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CONTENTS

Editorial

Environmental issues are international issues. Many would agree with this statement when thinking of climate change, biodiversity loss and globalised markets. Environmental impacts in particular do not cease at country borders. For this reason the current issue of elni Review (2/2010) focuses on the environmental law of countries outside the EU – especially those considered to be developing or emerging countries. Questions of law arising in those legal spheres are likely to be different in nature, because developments in social and environmental law generally occur more slowly than developments in economic law do.

This issue of *elni Review* (2/2010) contains valuable insights on this subject, based on the following contributions:

First off, *Richard Gutierrez* tackles 'new age' trade agreements and their possible contribution to toxic trade in his article, examining the legal provisions under the Japanese economic partnership agreements that gave rise to the concerns over toxic waste trade and dumping. He also discusses the corresponding implications, particularly on the implementation of the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal by the Southeast Asian countries.

In an article entitled 'WTO Compatibility of Border Tax Adjustments as a Means for Promoting Environmental Protection', *Rike U. Krämer* analyses the rationale behind Border Tax Adjustments, its contribution to a level-playing field, and its legality under WTO law.

'Intellectual Property Rights, Genetical Resources and Traditional Knowledge: An Approach from the Perspective of Megadiverse Countries' by *Aírton Guilherme Berger Filho* discusses biodiversity as well as biopiracy issues against the background of intellectual property rights and the rights of the native populations and the local communities regarding their territory, their cultural and environmental goods.

Jimena Murillo Chávarro and *Frank Maes* provide details on the Andean Community, its legal instruments and a corresponding decision in their article 'The Legal Nature of the Biodiversity Provisions adopted by the Andean Community'.

In 'Convergence with the Water Framework Directive in the Context of the European Neighbourhood Policy', *Claire Dupont* and *Gretta Goldenman* look at the differences between approximation and convergence processes in the light of EU water legislation, drawing on interesting practical experiences gathered in Moldova and Georgia.

Alongside articles covering environmental law issues of developing and emerging countries, this issue of *elni Review* also deals with three additional issues:

From a broader perspective *Stefan Scheuer* provides a critical analysis of the repercussions of the EU Water Framework Directive in 'The Phase-Out of Hazardous Substances in Troubled Waters'.

Furthermore, *Hanna D. Tolsma* looks at the legal instrument of integrated environmental permitting, discussing in the process the integrated approach under the IPPC Directive and recent developments on integrated permitting in the Netherlands.

Finally, we cover recent developments in the law on island protection in China and provide a brief summary of the ELNI-VMR-VVOR congress 2010. The latter addressed the environmental effects of industrial installations the European Directive on Industrial Emissions (IED/current IPPC Directive) and took place in Ghent on 17 September 2010.

Contributions for the next issue of the elni Review are very welcome. Please send contributions to the editors by mid-February 2011.

Nicola Below/Martin Führ

October 2010

European Environmental Law Forum Kick-off Symposium:

19th and 20th May 2011
in Leipzig, Germany

"Key Challenges and Developments of European Environmental Law"

The German Helmholtz Centre for Environmental Research (UFZ) is organising a European expert symposium to promote exchange in the field of European environmental jurisprudence.

The symposium is divided into two parts. In the first part the key challenges and developments of environmental law will be discussed. There will be presentations on central topics of European environmental law, followed by open debate. In the second part, the situation with regard to the exchange of ideas and information on environmental law amongst experts of this field will be addressed with a view to establishing a European Environmental Law Forum. This forum is to be a common open network and shall encompass regular European conferences.

Please note that this symposium is only open to invited experts.

For more information on the Helmholtz Centre for Environmental Research (UFZ), please visit http://www.ufz.de/

The Legal Nature of the Biodiversity Provisions adopted by the Andean Community

Jimena Murillo Chávarro and Frank Maes

1 Introduction

The Andean Community is a South American Regional Organization, nowadays composed of four of the seventeen states richest in biodiversity in the world. The Andean states are home to around 24 % of global biodiversity.[1] *Four countries are members: Bolivia, Colombia, Ecuador and Peru.*

The Andean Community began taking action in the field of biodiversity in the last ten years. As a result, it has elaborated a "Regional Biodiversity Strategy for the Tropical Andean Countries", which was developed within the framework of the principles set out in the Convention on Biological Diversity, the Rio Declaration on Environment and Development (Agenda 21) and the Andean Community legislation. The main objective of the Regional Biodiversity Strategy is the conservation and sustainable use of biodiversity as well as the region's sustainable development.

