

one on the post-2020 regime and the other on the post-2012 work plan on enhancing the level of ambition.

At the conference Australia proposed elements of a 'multilateral environment' to facilitate enhanced domestic action and ambition. These were:

- a place accessible to all Parties, such as annexes to COP decisions, for Parties to voluntarily put forward new or additional undertakings
- annual consideration of Parties' mitigation pledges to 2015 and beyond, starting at COP18, to inform negotiations in advance of the submission of the first biennial reports (2014–15), publication of the IPCC's Fifth Assessment Report (2014) and finalisation of the 2013–15 Review
- transparency, to give governments confidence that they were not acting alone
- continued learning and information-sharing through workshops
- international assessment and review (IAR) and international consultations and analysis (ICA).

Australia's views on options and ways for further increasing the level of ambition can be found in UN Doc FCCC/ADP/2012/MISC.1/Add.1.

The above text draws on: IISD Reporting Services, 'Summary of the Bonn Climate Change Conference', (2012) 12 (546) *Earth Negotiations Bulletin* <www.iisd.ca/vol12/enb12546e.html>

New intergovernmental body for biodiversity and ecosystems

In April 2012 more than 90 governments agreed to establish the Intergovernmental Platform on Biodiversity and Ecosystem Services (IPBES), with a secretariat in Bonn, Germany. Some describe it as the 'IPCC for biodiversity'. The IPBES will generate scientific knowledge and build capacity amongst policy makers for the protection of biodiversity and ecosystem services. The scientific and technical functions will be delivered by a Multidisciplinary Expert Panel (MEP). The secretariat will be administered by one (or more) of several United Nations organisations: the United Nations Environment Program (UNEP), the United Nations Educational, Scientific and Cultural Organization (UNESCO), the Food and Agriculture Organization (FAO) or the United Nations Development Programme (UNDP). IPBES will respond to requests for scientific information related to biodiversity and ecosystem services from governments, relevant multilateral environmental

agreements and United Nations bodies, as well as other relevant stakeholders. More information is available at: www.ipbes.net/

Civil aviation and the European Union's emissions trading scheme

Much criticism has been levelled at the inclusion of the aviation industry in the European Union's (EU's) emissions trading scheme (ETS). The ETS obliges EU and non-EU airlines to buy carbon emission allowances when they fly into EU airports or through EU air space. Critics have questioned whether this is a unilateral tax. Airlines will have to start paying for their emissions in April 2013, leaving less than a year for the legal questions over the move to be resolved. The Centre for International Sustainable Development Law (CISDL) has released a working paper to identify some of the legal issues raised by the ETS.

The working paper considers a recent ruling by the European Court of Justice 'upholding the validity of the measures adopted by the European Union'. In the case of *Air Transport Association v SS for Energy and Climate Change C-366/10* the European Court of Justice 'upheld the validity of directive 2008/101 to include aviation activities in the scheme for GHG emissions allowance trading within the community'. The Court looked at 'the conditions under which international treaties and customary international law principles could be relied on when addressing the validity of European community law ... and the validity of the directive in this context'.

Not surprisingly, the airline industry strongly opposes the inclusion of aviation activities within the EU ETS and the inclusion of emissions by non-EU carriers outside EU territories. The airline industry claims that the 'EU ETS imposes obligations on other nations as well as third country nationals and that by doing so the EU acts in breach of public international law as it expands the ETS without these third parties' consent'.

The European Commission regards the inclusion of aviation within the EU ETS as 'an important step to fulfil its international commitments to reduce GHG emissions in the transport sector.' In addition there are claims that the EU ETS underlies, 'discriminating between operators on the basis of nationality ... would be incompatible with the Chicago convention'.

Despite the debate over the legal status to the EU ETS, and the very vocal opposition from countries like the United States, China, Russia and India, only eight Chinese and two Indian airlines have so far refused to submit 2011

emissions data to Brussels. There are over 1 200 carriers that fly in and out of Europe.

