



Law Council  
OF AUSTRALIA

Martyn Hagan  
Acting Secretary-General

18 January 2013

Committee Secretary  
Senate Standing Committee on Environment & Communications  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600.

Email: [ec.sen@aph.gov.au](mailto:ec.sen@aph.gov.au)

Dear Sir/Madam

***Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012***

The Law Council of Australia is the peak body of the Australian Legal Profession. It welcomes this opportunity to make a submission to the Committee considering the above Bill.

The *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)* is the principal piece of national legislation directed at protecting Australia's environment. The EPBC Act was developed following recognition in both the 1992 and 1997 *Intergovernmental Agreements for the Environment* of the important role for the Federal Government in matters of international and national environmental significance. The EPBC Act identifies the following matters of national environmental significance (MNES):

- [World Heritage properties](#);
- [National Heritage places](#);
- [Wetlands of international importance](#) ('Ramsar wetlands');
- [Listed threatened species and ecological communities](#);
- [Migratory species](#) protected under international agreements;
- [Commonwealth marine areas](#);
- [Great Barrier Reef Marine Park](#); and
- Nuclear actions (including uranium mines).

These MNES are subject to international commitments and their protection and management is of national concern, extending beyond the interests of any one state. As a consequence, it was considered appropriate to require approval from the Federal

government before any action can be taken that is likely to adversely impact on any of the listed matters.

The EPBC Act provides for bilateral agreements between the states and the Commonwealth to accredit each other's assessment and approval processes (see ss 45-48).

The *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* proposes changes to remove the power for the Federal government to enter into bilateral agreements which delegate approval powers under the EPBC Act to State governments (*State approval bilaterals*). The proposed amendment responds to reform proposals adopted by the Council of Australian Governments (COAG) in April 2012.<sup>1</sup>

Implementation of State approval bilaterals would essentially remove any role for the Commonwealth government in the assessment and approval of actions likely to impact on MNES.

The Law Council urges the application of the non-regression principle in any assessment of environmental law reform. Consistent with that principle, and in the absence of any assurance that state legislation offers equivalent protections, we support the retention of approval responsibilities under the EPBC Act by the Federal government.

### **Principle of non-regression**

The principle of non-regression is well established in international human rights law. The principle discourages public authorities from amending legislation where the amendments will reduce the available protections.

There is growing international support for wider adoption of the principle in environmental law, as outlined by Emeritus Professor Michel Prieur.<sup>2</sup> Recent affirmations include:

- Resolution by the European Parliament on 29 September 2011 to develop a common EU position ahead of the United Nations Conference on Sustainable Development (Rio+20)<sup>3</sup>;
- International Organisation of La Francophonie position paper on 8 February 2012, urging recognition of the principle in environmental matters;
- *Declaration on the Principle of Non-regression of Environmental Protection in Anticipation of the United Nations Conference on Sustainable Development (Rio+20)*, adopted at the international colloquium organized by the Brazilian Senate in Brasilia on 29 March 2012; and
- The IUCN World Conservation Congress in Jeju, South Korea, in September 2012, urged national governments to recognise the non-regression principle<sup>4</sup>.

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<sup>1</sup> The announcement made by Prime Minister prior to the COAG meeting on 7 December 2012 made it clear that proposed accreditation of state approval processes has now been deferred.

<sup>2</sup> Prieur, M. 2012. "Non-regression in environment law" in S.A.P.I.EN.S Vol5 5(2). IUCN Commissions. Available at <http://sapiens.revues.org/1405>. Copy attached

<sup>3</sup> Referenced in <<http://www.europarl.europa.eu/sides/getDoc.do?type=MOTION&reference=B7-2011-0522&language=EN>>, cl.97.

<sup>4</sup> WCC-2012-Res-128-EN Need for non-regression in environmental law and policy

As Emeritus Professor Prieur argues, “simplification” or weakening of environmental legislation in an economic climate which favours development and does not sufficiently promote environmental values, necessarily compromises the achievement of ecologically sustainable development outcomes. In contrast, evidence of declining ecosystem health globally serves as a reminder that all countries should be striving to enhance, rather than weaken, environmental protections.

