FORUM

Environmental Justice v Deregulation? Themes of an Environmental Law Conference in Auckland

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Earlier this year saw one of the most important environmental law conferences ever staged in New Zealand. Entitled *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law and Policy*, the conference was hosted by the University of Auckland Faculty of Law and principally sponsored by the New Zealand Law Foundation. It attracted 175 legal academics and practitioners from around the world. The wide attraction to participants from North America and Europe came as no surprise considering the reputation of New Zealand as a world leader in both sustainable management law and neo-liberal economic policy. New Zealand's radical economic reform with its move to deregulation and privatisation has aroused enormous interest — and criticism — internationally. Attracting a similar level of attention in the environmental arena is the Resource Management Act 1991 (RMA) which introduced the concept of sustainability as a guiding principle for resource management. How the concept of sustainable management ("environmental justice") and neo-liberal economics ("market mechanisms") may work together, what common ground exists and what tensions arise, was the overall theme of the conference.

The wider context of the conference theme is a rapidly changing world of globalisation. Some of its implications for the development of environmental law and policy are worth a closer look.

New Challenges for Environmental Law and Policy

At the end of the 1990s an alarming world-wide trend has emerged: the state, the market and the environment are drifting apart. They are hardly linked as the notions of the 1980s, "integrated resource management" and "sustainable devel-

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opment", had promised. We are left with an unfulfilled promise. Instead of integrating the environment in public and economic decision-making, states have resorted to their traditional role. Not protecting the environment, but protecting the national economy became the predominant response to globalisation. Is environmental policy off the agenda?

While the state seems further removed from environmental law and policy, the market has acquired a greater role. The final decade of the twentieth century has seen a shift from regulatory strategies to deregulation and economic instruments. State regulation is, in part, being replaced by market self-regulation. Given the unprecedented dynamics of economic globalisation, there can be little doubt that strategies for self-regulation are here to stay. Whether they will completely replace the traditional command-and-control approach to environmental policy or merely play a part in a new stick-and-carrot policy combination remains to be seen. A lot will depend on how states are going to define their new role — whether they will choose to set the agenda or allow it to be set for them.

Traditionally, environmental law and policy has been a mere reflection of the economic agenda. In times of highly regulated national economies, environmental policy appeared as a regulatory system of commands and controls. By moving into deregulated national (and global) economies, states have increasingly used market-based instruments and incentives. From a perspective of successful environmental policy the issue is not more or less state regulation, but more or less efficiency. There is no empirical evidence that the ever more dense regulatory networks of the 1970s and 1980s led to more environmental efficiency than the current trend towards deregulation. It is safe to suggest that efficiency depends on whether the players (in the market) actually play to the rules, not how rigorous or prescriptive the rules are. As long as the basic rules ensure and improve environmental quality, it does not matter how many rules there are and whether they are enforced by the state, or the market, or both. In other words, the state cannot be dismissed from its pivotal role for the design and enforcement of environmental standards.

Potential risks associated with the increased role of the market in environmental policy range from implementation and enforcement deficits to a complete failure of achieving, or even identifying, environmental objectives. In so far as the quest for environmental justice is a quest for environmental quality and social justice, there is a natural tension between environmental justice and market mechanisms. This does not mean that both are mutually exclusive. At least, it does not necessarily mean this. However, justice and the market are not easy to reconcile. In the absence of any example in history that could suggest that the market *per se* provided the mechanisms for social justice, there is nothing to suggest that the market could provide the mechanisms necessary for environmental justice. At best, the market may provide some support or prerequisites. It is for the state, as the policy- and law-making entity, to determine the extent to

which the mechanisms of the market can be employed as a means for achieving environmental ends. Any confusion of means and ends would be the end of environmental policy and of the policy-making state alike.

Since its origins in the late 1960s, modern environmental policy has come a long way. Initially, its design followed the perceived simplicity of the task: certain activities, identified as harmful to people and the environment, had to be banned or meet some requirements. As a continuation of public health and safety regulations, environmental law was very much an exercise of commands and controls. Typical mechanisms were bans of certain activities or products, granting of permits, duties of prior notification and sanctions for prohibited activities. The advantages of environmental legislation designed in such a manner are those associated with administrative law in general: orientation at the public good, participation of the public, transparency of procedures and accountability of authorities.