According to the legal system of this regional organisation, decisions are – irrespective of whether they are adopted by the Andean Council of Ministers of Foreign Affairs or the Commission of the Andean Community (the two legislative institutions of the CAN) – part of the Andean legal system. Decisions are legally binding for the Member Countries and directly applicable from their day of publication in the official gazette onwards.

The "Regional Biodiversity Strategy for the Tropical Andean Countries" was adopted in 2002 through Decision 523 by the Andean Council of Ministers of Foreign Affairs. This Decision, which has binding effects, tends to be confused with a policy document since it was written as a programmatic document that establishes guidelines, lines of actions as well as instruments for its implementation.

In this article we will provide a general description of the Andean Community and its legal instruments. Then, we will discuss the nature of Decision 523: Should this provision be considered soft or hard law and what are its legal implications? First of all, we will explain the definition of soft law.

2 The notion of soft law.

In the international legal system there a great number of agreements ranging from those susceptible to enforcement to those that do not create enforceable right and duties. The latter ones are categorised as 'soft law' as opposed to 'hard law'.

The term 'soft law' has created some disagreement in the relevant literature since no uniform definition exists; and in some cases its existence has been criticised as undesirable.[2] Some writers understand 'soft law' as part of a binary division whereby soft law means non-legally binding instruments that are likely to produce some effects, while hard law implies all binding legal instruments.

The following definitions enable us to see the main elements of this binary division of soft and hard law. Snyder regards soft law as "*Rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effects*"[3]. Another definition is given by Thürer; here 'soft law' is described as "*[c]ommitments which are more than policy statements but less than law in its strict sense. They all have in common, without being binding as a matter of law, a certain proximity to the law or a certain legal relevance*"[4]. Finally, Senden provides the following definition: "*Rules of conduct that are laid down in instruments which have not been attributed legally binding force as such, but nevertheless may have certain (indirect) legal effects, and that are aimed at and may produce practical effects*"[5].

At the same time, other writers understand soft law in a wider sense, such as Abbot and Snidal. For them the realm of soft law "*begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision and delegation. This softening can occur in varying degrees along each dimension and in different combinations across dimensions*"[6]. According to these writers legalisation refers to a particular set of characteristics that are defined along three dimensions: obligation, precision and delegation. In this context *obligation* means that states are legally bound by a rule or commitment in the sense that their

1 Programa de las Naciones Unidas para el Medio Ambiente, et al., Geo Andino 2003, Perspectivas del Medio Ambiente. Available online at <http://www.comunidadandina.org/public/libro_27.htm>.

2 See Jan Klabbers, The Redundancy of Soft law, 65 Nordic J. Int'l L., 1996, pp. 167-182. Also Jan Klabbers, The Undesirability of Soft Law, Nordic J.Int'l L., 1998, p 381-391.

3 Francis Snyder, Soft law and Institutional Practice in the European Community, in The Construction in Europe: Essays in Honour of Emile Noel, p. 197 (S Martin ed., 1994) quoted in Linda Senden, Soft Law in European Community Law, 2004, p. 112.

4 D Thürer, The Role of Soft Law in the Actual Process of European Integration, in L´Avenir du Libre-échange en Europe: Vers un Espace Économique Européen ? p. 131 (O. Jacot-Guillarmod & P. Pescatore ed., 1990) quoted in Linda Senden, Soft Law in European Community Law, 2004, p. 112.

5 Linda Senden, Soft Law in European Community Law, 2004, p. 112.

6 Kenneth W. Abbott & Duncan Snidal, Hard and Soft law in international Governance, 54 Int'l Org. Issue 3, 2000, 421-456, p. 422.

behaviour is subject to scrutiny under the general rules, procedures, and discourse of international law and often of domestic law as well. This means that legal rules and commitments impose a particular type of binding obligation. The breach of this legal obligation is understood to create legal responsibility. *Precision* means that rules unambiguously define the conduct they require, authorize, or proscribe. *Delegation* means that third parties have been granted authority to implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.[7]

Baxter - another author who understands soft law in a wide sense – argues that there are three types of norms in international agreements to be considered as soft law. These are *the pactum de contrahendo,* the non-self-executing articles of a treaty requiring further agreement to give it effect and the hortatory provisions. They have in common that they do not create legal obligations which are susceptible to enforcement, irrespective of the concept of enforcement employed.[8]

Baxter tends to use the term international agreement in a broad sense to describe all those norms of conduct which states or persons acting on behalf of states have subscribed to, without regard to their being binding, or enforceable or subject to an obligation of performance in good faith. For him, these written instruments run the gamut from treaties in the strict sense, through declarations of policy, joint communiqués or resolutions of the General Assembly, to commitments of varying character made on the highest level of government down to the lowest.[9]

