right.[77] This was also the case where the absence of any such internal document or decision confirming the risk was counterbalanced by a record of a relatively recent incident on the site which had caused environmental harm.[78] It is also important to

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72 *Asselbourg and 78 others and Greenpeace Association-Luxembourg*, cited above.

73 ibid. and *Aly Bernard and 47 others and Greenpeace – Luxembourg*, cited above.

74 *Luginbühl v. Switzerland* (dec.), no. 42756/02, 17 January 2006.

75 *Balmer-Schafroth e.a.*, cited above, § 40 and *Athanassoglou and Others*, cited above, § 51.

76 *Folkman and Others v. the Czech Republic* (dec.), no. 23673/03, 10 July 2006.

77 *Taşkın and Others*, cited above, § 113; *Öçkan and Others*, cited above; *Lemke*, cited above; *Hardy and Maile v. the United Kingdom*, no. 31965/07, 14 February 2012; and *Genç and Demirgan*, cited above.

78 *Tătar*, cited above, §§ 93-97; contrast with *Tauria and 18 others*, cited above.

bring up the case in which the Court defied the "Balmer test" altogether. This case concerned the non-enforcement of a judicial order to stop the activities of thermal power plants, which had been proved to be causing hazardous emissions.[79] The applicants, however, lived at a great distance from the source of the pollution, and even though it was confirmed that their homes were in the affected zone, there were no specific emissions indicators for their home region. The Court nevertheless held that the right to the protection of the applicants' physical integrity was brought into play, despite the fact that the risk which they ran was not as serious, specific and imminent as that run by those living in the immediate vicinity of the plants. To justify this conclusion, the Court attached importance to the fact that the applicants had standing before the domestic court; that the domestic court had ruled in their favour on the merits; and that the national constitution provided for the right to a healthy and balanced environment.

The analysis of the above cases leads to the following conclusions. Firstly, the Court's understanding of the precautionary principle (the substance of which is altogether very much debatable) certainly does not reflect its soft law/activist variant, which endorses a lower threshold for its applicability, namely that of "potential adverse effects."[80] It does not, however, differ from the most common and most authoritative definition under the Rio Declaration[81] or the case law of the International Court of Justice,[82] which unequivocally enshrine the serious and irreversible nature of environmental damage into the elements of the precautionary principle. Secondly, the Court's applicability tests have, in practice, become more relaxed, which may open the door for human rights rulings which are more preventative. And thirdly, the Court does not apply these tests summarily and will always look at all the circumstances of a case. With the current progress in the field of science and with domestic regulations ensuring better access to information and requiring environmental impact assessments, it is becoming easier for applicants to submit convincing causality arguments and for the Court to undertake legitimate risk assessments in precautionary-type of cases.

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79 *Okyay and Others v. Turkey*, no. 36220/97, ECHR 2005-VII.

80 1982 United Nations World Charter for Nature.

81 1992 Rio Declaration on Environment and Development, Principle 15 and also, the 1992 United Nations Framework Convention on Climate Change, Article 3(3).

82 *Gabčíkovo-Nagymaros Project Case* (Slovakia v. Hungary), ICJ Judgment of 25 September 1997 and *Pulp Mills on the River Uruguay Case* (Argentina v. Uruguay), ICJ Judgment of 20 April 2010.

3.3. Minimum level of disturbance requirement vs lesser environmental harm

Article 8 of the ECHR protects the right to respect for one's home, which in the context of environmental degradation or nuisance has been interpreted by the Court as closely interconnected with the notions of private and family life. The right to a home guarantees not just the right to the use of the actual physical area concerned, but also to the enjoyment of that area without disturbance. Such disturbance includes noise, emissions, smells or other forms of nuisance if they prevent people from enjoying the amenities of their homes. The adverse effects of environmental pollution must attain a certain minimum level of disturbance if they are to fall within the scope of this provision.[83] This means that – sometimes, disastrously for the environment - the ECHR will only be triggered when the level of environmental protection falls below that necessary to maintain any of the guaranteed rights while lesser violations of human rights go unscrutinised. However, the notion of a minimum threshold is also present in international environmental law. There is a vast consensus that harm which does not amount to a significant or "appreciable" degree should be tolerated, for example, is a liability regime or that a general obligation of prevention arises only in respect of activities that entail the risk of substantial harm.[84] In the ECHR system, an important safeguard in this respect lies in the Court's practice of assessing that minimum threshold of disturbance in the light of all the circumstances of the case, such as the intensity and duration of the nuisance in question, and its physical or mental effects on the individual's health or quality of life.[85] The Court will take account of the general context of the environment and in principle, no issue will arise if the detriment complained of is negligible in comparison with the environmental hazards inherent to life in every modern city.[86] On the other hand, a case will not be dismissed on the sole grounds that the pollution or other nuisance in question does not produce a serious health impact or is not life threatening.[87] Another advantage for applicants is that, in establishing the particulars of each case, the Court is not bound by any strict evidentiary rules. The Court has generally applied the very high standard of proof "beyond reasonable doubt". It is nevertheless

83 *López Ostra*, cited above, § 51.

84 Barboza, Julio: The Environment, Risk and Liability in International Law, Martinus Nijoff Publishers, 2011, pp. 10, 11, 14 and 15; see also, Trail Smelter Case (United States, Canada) 16 April 1938 and 11 March 1941, Reports of International Arbitral Awards, Vol. III, p. 1965.

85 *Fadeyeva*, cited above, §§ 68-69.

86 ibid., § 69; *Mileva and Others v. Bulgaria*, nos. 43449/02 and 21475/04, § 90, 25 November 2010; and *Marchiş and Others v. Romania* (dec.), no. 38197/03, § 33, 28 June 2011.

87 Among others, *López Ostra*, cited above, § 51; *Taşkın and Others*, cited above, § 113; *Marchiş and Others*, cited above, § 28; and *Brânduşe v. Romania*, no. 6586/03, § 67, 7 April 2009.

accepted that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact, and it has been the Court's practice to allow flexibility in that respect, taking into consideration the nature of the substantive right at stake and any evidentiary difficulties involved.[88] The Court, in its free assessment of evidence, will thus rely, *inter alia*, on the findings of the domestic courts and other competent authorities; environmental standards under domestic law; relevant scientific studies (whether commissioned by state authorities or private entities); and the applicant's medical certificates and personal accounts of event.[89]

It is noteworthy that the Court considered that, for example, in the "pollution" category, the minimum disturbance threshold had been met and the ECHR had been breached in nineteen (i.e. in almost half) of such cases examined by the Court.[90] Three additional pollution cases were found to have violated Article 6 only on account of the non-enforcement of a judicial decision to stop the hazardous activities in question.[91] In these judgments the ECtHR ordered the states concerned to pay compensation to the individual victims. Moreover, in the course of the implementation of these judgments by the Committee of Ministers (the supervisory mechanism of execution of judgments of the Council of Europe), additional obligations were imposed on the respective states requiring them to undertake the legal and practical measures (whether individual or general) necessary to ensure the ending of the situation that gave rise to a violation - if that was necessary in the circumstance of the case - and that similar violations were prevented in the future. Such measures included orders to: enforce outstanding judicial decisions;[92] assess environmental risks and develop practices aimed at the rapid provision of adequate information regarding

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88 *Fadeyeva*, cited above, § 79.

89 *Dubetska and Others*, cited above, § 107.

90 *Inter alia*, *López Ostra*, cited above; *Guerra and Others*, cited above; *Taşkın and Others*, cited above; *Fadeyeva*, cited above; *Öçkan and Others*, cited above; *Ledyayeva and Others*, cited above; *Giacomelli*, cited above; *Lemke*, cited above; *Tătar*, cited above; *Brânduşe*, cited above; *Băcilă*, cited above; *Deés v. Hungary*, no. 2345/06, 9 November 2010; *Dubetska and Others*, cited above; *Grimkovskaya v. Ukraine*, no. 38182/03, 21 July 2011; *Di Sarno and Others*, cited above; *Dzemyuk v. Ukraine*, no. 42488/02, 4 September 2014; *Otgon v. the Republic of Moldova*, no. 22743/07, 25 October 2016; *Jugheli and Others*, cited above; and *Genç and Demirgan*, cited above.

91 *Zander*, cited above; *Okyay and Others*, cited above; *Iera Moni Profitou Iliou Thiras v. Greece*, no. 32259/02, 22 December 2005.

92 Interim Resolution CM/ResDH(2007)4 adopted by the Committee of Ministers on 14 February 2007 in respect of the judgment in the case of *Okyay and Others*, cited above.

environmental hazards;[93] reduce and control traffic;[94] set up a general framework for protection against industrial pollution, the rehabilitating polluting sites, creating sanitary zones around them, and resettling victims;[95] reform the legal system in order to ensure effective judicial review;[96] remove any aerials causing radiation;[97] shut down polluting mines;[98] lower levels of toxic emissions by making technical improvements to thermal plants, installing filters, or operating them at minimum capacity;[99] improve the waste management;[100] and monitor the conformity of a polluting plant with environmental requirements.[101] These examples demonstrate that the enforcement of the Court's judgments facilitates general changes in the behaviour of public bodies and may thus lead to overall environmental improvements.[102]

3.4. Wide margin of appreciation vs environmentally harmful policy decisions

The last contentious issue revolves around the wide "margin of appreciation"[103] that the Court affords national authorities - for example under Article 8 of the ECHR and Article 1 of Protocol No. 1 to the ECHR (right to property) in determining their best environmental policies and in choosing between different ways and means of meeting their international

[93] Resolution CM/ResDH (2002)146 adopted by the Committee of Ministers on 17 December 2002 in respect of the judgment in the case of *Guerra and Others*, cited above and Resolution CM/ResDH(2016)349 adopted by the Committee of Ministers on 8 December 2016 in respect of judgments in the cases of *Tătar* and *Băcilă*, both cited above.

[94] Action Plan submitted by Hungary on 15 June 2012 in respect of the judgment in the case of *Deés*, cited above.

[95] Report CM/Inf/DH (2007)7 submitted by Russia on 13 February 2007 in respect of the judgments in the cases of *Fadeyeva* and *Ledyayeva and Others*, both cited above.

[96] Resolution adopted by the Committee of Ministers on 21 March 1994 in respect of the judgment in the case of *Zander*, cited above.

[97] Resolution CM/ResDH(2010)193 adopted by the Committee of Ministers on 2 December 2010 in respect of the judgment in the case of *Iera Moni Profitou Iliou Thiras*, cited above.

[98] Action Plan submitted by Turkey on 20 April 2012 in respect of the judgments in the case of *Taşkın and Others*, *Öçkan and Others*; and *Lemke v. Turkey*, all cited above.

[99] Interim Resolution CM/ResDH(2007)4 adopted by the Committee of Ministers on 14 February 2007 in respect of the judgment in the case of *Okyay and Others*, cited above.

[100] Decision DH-DD(2016)507 adopted by the Supervision of the Execution of the Court's judgments on 8 June 2016 and Action Plan submitted by Italy on 14 May 2014 in respect of the judgment in the case of *Di Sarno and Others*, cited above.

[101] Action Report submitted by Italy on 1 August 2014 and Resolution CM/Res/DH (2014)214 adopted by the Committee of Ministers on 12 November 2014 in respect of the judgment in the case of *Giacomelli*, cited above.

[102] Pedersen, Ole W.: The Ties that Bind: The Environment, the European Convention on Human Rights and the Rule of Law, in European Public Law, Vol. 16, No. 4, p. 571, 2010.

[103] *Handyside v. the United Kingdom*, 7 December 1976, §§ 48-50, Series A no. 24.

obligations. This doctrine is based on the assumptions that domestic authorities have direct democratic legitimacy and that, in view of the difficulty implicit in the social and technical aspects of environmental issues, they are better placed than an international court to decide what exactly should be done to stop or reduce environmental harm or nuisance.[104] Similarly, under the positive limb of Article 2 of the ECHR (right to life), the Court has held that an impossible or disproportionate burden must not be imposed on the authorities without consideration being given, in particular, to the operational choices which they must make in terms of priorities and resources.[105] But even with this approach, the Court can compare particular national choices with the European consensus or with international trends,[106] and can still review the merits of authorities' decision in order to ensure that they had not acted in an arbitrary manner or committed a manifest error of judgment in weighing the competing interests of the individual and of the community as a whole.[107] The doctrine of the margin of appreciation is also counterbalanced by the Court's practice of scrutinising the domestic procedure with a view to verifying whether the public authorities were independent, diligent and (under Articles 8 or 1 of Protocol No. 1) they took all the competing interests into consideration.[108] In fact, the Court will usually start with an examination of the quality of the decision-making process; then, if necessary, it will also review the material conclusions of the domestic authorities.[109] Inspecting the procedures at issue, the ECtHR will examine whether the authorities have conducted sufficient studies to evaluate the risks of a potentially hazardous activity;[110] whether, on the basis of the information available, they have developed adequate policy vis-à-vis polluters; and whether all necessary measures have been taken to enforce this policy in good time.[111] The Court will likewise examine the extent to which the individuals affected by the policy at issue were able to contribute to the decision-making, including access to the relevant information[112] and their ability to challenge the authorities' decisions in an effective way.[113] As the

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[104] *Powell and Rayner v. the United Kingdom*, no. 9310/81, § 44 in fine, 21 February 1990; *Hatton and Others*, cited above, § 97; *Giacomelli*, cited above, § 80; and *Mileva and Others*, cited above, § 98.

[105] *Öneryıldız*, cited above, § 71 and *Budayeva and Others v. Russia*, nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02, § 128, ECHR 2008 (extracts).

[106] *Tănase v. Moldova* [GC], no. 7/08, § 176, ECHR 2010; *Kiyutin v. Russia*, no. 2700/10, § 65, ECHR 2011 and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 85, ECHR 2002-VI.

[107] *Hatton and Others*, cited above, §§ 98 and 99.

[108] *Fadeyeva*, cited above, § 128 and *Hatton and Others*, cited above, § 99.

[109] ibid., § 105.

[110] *Hatton and Others*, cited above, § 128 and *Giacomelli*, cited above, § 86.

[111] *Ledyayeva and Others*, cited above, § 104 and *Giacomelli*, cited above, §§ 92 and 93.

[112] *Öneryıldız*, cited above, § 108.

[113] *Guerra and Others*, cited above, § 60; *Hatton and Others*, cited above, § 127; and *Taşkın and Others*, cited above, § 119.

Convention is intended to protect effective rights, not illusory ones, a fair balance between the various interests at stake may be upset not only where the regulations to protect the guaranteed rights are lacking, but also where they are not duly complied with.[114] The procedural safeguards available to the applicant may be rendered inoperative and the state may be found liable under the ECHR where a decision-making procedure is unjustifiably lengthy or where a decision taken as a result remains for an important period unenforced.[115] Overall, the onus is on the state to justify, using detailed and rigorous data, a situation in which certain individuals bear a heavy burden on behalf of the rest of the community.[116]

Even bearing the wide margin of appreciation in mind, the ultimate question before the Court remains whether a state has succeeded in striking a fair balance between the competing interests of the individuals affected and the community as a whole without imposing an excessive burden on the applicant.[117] The Court has undertaken that proportionality test in respect of over one hundred environment-related applications, with different outcomes.

In the light of the growing number of national law suits regarding air quality in Europe's larger cities, it is important to note the "margin of appreciation" rulings in which the Court has been called on to weight the effects of heavy aeroplane or car traffic on individual residents against the economic interests of the country as a whole.

The Court has, for the most part, declined to find violations in cases concerning aircraft traffic that were argued not in relation to any exhaust fumes pollution but with reference to noise nuisance caused to the residents of areas near various airports.[118] The Court usually reasoned that: the level of discomfort was not high; there was no disparity with domestic law; the individuals concerned had a real choice of leaving the area in question; noise-mitigating measures and compensation schemes had been put in place by the authorities; and the authorities were monitoring the situation.[119] The Court has also expressed the view, which has not resonate well with environmentalists, that no exception to the doctrine of

[114] *Moreno Gómez*, cited above, §§ 56 and 61.

[115] *Taşkın and Others*, cited above, §§ 124 and 125.

[116] *Fadeyeva v. Russia*, cited above, § 128.

[117] *Hatton and Others*, cited above, §§ 100, 119 and 123.

[118] *Arrondelle v. the United Kingdom* (dec.), 7889/77, 15 July 1980; *Baggs v. the United Kingdom* (dec.), 9310/81, 14 October 1985; *Powell and Rayner*, cited above; *Hatton and Others*, cited above; *Ashworth and Others v. the United Kingdom* (dec.), no. 39561/98, 20 January 2004; *Balzarini and 435 others v. Italy* (dec.), no. 3717/03, 28 October 2004; *Giani v. Italy* (dec.), no. 77633/01, 28 October 2004; *Nasalli Rocca v. Italy* (dec.), no. 8162/02, 31 March 2005; *Flamenbaum and Others v. France*, nos. 3675/04 and 23264/04, 13 December 2012; *Frank Eckenbrcht and Heinz Ruhmer v. Germany* (dec.), no. 25330/10, 10 June 2014; and *Elżbieta Płachta and 3 others v. Poland* (dec.), no. 25194/08, 25 November 2014.

[119] *Hatton and Others*, cited above, §§ 118, 120, 123, 125, 127 and 128.

wide margin of appreciation is warranted in environmental cases; it has attached great importance to the consideration that the intensified operation of airports, including at night, contributes to the general economy.[120]

In relation to road traffic, the Court has so far been presented with four applications. In the case which was brought against Germany by Greenpeace together with individual residents of Hamburg,[121] the proportionality test was favourable to the state. The Court accepted that soot and respirable dust particles could have a serious detrimental effect on health - particularly in densely populated areas with heavy traffic. The case-file demonstrated, however, that the authorities had attended to the problem, having taken a series of reasonable and potentially efficient measures to curb emissions by diesel vehicles. The Court concluded that the authorities had not erred in refusing to order the compulsory installation of filters in diesel vehicles, which the applicants recommended as the most effective measure. The importance of the principles established by the Court in this case in respect of the victim status and the minimum level of disturbance takes precedence over the finding of "no violation" under the proportionality test. Notably, violations were found in cases that were to some extent linked, which were brought by a Hungarian living near a motorway toll gate[122] and a Ukrainian who had a motorway re-routed through her street.[123] Lastly, an important application concerning noise and exhaust fumes emissions stemming from heavy day and night motorway traffic in Poland is currently pending examination before the Court.[124]

4. Conclusion

Faced with a large number of environment-related cases, the ECHR organs have gradually expanded the protection of the civil and political human rights to encompass various forms of environmental risk and harm. Nowadays, the system efficiently safeguards the natural environment, albeit in a surrogate and somewhat covert manner, through the rights of humans to the environment. Regarding the balancing of community and personal interests, it recognises the growing importance of obligations of states and individuals to preserve the natural environment for current and future generations. Through the procedural rights and duties that are considered essential for the practical realisation of substantive rights, European human rights law reinforces the fundamental principles and concepts of

[120] ibid., §§ 122 and 126.
[121] *Greenpeace e. V. and Others*, cited above.
[122] *Deés*, cited above.
[123] *Grimkovskaya*, cited above.
[124] *Kapa and 3 others*, cited above, communicated to the parties in December 2017.

international and community environmental law, such as citizens' participation in a decision-making process, access to information and justice, environmental impact assessment and good governance. Within this procedural context, it sometimes becomes indirectly involved in public-interest campaigns for the defence of non-human species, ecological processes and lesser threats to humans. The ECtHR is a readily operative and effective last-resort mechanism for redressing environmental damage, halting ecologically unsound projects, and deterring environmentally unfriendly policies.

It is, nevertheless obvious that the ECHR has its limits in that it does not stipulate a substantive right to a healthy environment and thus does not provide the Court with infinite jurisdiction over anything from the ozone layer to the Siberian tiger.[125] However, this anthropocentric and restrained protection of the environment is not deficient simply because it cannot serve all purposes. The direct protection of the environment's components (other than humans), lies primarily within the realm of environmental law. It is therefore wrong to diminish the role of human rights law only because it cannot wholly incorporate environmental protection.[126]

Nature may well have a value in and of itself and giving it rights may no longer be a fanciful legal notion.[127] It still cannot practically be protected independently of a human being, if only because of the fact that at the centre of the cause and of the solution of the problems such as pollution, climate change and deforestation are individuals with legal standing and with substantive rights guaranteed by national and international law (and with obligations derived therefrom).[128] The natural environment thus needs the agency of a human, whether as its guardian *ad litem*[129] or to defend it through the exercise of his or her own rights. Moreover, to leave the rights with the people is not to say that they should have supremacy over the natural environment. Human rights law could, both conceptually and practically,

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[125] Miller, David on environmental goods: Social Justice and Environmental Goods, in Fairness and Futurity. Essays On Environmental Sustainability and Social Justice, Andrew Dobson, Oxford University Press, 1999, pp. 152 and 153.