The Law Council urges the federal government to recognise the non-regression principle as an appropriate prism through which to assess proposed legislative reforms affecting matters of national (and international) environmental significance.

### **International obligations**

The EPBC Act is designed in part to secure compliance with Australia’s international environmental obligations. Giving assessment and approval power to the Federal government was intended to overcome shortcomings in state and territory assessment and development processes, with a view to providing more comprehensive, and consistent, protections to MNES.

The Law Council considers it appropriate that the Federal government retains responsibility for ensuring that these obligations are met.

The Law Council is concerned that state governments, and the legislative regimes they implement, remain inadequate to protect these matters and to meet Australia’s international commitments. In fact, in deferring the COAG reform agenda in December 2012, the Federal government acknowledged that the States had not been able to provide assurances that the standards under the EPBC Act could be met.<sup>5</sup>

State and territory governments, by their nature, will focus on state issues and interests, particularly those states experiencing economic difficulties. Furthermore, there is a limit on the expertise, resources and legislative powers of individual State governments to adequately consider impacts outside their jurisdictions.

The recent determinations in relation to the Victorian government’s decision to allow cattle grazing in Alpine national parks illustrates the importance of maintaining Federal checks-and-balances in relation the MNES. In response to strong lobbying from grazing stakeholders, the Victorian government sought to permit the resumption of grazing in habitat for nationally listed threatened species. In contrast, the Federal government was satisfied that the practice would have inappropriate impacts on the listed species and refused to allow the grazing.

Unless the current approval powers under the EPBC Act are retained, the Federal government would not have power to intervene in similar situations in future. This is likely to lead to poorer environmental outcomes and compromise the protection of MNES.

### **Differing Levels of Participation Infrastructure**

The capacity of members of the public to seek to enforce compliance with environmental law varies from State to State. For example in NSW any person has the right to bring legal

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<sup>5</sup> See Grattan and Arup, ‘Environmental powers to be kept by Canberra’ (December 6 2012) <http://m.smh.com.au/opinion/political-news/environmental-powers-to-be-kept-by-canberra-20121205-2avw7.html>

proceedings to remedy or restrain a breach of most environmental laws, whereas in other jurisdictions common law standing may have to be established. Similarly the rights of access to information (FOI laws) and the availability of legal aid vary from State to State.

Accreditation of State approval processes will be unfair and will discriminate between Australian citizens seeking to protect matters of national environmental significance.

### **Improving the EPBC Act**

The Law Council recognises that there are opportunities to improve the operation of the EPBC Act to reduce duplication and provide clearer guidance regarding assessment expectations. For example, the Wentworth Group of Concerned Scientists' proposal for consolidating assessment processes, with final approval powers retained by the Commonwealth<sup>6</sup>, would go a long way towards effectively streamlining assessment and approval practices.

However, consistent with the non-regression principle, it is essential that any streamlining not be achieved at the expense of protection of matters of national environmental significance.

If there is a perceived need to reduce "green tape", then there remains the capacity for the States to accredit Commonwealth approval processes in a bilateral agreement (a Commonwealth Approval bilateral).

### **Conclusion**

Without any assurance that state legislation (both the laws themselves and the implementation of those laws in practice) will achieve the same level of protection as the EPBC Act, the Law Council does not support any devolution of approval powers to the states or territories.

The Law Council therefore urges the Federal government to retain the current approval powers in relation to actions with the potential to significantly impact on MNES.

Thank you for the opportunity to make these comments. If you would like to discuss our position in more detail, please do not hesitate to contact Gwen Fryer, A/Section Administrator, Legal Practice Section, Law Council of Australia on 02 6246 3722 or at [gwen.fryer@lawcouncil.asn.au](mailto:gwen.fryer@lawcouncil.asn.au).

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<sup>6</sup> Wentworth Group of Concerned Scientists, 'Statement on Changes to Commonwealth Powers to Protect Australia's Environment', < <http://www.wentworthgroup.org/blueprints/changes-to-commonwealth-powers-to-protect-australia-s-environment>>

This submission has been lodged by the authority delegated by Directors to the Secretary General, but does not necessarily reflect the personal views of each Director of the Law Council of Australia.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Martyn Hagan', written in a cursive style.