The Chinese government is reported to have put on hold a plan for Chinese airlines to buy 45 Airbus aircraft because of the ETS. Airbus, the Franco-German maker of passenger jets has strongly objected to the EU's requirements.

See: <http://online.wsj.com>; www.cisd.org/public/docs/news/CISDL_EU_ETS_Expansion_Legal_Brief.pdf

Third clean energy ministerial meeting

Ministers and senior officials from over 22 countries attended the Clean Energy Ministerial 3 (CEM3) in London, 25–26 April 2012. CEM3 discussed many issues, including financing renewable energy and energy efficiency, electric vehicles, large scale energy efficiency programs, appliance efficiency, carbon capture use and storage, and integrating variable renewables and solar photovoltaic. It encouraged collaboration between public and private sectors. Some CEM3 announcements included:

- from the United Kingdom, a £60m fund to accelerate the deployment of carbon capture and storing technologies in developing countries
- Denmark, Germany and Spain and partner governments and institutions released a global renewable resource atlas that maps the potential for solar and wind energy
- the ClimateWorks Foundation committed \$1m of in-kind support to facilitate direct access to global policy experts
- China, Denmark, Sweden and the United Arab Emirates launched a global sustainable cities network.

CEM3 ran in conjunction with the high level group of Sustainable Energy for All (SE4all), an initiative of the United Nations Secretary General Ban Ki-Moon. The SE4all gathering focused on the need to meet energy demands with renewable energy, energy efficiency and access to energy, without harming the environment. See: www.cleanenergyministerial.org.

Flood damage case review

In *Arkansas Game and Fish Commission v United States*, the Supreme Court of the United States has granted a review on the question of whether the Federal Government is liable for millions of dollars in damage from flooding of a 23 000 acre wildlife management area owned by the state of Arkansas.

The case raises a threshold legal question as to whether government actions that impose recurring flood events must continue permanently to amount to 'taking property' within the meaning of the Takings Clause of the Fifth Amendment of the Constitution.

Between 1993 and 2000 the US Army Corp Engineers released water from the Clear Water Dam on Arkansas Black River. According to the Arkansas Game and Fishing Commission, the downstream Black River Wildlife Management Area subsequently suffered extensive damage. In 2009 the US Court of Federal Claims ordered the Federal Government to pay Arkansas nearly \$6m in damages to compensate for the dead trees and to fund regeneration in the area. Compensation was payable for the 'temporary flowage easement over the property for which compensation was due under the Fifth Amendment'. The Government appealed the decision last year and a divided panel of the US Court of Appeals for the fifth circuit held that 'taking liability only attaches when there is a permanent invasion of land rather than a temporary injury to property'. Arkansas petitioned for certiorari which was supported by a number of other states and the Pacific Legal Foundation. The case will be argued in June 2012. Commentators note that the case 'provides the Supreme Court with an opportunity to resolve some long standing confusion amongst lower courts as to whether such flooding cases are properly viewed as unconstitutional, physical takings of property or as garden-variety property damage cases best resolved through application of traditional tort law principles'.

Nigerian villagers sue Shell over oil spills

In October 2011, a Shell oil Bomu-Burry pipeline in Nigeria ruptured, spilling over 100 gal of crude oil per minute for around 24 hours. The spill occurred while a lawsuit brought by over 11 000 Nigerians from the Bodo fishing community was still before the London High Court.

Shell admits responsibility for two spills in 2008–09 which devastated communities in the delta by polluting its creeks and swamps. It is alleged that the spills destroyed the Bodo villagers' livelihoods and were at least 60 times worse than the company announced at the time.