[126] Anton Donald K. and Shelton, Dinah L.: Environmental Protection and Human Rights, Cambridge University Press, p. 130.

[127] For example, Constitution of Ecuador, Articles 10 and 71-74 and *Wheeler c. Director de la Procuraduria General Del Estado de Loja*, Juicio No. 11121-2011-0010, for review in English: The Ecuadorian Exemplar: The First Ever Vindications of Constitutional Rights of Nature, Erin Daly, Review of European Community & International Environmental Law, Volume 21, Issue 1, pages 63–66, April 2012, and New Zealand's Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Public Act 2017 No 7, 20 March 2017, Article 14.

[128] Anton Donald K. and Shelton, Dinah L.: Environmental Protection and Human Rights, Cambridge University Press.

[129] New Zealand's Te Awa Tupua (Whanganui River Claims Settlement) Act 2017, Public Act 2017 No 7, 20 March 2017, Article 18 (2) "Te Pou Tupua is to be the human face of Te Awa Tupua and act in the name of Te Awa Tupua."

redefine human self-interest in view of the environmental necessity of modern times, and make this interest rational and intergenerational. Human rights law could therefore become eco-centric and no longer give precedence to economic considerations over the environmental damage.[130]

Such a paradigm shift could be achieved by the Court, not through a single giant leap, but through incrementalism - its usual practice of muddling through various legal problems - in a way, forced on its judges by applicants. Wise and widespread environmental litigation is therefore essential in making the Court employ ecological rationality in explaining the value of nature in cases in which its protection paradoxically seems to collide with conventionally-perceived individual rights. Just as much as the environmental law suffers from a lack of coherence and is immature[131], "green" human rights case law is also a work in progress - it is sometimes encouraging and sometimes deceiving. However, the Court's jurisprudence is dynamic and susceptible to change because the notion that the ECHR is a living instrument is firmly established and because the cross-fertilisation of ideas is definitely occurring between the different human rights systems.[132] For all these reasons, notwithstanding the limits of the human rights law and the importance of other platforms of ecological justice, environment cases should continue to be brought before the European Court of Human Rights.

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[130] Hiskes, Richard P.: The Human Right to a Green Future, in Environmental Rights and Intergenerational Justice, Cambridge University Press, 2008.

[131] Pedersen, Ole W.: Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law, in 2013 Oxford Journal of Legal Studies, Volume 33, Issue 1, 1 March 2013, Pages 103–131.

[132] The development of international human rights law through the activities and case law of the European and the Inter-American Courts of Human Rights, Speech given by Judge Antonio A. Cançado Trinidade, then President of the IACtHR on the occasion of the opening of the judicial year of the ECtHR, 22 January 2004.

PRIVILEGE OR RIGHT? THE PROTECTION OF ADVERTISING AS A FORM OF EXPRESSION UNDER HUMAN RIGHTS LAW

Hendrik Daði Jónsson*

Abstract

This paper addresses questions of the universality of human rights and the failure of the European Court of Human Rights to give proper effect to the European Convention on Human Rights where it mandates protection for less popular causes. The notion of commercial expression as a human right protected by the Convention is not without its controversy, but the European Court of Human Rights has recognised it as being within the scope of Article 10 of the Convention. Nevertheless, the approach of the Strasbourg Court has been to impair the full realisation of this right through shoddy case law characterised by ad hoc rulings based apparently on the societal value of each Article 10 claim. The paper considers how the practice of the European Court of Human Rights of not properly safeguarding commercial expression has translated from the European to the national level. Exploring the status of advertising under the law of the United Kingdom, the paper argues that the half-hearted framing of the right of commercial expression is a missed opportunity to enable national regulators to strike a fair balance between the rights of advertisers and the rights of vulnerable groups targeted by advertising regulations. Thus, the paper seeks to demonstrate how if courts both in the UK and at the European level would allow for the full exercise of the right to commercial expression, it would not prevent states from safeguarding societal interests which advertisements can threaten or pose a risk to, but would rather require regulators to have more substantiated and targeted approaches to defend their stakeholders, in full harmony with the structure of the Convention's qualified rights.

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1. Introduction

An advertisement. Is it a capitalist scourge upon our urban landscapes, conditioning the minds and wants of consumers through inescapable graphic manipulation? Is it the legitimate expression by free enterprising individuals of their inherent right to promote their products? In a free-market economy, advertising serves as the medium through which businesses and traders channel information about their products and services to consumers. However, the prevalence of commercial advertisements in society means that they can have an enormous impact on the choices that consumers make.[1] Simply attempting to frame what an advertisement is proves a challenging exercise, since although it may be easy to recognise an advertisement, determining the broad effects it may have on consumer culture and society at large requires extensive academic analysis the results of which may be contingent on the ideology adopted. Nevertheless, the fact that advertisements dominate the landscape of public spaces, print and broadcast media outlets, the internet as well as popular culture raises legitimate questions as to the extent to which traders should be entitled to express their commercial messages to the public at large.

Hence, regulatory bodies internationally have sought and struggled to govern the operations of the advertising industry; to draw a box to contain it and thus mitigate the impact an advertisement will have on consumers. Regulators intervene to prevent the propagation of misleading and inaccurate claims, to lessen the impact on the way consumers dispense their resources, and to thwart the ability of advertisements to bolster certain societal norms and stereotypes.[2] Conversely, advertisers have opposed the perspective that theirs is an industry sanctioned and regulated by law, countering that advertising constitutes the exercise of the freedom of expression enshrined in Article 10 of the European Convention on Human Rights.[3] The consequence of such a framing is that any limitations imposed by regulators on such expression must be legitimate not only as constraints on a trader's commercial activity but on their human rights.[4]

In this paper, I demonstrate that the protection afforded to advertising as a form of commercial expression in the United Kingdom (UK) is both limited and sporadic, despite legal recognition of that right at the European level. I argue that this is the result of both a

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1 Colin Scott and Julia Black, *Cranston's Consumers and the Law* (3rd edn, Butterworths 2000) 51; Iain Ramsay, *Advertising, Culture and the Law* (Sweet & Maxwell 1996) 87.

2 Iain Ramsay, *Consumer Law and Policy: Texts and Materials on Regulating Consumer Markets* (3rd edn, Hart Publishing 2012) 131.

3 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR), art 10.

4 D J Harris and others, *Harris, O'Boyle & Warbrick Law of the European Convention on Human Rights* (3rd edn, OUP 2014) 635.

deliberate policy of deference by the European Court of Human Rights and a sentiment that commercial expression does not merit substantial protection despite falling under the ambit of human rights law. Further, I reason that national courts in the UK have not designed a principled approach for assessing claims where commercial expression is invoked. Finally, I argue that greater care ought to be taken to formulate a consistent approach to the operation of the right of free commercial expression since otherwise advertisers will be unable to discern the extent to which they enjoy legal protection from regulatory interference, and since the current arrangement creates a legacy of discretionary and inconsistent rulings.

2. Advertising under the European Convention on Human Rights

Article of the European Convention on Human Rights ('the Convention') guarantees all the freedom of expression without interference from state institutions, although this right can be qualified in key areas of public policy including "in the interests of national security" and the protection of public health and morals.[5] While these qualifiers to restrict the freedom of expression are at the disposal of states to apply, the Convention mandates that such qualifications must meet the threshold of being "necessary in a democratic society" and "prescribed by law".[6] This is necessary for the functioning of this freedom, which is deemed a fundamental civil liberty essential to guaranteeing that societal minorities and ostracised groups have a voice in the public debates conducted in a particular state.[7] However, despite the text of the Convention implying that state-imposed limitations to free expressions will be subject to scrutiny, the scope and functionality of Article 10 has continuously been called into question by two doctrines employed by the European Court of Human Rights: firstly, the margin of appreciation and, secondly, the categorisation and ranking of different forms of expression.

The margin of appreciation has long been controversial as a doctrine of deference by the Court in which it abdicates questions such as the necessity of human rights restrictions to national authorities, reasoning that they are better equipped to strike the right balance.[8] The concept was originally forged to acknowledge the superior competence of national

[5] ECHR, art 10.
[6] ibid.
[7] Iain Ramsay, *Consumer Law and Policy: Texts and Materials on Regulating Consumer Markets* (n 2) 130; Harris and others (n 4) 613.
[8] Fried van Hoof, 'The Stubbornness of the European Court of Human Rights' Margin of Appreciation Doctrine' in Yves Haeck and others (eds), *The Realisation of Human Rights: When Theory Meets Practice* (Intersentia 2013) 126.

authorities in determining the existence of a public emergency, but it has since been used to attenuate the competence of the Court where its cases force it to confront politically sensitive issues including ones pertaining to the freedom of expressions, as was confirmed in the case of *Handyside v the United Kingdom*.[9] In addition to recognising the margin of appreciation as relevant to Article 10, the Court has further qualified protection for the freedom of expression by varying the degree of protection afforded to individuals based on whether their expression was political, artistic or commercial in nature.[10] The result is that the Court's jurisprudence allows broader tests of necessity and proportionality to be applied to assess interference with the right to commercial expression than it does for the other types, so long as the policy aims for the restriction are accepted as legitimate.[11] The Court has justified this approach on the basis that there is no Europe-wide consensus on the role of the state in commercial affairs however, the consequence has been a series of very inconsistent judgments because all forms of expression do not readily fit within one of these categories.[12] This is exemplified by the case of *Hertel v Switzerland* in which the state's censorship of expression that had clear commercial attributes was deemed a violation in Article 10 in that case in order to protect a "public debate", reflecting on the very discretionary nature of this right.[13]

The impact of the low degree of scrutiny generally applied can be identified in the way in which regulators of advertising industries are able to enforce codes of conduct that restrict freedom of commercial expression on ill-defined policy grounds such as public morality. In the United Kingdom, the Advertising Standards Authority ('the ASA') is able to withdraw offensive advertisements for contravening societal standards of decency and morality, without substantially elaborating on what constitutes such violations.[14] As a result, perceptions of public sentiment appear to be the dominant factor in determining the conformity of advertisements to the Codes of Practice on such matters.[15] For example, a

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[9] ibid; (1976) 1 EHRR 737, para 57.

[10] Colin R Munro, 'The Value of Commercial Speech' [2003] CLJ 134.

[11] *X and the Church of Scientology v Sweden* (1979) 16 DR 68, para 73; Harris and others (n 4) 637.

[12] *Markt intern Verlag v Germany* (1989) 12 EHRR 161, para 33; Maya Hertig Randall, 'Commercial Speech under the European Convention on Human Rights: Subordinate or Equal?' [2006] Human Rights Law Review 53, 64.

[13] (1998) 28 EHRR 534, para 50.

[14] *The UK Code of Non-broadcast Advertising and Direct & Promotional Marketing* (12th edn, 2016), rule 1.1; Gov.uk, 'Marketing and advertising: the law' (Government Digital Service, 23 September 2016) <www.gov.uk/marketing-advertising-law/advertising-codes-of-practice> accessed 9 December 2016.

[15] The Advertising Standards Authority, 'Annual Report 1991' (Report, 1991) <www.asa.org.uk/~/media/Files/ASA/Annual%20reports/Countdown%20to%2050/27th%20report%201990-1991%20(1).ashx> accessed 4 December 2016 3; E-Cyclopedia, 'Shockvertising: Ads that divide' *BBC News* (London, 21 January 2000)

1991 advertisement by fashion retailer United Colors of Benetton depicting a new-born baby, described in the ASA's annual report as a "naked blood-smeared baby", was withdrawn by the Authority and justified on the basis that it had prompted the filing of 800 public complaints.[16] While the ASA does take into consideration factors such as the size and type of audience targeted by advertisements in order to determine the proportionality of their actions, the wide margin of appreciation adopted by the European Court of Human Rights on the basis that it cannot define moral standards means that advertisers have very limited means of asserting their Article 10 rights to commercial expression when advertisements are withdrawn.[17]

Ultimately, the combination of a discriminatory approach of categorising forms of expression and a wide margin of appreciation policy from the European Court of Human Rights has the effect that protection afforded to commercial expression under the Convention is both significantly reduced and unclear. The sentiment that advertising and other forms of commercial speech should generally be less protected than political and artistic speech operates without definitive standards of categorisation, and it results in inconsistent decisions based on formalities rather than principles. This, in turn, means that the national courts will be the primary guarantors of commercial speech rights, and it is thus important to analyse their jurisprudence in order to determine the extent to which the advertising industry can assert its Article 10 right to free expression.

3. The Approach of UK National Courts

With regard to the example set at the European level, I now turn to the assessment of how the national courts of the United Kingdom have dealt with claims pertaining to the right to commercial expression. While the status of expression as a guaranteed individual freedom has historically been contested in the United Kingdom, the Human Rights Act 1998 (the 'HRA') makes the rights guaranteed under the European Convention on Human Rights

<news.bbc.co.uk/1/hi/special_report/1999/02/99/e-cyclopedia/611979.stm> accessed 4 December 2016.

16 The Advertising Standards Authority (n 15) 11.

17 Campaign Live, 'Gucci pubic hair ad gets all clear from ASA ruling' *Campaign Magazine* (27 February 2003) <www.campaignlive.co.uk/article/171489/gucci-pubic-hair-ad-gets-clear-asa-ruling> accessed 9 December 2016; Howard Charles Yourow, 'The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence' [1987] Connecticut Journal of International Law 111, 125; *Handyside v the United Kingdom* (n 9) para 48.

directly enforceable in domestic courts.[18] Prior to its entry into force, academics had anticipated that the HRA would prompt court decisions that would strengthen the prerogative of advertisers in regards to the content of their publications, however more than two decades on, the status of commercial expression under UK law remains remarkably "under-theorised."[19] I argue that the evident lack of a principled approach by the courts has meant that traders have had to pursue remedies under alternative claims, that in conjunction with an uneven application of consumer law benchmarks, has resulted in a legal precedent that appears to disregard the validity of the concept of free speech in the commercial setting. This approach to commercial expression claims was primarily developed in the two High Court cases of *British American Tobacco* and *North Cyprus Tourism Centre Ltd* ('*North Cyprus*').[20] *British American Tobacco* was bought by a number of tobacco industry companies objecting to prohibitive advertising regulations which they claimed acted to impair the "very essence" of their right to commercial expression. In his judgment, McCombe J limited his analysis to the doctrines of the European Court of Human Rights such as the margin of appreciation and proportionality and promptly rejected the claim.[21] In *North Cyprus*, the removal of a tourism advertisement was successfully challenged on the grounds of Wednesbury unreasonableness, however, Newman J additionally elaborated on the approach to assessing a claim pertaining to commercial expression, emphasising that the right meant that regulations had to be foreseeable and advertisements could not be withdrawn without causing serious and widespread offence.[22] This judgment may have been the first step towards the foundation of a principled judicial approach to assessing the freedom of commercial expression, however, a readily applicable and sufficiently theorised approach setting a foreseeable and legally certain standard remains absent from the case law.

This is particularly evident when considering the approach of UK courts in cases concerning instances of comparative advertising. Such claims place courts in situations where they must balance the rights of advertisers to free expression with the rights of those traders whose business reputation may be unfairly impacted by a comparison, on top of the statutory rights of consumers not to be presented with misleading information.[23] Comparative

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18 Human Rights Act 1998, s 6(1).

19 Scott and Black (n 1) 65-66; Paul Wragg, 'Advertising, free speech and the consumer' in James Devenney and Mel Kenny (eds), *European Consumer Protection* (Cambridge University Press 2012) 319.

20 *R (on the application of British American Tobacco and others) v Secretary of State for Health* [2004] EWHC 2493, [2004] ALL ER (D) 91 (Nov); R *(North Cyprus Tourism Centre Ltd and Another) v Transport for London* [2005] EWHC 1698, [2005] UKHRR 1231.

21 *British American Tobacco and others*, [13], [19], [28], [63].

22 *North Cyprus Tourism Centre Ltd and* Another, [75], [86]-[96].

23 Belinda Mills, 'Comparative Advertising – Should it be allowed in the United Kingdom?' [1996] Trademark Rep 174, 182, 196.

advertisements are protected as a form of commercial expression under Article 10 of the European Convention of Human Rights,[24] and furthermore under European Union law based on the recognition that it can "stimulate competition between suppliers of goods and services to the consumer's advantage."[25] Protection does, however, only extend to advertisements if they fulfil a variety of specific criteria including honesty, objectivity, and verifiability, in addition to not denigrating the trademark of another business.[26]

UK case law addressing the practice of comparative advertising has not considered it in terms of the right of commercial expression, but primarily applied the benchmark of the "reasonably well informed" average consumer, a staple of European Union law, that appears to fluctuate between courts and cases. [27] A comparison of the *Burger King (UK) Ltd* case and that of *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* reveals how inconsistent the average consumer test is in the UK courts particularly in the absence of a theorised approach to advertising.[28] The earlier has been criticised for treating consumers as "naïve and unable to distinguish products and brands," as a court ruled that consumers would be unable to discern that an advertisement featuring a Burger King meal accentuated by the tag line "It's not just Big, Mac" was not, in fact, advertising a McDonald's product.[29] In the latter case, the High Court ruled that a product advertisement placing aspartame under a banner marked as "nasties" would not instil in consumer perception of that form of sweeteners as being dangerous to one's health, partially on the basis that consumers would distinguish between the validity of claims based on whether it was presented in a business-like black font or in more "cheerful and informal colours."[30]

The value in comparing these cases is that it demonstrates the inconsistencies across the board in cases concerning the content of an advertisement, attributable to the root failure of the UK courts to develop their approach to the freedom of commercial expression, as guaranteed by the European Convention on Human Rights. The application of European consumer benchmarks is inconsistent, and the reasoning in individual cases concerning advertising appears *ad hoc* because of the lack of recognition in court reasoning that at the outset there is a human right for traders to promote their products. This unprincipled approach at the national level is bolstered by the deference of the European Court of

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[24] Harris and others (n 4) 638.

[25] Stephen Weatherill, *EU Consumer Law and Policy* (2nd edn, Elgar European Law 2013) 222.

[26] Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising [2006] OJ L376/21, art 4.

[27] Wragg (n 19) 333-4.

[28] *McDonald's Hamburgers Ltd v Burger King (UK) Ltd* [1986] FSR 45; *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2009] EWHC 781, [2010] QB 204.

[29] Scott and Black (n 1) 52.

[30] *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* (n 28) [66].

Human Rights at the European level, and the culmination of the two is that advertising is in fact afforded very limited legal protection in the United Kingdom. With this in mind, I now turn to assess whether this is an altogether undesirable arrangement or if a more theorised approach should be adopted, and if so, whether it would actually grant more freedom to advertisers.

4. Should Commercial Expression Be Protected?

Proponents of the protection of commercial expression commonly view advertising first and foremost as an economic mechanism for traders to inform consumers of the products they sell and for consumers to receive and process that information, and they argue that the need for regulatory intervention arises only in the case of an "informational market failure."[31] In fact, a direct analogy to free-market economics has been employed to demonstrate this argument wherein advertisements are compared to a "marketplace of ideas" where an objective truth will eventually surface.[32] Marketing practices and the substantive content of the advertisement unrelated to the factual information being conveyed should thus be protected and only regulated to guarantee a transparent process preventing the publication of dishonest, inaccurate or misleading claims.[33] The implication of this theory is that advertising ought to be afforded maximum protection as commercial expression because it serves a function of societal importance, lowering "search costs" by providing the consumer with the information needed to make a rational choice about how he distributes his resources.[34] This argument served as the basis for the Supreme Court of the United States when it ruled that commercial expression came under the constitutional protection of free speech, as Justice Blackmun argued that the "free flow of commercial information" was of paramount importance to consumers, and restrictions placed upon it would disadvantage vulnerable societal groups the most due to their reduced ability to attain such information.[35]

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[31] Michael B Mazis and others, 'A Framework for Evaluating Consumer Information Regulation' [1981] Journal of Marketing 11, 12.

[32] Iain Ramsay, *Advertising, Culture and the Law* (n 1) 91.