The three types of soft law are described by Baxter in the following way. According to him *pactum de contrahendo* means treaty provisions that call for negotiations looking to the conclusion of further agreements between the parties. In this case the provisions cannot be enforced if the parties do not reach an agreement, and there is likewise no way in which the parties can be compelled to negotiate.[10] The other type of soft law is the non-self-executive provisions which require further detailed norms to give effect to the principal treaty. These detailed norms can be adopted by the institutions of the international organisation which adopted the principal treaty. The last type is the hortatory provisions which call for the co-operation of the states to achieve certain purposes and where, in the absence of institutional machinery, a party's refusal to follow the hortatory provisions cannot be countered by a compulsory measure.[11]

After analysing the different notions of soft law, we consider that the criteria for identifying a norm as soft or hard should be based on its content or substance, and the elements of obligations, precision and delegation rather than simply on the compulsory or non-compulsory character of the instrument that contains these provisions.[12]

On the other hand, if we agree with the binary definitions we will encounter a problem when faced with legally binding norms that have been weakened in their content, in their provisions, and cannot therefore be enforced. Thus, should a legally binding norm still be considered 'hard law' when softened to the point of not requesting any specific behaviour from states and neither creating a right or an obligation, thus making it difficult (or almost impossible) to enforce?

For this reason we disagree with the binary definitions of soft law since they do not accept that legally binding norms which have been weakened in some of its elements (e.g. precision and delegation) can be categorised as soft due to the legal character of the instrument.

Consequently, we will use the broad definition of soft law in order to analyse whether the decision that adopted the Regional Biodiversity Strategy can fall into the category of legal soft law. On this basis, the type of legal instruments that can be adopted by the Andean institutions will be examined, followed by the content of Decision 523.

3 Legal instruments of the Andean Community

The Andean integration process started in 1969 when Bolivia, Chile, Colombia, Ecuador and Peru signed the Cartagena Agreement on 26 May of 1969.[13] In October 1976 Chile withdrew from the organisation during the military regime of Pinochet, due to discrepancies between the economic policy of this country and the regional organisation.

The Community of Andean Nations (CAN) is composed of the following institutions: the Andean Presidential Council made up of the Heads of States of the Member Countries of the organisation, which is the decision-making policy body; the Commission of the Andean Community (one of the legislative organs); the Andean Council of Ministers of Foreign Affairs, (the other legislative institution); the General Secretariat[14] which is the executive body and acts solely in

7 Abbot, et al., *supra* note 6, p. 401.

8 Richard Baxter, International Law in "Her Infinite Variety", 29 Int'l & Comp. L.Q., 1980, pp. 549-566 (554).

9 Baxter, *supra* note 8, p. 550.

10 As an example of this type of soft law Baxter mentions the Montevideo Treaty instituting the Latin American Free Trade Area that calls for negotiations among the contracting parties with a view of drawing up schedules for the reduction or elimination of customs duties and other restrictions.

11 Baxter, *supra* note 8, pp. 552-553.

12 Pierre-Marie Dupuy, Soft Law and the International law of the Environment, 12 Mich J. Int'l L., 1991, pp. 420-435 (430).

13 The Andean Community came into existence with the signing of the Cartagena Agreement. This document has been amended through a number of protocols. It was codified by Decision 563 of 2003 (hereafter Cartagena Agreement), Available online at : <http://www.comunidadandina.org/ingles/normativa/D563e.htm>.

14 Cartagena Agreement, Art. 29.

accordance with the interest of the organization; the Court of Justice of the Andean Community[15] which is in charge of the judicial power; and the Andean Parliament[16], which is only a deliberative institution and can only participate in the law-making process by suggesting draft provision, meaning that it merely has a right of initiative. The Andean Parliament does not yet have any other legislative power.

The Andean Community has entrusted its legislative power to the Commission of the Andean Community (hereafter the Commission), who shares this power with the Andean Council of Ministers of Foreign Affairs (ACMFA). These two institutions can adopt decisions which are part of the Andean Community legal system.

The instruments that constitute the Andean legal system[17] are as follows:

a. The Cartagena Agreement, its protocols and additional instruments,
b. The Treaty Creating the Court of Justice and its amending protocols,
c. The decisions of the Andean Council of Ministers of Foreign Affairs, and of the Commission of the Andean Community
d. The resolutions of the General Secretariat of the Andean Community; and
e. The industrial complementary agreements and any such other agreements as the Member Countries may adopt among themselves within the context of the Andean sub-regional integration process.