The case against Shell is premised on the basis that the spills have caused extensive damage and while there may be ongoing theft from the pipelines, Shell is responsible for cleaning up the damage and compensating the communities who have lost fishing and farming income. See: <http://worldnews.msnbc.msn.com> and www.counterspill.org

Deepwater Horizon charges

In the first of many expected prosecutions, an obstruction of justice claim in the Deepwater Horizon investigation has been made against a former BP engineer. The Grand Jury in Louisiana indicted Kurt Mix on two counts of obstructing justice for deleting electronic flow rate information. This is the first time that criminal charges have been laid as a result of the Deepwater Horizon task force investigation. It is claimed that the rig experienced ‘uncontrolled blow out and related explosions’ while finishing the Macondo Well which killed 11 people and resulted in one of the largest environmental disasters in the United States.

The first stage of the clean-up, known as ‘top kill’ involved BP pumping heavy mud into the blow out well head to try to stop the oil flow. BP requested that Mr Mix retain all information concerning the rig including any text messages. It is alleged that when Mr Mix became aware that his electronic files were being collected for BP’s lawyer he allegedly ‘deleted from his phone a string of text messages containing over 200 messages with BP’s supervisors. The deleted texts, which were recovered forensically, include sensitive internal BP information collected in real time as the ‘top kill’ operation was occurring’. The messages allegedly indicate that the ‘top kill’ was failing.

Documents lodged in court allege that Mr Mix deleted a text sent on 26 May 2010 at the end of the first day of top kill stating that the flow rate was more than 15 000 barrels of oil per day. The significance of this is that BP engineers had concluded that if the flow rate was greater than 15 000 barrels per day, the ‘top kill’ was unlikely to succeed. At that time BP had estimated the flow rate at approximately 5 000, when they were in fact over 15 000.

In addition, on about 19 August 2011 it is alleged that after learning that his phone was about to be viewed by BP’s counsel ‘a string of more than 100 text messages were deleted concerning various issues as to how much oil was flowing from the well after the blow out’. At the time Mr Mix deleted the text messages he was already in possession of a number of legal hold notices requiring him to preserve such data and had been communicating with the criminal defence lawyers in connection with the pending Grand Jury investigation for the Deepwater Horizon disaster. See: www.justice.gov and www.hydrocarbonprocessing.com

Clean Water Act violations

In late April 2012 Integrated Production Services Inc was found guilty of breaches of the United States’ Clean Water Act 33 U.S.C. §1251 et seq. (1972) in the Muskogee Federal Court and fined \$140 000.00 as a result of its operations

in Atoka County in the Eastern District of Oklahoma. A crew supervisor was fined \$2 500 and placed on probation for two years. IPS also had to serve a two-year probation period, and invest more than \$38 000 to train IPS employees in proper hazardous waste handling and spill response procedures. It was also required to make a community service payment of \$22 000 to the Oklahoma Department of Wildlife Conservation for ecological studies and remediation of Boggy Creek.

The charges resulted from the leakage of an estimated 400 000 gal of hydrochloric acid in 2007 when IPS was performing fractured iodising at its well sites. The operations included the use of hydrochloric acid to penetrate bedrock and substrata.

Both parties pleaded guilty to negligent violation of the Clean Water Act and have implemented a compliance program to ensure that such spills do not occur again. This case highlights the need to have proper training and procedures in place to deal with such accidents. See: www.epa.gov/compliance/resources/newsletters/criminal/envcrimesbulletin-04-12.pdf

New environmental courts

The Sindh High Court Chief Justice Mushir Alam announced in Karachi, Pakistan in April 2012 that special ‘green courts’ at District Court level would be established to deal with the backlog of litigation on environment related matters. Special ‘green benches’ would be constituted to deal with environment related issues while the District and Sessions Judges would appoint additional District and Sessional Judges and senior Civil Judges to hear environment related cases. His honour noted that Judges of high moral character, value and high learning were needed for a firm and independent judiciary.

The establishment of specialist environmental benches is consistent with the recommendations in the Bhurban Declaration 2012, ‘A Common Vision on Environment for the South Asian Judiciaries,’ adopted during the South Asian Conference on Environmental Justice held 24–25 March 2012 under the aegis of Supreme Court of Pakistan. The Asian Development Bank (ADB), United Nations Environment Programme (UNEP) and IUCN supported the conference.