**Martyn Hagan**

**A/Secretary-General**

Attachment: Prieur, M. 2012. "Non-regression in environment law" in S.A.P.I.EN.S Vol5 5(2). IUCN Commissions.



Michel Prieur

## Non-regression in environmental law

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### Electronic reference

Michel Prieur, « Non-regression in environmental law », *S.A.P.I.E.N.S* [Online], 5.2 | 2012, Online since 12 August 2012, Connection on 11 October 2012. URL : <http://sapiens.revues.org/1405>

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## Views

# Non-Regression in Environmental Law

Michel Prieur

Scientific Director, Center for Interdisciplinary Research in Environmental law, Land planning and Urban law (CRIDEAU-OMIJ)

Editor of the *Revue Juridique de l'environnement (Environmental Law Journal)*

Member of the IUCN Environmental Law Commission

For further information: contact the group of legal experts of the IUCN Environmental Law Commission: michel.prieur@unilim.fr and stephanie.bartkowiak@cidce.org

Correspondence to: michel.prieur@unilim.fr

Would it appear that we have entered an era of law that refuses established rights in the name of sovereignty of laws and Parliaments — “what a law can do can be undone by another law”? Is this not in contradiction with the rights of future generations, the paradigm of sustainable development proclaimed by States in Rio in 1992 and reaffirmed in Rio twenty years later?



The environment is a value-policy and an ethic (or a “moral of the environment”, as said by French President Pompidou in 1970<sup>1</sup>) that, because of its scope, reflects a permanent quest for improved human and animal well-being in the name of permanent social progress. Environmental policies, if they reflect progress, should ban any regression.

Since the 1972 UN Conference in Stockholm, the main purpose of environmental policies and of their indispensable implementation instrument – environmental law, both national and international – is to contribute to abating pollution and preserving biological diversity.

At a time when environmental law is enshrined in numerous constitutions as a new human right, it is paradoxically threatened in its substance. This could lead to a U-turn and a real regression that would be detrimental to the future of humankind and a threat to intergenerational environmental fairness.

Should not environmental law be included in the category of eternal legal rules, and therefore be non-repealable in the name of the common interest of humanity?

Several threats exist that could curb environmental law. They are:

- political: the often demagogic will to simplify laws leads to deregulation, indeed to the repeal of environmental legislation, in view of the growing number of national and international legal environmental standards;
- economic: the global economic crisis is conducive to speeches calling for fewer legal environmental obligations, some people considering that they hinder development and poverty reduction;
- psychological: the huge scope of environmental standards means they are complex and difficult to understand for non-specialists, which encourages calls for less restrictive environmental laws.

Regression takes many forms. It is seldom explicit, since governments do not have the courage to announce backtracking in environmental protection officially for fear of an unfavourable public response from environmental and consumer NGOs.

- Internationally, it can take the form of refusing to adhere to universal environmental treaties, boycotting their implementation, or even denouncing them. This happened for the first time in the field of international environmental law when Canada decided to denounce the Kyoto Protocol during the Conference of the Parties to the Climate Change Convention in Durban in December 2011.
- In EU environmental legislation, regression is diffuse and appears when certain directives are revised.
- National environmental legislation is subject to increasing and often insidious regression:
  - changing procedures so as to curtail the rights of the public on the pretext of simplification;
  - repealing or amending environmental rules, thus reducing means of protection or rendering them ineffective. Exceptionally, such regressions may be validated by a judge: for example, on the 27<sup>th</sup> April 2012, the Panama Supreme Court ruled for a provisional suspension of the Protected Area status given to the mangroves of Panama Bay.

Faced with this diversity of forms of regression, environmental lawyers must respond firmly and rely on implacable legal arguments. Public opinion, once alerted, would not tolerate reversals in environmental and therefore health protection.

A group of legal experts was created in August 2010 within the IUCN Environmental Law Commission. It aims at pooling relevant universal legal experience and arguments in order to put an end to threats of environmental law backsliding in liaison with a Franco-Argentinean research group of the ECOS-Sud<sup>1</sup>/MINCyT<sup>2</sup> cooperation programme between the University of Limoges (France) and the National University of the Littoral in Santa Fe (Argentina).