The legal instruments adopted by the institutions of the Andean Community have special legal effects. The Treaty Creating the Court of Justice expresses that decisions adopted by the Andean Council of Ministers of Foreign Affairs or the Commission are binding for all Member Countries. This treaty also states that decisions as well as resolutions of the General Secretariat shall be directly applicable in all Member Countries upon their date of publication in the Official Gazette, unless they indicate a later date. In the latter case, the decision or resolution must be incorporated into the national legal system of each Member Country. The date when the norm will enter into force should be explicitly indicated.[18] In fact, as a general rule the norms comprising the Andean legal system are – irrespective of the form they take (treaties, protocols, agreements, resolutions) – directly applicable in all Member Countries and have direct effect upon publication in the Official Gazette.[19]

The following consequences are produced due to the direct effect given to decisions and regulations. First, if these legal instruments confer a right or impose an obligation on individuals, national courts are bound to recognize that right and enforce that obligation. And second, they are superior to domestic law even though national provisions on the same subject are adopted after community norms.[20]

From the Treaty Creating the Court of Justice we can conclude that the two legal instruments which emanate from the institutions of the Andean Community are decisions and resolutions. Other documents adopted by any of the institutions of the CAN that are not listed in Art. 1 of the Treaty Creating the Court of Justice of the Andean Community, such as declarations[21] adopted by the Andean Council of Ministers of Foreign Affairs are not legally binding.

The other type of norms found in the Andean legal system is resolutions adopted by the General Secretariat. According to the Cartagena Agreement the General Secretariat has more functions[22] than those as an executive organ. This institution also has functions related to the integration process, directly granted by the Cartagena Agreement, to ensure compliance of the obligations adopted by Member Countries in the Constituency agreement[23] and in the norms of the Andean legal system. As a result, resolutions have a different nature according to the functions that the General

15 Established by the Treaty of Creation of the Court of Justice adopted in 28 May of 1979, which entered into force on 19 May 1983.

16 The responsibilities if the Andean Parliament's are listed in Art. 43 of the Cartagena Agreement:
a) To participate in the promotion and guidance of the Andean subregional integration process, with a view to consolidating Latin American integration;
b) To examine the progress of the Andean subregional integration process and the fulfillment of its objectives, requesting periodic information from the System bodies and institutions for that purpose;
c) To formulate recommendations regarding the annual draft budgets of the System bodies and institutions that are financed through the direct contributions of the Member Countries;
d) To suggest to the System bodies and institutions actions or decisions, whose goal or effect is the adoption of modifications, adjustments, or new general guidelines in relation to the programmed objectives and institutional structure of the System;
e) To participate in the law-making process by suggesting to the System bodies draft provisions on subjects of common interest, for incorporation in Andean Community Law;
f) To promote the harmonization of Member Country legislation; and,
g) To promote cooperative and coordinated relations with Member Country Parliaments, System bodies and institutions, and third country parliamentary integration or cooperation bodies.

17 Art. 1 of the Treaty of Creation of the Court of Justice of the Andean Community, codified text by Decision 472 of 1999 (hereafter TCCJAC). Available online at:
<http://www.comunidadandina.org/ingles/normativa/ande_trie2.htm>.

18 TCCJAC, Art 3.

19 Secretaria General de la Comunidad Andina. V. Republica del Perú, p 10-11 [1999] Proceso 07-AI-99. Tribunal de Justicia de la Comunidad Andina. All judgments of the Andean Court of Justice are available online at <http://intranet.comunidadandina.org/IDocumentos/c_Newdocs.asp?GruDoc=11>.

20 Interpretación prejudicial de los artículos 56, 58, 76, 77 y 84 de la Decisión 85 de la Comisión del Acuerdo de Cartagena, solicitada por la Corte Suprema de Justicia de la Republica de Colombia, p 4 [1988] Proceso 2-IP-88, tribunal de Justicia de la Comunidad Andina..

21 Cartagena Agreement, Art. 17.

22 Cartagena Agreement, Art. 30.

23 Compañía New Yorker S.A. V. las Resoluciones Nos: 171 y 210, del 17 de diciembre de 1998 y del 31 de marzo de 1999, expedidas por la Secretaria General de la Comunidad Andina, p 10-11[1999] Proceso 24-AN-99.Tribunal de Justicia de la Comunidad Andina.

Secretariat is performing, which could be of legal or administrative nature.