The growth of an environmental regulatory network in the 1970s and the emergence of comprehensive environmental management strategies in the 1980s created the success of environmental law. It began to influence the market. Public opinion and consumer behaviour changed, causing industry to take a more proactive approach and engage in technological innovation, new product design, the creation of new markets and long-term perspectives for development.

Increasingly, however, the market economies also felt the constraints. In many industrial countries regulation was perceived as overregulation hindering innovation rather than stimulating it. Highly regulated economies saw themselves as disadvantaged against less-regulated economies. Environmental intervention seemed at odds with the logic of capitalism. In a world about to free itself from central planning and national borders, the command-and-control approach appeared outmoded. The collapse of state socialism in Eastern Europe further confirmed this belief. The 1990s called for deregulation and global markets.

It would be simplistic, though, to assume free-market ideology as the sole driving force behind environmental deregulation. While the market economy has obviously shaped the development of environmental law, it is also the complexity of modern environmental law itself that challenges traditional command-and-control methods.

Ultimately, a command-and-control policy can only work if both the policy-maker and the recipient are absolutely certain of what is required. Uncertainty is, however, inherent in any environmental risk assessment, and the more far-reaching and long-term orientated environmental policy becomes, the less certain are its standards and goals. There is an important tension between scientific uncertainty and economic certainty which environmental law, more than any other area of the law, has to take into account. For a successful strategy, environmental law needs to take a precautionary approach while, at the same time, ensuring a stable framework for economic development. The double nature of

this task is perfectly captured by the notion of sustainable development: in a world of uncertainty, societies aim to place themselves between ecological sustainability and economic prosperity. The complexity of this task signals the complexity and importance of modern environmental law.

Against this background the call for more flexibility and economic realism seems convincing. Economic instruments first appeared on the policy agenda in the mid-1970s when the OECD advocated adoption of the "polluter-pays" principle and internalisation of environmental costs in decisions. In the mid-1980s, governments and industry began to experiment with specific economic instruments. Under closer scrutiny, while industry has been a staunch advocate of deregulation of environmental policy, it has not necessarily supported the economic instruments associated with it. Evidence in various countries suggests that the initial enthusiasm faded once industry was faced with the real possibility of green taxes, environmental charges or tradable emission rights. This is due partly to the realisation that many examples of economic instruments involve considerable re-regulation which erodes the autonomy promised by market mechanisms. So far, only voluntary agreements have been a commonly used instrument.

Regardless of industry's ambiguity towards economic instruments, environmental policy has become more flexible. While the re-active "stick" of commands, controls, permits and sanctions may still have its role, it is increasingly complemented by the pro-active "carrot" of tax relief, subsidies, voluntary agreements and other economic instruments. The problem seems not *whether* economic instruments should be used, but *how* they should be used, and particularly, how they are to serve the overall aim of environmental justice.

Environmental Justice and Market Mechanisms

Could such a stick-and-carrot combination reconcile environmental justice with the market or, at least, help to resolve the tensions between them? The answer is a cautious "maybe", depending on how "environmental justice" and "market mechanisms" are defined. There is no commonly agreed definition for either, and the contributions at this conference reflect a considerable variety of definitions and approaches. For some, environmental justice, social justice and ecological sustainability represent the new yardstick against which all concepts of environmental law and policy are to be measured. For others, the market economy, whether free or regulated, marks the starting-point for any strategy of environmental protection. Similarly to the interpretation of sustainable development, which can be understood either as economic development consistent with the needs of ecological sustainability or as ecological sustainability consistent with the needs of economic development, the emphasis is either on environmental justice or on market mechanisms.

Underlying the task of finding the right balance is the issue of definitions. What do we mean by environmental justice? Does it have any meaning beyond the context of the environmental justice movement as originated in the United States? If so, is environmental justice a form of social justice or distinguished from it (if so, in what way), or is it just another word for environmental responsibility and environmental protection, thus not sufficiently defined to provide guidance for successful environmental strategies? It is yet to be seen whether the term "environmental justice" is simply jargon or a jurisprudential category indicating a new concept of justice.