Legal arguments must indeed be deployed so as to create a new principle of environmental law, in addition to those already recognised since Rio 1992 (*viz* prevention, precaution, polluter pays and public participation principles). This new principle is already recognised in a small number of national constitutions and legislations. Some courts refer to it. Legal doctrine has started to show an interest, in particular among Brazilian lawyers. “Non-regression” was for the first time the subject of proposals and discussion at European and international level, first in the European Parliament in September 2011<sup>ii</sup> [Resolution 29 September 2011, par. 97], then in New York and Rio in the framework of Rio+20 in 2012.

The legal arguments are based on:

1 – **Legal theory and philosophy of law:** is it acceptable to depart from the theory of mutability of laws, the very foundation of democratic systems? Classical authors consider laws are necessarily subject to a rule of permanent adaptation that reflects changes in social requirements. Any legal rule must be modifiable or repealable at any time, for it would be

morally unthinkable that a “generation of men, in any country, be possessed of the right or the power of binding and controlling posterity to the ‘end of time,’ or of commanding forever how the world shall be governed” (Paine, 1792, p.55<sup>iii</sup>). It is along the same lines that Article 28 of the draft Human Rights Declaration<sup>iv</sup> of June 24<sup>th</sup> 1793 stated: “a generation cannot subject future generations to its laws”.

Apart from the fact that the article was never adopted, the environment and sustainable development compel us today to think differently. The concept of sustainable development now means that the right to life and health of future generations must not be overlooked and measures that would be detrimental to them must not be adopted. Minimizing or repealing rules protecting the environment would result in imposing a more degraded environment on future generations. Therefore, the above-mentioned Article 28 taken literally, combined with the principle of sustainable development, can nowadays be interpreted in the environmental area as speaking in favour of the principle of non-regression, since it prohibits subjecting future generations to a law that would reduce environmental protection.

2 – **Human rights theory:** international law, through the 1966 international covenants, aims for the constant progress of protected rights; it is interpreted as prohibiting regression. Environmental law, now a human right, can benefit from this theory of constant progress applied in particular to social rights. In its General Comment 3 of December 14 1990, the UN Committee for Economic Social and Cultural Rights (CESCR) condemns “any deliberately retrogressive measures” (Para.9)<sup>v</sup>. The idea that once a human right is recognised it cannot be restrained, destroyed or repealed is shared by all major international instruments on human rights (Universal Declaration of Human Rights, 1948, Art. 30<sup>vi</sup>; European Convention on Human Rights, 1950, Arts. 17 and 53<sup>vii</sup>; Art. 5 of the two 1966 human rights covenants<sup>viii</sup>).

3 – **International environmental law:** universal or regional international environmental conventions all aim at “improving the environment”. The final nature of international environmental law is easily apprehended on reading all international environmental conventions. As specified in the 1992 Rio Declaration on Environment and Development, they all undertake to “conserve, protect and restore the health and integrity of the Earth’s ecosystem” (Principle 7)<sup>ix</sup>. Aiming at protection means conversely asserting that any contrary measure is prohibited. A number of conventions state expressly that there can be no reversal: it is forbidden to reduce the level of environmental protection (e.g. North American Agreement On Environmental Cooperation, 1994<sup>x</sup>).

4 – **European Union law:** the Lisbon treaty (Art.2, para.3<sup>xi</sup>) aims at a high level of protection and improvement of the quality of the environment; there can be no derogation from this principle, based on the theory of “*acquis communautaires*”.

1 Evaluation-orientation de la COopération Scientifique française dans le Cône Sud [Assessment-direction of the French scientific cooperative in the southernmost regions of South America]

2 Ministry of Science, Technology and Innovation of Argentina.



5 – **Constitutional law:** a number of countries (e.g. Brazil, Portugal, Germany), have eternal provisions (*clausula petrea*) in their constitutions. They can be interpreted as including human rights to the environment. The 2008 constitution of Ecuador<sup>xii</sup> recognizes non-regression in the field of the environment, and the 2008 constitution of Bhutan<sup>xiii</sup> declares that 70% of the country's forests are eternal. Law-makers are sometimes prohibited from reducing or restraining fundamental rights (for instance in Argentina or Spain): it should be possible to apply this limitation to environmental law, which has become a fundamental right, by invoking it in national courts and raising awareness in constitutional doctrine and NGOs.