[33] Scott and Black (n 1) 51-52; James P. Nehf, 'Misleading and unfair advertising' in Gerald Howells, Iain Ramsay, and Thomas Wilhelmsson (eds), *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010) 107.

[34] Nehf (n 33) 107; Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 2) 128.

[35] *Virginia State Board of Pharmacy et al v Virginia Citizens Consumer Council Inc et al* (1976) 425 US 748, 763.

I have already argued that the absence of a principled approach to the freedom of commercial expression in the United Kingdom limits the protection of advertising, however, the adoption of one would not necessarily strengthen the position of advertisers as much as it would clarify how the law regulates advertisements and prevent inconsistency in the judgements handed down by courts. Recognising the right to free expression of advertisers does not preclude state authorities from regulating the advertising industry; it rather demarcates the extent to which the right of advertisers to express themselves freely can be curtailed. In the European context, this is exemplified by how Swedish regulators prohibit the marketing of toys and other goods directly to children. While the Swedish rule limits how these products may be advertised, the companies affected are not banned from advertising their products in general but are directed to target them to adults instead.[36] Hence, I argue that the ability of traders to promote their products in a truthful manner must be safeguarded by a real enforcement of their right to advertising under Article 10 of the Convention. National authorities have a responsibility to regulate the advertising industry and protect consumers for minimising the potential for wider societal impact, and that responsibility is reinforced by the structure of Article 10. Remaining faithful to the Convention, courts should as a starting point recognise any regulatory action against advertisers as limitations on protected human rights and not as the withdrawal of a privilege. From that starting point, courts can properly evaluate the legitimacy and proportionality of regulatory action and thus not only give effect to a Convention right but also forge a legally certain and foreseeable culture of advertising.

The academic literature on behavioural economics indicates that advertising does not merely provide individuals with information, but also has the impact of instilling artificial wants in consumers that undermine their personal sovereignty, reinforces controversial stereotypes on race, gender and religion, and results in an inefficient and unsustainable allocation of resources.[37] It is also important to note that substantially increasing the protection of commercial expression may result in a weaker standing of political and artistic expression, as Ramsay has argued that the vast power of the constitutionally protected advertising industry in the United States means that it can block programming on media outlets that contradicts corporate values by refusing to run their advertisements during such broadcast.[38] This provides for a legitimate platform for regulatory intervention and largely distinguishes

[36] Andrew Oliver, 'The Proposed European Ban on Television Advertising Targeting Children: Would it Violate European Human Rights Law' [2000] New York Law School Journal of International and Comparative Law 501, 502.

[37] Ramsay, *Consumer Law and Policy: Text and Materials on Regulating Consumer Markets* (n 2) 128-129.

[38] Iain Ramsay, *Advertising, Culture and the Law* (n 1) 91.

commercial expression from its political and artistic counterparts. However, I disagree with academics such as Randall who have voiced approval of the approach taken by the European Court of Human Rights to ranking categories of expression in order of the level of protection awarded. The human expression cannot be categorised into separated silos, and such an approach will always yield the issue of "hybrid speech", ultimately leading to inconsistent applications of the law and thus an unequal enjoyment of human rights.[39] Instead, I argue that it would be better if variances in legal scrutiny of regulations would be applied based on the size of an advertisement's audience and thus its potential impact on society.

Any discussion around the protection of commercial expression cannot take place in the abstract but must be informed by the complex reality that advertising plays a larger role in society than being a platform for the conveying of information. This cannot justify deference, abdication or ad hoc rulings by courts when these claims are raised in a judicial setting. Au contraire, it may, in fact, thwart legitimate judicial scrutiny of the societal challenges posed and bolstered by the advertising industry at large. Hence, the UK courts should decide how to balance the protected rights of advertisers with the needs of regulatory authorities to protect consumers in order for advertising to enjoy a clearer legal status.

5. Conclusion

The mission of this paper has been to ascertain the extent to which advertising is protected as a form of commercial expression in the United Kingdom and to assess to what extent such protection under human rights law is warranted. The main conclusions drawn are that protection of advertising in the United Kingdom can be characterised by superficiality and inconsistency, derived from a general lack of interest for protecting this human right, despite its established status under the European Convention on Human Rights. This low degree of protection is rooted in an unwillingness to enforce it at the European level to the same extent as political and artistic expression are protected, primarily expressed through a wide margin of appreciation, that does not oblige states such as the United Kingdom to balance the freedom of commercial speech with other rights and allows it to be continuously undermined. Authorities such as the ASA are thus able to have broadly defined powers for regulatory interference into the right of expression in the commercial context that, when coupled with inconsistent judicial rulings, has the combined effect of advertisers not being able to determine the scope of their rights to market their products. This breadth also has the effect of limiting genuine and legitimate regulation of advertising. The ASA operates in

[39] Randall (n 12) 72, 85.

a reactionary manner, responding to public complaints filed and can thus act based on immediate shock value rather than delving into the complex societal questions posed in the longer run by advertising culture. While these issues are being assessed by behavioural economics and academic literature, they remain largely absent from the UK's regulatory infrastructure. Therefore, I conclude that the UK courts should act to clarify the legal status of advertising by formulating a principled and readily applicable approach that recognises that commercial expression is inherently a human right. While this would generally elevate the level of protection given to advertisements under UK law, it would not jeopardise the ability of the ASA to regulate advertisements. Instead, giving serious meaning to the right to commercial expression prompts serious approaches to how advertising should be regulated, giving way to smarter and more balanced regulation resting on legal authority rather than the whims of public reaction.

TOWARDS A BETTER JUSTICE: HUMAN RIGHTS, THE SHIELD AGAINST THE STATE SKID?

Myriam Nora Lazar*

Abstract

This paper is aimed at analysing the Soering case as a landmark case in the history of standards of extraditions and the recognition of the death row phenomenon by the European Court of Human Rights (ECtHR). Furthermore, this case is also shedding light on the ECtHR's vision on the application of the law and to a larger extent, on the notion of justice. Using the abstracts theories of law and justice, we shall defend the thesis that the ideal of justice is relative and that its administration is biased as a principle. Next to that, we shall interrogate ourselves on the implications of such a decision on the field of human rights as being protected by a vivid tool, the ECHR. Finally, where different ideologies of justice are in tension with each other, we will question some theories of the legitimacy of the State: The State as a completely disinterested actor, acting solely for this ideal of justice. In the same vein, this paper will allow further interrogation on the limits of the State's sovereignty. At the end of the day, we shall assess the Soering Case based on some piece of work derived from literature.

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1. Introduction

Since the beginning of legal studies, we have been encountering legal rules as part of a rational and comprehensive body. As I told my relatives, contrary to the doctors, we have to study a body created by humans themselves which is in constant re-creation of itself. The rules of the functioning of this body may differ either because the creators of that body are changing (due to politics, Government) or the atoms of the body themselves have changed (thanks to the society's conception of the law and the social reaction). Quite logically, we are told that the judiciary is mainly controlling the correct application of this body of law and sanctioning its non-respect.

In the objective of the question we speak about notions of justice, implying that justice is not the mere application of a general and equal law to everyone. Justice is relative and polysemic simply because it is a notion that conceals many realities.

By the ideal of justice, we mean that as it is a human system, it is imperfect, partial and biased by several factors (essentially those stemming from human nature: fear, pity, and interests). According to us, it is a system of law created in man's image.

Finally, in critique of a perfect system, we shall check if the equation 'justice equals interest of the State' is true at any time

In that line of thought, far more than just a case brief, this work tends to discover the ins and outs of the ECtHR's decision-making process and its interference with the Subjectivity. To achieve such a result, this paper shall focus on the case *Soering v. UK* delivered on the 7th of July, in 1989 by the ECtHR. Enshrined in the field of international criminal law and fundamental freedoms, this case shall bolster our reflection.

Indeed, in that special area of law that has human life and freedom as an object, this departs from the classical theories where interference with human sciences is absent. Moreover, this field remains still under the sovereignty of the State and in that sense, one might be interested to analyse the application of the law, the administration of justice and foremost to test the solidity of some legal theories that postulate the comprehensive and objective features of the law.

2. The Legitimacy of Death Penalty?

2.1 The Soering Case: A dramatic love plot

2.1.1 Facts

Jens Soering,[1] a German national and son of a German diplomat, moved to the United States with his parents when he was 10 years old. At the age of 18, in 1985, he attended the University of Virginia where he met a fellow student who would later become his girlfriend, her name was Elizabeth Haysom.

After a while, the young couple began a romantic relationship. This relationship became very complicated knowing that the parents were strongly opposed to their relationship while Elizabeth claimed in her love letters to Jens that she wanted to get rid of them. This hatred towards her parents would lead Elizabeth to ask for her parents to be killed as true evidence of Jens' love. Jens, in turn, seemed to have granted her wish. In fact, according to the Virginian jurisdiction, one night, the young couple decided to rent a car in Charlottesville as an alibi and during that same night, on the 30th of March in 1985, the Haysoms were killed in their dining room. According to the argument given by the prosecution that was heard by the jury, Soering killed both parents: he stabbed them about forty-fives times each and slit their throats. The crime scene will be later labelled as a 'slaughterhouse' by the investigators.[2]

Benefiting from the slowness of the investigations, Elizabeth and Jens fled to the United Kingdom where they lived using false cheques and exchanging them at Marks & Spencer. Nevertheless, this misdemeanour will cost them their freedom. In fact, on the 30th of April in 1986, the British police arrested them on that basis. During the search done by police they found several incriminating pieces of evidence including the infamous love letters. Unfortunately for the couple, this link was quickly made, and the British police notified the Virginian authorities.

About six weeks later, the grand jury of the Circuit Court of Bedford County would charge Soering with capital murder which was punishable by death (therefore the death penalty).

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[1] By the way, Soering identified himself to Sydney Carton, a heroic character in Dicken's Tale of two cities making a sacrifice for his beloved.

[2] Denise Martinez-Ramundo and others, 'Convicted killer, after decades of maintaining innocence, believes freedom is finally in sight' *ABC News* (9 February 2018) <https://abcnews.go.com/US/convicted-killer-decades-maintaining-innocence-believes-freedom-finally/story?id=52914848> accessed 5 July 2019.

During the two months that followed, the United States requested Soering's extradition pursuant to the Extradition Treaty Act of 1870.

Contrary to Elizabeth, Jens opposed this extradition and based his claim on Article IV of the Extradition Treaty alleging that the mere fact of having the Advocate general of the Commonwealth making a representation of the UK not wanting the death penalty to be applied, was not a s*atisfactory assurance* in the light of the *circumstances*.[3] Put simply, Soering argued that this was not sufficient to prevent the carrying out of the death penalty as well as the fact that he would be subject to ill-treatment in the implementation of the Home Secretary of State's political decision.

2.1.2 Legal proceedings

After exhausting all the national remedies in the UK where the leave to appeal was denied, Soering filed a complaint on the basis of Article 3 ECHR. The case went through the Human Rights Committee which in turn concluded to an absence of violation of Article 3 before surrendering the case to the European Court of Human Rights (ECtHR) which after only six months, delivered a judgement.

2.1.3 Contextualisation

Before entering into a deeper analysis of the reasoning of the ECtHR, it is important to bear in mind some important aspects of the legal landscape at the time of the decision.

First, one has to understand that even if Protocol No. 6 (related to the abolition of the death penalty) was opened for signature in 1983, it was not yet ratified by the UK. On top of that, Article 2 ECHR was not condemning the punishment yet. Indeed, the abolition of the death penalty *per se* was for the first time stated in the case *Öcalan v. Turkey* (2005) where the ECtHR claimed that the death penalty can no longer be seen as having any legitimate place in a democratic society.[4]

The second and last remark is that one has to observe that the UK was not only bound by the ECHR but also by its treaty obligations with the US under the Extradition Act.[5]

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[3] *Soering v UK* App no 14038/88 (ECtHR, 7 July 1989), para 97; See: "a representation will be made in the name of the United Kingdom to the sentencing judge that it is the wish of the United Kingdom that the death penalty should not be imposed or carried out".

[4] *Öcalan v Turkey* App no 46221/99 (ECtHR, 12 May 2005), para 58.

[5] Even if, as we know, lack of written constitution, all obligations were implemented in simple formal laws that quite blur the hierarchy between the norms and maybe dilute their effectivity as far as we are concerned.

3. The Death Penalty as a Punishment: The Quest for the Sense(s) of Justice

3.1 The Soering decision

In its decision, the ECtHR first affirmed both its devotion towards the rule of non-inquiry and the limited scope of the regional Covenant.[6] Nevertheless, it quickly fells under the spell of juridical acrobatics: claiming that the Convention only binds contracting parties (UK), the ECtHR established later that this same State can be liable for a breach of Article 3 ECHR occurring *outside the regional scope* of the ECHR (the State of Virginia) if the exposure to the ill-treatment was *coming upstream from a contracting party*.[7]

For that purpose, the ECtHR analysed to which extent Soering's extradition would amount to a violation of Article 3 ECHR. It says that since the inhumane treatment, namely the death row phenomenon,[8] is a derived consequence of the death penalty, first had to assess whether Soering *risked being condemned to the death penalty* according to Virginian law. The ECtHR analysed in a cautious manner, the circumstances and elements of the case that may help to determine if Soering will be convicted: after a series of considerations in relation with the Attorney General's closing speech for the prosecution of Jens, the presence of mitigating factors (such as his young age, his mental sanity, his absence of criminal record, and also his excellent academic results), the ECtHR making a balance of interests concluded that the risk of being subjected to the death penalty was more than hypothetical.

Then, the ECtHR analysis was inclined to determine whether the *extradition*, as exposing Soering to the death row phenomenon, would amount to a violation of the Convention and to the commitment of the liability of the UK as a contracting party to the ECHR.

The ECtHR points out that as the Article 2 (1) ECHR still permitted the death penalty despite the evolving thoughts about the death penalty in Europe, one must wait until an abrogation of that paragraph (allowing for exceptions) to give full consistency to the

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[6] Donald K Piragoff and Marcia V J Kran, 'The impact of human rights principles on extradition from Canada and United States : the role of national courts' [1992] Criminal Law Forum 225, 230; See: "Courts decline to consider questions about the motives for extradition requests or about the judicial procedures or likely treatment in the requesting state".

[7] *Soering v UK* (n 3) para 91; See: "it is liability incurred by the extraditing Contracting State by reason of its having taken action, which has as a direct consequence the exposure of an individual to proscribed ill-treatment".

[8] Namely in French, "le sydrôme du couloir de la mort", is the surrounding consequence on the physical and psychological effects of being condemned to the death penalty while spending extended delays in prison.

extensive interpretation. Hence, it rather concluded that the death row phenomenon constituted a degrading treatment but not the death penalty *per se*.

Afterwards, the Strasbourg jurisdiction analysed, *in concreto*, if the death row phenomenon, in the case of Soering, would amount to a violation of Article 3 ECHR. Taking into account the young age of Soering, the length of his detention, the conditions of the death row,[9] the ECtHR of 18 judges unanimously concluded that there was a conditional violation of Article 3 ECHR by the British authorities *(so, in case of* extradition).[10]

As seen, the ECtHR was quite reluctant to admit that the death penalty constituted a violation of Article 3 ECHR. Nevertheless, *Soering* revealed itself to be very effective in the sense that Soering was not sentenced to the death penalty after all. Moreover, as we will see later, this decision, as implicitly critiquing the death penalty, was heavily debated within the American legal scholars.

3.2 The dilemma of Justice

To understand why *Soering* is still relevant for today's lawyers and jurists, one should first begin the inquiry into extradition law and the inherent dilemma of justice.

Indeed, the UK had to execute a judicial and political decision stemming from the Virginian State. In the field of international customary law, it is supposed that States collaborate for better administration of justice. At the same time, it has to be admitted that other rules, such as international human rights (*ius cogens*) or rights deriving from the ECHR, may imply that States do not honour this cooperation process at risk of violating a form of absolute positive obligation. As seen, transnational justice, one a larger scale, Justice is dominated by a *conflict between prosecution and protection.*[11]

One may argue that human rights are not opposed to justice and this is certainly right but human rights are an ideology, a legal-linguistic creation under which the content but also the effective protection may be variable according to the State. Indeed, it is noted the conspicuous absence of the United States within several international Treaties on human rights.[12] The Eighth Amendment of the American Constitution is also protecting against

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[9] Richard B Lillich, 'The Soering Case' [1991] AJIL 128, 134;See: "the delays in the appeal system, the conditions of detention in Mecklenburg correctional center, but also the possibility to be extradited to Germany where the death penalty has been abolished".

[10] *Soering v UK* (n 3) para 112.

[11] Piragoff and Kran (n 6) 225.

[12] Anne M Kobayashi, 'International and domestic approaches to the constitutional protection of individual rights: reconciling the Soering and Kindler Decisions' [1996] Am Crim L Rev 225, 227.

inhumane and degrading treatments but not in the same manner as the ECHR, as it may appear.

To that extent, and standing against Grotius,[13] there is no such thing as universal principles (i.e. respect of human rights) which have a homogenous comprehension. This is why it can be said that justice is partially denaturalised in the sense that it does hardly rely, *in practice*, on natural rights common to all humans *and recognised as such* by the States of the international community.

Noting that diversity on the notion of human rights and justice, especially in the field of international criminal law, one makes the ultimate proof that we are in a logic of an 'international system of nation-states' that is dominated by politics.[14] In fact, the criminal procedure is intrinsic to the sovereignty of the State where 'each State possesses the sovereignty to set rules of its own legal system with the duty to maintain and protect it'.[15]

Nevertheless, it can be underlined that the ECtHR forces the entry of American sovereignty by declaring implicitly that human rights should transcend cultural relativism as put forward in the national sovereignty theory. Furthermore, the ECtHR seems to reject any 'utilitarian justifications for capital punishment'.[16]

3.3 The opposition of the interests and the social contract

As understood, the ECtHR had limited positive tools to prevent Soering from being extradited and thus, being executed. However, the ECtHR, at the height of its reputation, succeeded in answering Soering's appeal for justice.

There is an interplay between the notions of justice, rights, and sovereignty. In this instance, *The Social Contract* of Rousseau is actually quite illuminating: the state of nature, in which humans had their own master of violence, decided, based on *piety* and *fear*, to create a *State*. That State correlatively has also the monopoly of violence and this will have some implications, later on, on its liability as a disinterested actor acting for the common good.[17]

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13 Katalin Siska, 'Historical and legal perspectives of the right of asylum and extradition until the 19th century' [2004] Miskolc Journal of International Law 188, 195; Indeed, the author analyses Grotius, a universal legal theorist, according to whom every State must cooperate in the world legal order.

14 Louis Henkin, 'International Human Rights and Rights in the United States' in Theodor Meron (ed), *Human Rights in International Law: Legal and Policy Issues* (Clarendon Press 1984).

15 Siska (n 13) 195.

16 Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide Perspective* (Oxford University Press 2008) 3.

17 See: Xavier Rousseaux and René Lévy, 'Le pénal dans tous ses états' in Xavier Rousseaux and René Lévy (eds*), Le pénal dans tous ses états: Justice, États et sociétés en Europe (XIIème - XXème siècles)* (Facultés universitaires Saint-Louis 1997), in which it is underlined that this use of

It had to be waited until Montesquieu wrote about the separation of power doctrine and the idea of a political mandate. In fact, it is in representing the people, that sovereignty of the Legislator lies. However, in an international field, it is of the opinion that we are still in a semi-state of nature. Admittedly, the idea behind *ius cogens* or the absolute character of Article 3 ECHR is that even a State cannot exercise violence for its own purposes.

From a pragmatic point of view, it has to be admitted that after all, the national state is sovereign in recognising such and such right, to ratify such a Convention or Treaty and only on that basis, the individual claim for justice can be allowed. On the same line of thought Siska noted that 'international law is customary law because a legislative authority that could legislate universal measures does not exist'.[18] In that sense, the content of human rights can be manipulated.

As seen, there is conflict between the interests of the individual, their rights and the interest of the State and the rights afforded and guaranteed. Here, in its balance, the Court has made the right of Soering prevail over the right of the British authorities to honour their treaty obligation.

4. Death Row Phenomenon as a Tort … Or Human Rights as the Shield of Criminal Law

In this chapter, the Soering case will be studied as shedding light on the theories of punishment and the humanistic application of the law by relying on some pieces of literature (from *Shakespeare* and *Melville*).