And what do we mean by market mechanisms? Only *prima facie* we can refer to market mechanisms as economic instruments designed to implement and enforce environmental objectives. The nature and scope of such economic instruments is far from clear. While charges, taxes, tradable permits, voluntary agreements and similar forms of self-regulation can be readily identified as "instruments", ie, serving a specific, prescribed purpose, deregulation as the new economic policy has much wider implications. Deregulation marks an advanced stage in the development of capitalism. Competition, the powerful driving force of the market, has been hampered by governmental intervention and national boundaries and is now freeing itself from both. The modern state is being forced to become "minimal", allowing for an unprecedented system of deregulated and privatised public services. Considering the far-reaching implications deregulation may have for the prerogative of the state to create environmental policy, it becomes difficult to perceive market mechanisms as mere means to achieve the ends of the state's environmental policy. It might be more realistic to perceive environmental policy as a "new deal", a combined effort of state and market, at best, or as no longer existing, at worst.

If both the concept of environmental justice and the role of market mechanisms are clouded by fundamental social and economic changes, the task ahead is to investigate these changes and their significance for future environmental law. Defining the purpose of environmental law as protecting the natural environment in a situation of scientific uncertainty and need for economic stability, as suggested above, we can ask how current social and economic change may affect this purpose. Are we likely to overlook the reality of scientific uncertainty (requiring a precautionary approach) in a fixation to secure economic prosperity? Or is there still, or even more so, a need for environmental justice as the guiding principle for environmental law and policy? One possible answer to these questions could be to see environmental law guided by environmental justice as a prerequisite for any attempt to secure economic prosperity. The economic system depends, after all, on the ecological system. By not giving the environment its due, we cannot expect, at least in the longer term, to sufficiently supply people with material goods.

The answers governments have been giving to these questions differ and

were well documented by the speakers of the conference. A dozen papers covered experiences in a range of countries and regions including the United States, European Union, United Kingdom, Germany, Belgium, Central and Eastern Europe, Russia, South Africa, Australia and New Zealand. Despite the variety of approaches and experiences, it became obvious that all countries have been struggling to adjust their environmental policies to the challenges of deregulation on the one hand, and environmental justice on the other.

Perhaps no other country has responded to these challenges so radically as New Zealand. New Zealand was one of the world's first countries to adopt the concept of sustainable development for its environmental legislation. The RMA promotes "sustainable management" as the guiding principle for all activities that may have environmental effects and sets out various aspects of environmental justice as an ethical and legal commitment. Slightly preceding, but mostly contemporaneously with environmental reform, New Zealand was also one of the first countries to undergo a radical economic reform programme. Since the mid-1980s, deregulation and privatisation have deeply changed the way and extent of public services. Public welfare has largely been replaced by the idea of "user-pays" and individual responsibility. Environmental justice as espoused by the RMA sits at odds with such economic neo-liberalism. Not surprisingly, therefore, market pressures have influenced the way the Act is administered. The government promotes economic instruments such as voluntary agreements and tradable permits, but also the privatisation of key environmental sectors such as electricity, water, waste, forests and coastal marine areas. As a result, not only is the enforcement of environmental law increasingly influenced by market-driven concerns, but the RMA itself is at stake with a current review taking place which may well see the removal of many "assumed" obstacles for investment and development.

The New Zealand experience would suggest that environmental justice and market mechanisms contradict each other and cannot be reconciled unless environmental justice and ecological sustainability are the clearly defined parameters for market-orientated instruments. For other countries the conference reports often-expressed similar concerns.

Key Themes of the Conference

The key themes, covered by some forty speakers from fifteen countries in eight plenary and eight topic sessions, reflected the tensions between state regulation and market self-regulation and included the following:

(1) defining environmental justice as a yardstick for measuring the success of environmental policy and law;

(2) defining market mechanisms;
(3) experiences from overseas jurisdictions; and
(4) operational aspects of environmental justice.[1]

The views of academics were complemented by the experiences and observations of practitioners, including environmentalists, representatives of indigenous peoples, business, and government agencies.

(1) Defining environmental justice
In the opening keynote address Professor Dinah Shelton (University of Notre Dame, N.Y.) spoke on "Environmental Justice in the Post-Modern World". Reviewing the development of environmental policy during the past three decades Shelton diagnosed severe flaws and gaps in both the design and the enforcement of environmental policy. She called for solidarity as a concern for the well-being of all. While the Modern World may have achieved two-thirds of the ideals of the French revolution (*liberté, egalité*), the third (*fraternité* or solidarity) will be the big challenge for the Post-Modern World.