6 – **National environmental law:** whereas national texts on the environment all proclaim as imperative reducing damage to the environment, they can, conversely, be interpreted as prohibiting any retrogressive measure.

7 – Finally, **jurisprudence in the various national, regional and international courts:** it is advisable to inform judges and explain to them the existence of the principle of non-regression by publicising the first rulings that refer to this principle (in Hungary, Belgium, Brazil and Spain as well as the Inter-American Court of Human Rights, July 1, 2009<sup>xiv</sup>).

The principle of non-regression was first established by a referendum in California<sup>xv</sup> on November 2, 2010, when a majority of voters refused to suspend a law on climate change and reduction of greenhouse gas emissions as requested by oil companies. The Swiss popular initiative in late 2011 prohibiting more than 20% of second homes in rural areas can be interpreted as expressing a refusal of increasing landscape and environmental degradation.

The principle of non-regression is thus emerging in states and at an international level. The French Senate, in its contribution to Rio + 20, included the principle among its recommendations<sup>xvi</sup> (report No 545 by L. Rossignol, May 22, 2012). The International Centre of Comparative Environmental Law (CIDCE) made it its main proposal for the Rio + 20 Conference. This resulted in a consensus of the Major Groups in its favour, and in the express proposal by the Group of 77 + China to include it in the final document – “*The Future We Want*” (UN, 2012, June 19<sup>xvii</sup>) – during informal negotiations on May 4 and 31, 2012 in New York.

In the face of opposition from the USA, Japan and Canada, and the indecision of the EU and Switzerland, Brazil, in its role as president of the conference, imposed the withdrawal of the expression “Principle of non-regression”. However, the principle was reintroduced with different wording in the final text adopted on the 22<sup>nd</sup> June, 2012. According to paragraph 20, after having noted some backtracking in the integration of the three dimensions of sustainable development<sup>3</sup>, it is written: “In this regard, it is critical that we do not backtrack from our commitment to

the earth summit.” Thus, the term “non-regression” was replaced by “do not backtrack”, which carries the same meaning. The statement applies to all the decisions taken at Rio in 1992, that is to say, the three conventions, the Rio declaration, Agenda 21 and the forests declaration. The reaffirmation to implement in full the Rio 1992 commitments reinforces the idea of non-regression and contributes to the formation of a judicial obligation, following the custom of international law. The IUCN should adopt a recommendation in this direction on the occasion of the WCC in Jeju in September, 2012.

However, it is certain that the principle of non-regression allows for exceptions, so long as they do not contravene fundamental environmental policy objectives. For instance, under CITES on the international trade in endangered species of wild flora and fauna, species that are no longer endangered could be removed from the list without a regression in the level of protection. The ban on a particular pollutant could be lifted when it is demonstrated that it no longer poses a health hazard. Non-regression does not prohibit repealing or amending existing texts. There is no question of “freezing” environmental law. On the contrary, with the scientific progress that will result from the implementation of the precautionary principle, either it will be strengthened to deal with new threats to health and nature, or it will be eased if a source of pollution that required protection is demonstrated to be innocuous. The main thing is that the new rule continues to contribute to environmental and health protection, and does not worsen pollution or loss of biodiversity. In order, therefore, to assess whether a new rule or changes to an old one are retrogressive, there must be a special chapter in the impact study of the draft bill or decree demonstrating non-regression on the basis of relevant indicators of the state of the environment, including legal indicators.

## FURTHER READING

ECOS-Sud – MINCYT (2012, 23 May). Adoptar el principio de no regresión del derecho ambiental global: un desafío central para Río+20. [To adopt the principle of non-regression of international environmental law: a central challenge for Rio+20.] *La Ley [suplemento de derecho ambiental] [The Law [supplement on environmental law]]*, 23 May 2012, pp.6-7. [In Spanish.]