4.1 The theories of punishment

4.1.1 The judgement, as a reminder of the social contract

In this sub-point, our thinking still lies in the approach of the social contract. Indeed, we tend to consider that the judgement is a written reminder of the social contract: As the power to punish only lies in the hand of the State according to the social contract, in the field of the criminal law, the judge is condemning the person to a specific kind of punishment that has been formally described by the body of law we spoke about. The convict will understand that he is excluded as an 'enemy of this society'.

legitimate violence has to be the ultima ratio. Moreover, Rousseaux said "pas de pénal sans État : pas d'État sans pénal".

18 Siska (n 13) 195.

In this instance, the Court had to judge for the first time a criminal fugitive (in the context of extradition). Devising that the social reactions and expectations in such cases must be very high (he has committed two offences against the law, by committing a double murder in the rural Bedford County in Virginia). We can without any difficulty imagine that Soering was 'the enemy of the society and the law'. The Court, still, has not denied his rights. That is proof that we are not in a strict 'personal' and Talion law relation.

Indeed, this idea of tempered and *effective justice vs. literal, strict, retributive* and even h*ypocritical justice* has been the centre of one of Shakespeare's plots, *Measure for Measure.* As the title is quite self-explanatory, it introduces the idea of measure, of equity. In this plot, Shakespeare portrays human nature in all its beauty when it comes to the application of the law. As the Duke, in *Measure for Measure*, the Court, exercising the power of a man of the State, does not seek a mechanical and vengeful application of the criminal law but more of a utilitarian and humanistic application of the law.

To summarise, Angelo - who replaces the Duke while he is gone - implements the law in a very strict way. As described by Ost, this 'moralisme punitif' will lose its whole meaning when it is learnt that Angelo will himself commit the irreparable.[19] It is then thought that there is a link between human nature and mercy. As humans, we ourselves are not perfect, must admit being more equitable while applying the law. Again, behind the plot, there is also the idea that jurists hide behind the letter of the law to justify the consequences even if they are unjust. The Latin maxim phrase by Portalis may correctly summarise this idea '*dura lex, sed lex*.'[20]

In our opinion, as opposed to Angelo, the Court may be, within its limits, identified to the Duke. As a matter of fact, contrary to the majority of American legal doctrine on the *Soering* case, we think that the ECtHR stays coherent in its approach and stays loyal to its principles (*cf. infra*). Again, coming back to Angelo, we think that in applying such strict sense of the letter of the law, the purpose of justice is denaturalised. As Ost said 'without logic, humanity or equity, the mechanical application leads only to aporia'.[21] This extreme legalism is murder of the law itself: we invite the reader to read what happened to Angelo at the end of the plot.

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19 François Ost, 'Mesure pour mesure de Shakespeare : les lois pénales sont-elles faites pour être appliquées ?' in F Tulkens and others (ed), *La peine dans tous ses états. Hommage à Michel van de Kerchove* (Larcier 2011).

20 M. Couderc, 'Les fonctions de la loi sous le regard du commandeur' [2005] Pouvoirs 21, 23; Portalis even said that even an excessive harshness in the administration of justice would have all the characteristics of the oppression. We indeed think that by that, justice is in reality denaturalised.

21 Ost (n 19) 51.

The peak of our reasoning is the following: to administer proper justice, one should not only look at the text to a strict syllogism. It is rather a more complex intellectual process in which the judge has to be more transparent and less vague about the steps to their reasoning. In that, they will admit the imperfection of our legal system.

4.1.2 The choice of the punishment or death note

Above, it is noticed that there is a plurality of justice on the international law field and that each system of law is behaving according to its own conception of law and can exclude what is constructed outside.[22]

After discussing Angelo, it is hard not to talk about the death penalty as the punishment paradigm which traduces a strict legalist and retributive justice. It seems that the death penalty is a punishment that traduces a conception of the perfection of the legal system. Moreover, the judgement, as a reminder of the social contract, is condemning the man, in just one legal writing.[23]

Understanding the death penalty as Justice's response to the offender, Rousseau seemed to favour it in *The Social Contract* (1762). Montesquieu in *Spirit of Laws* (1748) argued that this method is efficient because of its deterrent effect and Kant in *The Metaphysics of Morals* (1797) is basing himself upon the retributive argument claiming that it is a way to put an end to the former violence exercised.

On the other side of the stand, is Voltaire present. In *Commentaire sur le livre des délits et des peines* (1766), he upheld that the law that kills is *unjust* and *inhumane*. As opposed to Kant, he indeed thinks that justice, in that case, is falling into a degenerated violence. Quite interestingly it needs to be mentioned that the ECtHR has declared that the death row phenomenon was considered as an *inhumane* and degrading treatment and thus was *illegal* as it violated art. 3 ECHR. Hugo in *Le dernier jour d'un condamné* will affirm that the society does not have the necessary legitimacy or objectivity to take away a life.

In our point of view, the ECtHR is significantly attached to the preservation of human life beyond other considerations: in *Soering v. UK*, one can conclude that Soering was protected

[22] Hood and Hoyle (n 16) 5; See: "the truth is that each country, while influenced by a developing international climate that saw abolition as a civilised goal in penal reform, nevertheless chooses its own path influenced by its own cultural and political interpretation of the need for capital punishment as an arm of its crime-control policy".

[23] That reminds us of a manga series that was adapted by Netflix, namely Death Note. There is a character named Kira, a young student that has inherited the power to kill any individual he wanted. In the end, we see that Kira will abuse his power and kill everyone including innocent people. He will die at the end.

against all kinds of inhumane treatment. The ECtHR in *Soering v. UK* seemed to subordinate the administration of human justice to the absence of any inhumane treatment.

4.1.3 An objective body of law that is comparable to nature and science?

This tempered and flexible view of the social contract will lead us to another litigation: the link between *human justice vs. justice of God* or *law vs. mercy*.
The concurrence between legal justice and divine justice is a slippery slope of a debate: to pronounce death even before the natural death is coming should not be amid human prerogatives according to Hugo and Camus. [24] Even worse, the death sentence is blurring the coherence of positivist arguments: for Mereu, the law cannot claim a right for life and at the same time allow judicial murder.[25] The judge indeed, seems in that case to have the power of life and death over humans: It definitely introduces a religious dimension of justice.[26] In *Measure for Measure*, Angelo condemned Isabella's brother to death, but Shakespeare is later showing that he is not a disinterested actor of justice. It is clear that to be able to take someone's life, one should have the objective intent to make Justice triumph, which the human being by definition does not have. This is why the Duke, in applying the law, is more humanistic and thus, more coherent with himself: he implicitly admits the limited character of perfection of human justice.
To a more general extent, the idea of human rights is derived from the imperfection of human justice or the shield of criminal law, the shield against the State skid. In that sense, there are, within this body of law, rules that stand against the severe application of criminal law, guaranteeing a limited framework of the hard application of the law, but still legitimising order.
It can now be understood why the humanistic application of the law is not a blind and blunt mercy but rather a subtle mix of objective considerations deduced from the human relativity of Justice.

[24] P Smets, *Le combat pour l'abolition de la peine de mort : Hugo, Koestler, Camus et d'autres* (Académie royale de Belgique 2003) 45.
[25] Italo Mereu, *La mort comme peine* (Larcier 2012) 89.
[26] Rousseaux and Lévy (n 17) 17; See: "Elle assure le rapport de l'homme au surnaturel à travers la figure du juge souverain, investi du pouvoir de punir et de pardonner".

4.1.4 The objection for a mere demand for justice, return to the state's interests

Still, for Feibleman, justice is a response for *demand* of order, following a threat against the common good.[27] The more we get into the reflection, the more we understand that justice is not an objective process. Here, we consider Justice as a societal demand for order. Rousseau considering the convict as an enemy of the society is showing that the exercise of justice is not independent of political and societal influence.

In the case in point, it needs to be mentioned that the United Kingdom wanted to fulfil its treaty obligations to not execute a diplomatic order coming from the United States. There is a risk of contamination: society demanded Soering to be killed as he might represent a threat to national American security.

If we consider the State reaction as the supply for the social demand, we have to make a link with the interests as developed above: justice, as a State enterprise. It is particularly true for the case where pressure and conflicts of interests are at stake. Justice if not shaped by emotions can be shaped by the interests of the state.

This idea of the sensibility of justice towards the intrinsic fear of the other's reaction is not a ground-breaking discovery. One might also refer to the Melville's plot *Billy Budd* where Captain Vere pretended to have no choice but to kill Budd because he killed another sailor man. It was the sacrifice that Vere had to make in the name of the establishment of the order as the society's demand and expectation.[28] Vere killing Budd on the spot did mind judging him according to the law.[29] Without taking such a radical measure, Vere thought he might lose his place as a captain on the boat (according to Vere). We see that Vere, in his use of legitimate violence, could have done it in another way, even if he pretends the opposite. As opposed to the concept of '*la culture de la honte*' developed by Foucault, we think that the application of criminal law should be more individual than societal.[30] Once again, we tend to prove that as we are humans, there is an inevitable interplay with emotions be it fear or piety.

The ECtHR, however, in its judgement is bold and does not seem to care about the political implications and debates after its decision. It is neither acting on the basis of fear nor on piety but on equity (which to our meaning is different, *cf. infra*). From that one lesson can be retained: we cannot hide anymore behind the text of the law and the fear as we all know

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27 James Feibleman, *Justice, law, and culture* (Martinus Nijhoff Publishers 1985) 6.

28 James McBride, 'Revisiting a Seminal Text of the Law & Literature Movement: a Girardian Reading of Herman Melville's Billy Budd, Sailor' [2003] University of Maryland Law Journal of Race, Religion, Gender and Class 285, 298.

29 ibid 289.

30 Michel Foucault, *Surveiller et Punir* (Gallimard 1975).

the truth, the reality. Again, herein lies our reasoning affording rights is not mercy, but justice. Human Rights are not a favour, they are the correlative of the human character of justice.

4.2 Human rights or the emotions as foundations of the State

Alexander Hamilton, the framer of the American Constitution, has once said that he perceived the judicial as being the « least dangerous branch » maybe as it is bound to apply all the existing laws but also due to its very limited judicial review.
As seen with the ECtHR in *Soering*, the widening of the scope of Article 3 ECHR to the death row phenomenon has as a result guaranteed Soering, a fugitive murderer, to be protected from any inhumane treatment and thus, by extension, to the death penalty.
On one hand, according to some authors, the ECtHR would have taken too much power in that case, practicing an '*over-inclusive test*' that it is reality shrinking the power of the State to make justice,[31] to honour its social contract and treaty obligations. Colin thinks that this supranational institution actually deprives the Contracting States of their sovereignty due to its centripetal tendency to centralise all important litigation in relationship with the obligations of the countries in the field of human rights.[32] This willingness to harmonise national systems of criminal law and procedure may be seen as a denial of cultural relativism, but we think that is the price to pay for the same human rights, an extension of a universal human rights and therefore justice as we speak of below: a concretisation of the law as a standardising power of justice.
The American legal doctrine has also heavily critiqued this ruling arguing that through this humanistic and individual case-law, the ECtHR has threatened the legality of its case-law. For them, the ECtHR should have stood on the letter of the law because of cultural relativism, as respecting the United States sovereignty to ask for the extradition of Soering. The idea was put forward by Dostoevsky's *Crime and Punishment* where Portiry Petrovich, a policeman, is convinced by a strict application of the law without humanistic flexibility which by the way aspires to a scientific conception of the law. He thought that only acts contrary to the law must be judged and not the person. He thinks properly that piety shouldn't shape the spirit of the law at the expense of the legacy and more ultimately at the

31 Not to mention the fact that a Treaty is ratified on a voluntary basis.
32 Rousseaux and Lévy (n 17) 13.

society's integrity and order. More precisely, Petrovich is seeing the social contract as 'a promise to act lawfully provided the society punishes those who act unlawfully'.[33]
For some authors, the ECtHR used human rights as a 'sword of criminal law',[34] allowing for fugitive murderers to hide in safe haven where they would not face justice, some even consider the Soering case as being as accepting 'an assertion of national security'.[35] Even some have argued that States member to the ECHR may find themselves in a delicate position as it might be difficult for them to fulfil other obligations than the ECHR.[36] On that question, it comes back to the dialectic between protection and prosecution, between the law and equity, this will be returned to later (*cf.* Section 3).

4.3 Indirect state liability or Torture as a Tort

In the previous sections, it has been discovered the justifications of the death penalty. Among them, Kant said that it was a means to the end of violence: in this section, if it is to be believed that there is a 'return of violence'. In *Soering v. UK*, the ECtHR has concluded that the British authorities, *in case of* execution of the decision of extradition are violating Article 3 ECHR.[37] By holding a precautionary measure that may stake the UK's liability, the ECtHR enshrined a real positive obligation incumbent to the State. This principle of *accountability*, as explained by Ost and Van Drooghenbroeck,[38] is the obligation for a State to guarantee in effectivity the enjoyment of such human rights and to prevent their violation. In the Soering case, it was developed more as an 'obligation of results'.[39]

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33 Yoram Distein and Mala Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Kluwer Academic Publishers 1989) 251.

34 Y Cartuyvels, 'Les droits de l'homme, frein ou amplificateur de criminalisation ?' in François Ost (ed), *La responsabilité, face cachée des droits de l'homme* (Bruylant 2005) 407.

35 A Volou, 'Are diplomatic assurances adequate guarantees of safety against torture and ill-treatment: the pragmatic approach to the Strasbourg Court' (2015) UCL Journal of Law and Jurisprudence 37.

36 Lillich (n 9) 128, 143; See: "it is not difficult to imagine the political problems that might face a member of the Council of Europe caught between its European Convention and its extradition treaty obligations".

37 Piragoff and Kran (n 6) 225; See: "although in the event of recognition of a foreign judgement violating one of the rights guaranteed in the ECHR the violation has already taken place in that foreign country, it is the Court of one of the contracting parties which would ultimately allow such a violation in the contracting party".

38 François Ost and Sébatien Van Drooghenbroeck, 'La responsabilité, face cachée des droits de l'homme' in François Ost (ed), *La responsabilité, face cachée des droits de l'homme* (Bruylant 2005) 4.

39 As we saw, the mere fact of making a representation to the Virginian jurisdictions is indeed not sufficient per se.

What one should retain from that last section is that the ECtHR has asked the UK not to honour its Treaty with the US. It does not have to be mentioned that it was heavily critiqued by the American legal scholars.[40] They mainly rely on sovereign theory, on the principle of universal prosecution (as we have seen in chapter I), and finally on the argument of safe haven by saying that the ECtHR had been quite assertive on the matter.

It is indeed thought that relying on a strictly positive and monist approach, is a denial of a political and judicial decision. But beneath, as shown, The *Soering* case hides, in reality, a deeper debate: the ability of human rights to circumvent any illogical consequences derived by national legal orders.

To position ourselves on the debate, another piece Shakespeare's literary work shall be used: *The Merchant of Venice,* in which we encounter the character Shylock, a merchant that made a bond by including a clause according to which if the contract is not respected, Antonio shall give a pound of his flesh.[41] When the bond arrived at maturity and as he did not receive any money, he went on trial asking for the flesh. While the law was completely on Shylock's side, Portia, a rich woman - who turned herself into a lawyer - convinced Shylock to be merciful, as this is the essence of justice. For her, justice is not just the law but also the emotions of what is just or not. We understand that she also, reunite with her own experience: if it had not been for her tricks to marry the one she loves, because of her father's rule (derived from the Elizabethan marriage law),[42] she may be unfortunate for the rest of her life and this seemed unjust to her. She seems to understand that justice should be more than just the strict application of a general rule, but rather take the concrete impact on the human being after its implementation. Indeed, in applying strictly the law, Antonio might be injured, or killed because of the contract. Portia installs the idea that justice cannot lead to blood flowing. In that, one might say that *Justice is not the act of applying strictly the text, but it is rather to look if its implementation is in line with its spirit*.

5. Conclusion

After having done such a long journey to the plurality of justice, one must admit that it is a reality that is quite an overcoming one. The battle of the ECtHR for a humanised and tempered application of criminal law is indeed striking. In its judgement, the ECtHR has

[40] Colin Warbrick, 'Coherence and the European Court of Human Rights: the Adjudicative Background to the Soering Case' [1990] Michigan Journal of International Law 1073, 1094.

[41] Michael Jay Willson, 'View of Justice in Shakespeare's the Merchant of Venice and Measure for Measure' [1993] Notre Dame Law Review 695, 709.

[42] ibid 699.

shown in *Soering* but also in many other cases, that even if States have made a contract that consisted of extradition of fugitive criminals, this last could not lead to death.

All of this taken into consideration, we understand that the denial of human rights is the denial of the Law and Justice itself. In real life, numerous factors tend to interfere with this logic thought. This is why one should understand that this dogmatic affirmation according to which the law system is objective is the manifestation of an oversimplified vision of our judicial systems. The ECtHR, in its decision, was very honest and transparent. Without downplaying the political consequences of this judgement, we have to admit that the ECtHR has sent a strong message that was later copied by other sources of international law: the *Soering* case was not a jurisprudential skid but a real willingness to end the incoherent consequences of a strict vision of the social contract. Moreover, this will be the source of the thinking that wants to make the right to live and die out of reach to the human legislature. We could say that the ECtHR has introduced a humanist clause into the Social Contract.

Even being a criminal, the convict is still a part of the society and his integrity must be respected. The ECtHR has succeeded in showing that the heart of the law is not on its text as it may be changed, but rather lies in its spirit. At the same time, the United Kingdom was considered as the potential offender of Article 3 ECHR. Contrary to the thinking of the American doctrine, the ECtHR shows its antipathy to the death penalty in a coherent and convincing way: humans, by signing, the social contract could not have accepted a clause under which they will die.

After the *Soering* Case, the ECtHR held in *Öculan v. Turkey* the abolition of the death penalty in 2005. That same year, the United States, in *Ropper v. Simmons* abolished the death penalty for minors. This constitutes the ultimate proof that the ECtHR has been very convincing in its decision-making process. In that, the law is not the text in itself but the collective thought of what can or cannot be done.

Over our process, we wanted to show that the exemplarity of the ECtHR in *Soering* is undeniable: it succeeded, out of the text, to elaborate a pragmatic decision that has served as an example in many abolitionist judicial practices. In doing so, the ECtHR still respected the sovereignty and the integrity of the State. One could say that thanks to the ECtHR the ECHR has often been viewed as a shining example of a regional tool for the protection of human rights.

Finally, the ECtHR showed that political interests have to be set aside for the good of the law. Indeed, the ECtHR did rationally step into the international field where 'extradition is a relationship between two States and the person sought is considered to be an object of

the dealings between these states'.[43] The ECtHR, making a bet on effectiveness has obviously won. The Strasbourg jurisdiction is well known to make States realise their liability towards their citizens and non-citizens for the good of Justice. Its project and willingness to ensure a common sense of justice must be a constant source of inspiration. One could think about the issue of migration that leads millions of people to relocate themselves to other countries. Most of them are in danger of that process while risking their lives. We think that human rights as protecting the deprivation of life, have, once again, their role to play in this matter.

[43] Louwrens Kiestra, *The Impact of the European Convention on Human Rights on Private International Law* (Asser Press 2014) 251.

THE CASE FOR REGULATING ENVIRONMENT LAW THROUGH INTERNATIONAL INVESTMENT LAW

Stela Negran*

Abstract

This essay considers the extent and efficiency of protection of the environment in developing countries through the current legal instruments that regulate investment and concludes that even though there is some consideration of the environment present, that is not sufficient to remedy grave implications of the foreign direct investment on the environment or to protect the environment from those effects.

The essay examines the current situation of developing countries and their tendency to relax environmental regulations in domestic laws in order to attract more FDI in examples of Mexico and Indonesia. The difference between Mexico and Indonesia has been noted, as Indonesia's development enabled it to strengthen its position and keep environmental regulations, even if at the cost of FDI. The essay then proceeds to examine the hypothesis that environmental regulations should be introduced through international investment law, as opposed to international environmental law, due to the legitimacy and its binding mechanisms.

The essay explores the protection of the environment through soft control mechanisms of cross-border investment and continues to examine and evaluate binding legal instruments, enforcement mechanisms, standards of treaties and conduct of courts/arbitral tribunals, specifically with the emphasis on the expropriation claims and the mandatory requirement of the compensation from the host state.