Professor Gerard Rowe (Viadrina University, Frankfurt/Oder) explored "Environmental Justice as an Ethical and Legal Principle". In covering the different views in contemporary environmental ethics he highlighted environmental justice as a new concept which should be defined and used as a guiding principle for environmental legislation. This theme was further investigated by the author who developed five "Building-Blocks for a Theory of Environmental Justice". With respect to the idea of justice, three elements of environmental justice can be defined: intragenerational (social) justice; intergenerational justice; and interspecies justice. The importance of justice and equity for the design of environmental policy was also referred to by various other speakers, including Professor Terence Centner (University of Georgia), Professor James Huffman (University of Oregon), Patricia Park (Southampton Institute), Alberto Costi (Central European University, Budapest), Stephen Dovers and Warwick Gullett (Australian National University).

There is, however, no universally accepted definition. Among those who associate specific ideas with the concept of environmental justice, a common denominator are the aspects of equity, fairness and access. Within the US American context, environmental justice involves the fair treatment for people of all races, cultures, and incomes regarding the development of environmental laws, regulations and policies. This, of course, also has importance in the international

1 A selection of twenty conference papers have been chosen for publication in a book to be edited by Klaus Bosselmann and Benjamin Richardson entitled *Environmental Justice and Market Mechanisms: Key Challenges for Environmental Law* (Kluwer Law International, forthcoming). Other papers appear in this issue and further issues of the *NZJEL*.

setting, where developed and developing nations struggle to balance environmental burdens and access to natural resources in a fair fashion. Beyond these social or intragenerational dimensions of environmental justice, the nature and degree of intergenerational and interspecies justice are much debated among environmental philosophers, but have not yet reached common acceptance. Further progress would depend on a much-needed dialogue between environmental philosophers, lawyers and decision-makers. In this respect, the conference took a few initial, but very important steps.

(2) Defining market mechanisms

The definition of market mechanisms is similarly complex and controversial, as shown above. At the level of current environmental policy implementation, however, market-based instruments can be identified more easily. They include economic instruments such as environmental taxes, charges, subsidies, tradable emission permits and agreements, but also more indirect policy tools like privatisation of publicly owned environmental assets, government purchasing policies, environmental labelling or certification of management practices. There is a wide spectrum of market mechanisms to choose from, albeit with different degrees of efficiency. Obviously, an ecological tax system as, for example, initiated in the Netherlands and Denmark, has wider implications for a national economy (ie, shifting closer to sustainable development) than a reliance on voluntary agreements as preferred in New Zealand. One important outcome of the discussions in various sessions of the conference was that the use and mix of economic instruments was not so much determined by initiatives of governments, but by market pressure and public opinion. Countries with a high degree of environmental awareness are more likely to target economic instruments and provide clear guidance for them than countries with less environmental awareness and more influential market forces.

Professor Eckart Rehbinder (Chair of the German Council of Environmental Advisers) outlined the spectrum of currently used economic instruments in his address "States between Deregulation and Environmental Responsibility". He stressed that all economic instruments signal a form of deregulation, ie, increased reliance on the forces of the market, and thus need to be carefully monitored. For instance, tradable emission permits, pioneered and extensively used in the United States, tend to undermine judicial protection of affected citizens and cannot be controlled sufficiently by governments, which is why they are hardly used in Europe. Of increasing importance here are environmental charges and taxes which have been introduced in a number of EU member states. According to Rehbinder, the disadvantage of a system of environmental taxation is uncertainty (setting an artificial pricing on pollution and energy use); the advantage is a very powerful incentive to change behaviour of industry and consumers. In the case of an ecological tax reform, as being promoted in Germany,

and in first steps being introduced in the Netherlands and Denmark, the effect on industry and national economy can be profound. Through the combination of lower taxes for labour and higher taxes for the use of (non-renewable) energy, the economy may undergo a major restructuring, away from energy-intensive to labour-intensive forms of production. In Rehbinder's assessment, the general success of market mechanisms depends on whether the state maintains control over environmental objectives and their implementation. He concluded that "the choice of deregulation is a voyage into an unknown land".

Professor Michael Bothe (University of Frankfurt/Main) reflected on "The European Experience". Like Rehbinder and many other speakers, Bothe stressed the importance of an adequate legal and political framework for any attempts to rely on market mechanisms. They can certainly not replace good governance. Cost-effectiveness may be a plausible argument for market mechanisms, but environmental costs have also to be considered. With respect to European Community law, and likewise to international free-trade agreements, national governments still have the choice between developing high environmental standards or lowering them in fear of non-tariff trade barriers. As the well-known Danish bottle case of the EU Court of Justice demonstrated, governments are, in principle, free to maintain high environmental standards; international free-trade agreements are no excuse.