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Prieur, M. & G. Sozzo (2012). La non régression en droit de l'environnement [La non-regression in environmental law.] Brussels: Bruylant.

Prieur, M. & G. Garver (June, 2012). Non-regression in environmental protection: a new tool for implementing the Rio principles. In: *Future Perfect, Rio+20*, p.30. Tudor Rose/UN.

3 Viz. economic prosperity, environmental quality and social equity.

## NOTES AND REFERENCES

- i Quote from Pompidou's Speech on the Environment, given at the Chicago French Alliance on February 28, 1970. For an English translation see: [www.swans.com/library/art17/xxx145.html](http://www.swans.com/library/art17/xxx145.html)
- ii European Parliament (2011, 29 September). *Resolution on developing a common EU position ahead of the United Nations Conference on Sustainable Development (Rio+20)*. Document no. P7\_TA-PROV(2011)0430. Brussels. Available online from: <http://www.europarl.europa.eu/portal/en/>
- iii Paine, T. (1791). *Rights of Man: Answer to Mr Burke's Attack on the French Revolution*. London: Jordan.
- iv Republic of France, Constitution of the Year 1, Declaration of the Rights of Man and Citizen, 1793, 24<sup>th</sup> June 1793.
- v UN Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No.3: The Nature of States Parties Obligations*, Art.2, Para.1 of the Covenant, 14 December 1990, E/1991/23. Available at: [www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/94bdbaf59b43a424c12563ed0052b664](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/94bdbaf59b43a424c12563ed0052b664)
- vi UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III). Available at: [www.un.org/en/documents/udhr](http://www.un.org/en/documents/udhr)
- vii *European Convention on Human Rights Act 2003* [Ireland], Number 20 of 2003, 30 June 2003. Available at: <http://www.unhcr.org/refworld/docid/47a708170.html>
- viii *Viz. the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights:*  
UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p.171, available at: <http://www.unhcr.org/refworld/docid/3ae6b3aa0.html>  
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- ix UN General Assembly, *Report of the UN Conference on Environment and Development*, Annex 1: Rio Declaration on Environment and Development, Rio de Janeiro, 3-14 June 1992, UN Doc. A/CONF.151/26 (vol. I). Available at: [www.un.org/documents/ga/conf151/aconf15126-1](http://www.un.org/documents/ga/conf151/aconf15126-1)
- x NAAEC [North American Agreement On Environmental Cooperation] [Aug. 1993], US-Can.-Mex., US Gov't Printing Office [1993], entered into force 1 January 1994. *Part Three: Commission for Environmental Cooperation*, Art.10, Para.3(b). Available at: [www.cec.org/Page.asp?PageID=1226&SiteNodeID=567](http://www.cec.org/Page.asp?PageID=1226&SiteNodeID=567)
- xi European Union, *Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community*, 13 December 2007, 2007/C 306/01. Available at: <http://www.unhcr.org/refworld/docid/476258d32.html>
- xii Available from <http://pdba.georgetown.edu/Constitutions/Ecuador/english08.html>
- xiii Available from <http://www.wipo.int/wipolex/en/details.jsp?id=5214>
- xiv I/A Court H.R., *Acevedo Buendia et al. case*, Judgment of July 1, 2009, Series C, No. 198, para. 103.
- xv Proposition 23, which would have suspended AB 32, the "Global Warming Act of 2006", was on the November 2, 2010 ballot in California as an initiated state statute, where it was defeated.
- xvi France Senate. *Rio plus 20 : l'émergence d'un nouveau monde [Rio+20: the emergence of a new world.]*. Report no. 545 (2011-2012) by Senator L. Rossignol, representing the commission for sustainable development, submitted 22 May, 2012. [www.senat.fr/rap/r11-545/r11-5451.pdf](http://www.senat.fr/rap/r11-545/r11-5451.pdf) [accessed 7 July, 2012].
- xvii UN [United Nations] (2012, June 19). *The Future We Want*. Agenda Item 10, Outcome of the Conference, Doc. A/CONF.216/L.1.