The essay concludes that these instruments are insufficient to ensure the satisfactory protection of the governments to enact any environmental measures and not face the high amounts of compensation due to the investment disputes raised. Finally, the essay identifies possible course of action which investment law should take: including more stringent regulations concerning the environment with the analogy to Article XX of GATT, which means that this change would not go against common commercial practices and would be

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welcomed by the civil society and the developed countries that have no interest in attracting any FDI, thus can focus on giving priority to other policies.

1. Introduction

In today's modernised and continuously globalising world, the protection of the environment is crucial for society. The adverse effects of liberalisation of commercial activities such as trade and investment are contributing factors to global warming and other negative changes to the environment. In order to protect the environment and stop the detrimental consequences, more precautionary methods need to be put in place as well as more stringent regulations of commercial activities.

In this essay, it will be shown that such regulation must happen through international investment law in order to be effective. This will be done by first arguing that international investment law has more credibility in the international legal and political sphere, and is thus respected to a greater extent, as opposed to environmental law. After that, the current efforts of protecting the environment from the FDI implications will be discussed and their shortcomings evaluated through examination of soft control mechanisms, binding legal instruments and conduct of courts and arbitral tribunals with the emphasis on disputes concerning expropriation claims. Finally, the case will be made for the reform to happen in international investment law, as a consequence of inefficient safeguarding mechanisms through already mentioned legal instruments.

2. The Reality of Developing Countries

The primary purpose of foreign direct investment ("FDI") is to realise a profit. Generally, developing countries, among other benefits for the investors, often implement less stringent environmental regulations which allow multinational companies to incur fewer costs and generate higher return. Developing countries, in turn, receive capital, increased employment opportunities for their citizens, and new technologies and domestic competition emerge - all of which foster the economic development of a developing country.[1]

FDI often involves manufacturing, construction, mining, and similar industries, and thus, due to the very nature of these industries, it has devastating effects on the environment and natural resources.[2] Thus, low environmental standards have historically been one of the most significant incentives for FDI, which is why it often happens that developing countries

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1 Benjamin Martin, 'An Environmental Remedy to Paralyzed Negotiations for a Multilateral Foreign Direct Investment Agreement' (2007) 1(1) Golden Gate University Environmental Law Journal 209, 215-216.

2 Theodore Panayotou, 'Globalization and Environment' (2000) CID Working Papers 53A, Center for International Development at Harvard University, 21 <https://ideas.repec.org/p/cid/wpfacu/53a.html> accessed 15 March 2018.

enforce weak environmental policies, if any, in order to attract FDI. Whilst it is true that multinational companies increasingly introduce new, environmentally sustainable technologies to developing countries through this process, there are still many negative implications on the environment, and so investment practices should be revisited.

2.1 Mexico

Mexico has suffered damage to the environment due to the investment and the lack of correlation between investment regulations and domestic environmental law.[3] The flexibility of domestic law coupled with the want for strict and binding regulations on the international level allow authorities to make arrangements with multinational companies which continue to create environmental damage and pollution

Following the signing of the North American Free Trade Agreement (NAFTA), many amendments were introduced by the Federal Congress to relax the laws which limit participation of FDI in the energy sector, which until the 1990s was prohibited.[4] Such governmental practice is not surprising and is a common occurrence in developing countries who find themselves compromising their environmental policies in need of foreign capital. This issue is a result of the lack of effectiveness of international legal instruments in protecting the environment. One such failure of international instruments can be seen in the example of the *Tecmed* case, in which the tribunal was not willing to accept grave environmental damage as a justification for the expropriation, and awarded compensation to the foreign investor.[5] In this case, there was significant opposition from the civil society due to environmental damage. Around 300 people blocked the entrance to Cytrar, a hazardous waste-facility site in Mexico, until they were removed after a month by police forces. The tribunal completely disregarded the opposition claiming 200 people, out of a population of 1 million, is not enough to raise concern. They further stated that even if Cytrar was liable for various environmental offences and was in breach of federal law, the

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[3] Rosalien Diepeveen, Yulia Levashiva, and Tineke Lambooy, 'Bridging the Gap between International Investment Law and Environment' (2014) 30(78) Utrecht Journal of International and European Law <http://doi.org/10.5334/ujiel.cj> accessed 5 March 2018, 145-160.

[4] Robert F Fuentes, 'Mexico: Foreign Investment - Privatisation of Petrochemical Industry' in Deborah Cass (ed), *International Trade Law & Regulation* (Sweet & Maxwell 1995) 108.

[5] *Tecnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No ARB (AF)/00/2.

site "never compromised the ecological balance", and there was no excuse for the failure of the government to renew the permit to operate it.[6]
There are plenty of similar cases, and very often they end in a similar way – arbitral tribunals protect financial interests, find expropriation and the State remains liable for substantial amounts of compensation. Such decisions and high amounts of compensation discourage developing states to regulate the investment in favour of the protection of the environment.

2.2 Indonesia

It is important to note that there are certain developing states which prioritise environmental concerns over the investment interests. One such country is Indonesia which portrays the opposite approach to that of Mexico. Indonesia has incorporated corporate social responsibility and the investors' obligations to protect the environment in their domestic laws.[7] An example of this practice is Law No. 32 of 2009 on Environmental Protection and Management. The purpose of this law is to "create environmentally sustainable development",[8] which includes the protection of the territory of Indonesia from pollution and damage to the environment, assuring the safety of life and health, assuring the continuation of life and conservation of ecosystem, etc.[9] These goals are to be achieved through the planning of environmental protection and management through the phases set in Article 5 of the law.[10] It is important to note that this is just one of many regulations and laws enacted in Indonesia to protect the environment through regulations of permits, guidelines for evaluation and preparation of environmental documents, impact assessments, etc.[11]

More often than not, the interests of developing countries outweigh the environmental risks. As we are now in the 21st Century, and we can understand how much damage capitalism

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6 ibid; David Schneiderman, 'Investing in Democracy: Political Process and International Investment Law' (2010) 60(4) University of Toronto Law Journal 909.
7 Diepeveen, Levashiva, and Lambooy (n 3) 145-160.
8 'Law No. 32/2009 on Environmental Protection and Management' (*The Redd Desk*) <https://theredddesk.org/countries/laws/law-no-322009-environmental-protection-and-management> accessed 15 April 2018.
9 ibid, article 3.
10 ibid, article 5.
11 David Dawborn, Matthew Goerke, Ninditya R Prijono and Aditya Rachman, Hiswara Bunjamin & Tandjung in association with Herbert Smith Freehills, 'Major projects: environmental risks in Indonesia: overview' (Thomson Reuters: Practical Law) <https://uk.practicallaw.thomsonreuters.com/w-007-7728?transitionType=Default&contextData=(sc.Default)> accessed 12 March 2018.

has done to the environment, it is crucial to start regulating the effects of commercial activities and give more significance to the protection of the environment and follow Indonesia's example.

3. Preference of International Investment Law over International Environmental Law

As the states and general public realised the gravity of environmental consequences arising from today's globalised commercial practices, especially with the effects of trade and investment, there have been efforts to regulate the environment since the 20th Ct. Stockholm Conference on the Human Environment was the first of such efforts, and is the first global environmental conference that took place in 1972.[12] It was followed by the Rio Conference on Environment and Development in 1992 on whose agenda was the discussion of the implementation of Stockholm regulations. 20 years after Stockholm, it was recognised that there is an insufficient implementation of the action plan adopted in Stockholm.[13] Heads of States and Governments alongside diplomats and NGOs concluded that environmental development cannot be seen as an "isolated field" anymore. They developed a plan called "Agenda 21" which embraced all areas of sustainable development in order to balance the quality of the environment and the development of economies for the states around the world.[14]

However, there have been many obstacles to achieving the goals of these and related conferences and conventions. The first and the most difficult to overcome is the mechanisms established for the regulation and control of compliance with these international legal instruments. The most common mechanism for compliance is the submission of reports. This mechanism is very obviously flawed by the lack of the enforcement strength. Even though there are deadlines and formats which those reports should take, there are no real consequences for the non-complying nations.[15] In addition, such instruments concern states as a whole, and they do not examine individual cases of FDI. These are examined through dispute settlement with legally binding consequences.

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[12] Gunter Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (*Audiovisual Library of International Law)* <http://legal.un.org/avl/ha/dunche/dunche.html> accessed 15 March 2018.

[13] Pierre-Marie Dupuy and Jorge E Vinuales, *International Environmental Law* (Cambridge University Press 2015) 12.

[14] Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (vol. I) 31 ILM 874 (1992).

[15] Dupuy and Vinuales (n 13) 240-242.

Dispute settlement is another flawed and weak mechanism for the enforcement of compliance when it comes to environmental law cases because it proved to be inefficient and dysfunctional. This is because environmental harm is complicated to determine numerically in order to impose a fine. In addition, environmental harm can be costly to repair and can sometimes even be irreversible. Finally, activities which enhance the economy often have effects on the environment, which is why the courts and tribunals are still very reluctant in giving environmental issues more weight when put against investment interests.[16] Lack of experience in environmental issues is another problem with dispute settlement as a mechanism of regulating the environment because while specialised international proceedings have been developing rapidly in areas such as human rights, international trade law and international investment law, the opposite can be said for environmental law.[17] Romano argues that the reason why environmental law has not developed as much in the courtroom is because international adjudicatory bodies lack material and financial resources, in-depth knowledge of the subject, etc. They are not in a position to be of help to States defeated in domestic courts, and they are not familiar with the dispute until it is brought before them.[18]

All of these belong to the traditional approaches and attempts to environmental law, but the modern approach does not seem to be any more effective. Mechanisms of regulation and enforcement of modern instruments are usually based only on prevention and assistance, such as financial assistance, giving training to personnel, and non-compliance procedures (NCPs) which can be found in Kyoto Protocol, for example. However, these are not binding unless rectified by the nations, pursuant to Article 18.[19]

Since neither traditional nor modern approaches to the regulation of environmental law proved to be effective protection mechanisms, International Investment Law seems to be a more satisfactory option given that it is stricter, and the states are more ready to comply with it.

Firstly, the adjudication of investment issues is often very successful because of the ICSID Convention which provides for the arbitration procedure between the investors and host states in order to settle investment disputes, and it is included in most of the official investment dispute settlement mechanism. Many cases have been brought before the arbitral

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16 ibid 243.

17 ibid 245.

18 Cesare P R Romano, *The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach* (Kluwer Law International 1999) 333.

19 Jorge E Vinuales, 'Managing Abidance by Standards for the Protection of the Environment' in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (Oxford University Press 2012) 336.

tribunals, and international investment law has been successfully upheld by the imposition of compensation fees on the States and similar practices.[20] The costs of non-compliance in this field of law are incomparably higher than when it comes to non-compliance with environmental law, which is why nations have better incentive to comply.

Secondly, one of the most significant sources of international investment law are bilateral investment treaties (BITs) which are agreements between the two states that set the terms of the business relationship, regulate taxes, provide guarantees, etc. As they create contractual obligations among two states, they are binding in nature. Due to the financial interests of developing states to attract FDI, the interests of developed states and big companies to realise more profits by shifting the investment to countries where they would incur less costs, these agreements have a high level of credibility and legitimacy.[21]

As can be seen from the above, protection and regulation of the environment on the international level proved to be incapable of crossing all the hurdles posed by its characteristics and remains to mostly be in the hands of the nation-states with the extent of protection left to states' discretion. On the other hand, due to the critical financial interests and high costs of non-compliance, international investment law is regulated to a very satisfactory level and continues to be a useful tool in regulating international investment. For these reasons, the only way to successfully protect the environment from FDI implications is through more stringent regulation of investment law and its impacts on the environment.

4. Environmental Protection through "Soft Control Mechanisms"

There have been attempts to include the protection of the environment into the "soft control mechanisms" of investment law. Soft control mechanisms, as defined by Viñuales, consist of a number of diverse tools, including guidelines, codes and other voluntary initiatives, as well as contractual obligations.[22] These are the tools which do not belong within the definition of "hard law" due to the lack of binding force but are used to control or regulate the investment through incentives and voluntary initiatives by the States.

One of such mechanisms is the OECD Guidelines which are recommendations for multinational enterprises (MNEs). They provide non-binding principles for the conduct of business based on applicable laws and international standards and reflect the shared values

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20 The cases can be found in the Part 4 of this essay where they are discussed in detail.

21 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012) 13.

22 Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 59.

of governments from the states which most of the MNEs are based.[23] Because they are based on standard business practice, and because they represent a universally agreed code of responsible business behaviour, they are very often followed by multinational enterprises. Environmental standards are included within the Guidelines and they state that MNEs should "take due account of the need to protect the environment… and generally conduct their activities in a manner contributing to… sustainable development."[24]

This would appear as a worthy initiative for the MNEs to comply with environmental standards and act within the goals of sustainable development. However, the Guidelines have two caveats. Firstly, the standards are left to national laws and international commitments for the regulation which means that developing states have no incentive to implement them as more regulations would reduce the flow of FDI into their countries. Secondly, adhering countries make a commitment to implement the recommendations from the Guidelines through the National Contact Points (NCPs) which can consist of representatives from the government, independent experts or representatives of the business community.[25] This means that the states would implement the system of provision of guidance and establish a system of accountability, as opposed to a system of sanctions for non-compliance. The Guidelines may assist the states in the process, but it is left to the states whether or not they want to actually implement the Guidelines and act in accordance to them. As was already described, developing states may not have an incentive to do so, and so the Guidelines fall short of remedying the harm to the environment or preventing it.

Another example of a soft control mechanism is the UN Global Compact. As a voluntary initiative, UN Global Compact aims to tackle the issue by ensuring transparency, public accountability and disclosure. The compliance mechanism is, just as it is with similar instruments, submission of reports. This initiative, being voluntary in nature, has no enforcement mechanism nor does it have a rewarding incentive, meaning there are no actual consequences for the non-complying states and so, even with the best efforts, it is not capable of serving as a satisfactory safeguard for the protection of the environment from the implications of private investment.

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[23] OECD, 'OECD Guidelines for Multinational Enterprises' (OECD Publishing 2011) <http://dx.doi.org/10.1787/9789264115415-en> accessed 19 March 2018.

[24] ibid, Part I, VI.

[25] OECD, OECD Guidelines for Multinational Enterprises (OECD Publishing 2011) <http://dx.doi.org/10.1787/9789264115415-en> accessed 19 March 2018, Procedural Guidance.

Finally, even the Rio Declaration, often celebrated as "the major milestone in the evolution of international environmental law"[26] lacks strength, clarity and guidelines on the implementation of the principles. Throughout the Declaration the words such as "are entitled", "have the right", etc. are not definitive and serve just as encouragement for the behaviour, but leave too big of a gap in how that should be done.

It can be concluded that soft control mechanisms have not done much for the protection of the environment because of a lack of serious commitment and enforcement mechanisms which would impose costly consequences on the developing states. Since there is lack of interest and incentive for the regulation of the environmental law domestically using stronger means and the fear of its effects on the FDI, another set of voluntary guidelines or codes are unlikely to have any real effect. This leads to the conclusion that the only possible way to protect the environment from the implications of the FDI is through strong and legitimate mechanisms that have been regulating international investment.

5. Environmental Protection through "Hard Law" and Strong Enforcement Mechanisms

The idea of protection of the environment through "hard law", i.e. binding legal instruments, has been attempted to implement through various preambles and provisions of investment treaties, as well as through bringing environmental concerns as an argument in investment disputes before the tribunals, especially in the expropriation cases. However, as will be shown in this part of the essay, there is a lack of incentive to include environmental concerns into international investment law. The interests of the industry do not align with the protection of the environment, and in fact the opposite happens – private investment is very likely to have a detrimental impact on the environment. Even though in theory it might seem convenient and beneficial to include environmental concerns into the regulation of the international investment, in practice there is a lack of such protective mechanisms, or at best, environmental concerns are lightly considered. This reluctance of allowing for more protection to the environment at the cost of FDI can clearly be seen from the language and approach in internationally binding treaties and conventions, through low consideration in the case-law and through the approach towards expropriation claims and the requirement of compensation.

[26] Gunter Handl, 'Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration), 1972 and the Rio Declaration on Environment and Development, 1992' (*Audiovisual Library of International Law)* <http://legal.un.org/avl/ha/dunche/dunche.html> accessed 15 March 2018.

5.1 Treaties

Treaties, or better to say, binding legal agreements, successfully regulate international and cross-border investment. However, the extent to which efforts for protection of the environment through them were successful is very debatable. There are many broad, vague or ambiguous provisions which attempt to protect the environment and for those reasons often fail in doing so.

One of such efforts is the United States Model BIT which recognises the State's right to discretion in regulation of environmental concerns, as well as emphasises that it is "inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws."[27] The article can be interpreted in a way which supports domestic environmental law, as well as allows for any regulation concerning environmental matters. This would be a sufficient effort for ensuring minimal detriment to the environment as a result of the investment activities if it was not for the problematic and vague language: "in a manner sensitive", "inappropriate", "higher priority". The wording in those provisions is weak, meaning it does not seem to impose any grave consequences of non-compliance. Further, the provisions are incomplete lacking strict rules and guidelines, the extent to which the state can regulate without consequences and leaves a lot of room for subjective interpretation. The decision of whether or not the state breached the treaty by regulating the environmental concerns is ultimately on the arbitral tribunals or courts once the dispute arises, and states are likely to be unwilling to take the risk as they cannot know what the outcome will be.

Environment is, to some extent, protected by NAFTA as well. Article 1114 recognises that it is inappropriate to encourage investment by relaxing environmental regulations, as well as allows for the enactment of any measure considered appropriate to ensure that investment addresses the environmental concern.[28] As much as this article, on its face, protects governments to adopt environmental measures, it faces the same issue as most of the BITs, which is the lack of clear guidelines and leaves room for wide interpretation. For example, at the same time, NAFTA requires compensation for any direct or indirect expropriation of the host state.[29] Since Article 1114 fails to state which measures could be considered as "appropriate" or give any kind of clarification, it would be left to the courts to interpret it. Hence, if the claim against the host state is made under Article 1110, an environmental measure could easily be found as indirect expropriation by the court or arbitral tribunal.

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[27] US Model BIT, Art 12.

[28] NAFTA, The North American Free Trade Agreement, Article 1114.

[29] NAFTA, The North American Free Trade Agreement, Article 1110.

This has happened in *Metalclad v Mexico* where the tribunal found a regulatory environmental measure to be indirect expropriation, thus awarding compensation. This uncertainty due to the language used could discourage the host state from enacting any environmental measures at all.

When these binding legal documents are taken into consideration, it can be argued that the provisions on the protection of the environment are highly inefficient and do not serve their purpose. They are very easily defeated by stronger, clearer and "more important" provisions, such as the requirements of compensation in any case of direct or indirect expropriation. Even though it seems as though the states have decided to take FDI implications on the environment seriously and include their protection in the treaties and agreements, those provisions are still very weak and unlikely to give any protection to the host state.

5.2 Adjudication of environmental matters

As legally binding instruments are failing to successfully protect the environment from the impacts of the investment, another avenue could be taken, and this is international adjudicating institutions which deal with environmental claims arising from detrimental commercial practices.

Treaties often establish different systems of dispute resolution, one of which are courts specialising in the field of law relevant to the treaty. Hence, there are courts that specialise in environmental matters and they could give environmental binding instruments more force and credibility, such as investment and trade. Such courts are established through the provisions of the treaty which deal with dispute resolution. However, states often refuse to consent to judicial dispute settlement prescribed in the treaty, as is the case with the Convention on Biological Diversity which allows the states to submit their disputes to arbitration or to the International Court of Justice. In this case, only four states consented to this possibility, and the same outcome is seen in other such attempts, as well.[30]

Since there is little incentive and inclination of the states to consent to submit their disputes to arbitration procedures set up by treaties, there is another option available for settlement of environmental issues. This is available through the Permanent Court of Arbitration which adopted optional rules for environmental matters. The court is, among other things, able to request non-technical summaries and grant interim measures.[31] This constitutes a big step towards international environmental law gaining more credibility, but this mechanism is very rarely used in practice.

[30] Dupuy and Vinuales (n 13) 245.

[31] ibid 245.

Further efforts have been put towards settling this issue by establishing special chambers within the ICJ to deal with environmental matters. The Chamber for Environmental Matters was established with the aim of addressing pending cases before the ICJ, but in 13 years of existence, the Chamber has never been used and so the ICJ decided not to reconvene it.[32] This was yet another failed attempt at creating a specialised adjudication system for environmental matters on an international level.