Bothe described the situation in the European Union as still being "an experimentation field". The same could be said about the APEC region. In her paper, Associate Professor Jan McDonald (Bond University) asked the question, "Can APEC deliver Ecologically Sustainable Trade and Investment?" With APEC's strong focus on removing trade barriers and its lack of environmental safeguards, McDonald remains sceptical. There is a real risk of APEC becoming an economic community without environmental protection. Member states like Australia and New Zealand have already taken a market-based approach to environmental policy and are likely to lower environmental standards if they stand in the way of free trade and investment.

The tensions between global trade and environmental justice were the subject of two further keynote addresses. Professor Alexandre Kiss (President of the European Council on Environmental Law, Strasbourg) acknowledged the benefits international trade has for peace and development, but insisted on international law as the main device to protect human rights and the environment. Kiss identified a value system which no community can do without. Every community needs generally accepted ethics, respect of the human person and property, faithfulness to the country and cultural heritage or to a social order. The protection of such fundamental values is generally recognised as a common concern of the community and enforced by law. Kiss argued that a common concern of humanity has emerged slowly with the progressive globalisation of the planet and that it is time to acknowledge its existence in international treaties or in

customary rules. He also pointed to the fact that international environmental law has a wealth of agreements and principles which already hold the common concern of humanity as obligatory for all states.

Kiss' somewhat idealistic position was contrasted by Professor Jane Kelsey (University of Auckland) who reported on recent developments surrounding the Multilateral Agreement on Investment and possible consequences for global environmental justice. Kelsey expressed doubts whether economic globalisation can be captured and controlled by legal instruments. Trade liberalisation and environmental justice are presently on a collision course and could only be reconciled through pressure from environmental and consumer groups and the indigenous peoples' movement.

Donna Craig (Director of the Macquarie University Centre for Environmental Law) shared some of Kelsey's concerns in her paper "International Environmental Justice and Indigenous People". International law does not, as yet, recognise indigenous peoples' right of self-determination and sovereignty over native flora, fauna, and land. Craig called for a political and legal alliance of indigenous peoples, human rights and the environment and said that international environmental law increasingly reflects such an alliance. The "Compatibility of Trade and Environmental Concerns" was also questioned by Marie Wynter (Australian National University). Using the "Shrimp-Turtle Dispute" she demonstrated, however, that trade bans can be effective economic instruments provided they are accompanied by "positive" measures for better compliance with environmental standards.

(3) Experiences from overseas jurisdictions

A number of speakers, leading environmental law scholars in their respective countries, gave an account of the importance of environmental justice and the use of market mechanisms in individual states.

The United States were represented by two speakers. Professor James Huffman (Lewis and Clark Law School, Oregon) spoke on "Free Market Environmentalism and Fairness". His approach was to consider economic prosperity as a prerequisite for environmental protection. The US experience suggested that free markets may not *per se* achieve environmental justice, but failures to do so were less market failures than "institutional failures". The task of governments was to provide incentives for the generation of individual wealth and adjust economic instruments to this task. With environmentalists and environmental advocates in mind, Huffman warned that "we must not permit our ideologies to stand in the way of achieving the results we seek". In contrast, Professor Terence Centner (University of Georgia) saw environmental discrimination as a result of failures in the economic and legal system. In his paper "Toxic Exposure and Race: Establishing a case of Discrimination under American Legal Institutions" Centner showed that environmental injustice towards people of colour

and the poor are closely associated with a lack of governmental control and law enforcement.

Catherine Redgwell (University of Nottingham) analysed the relation between "Privatization and Environmental Justice in the United Kingdom". She argued that a number of privatised public services have performed badly not only in environmental terms, but also in terms of quality of services. For Australia, Margaret Bond (Centre for Natural Resources Law and Policy at the University of Wollongong) and Maria Comino (Healthy Rivers Commission of New South Wales) painted a similar picture. In their paper "Environmental Justice and the Water Market in Australia" they showed that the moves of the traditional water management regime (taking a precautionary approach) to a market system (allowing for the purchase of permanent water rights) undermines strategies for environmental justice such as the National Strategy for Ecologically Sustainable Development of 1992. Nicola Pain (New South Wales Environment Protection Agency) focussed on a new load-based licensing scheme which is currently being introduced in New South Wales to better link licensing requirements with actually occurring emissions. The new scheme forms part of a new framework of economic instruments.