See: www.nation.com.pk/pakistan-news-newspaper-daily-english-online/islamabad/13-May-2012/hcs-sc-ajk-form-green-benches; www.thenews.com.pk/Todays-News-4-104844-SHC-forms-green-bench-to-hear-environment-related-cases; http://cmsdata.iucn.org/downloads/pk_bhurban_declaration_2012__20120410_.pdf

Galapagos court

The national judicial authority of Ecuador is reported to have established a provincial court in the Galapagos, which means that environmental prosecutions will no longer have to take place on the Ecuadorian mainland, nearly 1 000km away.

Sea Shepherd Galapagos, a non-profit, marine wildlife conservation organization active in the Galapagos Islands, 'has been advocating for the creation of a first in the world judiciary specialising in the rights of nature'. Sea Shepherd believes that a specialised judiciary would be a 'big improvement when it comes to the local justice system and could make a difference not only in the Galapagos but also in other regions of the country'.

See: www.igtoa.org/galapagos-news/2012/03/sea-shepherd-new-provincial-court-in-the-galapagos-could-be-a-light-at-the

FEDERAL

Shol Blustein and Dr Nicola Swayne

NELA concerned about approval bilaterals

In May 2012 the NELA Executive wrote to the Minister for Sustainability, Environment, Water, Population and Communities, the Hon Tony Burke MP, urging him to ensure that any delegation of state assessment and approval responsibilities under the *Environment Protection and Biodiversity Act 1999* (EPBC Act) would only occur where appropriate environmental standards and assessment procedures were in place. NELA's concern is that the tenor of the inaugural meeting of the Business Advisory Forum to the Council of Australian Governments and the COAG communiqué of 13 April 2012 were skewed against the inconvenience of sound environmental controls, and that Australia's international obligations should not be compromised.

NELA supports reducing unnecessary duplication of regulation and red tape, but is concerned by the apparent agreement by the Australian Government to delegate assessment *and* approval responsibilities under the EPBC Act to state governments (except in the areas of World Heritage, nuclear actions and actions in Commonwealth waters).

Strategic assessment of the Great Barrier Reef World Heritage Area

The Federal and Queensland Governments and the Great Barrier Reef Marine Park Authority (GBRMPA) are working together to undertake a comprehensive strategic assessment of the Great Barrier Reef World Heritage Area and the adjacent coastal zone. The assessment is being conducted in response to the concerns expressed by UNESCO's World Heritage Committee about the potential impact of coastal or marine development on the World Heritage area, and their recommendation that Australia should undertake a comprehensive strategic assessment of the area.¹

The assessment will involve marine and coastal components. The GBRMPA will lead the marine component, while the Queensland Government will lead the coastal component. Both components are under s 146 of the EPBC Act.

The assessment is expected to take approximately 18 months. Draft terms of reference have been released for public comment, and final terms of reference are being developed.²

Draft National Wildlife Corridors Plan

The Draft National Wildlife Corridors Plan, a strategy for the Government to restore and manage ecological connections in the Australian landscape, was released in March 2012.³ The draft was prepared by an independent advisory group chaired by the Hon Bob Debus, in consultation with the Australian Government. The draft plan 'lays the foundation for a new, collaborative, whole-of-landscape approach to biodiversity conservation that is based on voluntary cooperation and the existing efforts of communities, landholders, governments and industry'.⁴

Tasmania's native forests: conservation agreement

– see text in recent developments – Tasmania

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- 1 http://www.derm.qld.gov.au/environmental_management/coast_and_oceans/great_barrier_reef/assessment-gbr-worldheritage.html
 - 2 <http://www.gbrmpa.gov.au/outlook-for-the-reef/strategic-assessment>
 - 3 <http://www.environment.gov.au/minister/burke/2012/mr20120308.html>
 - 4 <http://www.environment.gov.au/biodiversity/wildlife-corridors/index.html>