Third approach to this issue was the creation of the International Environmental Court. This was an idea by an Italian judge Postiglione in the 1980s but there were a number of issues with it from the conception of the idea. The most obvious and very difficult issue to overcome would be the jurisdiction of such a court. Defining the jurisdiction is a problem that arises due to the broad and vague nature of the environmental norms and provisions in treaties. Furthermore, given the failure of usage of special Chambers of ICJ, there is a strong argument to make that such a court is not necessary.[33]

Considering all of these efforts that have not proven successful, the only remaining possibility for adjudicating environmental matters is through borrowed fora.[34] That involves addressing environmental issues through adjudication of other branches of international law. Investment disputes, like other fields of law, often have environmental components and so the tribunals and courts should consider environmental components during the proceedings. This is not the most satisfying solution as, in this way, environmental law will never get the credibility and be on the equal level as investment law, however, it does seem to be the last resort to turn to for protection of damaging FDI implications on the environment.

5.3 Expropriation disputes and the requirement of compensation

There is a lot to discuss about adjudicating through borrowed fora, and it is important to concentrate on the case-law and examine it with care to find the extent to which protection of the environment through investment disputes takes place. Most of the investment disputes brought before the tribunals or courts consider expropriation and claims for the compensation.

In 2000, the ICSID tribunal said that expropriatory environmental measures, regardless of their benefit to the society, are as any other expropriation measures and the host state

[32] 'Chambers and Committees' (*International Court of Justice)* <http://www.icj-cij.org/en/chambers-and-committees> accessed 1 April 2018.

[33] Dupuy and Vinuales (n 13) 246.

[34] ibid 247.

remains liable to pay the compensation.[35] Such an approach is very dangerous and it clearly puts the financial interests of host states and investors before the environmental concerns. The investors are protected against any measures of expropriation regardless of the importance of the measure for public good, including the environmental importance, and the host states are required to pay compensation. This may have adverse effects on the protection of the environment as developing countries are likely to be discouraged from implementing any environmental policies due to the risk of having to pay large amounts of compensation.

Nearly all BITs provide protection against expropriation, and the majority also covers indirect expropriation which are measures that have the identical effect to expropriation. Because of such stringent provisions covering expropriation, as for example, can be seen in NAFTA, the courts and tribunals are very reluctant to find in favour of the host state and so they often award compensation for expropriation, as opposed to accept environmental measure as legitimate exercise of governmental rights, pursuant to most of the provisions and articles dealing with the environment.

One example which perfectly depicts the extent of judicial reluctance is the Metalclad in which the environmental matter at hand was potential contamination of local water supply. Even with such grave consequences of investment activity, the tribunal rejected Mexico's perception of environmental risk and ordered for compensation.[36] Thus, in this case, the government was liable for investor's economic loss which was a result of "bona fide" regulation. However, the otherwise has been accepted principle of international law, provided state acts within its "police powers". [37] This should especially be the case when the regulation leaves at least some value to the property[38] and could have reasonably been expected, as happened in Metalclad, where the claimant knew that the business activity it was carrying was highly regulated by Mexican Federal Law. As can be seen from the case, this principle of international law has not been applied to environmental regulations, but it has been applied to some other regulations, such as tax and export.

There is a strong argument to be made as to why environmental regulations should fall within this spectrum of regulations not amounting to expropriation under any circumstances. The first important thing to understand is that requiring the host state to pay for the compensation for enacting environmental regulation goes against a very well

35 *Compania del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No.ARB/96/1.

36 *Metalclad Corporation v The United Mexican States*, ICSID Case No.ARB(AF)/97/1.

37 Jorge E Vinuales, *Foreign Investment and the Environment in International Law* (Cambridge University Press 2012) 367-372.

38 J Martin Wagner, 'International Investment, Expropriation and Environmental Protection' (1999) 29(3) Golden Gate University Law Review 465.

established principle of International law – "Polluter pays for pollution". If the country has a reason to enact additional environmental measures, that is usually done in consequence or with the aim of prevention of a catastrophe, and so it should be on the polluter, or the investor, to pay for the damage to the environment, and not the state paying for depriving the investor of some profits that would be made on the basis of damaging the environment. Further, the environment is essential for the functioning of the State, and society itself, and so any regulations protecting it should be non-compensable, just like consumer protection measures, securities, and antitrust measures are.[39]

Tecmed[40] is another case which shows how inclined courts are to find expropriation and awarding compensation, even in the direct breaches of environmental law, as in this case the Cytrar site was less than 25 km away from a municipality, which was in violation of the Federal Law. The reasoning of the court was that this breach was not grounds for refusing the renewal of the licence, but rather the excision of landfill limits, and concluded that this could not be an excuse for the actions of the government.[41] Given the gravity of the case, the fact that the investment activity included huge detriment to the environment and population, but also a direct breach of federal law, this case clearly shows two important facts: 1) NAFTA provisions for the protection of the environment are incapable of actually protecting it due to the Article 1110 which requires compensation; and 2) adjudication of environmental matters through borrowed fora is not a satisfactory solution as the courts are reluctant to act upon environmental issues and give them priority over the financial interests. Even though there is a number of cases decided in the similar matter, where the environmental concerns made little or no difference to the outcome of the case,[42] there seems to be some progress made by the courts in considering environmental concerns when deciding the cases. For example, in SPP v Egypt the tribunal considered environmental issues and in result, awarded less compensation than was claimed by the investor.[43] Furthermore, in LG&E Energy Corporation v Argentina, the tribunal tried to use the test by balancing the right of ownership and the host state's power to implement its policies,

[39] As stated in the preamble of International Convention on Oil Pollution Preparedness, Response and Cooperation, and formulated on international level by OECD Council Recommendation on Guiding Principles concerning International Economic Aspects of Environmental Policies.

[40] See: Part 2.1.

[41] *Tecnicas Medioamientales Tecmed, S.A. v The United Mexican States*, ICSID Case No.ARB(AF)/00/2.

[42] See: *CDSE v Costa Rica*.

[43] *Southern Pacific Properties (Middle East) Limited v Arab Republic of Egypt*, ICSID Case No.ARB/84/3.

and even looked at the test of proportionality used by the European Court of Human Rights to determine the compensation.[44]

Even though the compensation has still been awarded in all of these cases, there is a positive step towards recognition of environmental concerns and their growing impact on the judgements. A positive step towards recognising companies' liabilities for environmental abuses. Environmental concerns should impact the decision of investment disputes as they can no longer be examined without reference to other fields of international law. Development should represent other issues, such as environment, and not just commercial interests, and so unless these are incorporated into the process, the whole system will be undermined.[45]

6. Consequences and a Case for a Reform

Considering that treaties, agreements and courts offer little or no safeguards to the developing host states when they enact regulations in order to protect the environment which affect investment activity and especially the profits, developing states are not as keen on enacting any kind of measures which might result in the dispute. It is costly for them to pay for the potential compensation resulting from enactment of such measures, but in addition, it is costly for them to even take part in court/arbitral proceedings as they often lack the expert representation and have to hire Western lawyers to represent them.

Further, unequal bargaining power often leaves developing states in need of foreign capital to enter into international investment agreements on take-it-or-leave-it-basis,[46] and in addition to affecting its policies by granting resources to big corporations or relaxing the domestic environmental standards. One example of such behaviour can be seen in Columbia which, following the BIT with the US, handed its fossil-fuel reserves, located in Columbian rainforests, for de facto control of Texaco showing the desperation for attracting FDI at the expense of the environment.[47]

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[44] *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic*, ICSID Case No.ARB/02/1; Kate M Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 59(2) Duke Law Journal 343, 365.

[45] M Sornarajah, *The International Law on Foreign Investment* (3rd ed, Cambridge University Press 2010) 78-79.

[46] Kate M Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 59(2) Duke Law Journal 343.

[47] Steven R. Ratner, 'Corporations and Human Rights: A Theory of Legal Responsibility' (2001) 111 Yale Law Journal 443, 462.

Given the importance of the environment, the situation as it is, is not acceptable, which is why it is crucial that a reform happens. This reform could start with an attempt of another multilateral agreement which will be binding and will successfully regulate investment and decrease its environmental impacts. However, weak bargaining power of the developing countries, coupled with diverging interests between developed and developing countries is the reason for the failure of establishing efficient and international investment treaties, such as the MAI. Because of these diverging interests, there has been a number of negotiations on the MAI through which similar issues and concerns have been discussed and if the international community learns from its past, it is possible to address those issues in future negotiations.[48] Knowing the concerns and arguments of both developing and developed states, working groups could be established in order to find a solution or an acceptable compromise which would be included in the MAI. This way, many concerns, including environmental ones, would successfully be addressed and become codified and enforceable. Martin argues environmental conditions should be added to such negotiations for the new MAI. He further argues that developing countries would strengthen their bargaining power by accepting more environmental conditions, as that would make foreign investors more compromising in parallel investment negotiation.[49] This way, investors would secure their FDI interests and the environmental progress in developing countries, where it is most needed, would take effect.

The new, reformed MAI could include provisions similar to Article XX of GATT which, alongside allowing measures relating to human, animal and plant life also allows for discriminatory measures provided they are not unjustifiable.[50] This evolution demonstrates the acceptance of environmental measures even in commercial businesses, which means that such a serious innovation to investment law should also be acceptable, as both investment and trade deal with commercial interests.

Finally, even the courts are making a step forward to recognise environmental regulations as important as some others which are allowed and do not amount to expropriation (e.g. tax). This can be seen in the LG&E Energy Corp v Argentina case, as discussed before.

Considering all of this, and especially the inclination of the general public and developed states to the environmental protection, this innovation to the investment law and allowing for regulation of environment through investment, would amount to much needed change

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[48] Jan MacDonald, 'The Multilateral Agreement on Investment: Heyday or MAI-Day for Ecologically Sustainable Development' (1998) 22 Melbourne University Law Review 617, 654-56.

[49] Martin (n 1) 209.

[50] Kate M Supnik, 'Making Amends: Amending the ICSID Convention to Reconcile Competing Interests in International Investment Law' (2009) 59(2) Duke Law Journal 343.

that is potentially the only way to protect the environment from one of the major causes of environmental hazards.

7. Conclusion

This essay considered the extent and efficiency of protection of the environment in developing countries through the current legal instruments that regulate investment and concludes that even though there is some consideration of the environment present, that is not sufficient to remedy grave implications of the foreign direct investment on the environment, or to protect the environment from those effects.

This was done through, first, examining the current situation of developing countries and their tendency to relax environmental regulations in domestic laws in order to attract more FDI, and in that way secure more incoming capital. This was done on the example of Mexico and Indonesia, two developing countries with very opposite environmental policies. The essay then proceeded to examine the hypothesis that environmental regulations should be introduced through international investment law, as opposed to international environmental law, due to the preference and compliance to the investment law by the companies, host states and the courts.

Following this discussion, this essay went to explore the protection of the environment through soft control mechanisms of cross-border investment and continued to examine and evaluate binding legal instruments, enforcement mechanisms, standards of treaties and conduct of courts/arbitral tribunals, specifically with the emphasis on the expropriation claims and the mandatory requirement of the compensation from the host state.

The essay concluded that these instruments are insufficient to ensure the satisfactory protection of the governments to enact any environmental measures and not face the high amounts of compensation due to the investment disputes raised. Finally, the essay identifies possible course of action which investment law should take: including more stringent regulations concerning the environment with the analogy to Article XX of GATT, which means that this change would not go against common commercial practices and would be welcomed by the civil society (the general public) and the developed countries that have no interest in attracting any FDI, thus can focus on giving priority to other policies.

In conclusion, the investment law is in dire need of reform and incorporation of environmental standards into it, because, after all, investment law has greatly adverse effects on the environment and so it should be the one bearing the cost of regulation and protection.

CIVIL AVIATION EMISSIONS REDUCTIONS: CORSIA VS. EUROPEAN EMISSIONS TRADING

Nathan Weijland*

Abstract

Aviation emissions have hardly been regulated in the past years. However, this changed when the European Union (EU) wanted to include international civil aviation into their ETS. After opposition to the EU, the ICAO eventually concluded a new scheme, named the Carbon Offsetting and Reduction Scheme for International Aviation. In this article the schemes are compared on the basis of how they function, their coverage, the needed amount of allowances or offsets and how compliance is regulated. First, because of CORSIA being based on offsets there are many drawbacks in connected fields of interest which should be respected and preserved compared to the EU ETS. Secondly, the coverage of CORSIA is route-based just as the EU ETS. Yet, CORSIA's coverage is higher than would have been reached within the original scope of the EU ETS. Thirdly, the EU ETS also leads to an absolute lowering of emissions and a higher need for allowances while CORSIA only offsets emissions growth and needs less offsets compared to the allowances in the EU ETS. Finally, compliance is strongly regulated within the EU ETS while it is not specifically regulated within CORSIA and left to the participating states which could become a problem for compliance in the future. Because there is a higher need for allowances and strong compliance mechanisms, the incentive from the original scope of the EU ETS to reach environmentally positive changes would be higher compared to CORSIA and would have a higher potential to reduce aviation emissions.

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1. Introduction

Climate change is happening, and the aviation industry is partly responsible for this change. Civil aviation is a relatively significant contributor to the total emissions of greenhouse gases (GHG), and emissions are growing faster every year. In 2017 the global aviation industry produced 859 million tonnes of carbon dioxide (CO_2) which measures just above 2% of all human-induced CO_2 emissions and for 12% of all transport sources emissions. In the same year, around 4.1 billion passengers were carried by all airlines combined. 80% of all emissions from aviation is produced on flights which are longer than 1.500 kilometres and for which there are minimal to none available alternatives. The aviation sector has already taken several steps to reduce its environmental impact by buying more energy-efficient aircraft and by fitting winglets on aircraft.[1]

In this article, the main question is if CORSIA from the ICAO has the same impact as the original scope of the EU ETS on environmental-positive changes in aviation during 2021-2035. Environmental-positive changes within aviation are needed in order to combat climate change because of the large amount of emissions from aviation as a whole.

This article will answer this question by analysing the European Union's Emission Trading Scheme (EU ETS) and the International Civil Aviation Organization's (ICAO) Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA). Paragraph 2 is about how and why aviation became included into the EU ETS and about the critique that followed. Paragraph 3 will analyse the goal, system and implementation of CORSIA. Paragraph 4 will go deeper into some of the differences between the EU ETS and CORSIA. The goal of the analysis is to find out which scheme is more prone to improve aviation environmentally in a world where we have to make sure we stop climate change in time. Therefore, this article will compare both types of schemes, their coverage, how much emission allowances or offsets are expected to be needed, and how compliance will be ensured. Paragraph 5 will conclude this article and will answer which scheme is expected to be more efficient for environmental changes in aviation during the years 2021-2035.

2. Aviation emissions regulation within the EU ETS

The legal framework for the EU ETS for aviation is the EU Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 (hereafter: Aviation Directive) and 2009/29/EC of the European Parliament and of the Council of 23 April

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1 'Facts & Figures' (*Air Transport Action Group*, 2018) <https://www.atag.org/facts-figures.html> accessed 2 March 2019.

2009. These two directives are amendments to Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 (hereafter: EU ETS Directive) which set the EU ETS in place. The EU ETS for aviation applies to all EU Member States and Norway, Iceland and Liechtenstein, these are named the EEA states.

2.1. Reasons for implementation

According to the European Commission, the EU ETS is 'the cornerstone of the European Union's drive to reduce its emissions of manmade greenhouse gases which are largely responsible for warming the planet and causing climate change'.[2] The inclusion of aviation was a logical decision due to the amount of emissions from the industry as a whole. The main goal of the EU is to reduce and limit GHG emissions that are produced by the aviation industry in line with this commitment.[3] There were several reasons for the EU to include civil aviation into the EU ETS, but a large factor was that the ICAO was not able to achieve a global agreement between its member states. Because of this, the EU decided to include civil aviation into the ETS unilaterally.[4] Next to this, it was noted by the European Commission that the emissions from the aviation sector were larger than entire other sectors, like the refinery and steel production sectors, which were included in the EU ETS.[5] Civil aviation was eventually included in the EU ETS from the 1st of January 2012 onwards.

2.2. Opposition

There has been a lot of opposition to the inclusion of international aviation, which either arrive or depart at an EEA airport, into the EU ETS. This opposition came from numeral airlines, trade associations and from several non-EU countries all over the world like the USA, China, Russia, Canada, Australia, Japan and Brazil but also from de ICAO. Their

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[2] European Commission, *The EU Emissions Trading System* (EU ETS) (2016) <https://ec.europa.eu/clima/sites/clima/files/factsheet_ets_en.pdf> accessed 2 March 2019.

[3] Directive 2008/101/EC of the European Parliament and of the Council of 19 November 2008 amending Directive 2003/87/EC so as to include aviation activities in the scheme for greenhouse gas emission allowance trading within the Community [2008] OJ L8/3 (Aviation Directive), preamble 4.

[4] Vincent Schade, *The Inclusion of Aviation in The European Emission Trading Scheme: Analysing the Scope of Impact on the Aviation Industry* (1st edn, Anchor Academic Publishing 2014) 26-27.

[5] European Commission, *Questions & Answers on Historic Aviation Emissions and the Inclusion of Aviation in the EU's Emission Trading System* (EU ETS) (2011) <http://europa.eu/rapid/press-release_MEMO-11-139_en.htm> accessed 2 March 2019.

arguments were, among others, conflict with international law like the Chicago Convention on Civil Aviation, a violation of their sovereignty and economic and competitive reasons.[6]
The states opposing the inclusion of non-EEA international aviation eventually led to the *Moscow Declaration* on the 22 February 2012, which listed possible retaliatory actions if the EU did not stop the implementation of the Aviation Directive. Some countries even went further and prohibited their national flag carrier from participating in the EU ETS, cancelling orders at Airbus or threatened to deny overflight over their territory.[7]
Airlines and trade associations also took action against the EU's plan, even before non-EEA states acted. One of these actions was the challenge of the legality of the Aviation Directive before the UK High Court of Justice. The court asked for a preliminary ruling by the CJEU, which in this ruling declared that the Aviation Directive was, in short, legal.[8] Other trade associations have stayed critical of any unilateral decision by the EU to implement international civil aviation within the EU ETS.[9]
There has also been opposition from within the EU. For example, Lufthansa said the implementation would become a fiasco, Airbus blamed the EU ETS for cancellation of orders, and there was political opposition from within the European Parliament because the ICAO was not willing (because of its members) to comply to the will of the EU to limit emissions in this way.[10]
The opposition was eventually successful when the EU Commissioner for Climate Action, Connie Hedegaard, said that they would 'stop the clock' for one year. This was done because of the 'encouraging results of the ICAO Council meeting of the 9th of November [2012]' and 'as a gesture of good faith', giving room to the ICAO to come to a global solution.[11]
This was only regarding international flights which either arrived or departed from an EEA country and did not affect intra-EEA flights. Eventually, the original scope was never reinstated because of the progress made by the ICAO. If the developments through CORSIA will not be deemed enough when the EU ETS is reviewed in order to include the global measures from CORSIA into the EU ETS, the original full scope of the Aviation Directive will be relieved from 2024.[12]

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6 Tanveer Ahmad, *Climate Change Governance in International Civil Aviation - Toward Regulating Emissions Relevant to Climate Change and Global Warming* (Eleven International Publishing 2016).
7 ibid 190-192.
8 *Air Transport Association of America and others. v UK Secretary of State for Energy and Climate Change* [2011] ECLI:EU:C: 2011:864.
9 Ahmad (n 6) 192-193.
10 ibid 194.
11 European Commission, *Stopping the Clock of ETS and Aviation Emissions following Last Week's International Civil Aviation Organisation (ICAO) Council* (2012) <http://europa.eu/rapid/press-release_MEMO-12-854_en.htm> accessed 2 March 2019.
12 European Commission, *Reducing Emissions from Aviation* (*Climate Action*)

2.3. The system

All aviation was initially included as long as an aircraft either arrived, departed or did both at an EEA airport. This was changed as explained above in order only to be applicable to intra-EEA aviation. All airlines operating within the EEA area, both European and non-European, are subject to the EU ETS and must monitor, report and verify their emissions. They all receive or buy tradable emission allowances, and aircraft operators must hand over the amount of allowances for their emissions on intra-EEA flights. Some aviation is excluded from the EU ETS. Military, rescue, firefighting, humanitarian and scientific research aviation are some of these categories.[13] Also excluded from the EU ETS are flights from third countries which have an 'equivalent' to the EU ETS to reduce CO_2, the European Commission decides if the measures taken by the third country are equivalent.[14]
The EU ETS is built on the 'cap and trade' principle. This means that the EU sets a cap which quantifies the maximum amount of emissions that can be emitted in total. The total is split in allowances worth the emission of 1 tonne of CO_2. The current aviation cap is 95% of the total CO_2 emissions as an average of emissions during the years 2004 to 2006 and remains the same during this trading period. This is not the same cap as is applicable to other, stationary, facilities and is limited to the aviation industry.[15] The initial cap was set at 210.349.264 aviation allowances per year, and this was raised by 116.524 allowances when Croatia joined the EU on the 1st of January 2014.[16] However, this was before the EU decided to exclude flights between non-EEA and EEA countries and the cap was substantially lowered afterwards. The aviation allowances that were put into circulation in 2018 were in total 38.703.971, including exchanges of international credits.[17]
The allocation of the aviation allowances in the second period 2013-2020 is mainly done by grandfathering, making up 82% of the total. The allowances are handed out by the EEA Member States applying a harmonised benchmark value. The other 18% is divided into two

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<https://ec.europa.eu/clima/policies/transport/aviation_en> accessed 3 March 2019.