Professor Kurt Deketelaere (Director of the Institute for Environmental and Energy Law at the University of Leuven) presented the "Market Mechanisms in Belgian Environmental Law and Policy". Typically for continental EU Member states, Belgium has taken a conceptual approach to environmental policy instruments. Based on the "polluter-pays" principle and the principle of "sustainable development", new economic instruments were introduced to complement, not replace, the existing regulatory system and thereby create more flexibility and economic efficiency. In the 1980s a system of environmental levies was established to finance the environmental policy of the government. Levies are the most widely used economic instrument covering a wide range of industrial activities (for example, use of energy and water, dangerous products, waste, ionising radiation). Since 1993, environmental taxes, called "ecotaxes", have been introduced incrementally; to date they cover packaging, packaging waste and environmentally harmful products like batteries and certain chemicals. A related concept is the use of differentiated taxes for products and services according to their environmental characteristics (for example, petrol). Currently an ecological revision of value-added tax is being considered. Other economic instruments include voluntary agreements (under certain conditions); environmental care systems for companies (with environmental coordinators, environmental audits and monitoring and reporting systems); and deposit, refund, return premium and other collection systems for consumer products.

According to Deketelaere, instruments of direct regulation will remain the cornerstone of environmental policy, but the objectives of environmental justice and sustainable development can be better achieved in a combination of regula-

tory and market-based instruments. Among these a fully developed ecological tax system (shifting the tax burden from labour and capital to environmentally harmful activities) can be particularly effective.

While the Belgian experience stands for most North and West European countries, Central and Eastern Europe has very little experience with market-orientated environmental instruments. Alberto Costi (Central European University, Budapest) gave a paper on "Reconciling Environmental Justice in Transition Economies: The Central and Eastern European Reality". Not surprisingly, the environment has not featured prominently in post-communist countries, although as Costi pointed out, the environmental movement played a vital part in the events of 1989–1990. Since the mid-1990s most countries including Hungary, Bulgaria, Romania, Croatia, Slovenia and the Czech Republic have had new environmental regulation in place featuring environmental impact assessment, polluter-pays principle, the precautionary principle and public participation. The problem is the implementation which, although heavily assisted by the European Union, faces the resistance of struggling economies. Costi concluded that the introduction of environmental market instruments will be counterproductive and unfair until the market economy is sufficiently developed. He added that they would need, in any case, a firm legal framework to ensure the achievement of environmental justice. Professor Oleg Kolbasov (Institute of State and Law of the Russian Academy of Sciences) entitled his report "The Role of Law in Ensuring Sustainable Development in Russia". He described the present state of the economy as "chaotic", not allowing any tangible measures of implementing sustainable development. The Russian experience would suggest that the rule of law and a related regulatory framework need to be firmly established before economic instruments could be introduced.

Almost the opposite seems true for South Africa — another country in transition. Michael Kidd (University of Natal) described "The Pursuit of Environmental Justice in South Africa" as a struggle against ongoing injustice. With social justice still being the main concern there is little room, at present, for a systematic application of market mechanisms in environmental policy. The constitutional and legal framework for environmental protection exists, but environmental justice can only be implemented if the government can deliver basic needs like employment, housing and services (for example, water, electricity).

(4) Operational aspects of environmental justice

A number of papers concentrated on current issues in New Zealand. Judge David Sheppard (Environment Court) described "Doing Justice in Environmental Decision-Making" as a process that needs an informed and participating public to achieve the best quality of environmental decisions. Justice Peter Salmon (High Court), in his paper on "Access to Environmental Justice", emphasised the need to remove practical barriers which persist despite the wide opportunities pro-

vided under the RMA. David Grinlinton (University of Auckland) identified particular "System Failures in Access to Environmental Justice under the Resource Management Act 1991", including problems relating to access to environmental information, environmental assessment, standing and costs. Derek Nolan and Nichola Christie (Russell McVeagh) dealt with "Financial Contributions as a Market Mechanism and the Resource Management Act 1991", and David Kirkpatrick (Simpson Grierson) assessed the merits of contracts and private agreements as means to achieve sustainable management. Roger Kerr (Business Roundtable) highlighted the glories of free market approaches in the New Zealand context, while Guy Salmon (Maruia Society) insisted on carefully targeted implementation strategies. Maori perspectives were given by Shane Jones (Maori Fisheries Commission) and Arthur Harawira (Auckland), but also featured prominently in the papers by Al Gillespie (University of Waikato) and Cath Wallace (Victoria University of Wellington). Gillespie demonstrated "Clashes and Communality between Maoridom and Environmentalism" arguing for a stronger focus on communality, since both Maoridom and environmentalists may be confronting many issues in common in forthcoming years. Wallace showed how the tradable fishing quota scheme under the Fisheries Act 1996 has impacted on Maori and intergenerational equity.