13 Aviation Directive, Annex I.

14 Janina Scheelhaase and others, 'EU ETS versus CORSIA – A Critical Assessment of Two Approaches to Limit Air Transport's CO 2 Emissions by Market-Based Measures' [2018] Journal of Air Transport Management 55.

15 ibid.

16 European Commission, *Report on the Functioning of the European Carbon Market* (report, 2018) <https://ec.europa.eu/clima/sites/clima/files/ets/docs/com_2018_842_final_en.pdf> accessed 2 March 2019, 16.

17 ibid 17.

parts of which 15% are sold through auctioning and 3% is put into a reserve for new entrants.[18]

Monitoring of emissions is done by the aircraft operators themselves. The aircraft operator must submit a verification report before the 1st of April of each year to their competent authority. The competent authority of a specific aircraft operator can be found in Commission Regulation 2017/294 of 20 February 2017. Allowances must be surrendered to the competent authority before the 1st of May each year and must be equivalent to the amount in the verification report. The verification report will be verified by an accredited independent verifier and is overseen by the competent authority.[19]

Banking and borrowing is possible within the EU ETS. Banking is possible since only the allowances for the actual emissions have to be handed over. The excess amount can either be sold or held for future emissions. Borrowing is possible because new allowances are received no later than the 28th of February while the allowances must only be handed in before the 1st of May. This gives overlap which means that you can use the newly given allowances directly, but this increases the risk for non-compliance in later years.[20]

The tradability of allowances follows from Article 3(a) of the EU ETS Directive. Aircraft operators can use all allowances and are not restricted to aviation allowances alone.[21] Aircraft operators can, next to buying allowances on the emissions market, also use credits from Clean Development Mechanism projects or Joint Implementation projects. These credits can also be used by aircraft operators to be allowed to emit. The use of these credits is limited for aircraft operators to a maximum of 1.5% of its verified emissions in the second period 2013-2020 and none thereafter.[22]

Compliance is enforced by the Member States. If an aircraft operator does not turn over all the allowances needed, then Article 16 of the EU ETS Directive imposes several, cumulative, penalties. The penalties can be quite hard on operators because of the severity. The first is a penalty of €100 (which increases with inflation) for each emission unit of one ton CO_2 for which no allowance is surrendered. The second is a requirement to 'repair' the

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[18] European Parliamentary Research Service, *CO2 Emissions from Aviation* (2018) <http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603925/EPRS_BRI(2017)603925_ EN.pdf> accessed 11 March 2019.

[19] Edwin Woerdman, 'The EU Greenhouse Gas Emissions Trading Scheme' in Edwin Woerdman and others (eds) *Essential EU Climate Law* (Edward Elgar Publishing 2015) 16-17.

[20] ibid 17-18.

[21] ibid 12.

[22] Commission Regulation (EU) No 1123/2013 of 8 November 2013 on determining international credit entitlements pursuant to Directive 2003/87/EC of the European Parliament and of the Council [2013] OJ L299/32, art. 1(5).

deficit; this means that you must surrender the missing allowances the next calendar year. The third is the naming and shaming of the companies who are non-compliant. The last, if all other enforcement measures fail, is an operating ban.

3. Aviation emissions regulation within the ICAO's CORSIA

There are currently no international, globally binding rules on maximum aviation emissions. The Annex I countries were tasked to 'pursue limitation or reduction of emissions of greenhouse gases (…) from aviation (…) working through the International Civil Aviation Organization' in the Kyoto Protocol.[23] The ICAO was therefore tasked to work on (a set of) global measures or to come to an agreement to limit or reduce emissions by aviation. Negotiations went slow and it took several years before a decision for a global market-based measure (MBM) was concluded. The first decision regarding a global MBM was made in Resolution A37-19 in 2010 and was followed in 2013 with Resolution A38-18. The final decision for a formalized global MBM was made in 2016 with Resolution A39-3. This was a CO_2 offset scheme named CORSIA.[24]

3.1. The goal and usage of CORSIA

The goal of CORSIA is to achieve a neutral carbon growth from 2020 onwards with the use of carbon offsets. It is however, only one of the measures to ensure neutral carbon growth of aviation by the ICAO. The other measures are, for example, technological and operational improvements and the use of more sustainable aviation fuels. These two measures are expected to be of too little effect on the rise of emissions from aviation. Thus, making sure that carbon neutrality is reached, carbon offsetting is used as a complementary system together with the other measures in order to bridge the gap between the improvements and the reaching of carbon neutrality.[25]

[23] The Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted December 1997, entered into force 26 February 2005) 2303 UNTS 162 (Kyoto Protocol), art 2(4).

[24] Scheelhaase and others (n 14) 56-57.

[25] ICAO, 'Frequently Asked Questions' (*ICAO*, 2019) <https://www.icao.int/environmental-protection/CORSIA/Pages/CORSIA-FAQs.aspx> accessed 9 March 2019, 1.3.

3.2. The system and implementation

CORSIA is set up as a global MBM. An MBM is used for its flexibility compared to direct regulation and to reach the set goals cost-effectively CORSIA is based on the usage of emissions units from the carbon market with which aircraft operators can offset the CO_2 emissions that they cannot reduce through a combined use of technological or operational improvements and by the use of more sustainable fuel.[26]

The base year of CORSIA is calculated from the years 2019 to 2020. From 2021 onwards the emissions which exceed the emissions calculated in the base year are covered by the scheme and have to be compensated by offsets.[27] According to Resolution A39-3 paragraph 10 and 13, the scheme will only apply to international flights which take place on routes between two states which both participate in CORSIA excluding for example humanitarian, medical and firefighting flights. This applies to all aircraft operators without regard for the nationality of the operator because it is route-based. A route-based approach makes sure that there is no conflict with the UNFCCC's principle of common but differentiated responsibilities and the provision from the Chicago Convention for a uniform-condition.[28]

Paragraph 9 of Resolution A39-3 states that participation is voluntary during the pilot phase (2021-2023) and the first phase (2024-2026) and will become mandatory during the second phase (2027-2035) for all member states of the ICAO. Some states are exempted from participation like small island developing states, least developed countries, landlocked countries and countries which have a low level of aviation activity, except when they volunteer to participate. There are two other exceptions, namely states from which aviation activities are less than 0.5% of the total Revenue Ton Kilometres (RTKs) and states which are not in the list of states that account for the top 90% of total RTKs.[29] The precise coverage of CORSIA is therefore determined by which countries participate and changes with the activity and participation of countries during the voluntary period.

Monitoring of emissions is done from the 1st of January 2019 by the operators themselves. All operators, whether they participate in CORSIA or not, will have to monitor their CO_2 emissions from their international flights. In order to do this, operators will need an emissions monitoring plan which includes information on the operator, the fleet, their

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26 ibid.

27 ICAO, '2. What is CORSIA and how Does it Work?' (*ICAO*, 2019) <https://www.icao.int/environmental-protection/pages/a39_corsia_faq2.aspx> accessed 9 March 2019.

28 Chris Lyle, 'Beyond the ICAO's CORSIA: Towards a More Climatically Effective Strategy for Mitigation of Civil-Aviation Emissions' 2018 Climate Law 104, 110.

29 ICAO (n 25).

operations and their methodology on how to measure fuel use, calculate emissions and other data. Their corresponding administering authority must approve the emission monitoring plan. This is the national authority, according to the ICAO designator. The plan made must meet the requirements of Annex 16, Volume IV to the Chicago Convention. There are several monitoring methods which can be used by the operator in their monitoring plan and from which they can choose.[30]

Verification is under the responsibility of the administering authority of the aircraft operator. The operator has to submit its annual emissions report at the end of each reporting year in order to be verified. The report needs to include the identification of the operator, information on the reporting cycle, the most recently approved monitoring plan, fuel and fleet information and whether there are gaps in their data and where these gaps are. The CO_2 emissions will be published to the public. The data is reported by state-pair but, there are alternatives possible when requested by the administering authority.[31]

The requirement of offsets is done by three-year compliance cycles. The amount needed to be offset calculated based on paragraph 11 of Resolution A39-3. The administering authorities will send the offset amounts needed to the aircraft operators each year and every compliance cycle. The needed amount of offsets will then be cancelled by the operator after which the units are no longer in circulation and unavailable for other uses. Emissions units can be bought directly from project developers, brokers, aggregators (which have a portfolio of projects) and retailers/wholesalers. However, not all emissions units are eligible for use in CORSIA.[32] The ICAO council has made a document which sets out the eligibility criteria for emissions units.[33]

Compliance is, according to paragraph 20 (j) of Resolution A39-3, enforced by the member states to the ICAO, and they need to establish national policies and a regulatory framework by 2020.

4. Effectiveness of the EU ETS vs CORSIA

This chapter will compare the EU ETS in its original scope and CORSIA to each other on some topics. It is nearly impossible to thoroughly compare the two schemes because they are different types, apply on a different level in the world and are dependent on many different factors. This article will therefore only compare both types of schemes, how much

[30] IATA, 'An Airline Handbook on CORSIA' (3rd edn, International Air Transport Association 2018) 11, 14-16.

[31] ibid 25.

[32] ibid 30, 32-33.

[33] ICAO, 'CORSIA Emissions Unit Eligibility Criteria' (ICAO 2019).

coverage there is in both schemes, how many allowances or offsets are expected to be needed and compare the compliance systems to each other.

4.1. Difference between EU ETS and CORSIA and implications

The EU ETS and CORSIA are both based on different mechanisms. The EU ETS is a cap and trade scheme whereas CORSIA is based on offsets. This means that within the EU ETS there is a set cap to which aircraft carriers must comply. All EEA states must participate, and there are only very few exclusions.
The cap within the EU ETS was initially set at 95% of 2004-2006 emissions but is going to decline by 2.2% every year from 2021 onwards.[34] Within CORSIA only emissions above 2019-2020 levels which are emitted on routes between participating CORSIA states have to be offset without any cap. The total allowed emissions within the EU ETS, including aviation, will go down every year from 2021. Thus, every year fewer allowances are put into circulation which forces companies to reduce emissions or buy allowances which become more and more scarce, and therefore become more expensive, or risk sanctions if not enough allowances are surrendered. Absolute emission reductions are therefore guaranteed within the EU ETS. Within CORSIA the total allowed emissions are staying at the same level without a lowering of this level over time or even a cap on maximum emissions. All the emissions above the base year level will have to be offset, but this does not give as strong an incentive to lower emission levels because offset projects can almost always be found somewhere. So, as long as the cost of offsets is not high enough, emission reductions in the first place will simply not happen because it is cheaper to buy offsets. The International Council on Clean Transportation found, in their Policy Update, that the expected impact of offsets compared to the volatile fuel prices (which usually makes up one-third of the total operating costs of an airline) is so small (expected to be 0.9% of total operating costs in 2035) that it is unlikely that CORSIA will give enough incentive to aircraft operators to increase fuel efficiency next to normal reactions on changes in fuel prices.[35] On top of this,

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[34] Directive (EU) 2018/410 of the European Parliament and of the Council of 14 March 2018 amending Directive 2003/87/EC to enhance cost-effective emission reductions and low-carbon investments, and Decision (EU) 2015/1814 [2018] OJ L76/3, art. 1(12).

[35] International Council on Clean Transportation, *Policy Update: International Civil Aviation Organizations Carbon Offset and Reduction Scheme for International Aviation (CORSIA)* (2017) <https://www.theicct.org/sites/default/files/publications/ICAO%20MBM_Policy-Update_13022017_vF.pdf> accessed 14 March 2019.

2004-2006 emission levels are much lower than 2019-2020 levels because of the yearly growth in civil aviation.[36]

Another point of interest is that within CORSIA, offsets are used while there are strong arguments that offsets sometimes come at the risk of other environmental or social area's which need to be guarded, like for example loss of biodiversity and the loss of land of indigenous communities. The EU ETS, for example, only allows international credits from CDM or JI projects to up to 1.5% of the verified emission and does not allow the use of these credits anymore from 2020 onwards. Studies also show that offsets are not sufficient because many offset projects fail to reduce emissions. Lyle, for example, finds that offsetting may be a useful tool as an interim mechanism but not as an excellent way to reduce aviation emissions.[37]

4.2. Coverage

As of the 15th of January 2019, there are 78 states which represent 76.63% of international aviation activity who intend to participate in CORSIA from the beginning.[38] Changes in the total coverage are prone to happen when countries step in or step out during the voluntary period or when countries who do not have to comply with CORSIA mandatorily still decide to do so after 2027. Yet, the coverage is without regard to domestic aviation which was around 36% in 2018.[39] Thus, CORSIA, with the current information, is applicable to 76.63% of 64% (the international flights). The global aviation which is under CORSIA's scope is therefore around 49%.

Within the EU ETS all EU Member States and Norway, Iceland and Liechtenstein participate. When considering the EU ETS' original scope, thus including international flights either arriving or departing from an EEA airport, around 35% of global aviation emissions would have been included.[40]

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36 European Commission, *Report on the Functioning of the European Carbon Market* (2018) Table 8 <https://ec.europa.eu/clima/sites/clima/files/ets/docs/com_2018_842_final_en.pdf> accessed 14 March 2019, 34.

37 Lyle (n 29) 114-115.

38 ICAO, 'CORSIA States for Chapter 3 State Pairs' (*ICAO.int*, 2019) <https://www.icao.int/environmental-protection/CORSIA/Pages/state-pairs.aspx> accessed 9 March 2019.

39 IATA, 'Robust Passenger Demand and a Record Load Factor in 2018' (*IATA*, 2019) <https://www.iata.org/publications/economics/Reports/pax-monthly-analysis/passenger-analysis-dec-2018.pdf> accessed 14 March 2019.

40 Holly Preston, David S Lee and Paul D Hooper, 'The Inclusion of the Aviation Sector within the European Union's Emissions Trading Scheme: What are the Prospects for a More Sustainable Aviation Industry?' [2012] Environmental Development 48.

It is important to know that domestic aviation is not controlled by CORSIA but does fall under the Nationally Determined Contributions (NDCs) which countries submit under article 4(2) of the Paris Agreement. Because of this, they will be considered nationally. Countries, if they intend to reduce emissions nationally, have to put certain measures on domestic aviation emissions in order to meet their NDC targets. Domestic aviation is a large portion in some countries, especially if they have large territories. For example, in the United States, domestic aviation accounts for 14.1% of global aviation and China domestic aviation accounts for 9.5% of global aviation in January 2019.[41]

4.3. Required allowances and offsets

Next to coverage, the needed amount of offsets (within CORSIA) or allowances (in the EU ETS) is also important because of the incentive the costs will impose on aircraft operators. For this reason, this article will use a study from CE Delft to compare the needed amounts.[42] The study is based on models to calculate the expected mitigation from both schemes. The study shows different models of the scope of the EU ETS and this article will use the original scope.
The results from the study show that CORSIA covers more routes than the EU ETS but that in the years 2021-2035 there are only offsets needed for 2.711 Mt of CO_2. The EU ETS, with the 2.2% decline, on the other hand, needs 3.888 Mt of CO_2 allowances. An important note to make to this is that the study only took the then 66 participating countries to CORSIA in their calculations while currently, 78 countries are participating in the voluntary stages. This means that the total needed offsets are expected to be higher but will probably not rise over the total emissions allowances needed in the original scope EU ETS because from 2027 onwards the countries that were not yet participating would be so mandatorily.

4.4. Compliance

Compliance within the EU ETS is strongly regulated and harmonised in the EU ETS Directive and its amendments. Article 16 of the EU ETS Directive imposes penalties of

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41 IATA, 'Passenger Growth Starts the Year on a Positive Note' (*IATA,* 2019) <https://www.iata.org/publications/economics/Reports/pax-monthly-analysis/passenger-analysis-jan-2019.pdf> accessed 15 March 2019.

42 CE Delft, 'A Comparison Between CORSIA and the EU ETS for Aviation' (*CE Delft,* 2016) <https://www.cedelft.eu/publicatie/a_comparison_between_corsia_and_the_eu_ets_for_aviation/1924> accessed 15 March 2019.

€100 per allowance which is not surrendered, requires reparation, facilitates the naming and shaming of companies who are non-compliant and even an operating ban if these first penalties fail.
This is totally different within CORSIA. Resolution A39-3 paragraph 20 (j) calls for a national framework and national policies to enforce compliance to CORSIA. This means that every state has to make their own enforcement mechanisms and penalties or sanctions in case of non-compliance. This calls for questions regarding what sanctions or penalties are imposed on aircraft operators because there is no uniform compliance mechanism agreed to. The result is most likely going to be a patchwork of different enforcement mechanisms and different penalties or sanctions. It is just guessing at this point whether or not states will give a strong incentive to comply with CORSIA or will just impose small penalties or sanctions.

5. Conclusion

The impact of both schemes on environmental-positive changes in aviation is still unclear as there are no definitive numbers available to make a complete comparison. Only after the period 2021-2035 when all the data is available, such a comparison can be entirely conclusive.
Both the EU ETS and CORSIA have been set out in paragraphs 2 and 3. The comparison of both schemes is made in paragraph 4. The main differences are that the EU ETS has a cap and forces all aircraft operators to reduce their absolute emissions over time due to the declining cap and rising costs as a result thereof, while CORSIA does not have an incentive to reduce emissions in absolute terms. Also, CORSIA offsets are not expected to be expensive or have a large impact on the total costs of aircraft operators. Nonetheless, the coverage of CORSIA of global aviation is higher than the original scope of the EU ETS with 49% against 35%. Nevertheless, the needed allowances for the EU ETS are higher than the needed offsets in CORSIA due to its base year and a declining cap in the EU ETS. The exact coverage also depends on the participation within CORSIA, which is still somewhat unclear as it can change with countries willing to participate or not. Another main difference is compliance, which is heavily incentivising emission reductions in the EU ETS due to high penalties and sanctions while sanctions under CORSIA depend on decisions made by national governments and may thus be penalties which do not give a strong incentive to comply with CORSIA.
Due to the differences in the need for offsets or allowances, it seems that in the years 2021-2035 the EU ETS can create a higher cost on aircraft operators to move towards more environmental-positive changes. Because of the decreasing cap and higher allowances costs

in the EU ETS, a cap being absent in CORSIA and offset costs probably being lower, the incentive is higher in the EU ETS. Compliance to the EU ETS is also going to be more strictly governed and will give a larger incentive to aircraft operators to implement all possible measures to reduce emissions. Yet, because the scope of CORSIA is larger and more spread around the globe, the environmental improvements will happen all over the world instead of just on routes between, into and out of EEA countries. Both schemes have their pros and cons yet for the short term the EU ETS is going to be a better option in reducing emissions in absolute terms and to create a stronger incentive for environmental-positive changes.

A DROP IN THE OCEAN? - JAPAN'S WITHDRAWAL FROM THE INTERNATIONAL CONVENTION ON THE REGULATION OF WHALING

Georgia-Mae Chung*

Abstract

In light of Japan's official withdrawal from the International Convention on the Regulation of Whaling and, therefore, the International Whaling Commission this year, this article considers several points. Firstly, it considers the Convention's place in history and its purposes. Secondly, the divisions between State parties to the treaty in terms of their attitude to conservation are analysed, along with how this fuelled tension through key decisions. Thirdly, more recent developments are explored, along with how Japan's withdrawal will impact the survival of the Convention itself.

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1. Introduction

Whilst the tide of enthusiasm for environmental action and activism has been well and true over recent years, the world's attention was noticeably drawn to international environmental law in late December 2018. This was when Yoshihide Suga, a spokesperson for the Japanese government, announced that Japan was to withdraw from the International Whaling Commission ("Commission").[1] This accompanies simultaneous withdrawal from the International Convention on the Regulation of Whaling ("Whaling Convention"), which served as the Commission's origins.[2]

Japan's withdrawal, although attracting international condemnation, was not altogether unpredictable. This article will explore the reasons why this is so, analysing the history of the Whaling Convention and the disagreement between its State Parties in their attitudes towards cruelty, conservation, and compromise. After this, it will consider the effect of Japan's withdrawal.

2. Why are International Conventions on Environmental Law Necessary?

The promulgation of domestic legislation concerning the protection of the environment stems back a long way historically, for example, the law for the establishment of nature reserves in 1370 BC Egypt. However, the regulation of environmental practice at an international level, through such instruments as treaties, has not been in action for nearly as long.[3]

It is clear that the inherently transboundary nature of harm to the environment demonstrates that there is a case for such intervention at the international level. For example, '[p]olitical boundaries commonly slice through landscape features' and 'many animals' migrate across 'numerous legal jurisdictions'.[4] Multiple States may be affected and this merits international legal instruments and cooperation.

Such action eventually gained momentum from 'the final quarter of the nineteenth century'. By then, interest in the environment had spiked dramatically. This followed various events, as noted by Bowman, such as 'the voyages of Charles Darwin', 'the process of colonial

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1 Daniel Victor, 'Japan to Resume Commercial Whaling, Defying International Ban' (*The New York Times*, 26 December 2018).

2 International Convention on the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 1123 UNTS 273.

3 Michael Bowman, Peter Davies, Catherine Redgwell, *Lyster's International Wildlife Law,* (2nd edn, Cambridge University Press 2010) 3.

4 ibid 48-49.

expansion [which had] stimulated a great deal of scientific interest', and the 'threats to nature' presented by 'the development of heavy industry and the expansion of human settlements'.[5]

Although progress after post-World War II was stark, with conservation not serving as a top priority, the time of 'the final consolidation of environmental protection, and wildlife conservation in particular, as serious and enduring issues on the global political agenda' occurred at some point during the 1960s. This period saw the inception of the World Wildlife Fund and the major incident of the Torrey Canyon, a Liberian oil tanker, running aground in the United Kingdom, and resulting in the escaping of large amounts of pollution into the surrounding water and environment.[6]

This led the way for the progress of the next decade, which saw such ground-breaking events as the United Nations Conference on the Human Environment of 1972 in Stockholm and its resulting in the adoption of the 'Stockholm Declaration'.[7] This contained key environmental principles, along with an action plan to implement them. Its principles, such as Principle 21 concerning transboundary harm, which has been declared to constitute customary international law, have been widely influential since.[8] There have been a number of key treaties that were adopted at a similar time, such as the 1971 Ramsar Convention on the Conservation of Wetlands of International Importance,[9] the 1973 Convention on International Trade in Endangered Species,[10] and the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals.[11]

Now, comes the twenty-first century, the threat to our environment is no less apparent. It continues to manifest itself in a fluid way but captures the attention of the general public

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5 ibid 3-4.

6 ibid 11-12.

7 Declaration on the United Nations Conference on the Human Environment, 'Report of the United Nations Conference on the Human Environment' (Stockholm 5-16 June 1972), UN.Doc.A/CONF.48/14/Rev.1, 3-5.

8 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996], ICJ–Rep 226, [29]; *Gabčíkovo-Nagymaros* [53]; *Pulp Mills* [101]; *Declaration on the United Nations Conference on the Human Environment*, UN.Doc.A/CONF.48/14/Rev.1, 3-5, Principle 21; *Rio Declaration on Environment and Development*, 'Report of the United Nations Conference on Environment and Development' (Rio De Janeiro, 3-14 June 1992), UN.Doc.A/CONF.151/26 (Vol.I), Principle 2; UN.Doc.A/Res/2996 (XXVII), (1972); UN.Doc.A/Res/3129 (XXVIII) (1973); ASEAN Agreement on the Conservation of Nature and Natural Resources (1985), Article 20.1; Alexandre Kiss and Dinah Shelton, *International Environmental Law* (Transnational Pub 1991) 106-107.

9 (Adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245.

10 (Adopted 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.

11 (Adopted 23 June 1979, entered into force 1 November 1983) UNTS 1651; Bowman, Davies and Redgwell (n 3) 13-14.

much more significantly. This can be attributed to such factors as the activism of environmentally focused non-governmental organisations and charities, such as Greenpeace and ClientEarth,[12] the popularity of fascinating nature documentaries, provided by the likes of David Attenborough,[13] and the rise of corporate social responsibility.[14]

3. The Place of Whales Within This History

The Whaling Convention itself was adopted in 1946 and entered into force in 1948,[15] during the post-war period that was so uneventful in terms of environmental protection at the international level.

For whales specifically, much has changed in terms of perspective. Sympathies have grown for them and, although fascinating and otherworldly, they are perceived by many Western countries as creatures that should be protected, rather than just hunted down and slaughtered for anthropocentric gain.[16]

However, for some historically pro-whaling states, there remains some reason to defend their tradition. Although whaling has occurred for 'thousands of years', going back to 'around 2200 BC',[17] demand for it has declined more recently. Despite whales traditionally being sought after for their oil, the arrival of cheaper alternatives has meant that the business has mostly ceased to be profitable.

Nevertheless, it is important to note that 'every part of the whale has value' and so some states have 'expanded their whaling activities to increase the production of meat and other whale products'. For example, parts of the whale can be used to make detergent, soap, lipstick, paint, and even tennis rackets.[18]

Although there is now less of a demand for meat, whaling is also renowned for its social and cultural value for certain whaling countries. It is perceived as 'an ancient, honourable profession'. In Japan, for example, a career of whaling runs in many families, and

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12 See: Greenpeace <https://www.greenpeace.org.uk/> accessed 10 July 2019; Client Earth <https://www.clientearth.org/> accessed 10 July 2019.

13 See: BBC News, 'Blue Planet II tops 2017 TV ratings' (*BBC News* 10 January 2018).

14 See: ISO Central Secretariat, 'ISO 26000:2010 Guidance on Social Responsibility' (*International Organization for Standardization*, 2010); Fraser Tennant, 'The importance of corporate social responsibility' (*Financier Worldwide* 2015).

15 International Convention on the Regulation of Whaling (adopted 2 December 1946, entered into force 10 November 1948) 1123 UNTS 273.

16 Bowman, Davies, and Redgwell (n 3) 154.

17 Lisa Kobayashi, 'Lifting the International Whaling Commission's Moratorium on Commercial Whaling as the Most Effective Global Regulation of Whaling' (2006) 29 Environs 177, 180.

18 ibid 179.

descendants are 'expected to respect their ancestors by continuing the family occupational tradition'.[19] But some assert that, no matter what the purpose of the Whaling Convention was according to its written preamble, 'the changing times and global participation in the whale conservation movement signifies that the objectives and goals of the organization have changed.'[20]

4. A Plaster over a gaping wound?

The Whaling Convention plays on this lasting divide between pro-whaling and anti-whaling nations. Hence, although the adoption of an environmentally concerned convention in the near immediate post-war period can seem odd, much of the explanation for this anomaly is found by referring to the aims of its preamble. This sets out two aims: conservation and preservation of the whaling industry. It lists the aims of State Parties as 'ensur[ing] proper and effective conservation and development of whale stocks'. However, it also asserts that this conservation 'thus make[s] possible the orderly development of the whaling industry'.[21] This dual-purpose was conflicting from the outset; a compromise which denies a purely conservational focus.

These aims, although perceivably oxymoronic, were decided with the intention of achieving a unity of sorts. Certain states, particularly those with a history of whaling, were unlikely to support a convention with conservation as its sole purpose; such an instrument would have been counterproductive to the functioning of the whaling industry.

Although this may have seemed like a suitable compromise at the time, it was actually the equivalent of sticking a plaster on a gaping wound that has only stretched and widened as a key component of the Whaling Convention, the Commission, has been put to use.

The consensus-based nature of conventions means that the functioning of international law is heavily dependent on the will of States. In a system at the mercy of autonomy, appeasement is essential. Furthermore, a convention with the main aim of conservation and apparently lacking regard for the functioning of the whaling industry would have resulted in a majority of, if not all signatories without a history of whaling. Consequently, they would more likely take an anti-whaling view.

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[19] ibid 195.

[20] Tara Jordan, 'Revising the International Convention on the Regulation of Whaling: A Proposal to End the Stalemate Within the International Whaling Commission' [2011] Wisconsin International Law Journal 833, 845.

[21] International Convention on the Regulation of Whaling (n 15) recital 8.

The cooperation of pro-whaling states was, and continues to be, essential. It is the states that engage in whaling that contributes to a reduction in whale populations. It follows that it is their efforts that will make or break the aim of whale conservation.

However, as Bowman notes, 'the phrase 'and thus make possible the orderly development of the whaling industry' makes it clear that 'conservation is a top priority; orderly development of the whaling industry comes next', as a 'secondary objective' of that conservation. In fact, it has been suggested that the 'development of the industry as such was not an essential part of the Convention's objectives at all'.[22]

In light of the more recent sway in opinion, Jordan suggests an alteration. She recognises that the dual purposes of the Convention hang in a delicate balance. Amending the treaty to be solely conservation-focused is 'neither reasonable nor realistic.' However, a compromise could produce an IWC purpose that includes the protection of whale populations from endangerment while providing for sustainable hunting. She argues that compromise between the divided State Parties should be shown by recognising several merits of whales that are not limited to whaling, for example, social, cultural, 'consumptive and non-consumptive' uses. This 'blends aspects of the pro-and anti-whaling positions, while at the same time neither position monopolizes the purpose.'[23] However it remains to be seen how easily this can be done by a Commission already riddled with tension.

5. Increasing Frustrations

Despite previous attempts at compromise, subsequent developments since the Whaling Convention entered into force have resulted in pro-whaling states becoming increasingly frustrated with the Commission.

The Commission was created through Article III of the Whaling Convention and it is 'an inter-governmental organisation whose purpose is the conservation of whales and the management of whaling'. In its early years, the Commission was accused of acting as a 'whalers club', since a lack of 'effective restrictions on whaling' and '[high] catch limits' meant that whale numbers continued to fall dramatically.[24]

Something had to be done to make the Commission's work effective in relation to the Whaling Convention's goal of conservation. Therefore, it is unsurprising that measures

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22 Michael J Bowman, '"Normalizing" the International Convention for the Regulation of Whaling' [2008] 29 Michigan International Law Journal 293.

23 Tara Jordan (n 20) 849.

24 See: 'Successes and Failures of the International Whaling Commission (IWC)' (*WWF*) <https://wwf.panda.org/knowledge_hub/endangered_species/cetaceans/cetaceans/iwc/iwc_successes_failures/> accessed 10 July 2019.

taken since have appeared primarily conservation-driven. For example, the 1994 vote to establish the Southern Ocean Whale Sanctuary. Nevertheless, Japan has continued to kill whales in the Sanctuary under an exemption provided for by Article VIII, taking the position that there were 'no significant grounds' for it and that 'the reasonable utilization of fishery resources that have relations dependent on the whales would be prevented' otherwise.[25]

Opposition to the Commission's conservation-focused movements was most inflamed following the introduction of the commercial whaling moratorium. The moratorium was initially rejected in the 1970s, before factors such as 'decline of the whaling industry' and 'the rise of environmental and animal rights movements' helped support for it to increase.[26] Following a decision by the Commission in 1982, the 1986 coastal and 1985-6 pelagic whaling seasons Schedule catch quotas in relation to commercial whaling have been set at zero.

Japan was one of the few State Parties to lodge an official objection following this. Such objections are allowed under Article V(3) of the Whaling Convention and can mean that the relevant amendment made by the Commission 'shall not become effective with respect to any Government which has so objected'. Therefore, Japan's objection had the effect of exempting them from the moratorium. However, Japan withdrew its reservation as of the 1987/88 season. This was largely a result of pressure exerted from other powerful State Parties, like the United States, who themselves provided 'threats of unilateral fishery sanctions'.[27] Norway and the Russian Federation remain unbound by the amendment.[28]

States being allowed the opportunity to lodge objections under conventions arguably puts the effectiveness of endeavours, such as the commercial whaling moratorium, at a disadvantage. Nevertheless, it is a common feature of international treaties and is reflective of its consensual foundations. Moreover, it still holds an advantage through its incentive to ratify. Could we imagine pro-whaling states ratifying the Whaling Convention, with anti-whaling states forming the majority of its signatories, if this mechanism were not included? Yet this, along with the sanctuary and other resolutions, such as that to establish a Conservation Committee in 2003, led to accusations that the Commission, by focusing on conservation, was neglecting the Whaling Convention's other purpose: the orderly development of the whaling industry.

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[25] Atsuko Kanehara, 'Japanese Practices Concerning the International Regulation of Whaling' [2003] The Japanese Annual of International Law 142.

[26] Kobayashi (n 17) 193.

[27] Peter H Sand, 'Japan's "Research Whaling" in the Antarctic Southern Ocean and the North Pacific Ocean in the Face of the Endangered Species Convention (CITES)' [2008] RECIEL 56, 57.

[28] Bowman, Davies and Redgwell (n 3) 166.

In 2006, Kobayashi argued that the moratorium was close to being lifted. The stalemate between pro-whaling and anti-whaling states may be ended by how 'pro-whaling nations are gaining a majority in the IWC and will most likely overturn the moratorium in the near future'. She argued that '[o]ne new country joining on either side could make a big difference in the outcome of votes regarding the moratorium.'[29]

However, the withdrawal of Japan means that there is one less pro-whaling state to assist in these efforts. Even in the state's absence, it is apparent that the stalemate still stands and will likely cause more disagreements in the future. For example, pro-whaling countries such as Iceland and Norway may continue to highlight how, since the moratorium, there has been an allowance for certain catch quotas to be set above zero for the purposes of 'aboriginal subsistence'.[30] They have previously argued that 'whaling is embedded in their culture as much as it is for [those classed as hunting] as aboriginal subsistence whalers'. The moratorium is therefore seen as discriminatory towards them.

Nevertheless, it could be suggested that 'many anti-whaling countries have developed a cultural norm that values the preservation of certain species of wildlife, such as whales, that is just as valid.'[31] The current moratorium embraces this viewpoint to the detriment of that of pro-whaling states. It is this that ultimately makes pro-whaling states feel 'compelled to fervently defend their position'.[32]

Additionally, there is the controversial issue of humane killing. 'The issue of humane killing has been a controversial one within the Commission. The Commission has expressed its concern that current methods of whaling 'do not guarantee death without pain, stress or distress'.[33] This has led to conflict in multiple ways. Pro-whaling states have traditionally asserted that debates as to welfare 'fall outside the formal competence of the [Commission], but anti-whaling states, such as the United Kingdom and New Zealand, have strongly argued that the Commission has a 'moral responsibility' to consider them.'[34]

There are also specific issues created through the activities of aboriginal whalers; '[T]he very factor which minimises their impact from a conservation perspective – primitiveness of

[29] Lisa Kobayashi (n 17) 208.
[30] Bowman, Davies and Redgwell (n 3) 169.
[31] Tara Jordan (n 20) 836.
[32] ibid 854.
[33] Bowman, Davies and Redgwell (n 3) 174-5.
[34] ibid 683-684; Bowman also argues that, 'although the Convention contains no overt reference to welfare, the matters to be regulated by the Schedule include both methods of whaling and types of apparatus and appliances which may be used, therefore opening the door to it indirectly.'

technique – may inherently serve to aggravate welfare problems.' Therefore, these whalers have also been a subject of concern for the Commission.[35]

6. Recent Developments and Whaling in the Antarctic

The opportunity to launch objections is not the only leeway available for those states still engaging in whaling. One example, which has received attention recently, is how Article VIII of the Whaling Convention authorises the signatory governments to 'grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for purposes of scientific research'.

Following the adoption of the commercial moratorium, the Japanese government started to issue special whaling permits for 'scientific purposes'. Framing this as fitting within the boundaries of Article VIII and primarily executed under the 'Japanese Whale Research Program Under Special Permit in the Antarctic', these were issued on a significant scale.

The impact of the moratorium on these developments is evident. Following Japan's withdrawal of its objection to the moratorium for the 1987/88 season, between 1988 and 2007, 10,857 whales were taken by Japanese 'research whaling' alone. This is in stark contrast to during the 40 years previously, when a mere 2,100 whales were reported to have been taken within Article VIII by all countries worldwide.[36]

Article VIII also demonstrates the tension between State Parties. This is demonstrated through how, for example, a United States delegation referred the Japanese to the provision 'as a way around the ban on commercial whaling'. This was allegedly used 'in order to avoid Japan's exit from the [Commission]'.[37]

The provision proved to be controversial and attracted complaints from anti-whaling states who feared that the exception would be misused. It has also fuelled further tension between State Parties. It is this that formed the subject matter of the dispute brought before the International Court of Justice in 2015 in the form of *Whaling in the Antarctic*. It was a case between the anti-whaling states of Australia and New Zealand on one side and Japan on the other. There, the Court assessed whether whaling carried out under Japan's project, JARPA II, constituted scientific research within the meaning of Article VIII.[38]

[35] ibid 685.

[36] Peter H Sand (n 27) 57.

[37] ibid.

[38] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, Judgment [2014], ICJ-Rep 226 [42].

The Court employed a two-stage test to determine whether it did so. They considered, firstly, whether it could be said to be for scientific research and, secondly, whether the methods employed to achieve that research was reasonable.[39]

It was held that, due to the unnecessary use of lethal methods, the second strand of this test was not satisfied. Being deprived of the exception under Article VIII, the whaling violated the Convention.[40] Consequently, the Court decided that research under JARPA II must cease. However, this has not prevented Japan from employing similar methods under differently named programmes. This has left the ground fertile for further disputes.

Tension between the Convention's State Parties has not lessened since the Court's judgment. Japan's continued assertion of its activities falling under the scientific research exception has attracted doubt and condemnation from critics. Indeed, some question whether Japan's similar endeavours since JARPA II do constitute scientific research.[41] But, given how it would be impractical to bring every project before the International Court of Justice, this was a challenge that could not be assessed in quite the same way.

7. Withdrawal – A Domino Effect?

The continuing survival of the moratorium eventually took its toll. Japan's withdrawal from the treaty was influenced by the intention of recommencing commercial whaling. Indeed, it is 'to be resumed from July' 2019.[42]

This is unlikely to be the last withdrawal from the Commission, since Japan's exit may effectively blaze a trail for other pro-whaling states to do the same. One possibility is Iceland. Despite having a history of whaling, Iceland did not initially put forward an objection to the commercial moratorium. However, controversially, after withdrawing in 1992, it re-joined the Whaling Convention ten years later. This time, it was accompanied with a reservation.[43] Norway, with its similar whaling history and long-sustained opposition to the moratorium,[44] serves as another candidate.

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39 ibid [67].

40 ibid [225].

41 See: Whale and Dolphin Conservation, 'Whaling in Japan' <https://uk.whales.org/our-4-goals/stop-whaling/whaling-in-japan> (*Whale and Dolphin Conservation*) accessed 10 July 2019.

42 Asia-Pacific News, 'Japan says it will resume commercial whaling in July 2019' (*Asia-Pacific News*, 26 December 2018).

43 See: Whale and Dolphin Conservation, 'Whaling in Iceland' <https://uk.whales.org/our-4-goals/stop-whaling/whaling-in-iceland> accessed 10 July 2019.

44 Bowman, Davies and Redgwell (n 3) 153, 166.

Considering the views of pro-whaling States that the ban had become a permanent measure, it is only a matter of time before Japan's example is followed. For all its merits, it is the autonomy allowed through this Whaling Convention, inflamed through the compromise at its origins and over time, that will be its downfall. The availability of withdrawal to the scarce number of pro-whaling signatories remaining means that each may leave with the force of a tsunami if they so desire.

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For the 2019 issue, the Editorial Board invited submissions on human rights law as well as environmental law, and hence the reader will be able to explore both topics in this issue. This issue of the ELSA Law Review also serves to mark the conclusion of ELSA's three-year International Focus Programme on Environmental Law.

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