A common theme in environmental law is the problem of access to environmental justice. Professor Jeremy Rowan-Robinson (University of Aberdeen Centre for Environmental Law and Policy) described the procedural aspect of environmental justice as an important focus in many jurisdictions. In his paper "Non-Regulatory Instruments and Public Access to Environmental Information" he showed that economic instruments have severe deficiencies in this respect. The United Kingdom has yet to provide public access to environmental information for its market-based environmental policy.

Environmental justice is not a set goal which can be achieved simply by providing access to environmental decision-making. As most speakers pointed out, environmental justice is an ideal which needs to be pursued by all involved in the legal and political process. Increasingly important tools in this respect are the various forms of alternative dispute-resolution (mediation, conciliation, facilitated negotiation). Ian Macduff and Amanda Wolf (Victoria University of Wellington) concentrated on the process of negotiation. In their paper "Negotiating the Principles and Applications of Environmental Justice: Implications of Participation" they identified justice and fairness as essential concepts for substantive negotiation, distinct from mere procedural concerns typically used to assess fairness in negotiation. The key is an understanding by negotiators that justice is a balance between constraint and choice and that the ambition is not to get the most for their side, but to find a solution that the other(s) will accept.

Methods of changing behaviour were also the subject of Patricia Park's (Southampton Institute) paper called "Environmental Justice: Changing Behaviour and

Pollution Control". For Park the main barrier against environmental justice is the difficulty to relate environmental ethics to economic and social issues. With reference to the UK landfill tax, introduced in 1996, she suggests that a market mechanism based on a carefully designed command-and-control system may be the best approach to initiate changing behaviour. Such design would involve the incorporation of ecological ethics into the legal framework. The transformation from the period of the "economic human" to the time of the "ecological human" could be facilitated by retaining the market as a basic system of resource allocation in most areas and introducing a greater range of macro-controls on market activity.

Conclusion

Nearly all conference papers and discussions focussed on the role of the state in environmental management. The central issue at this conference was how to re-define the role of the state in the age of free markets and globalisation. Is the traditional "commanding state" on its way to a "minimalist state"?

Perhaps surprisingly, market-based instruments have not been introduced to a degree one might have expected, given the wide-spread concern for cost-efficiency, greater flexibility and deregulation. States *and* industry do not seem to be overly committed to economic instruments. Many examples of economic instruments contain significant regulatory structures to frame their operation, thus compromising their "free" market promise. The performance of tradable permits in the US and levies and taxes in continental Europe is in no serious doubt; environmental objectives can obviously be achieved at lower cost. But overall, the picture does not show a clear dichotomy between legal commands versus economic incentives.

Whether such a dichotomy exists probably depends on the individual standpoint. From a perspective of the free market economy there may be the threat of an overregulating bureaucratic state. From a perspective of the regulating state there may be the threat of an irresponsible market. Between both perspectives there may be a position that rejects the state-versus-market dichotomy altogether.

The usefulness of the simple regulation/incentive distinction in the environmental policy discourse is questionable. For good environmental governance, the crucial question is not whether economic actors are compelled or merely induced or invited to comply with environmental standards. Rather, the question ought to be whether the state has a clearly defined commitment to the environment and how successfully this commitment is implemented and enforced. This may involve commands and controls, but likewise the use of market mechanisms.

The crucial issue is how society as a whole gears up for the transition from the presently unsustainable to a sustainable society. For the role of the state this means to think not in a state-versus-market dichotomy, but in terms of a failing state–market system versus a successful state–market system. To this end, the state should neither be "commanding" nor "minimalist", but rather be a "facilitating state".

The appropriate new role for the state would be to facilitate the transitions needed. It can do so by providing a legal framework that is guided by environmental justice and by helping the economic actors to operate in it.