On the one hand, resolutions have a legal character in two circumstances. The first one is when the General Secretariat adopts a resolution in order to fulfil a task directly established by the Cartagena Agreement[24], e.g. the applications of Art. 74.[25] In this case, resolutions are considered to be on the same level within the hierarchy of the Andean legal system as decisions. The second circumstance is when the resolution is adopted to regulate or execute a decision; in such cases the resolution is hierarchically below the decision.[26] On the other hand, resolutions will have an administrative character when they are related to the administrative or internal matters of the regional organisation.[27]

The Regional Biodiversity Strategy (RBS) was adopted by the Andean Council of Ministers of Foreign Affairs through Decision 523, without stipulating that the Member Countries needed to introduce it into the respective national law by an express act. The process of elaborating this legal instrument was unique to the Andean Community. Thus, we will describe it briefly before we begin analysing its content.

4 Elaboration of the Andean Regional Biodiversity Strategy

The Andean Community, with the cooperation of the Inter-American Development Bank (IADB), drew up the Regional Biodiversity Strategy for the Tropical Andean Countries by means of a wide and multisectorial participation of all Member Countries, coordinated by the Andean Committee of Environmental Authorities (CAAAM).

This strategy was elaborated through a unique process for the Andean Community. Between 2000 and 2002 a number of regional workshops and national consultations were held in the Members States, in which more than five hundred Andean representatives (indigenous people, Afro-Americans, local communities as well as representatives from the public sector, academic sector, civil society, private business, and international agencies, inter alia) involved in the conservation and sustainable use of biodiversity from the five states participated.

The topics dealt with in these workshops and consultations were biosafety; transboundary ecosystems and threatened species; access to genetic resources, traditional knowledge and benefit sharing; trade and valuing of biodiversity; the impact of infrastructure megaprojects; agrobiodiversity; invasive species; marine ecosystems, and biotechnology.[28]

In early 2002, a virtual consultation on the document of the strategy took place among all the workshop participants. A final integrating meeting was also held with the CAAAM, consultants and experts from the region for the purpose of drawing up the final draft of the Regional Biodiversity Strategy (RBS).

In a next step, the Regional Biodiversity Strategy was put under the consideration of the Andean Council of Ministers of Foreign Affairs, which adopted it in 2002 through Decision 523. This was the first time in the history of the Andean Community that the content of a decision was elaborated and agreed by the society of all its Member Countries. This was a participative process; as Guinand put it, it went from the 'bottom to the top'.[29]

As a result of this participatory process, the final document of the strategy has more elements of a policy or guiding document than a legal instrument that establishes obligations to its addressees. In fact, the Regional Biodiversity Strategy was written as a programmatic document; it states the actual situation of biodiversity in the Andean Countries based on the issue previously discussed in the Member Countries. It describes the framework of the strategy, the lines of action (i.e. general actions developed to achieve the expected results) as well as the institutional, financial, political and legislative tools that will be required for its implementation. Due to the vagueness of the Regional Biodiversity Strategy, it is difficult to see its legal consequences, if any. In fact for some the RBS is

24 For instance, when a Resolution is adopted by the General Secretariat in which it is determined whether a measure adopted unilaterally by Member Countries constitutes a 'duty' or 'restriction' in the liberalisation program, it has a legal character.

25 Cartagena Agreement, Art. 72, 73 and 74:
Art. 72.- The purpose of the Liberalization Program for goods is to eliminate duties and restrictions of all kinds levied on the importation of products originating in the territory of any Member Country.
Art. 73.- "Duties" are understood to be the customs duties and any other charges with equivalent effects, whether of a fiscal, monetary or foreign exchange nature, that may affect imports. Not included in this concept are analogous assessments and surcharges that correspond to the approximate cost of the services rendered.
"Restrictions of all kinds" are understood to mean any administrative, financial, or foreign exchange measure whereby a Member Country, through a unilateral decision, obstructs or hinders imports.
Art. 74.- For the purposes of the previous articles, the General Secretariat, on its own initiative or at the request of a party, shall determine, when necessary, whether a measure adopted unilaterally by a Member Country constitutes a "duty" or "restriction."

26 Acción de nulidad interpuesta por la República de Venezuela. V. las Resoluciones 397, 398 y 438 así como contra el Dictamen de Incumplimiento Nº 11-96, expedidos por la Junta del Acuerdo de Cartagena y referentes a la prohibición de importación de café tostado procedente de Colombia, p. 19 [1997] Proceso 1-AN-97. Tribunal de Justicia de la Comunidad Andina.

27 Compañía New Yorker S.A. V. las Resoluciones Nos: 171 y 210, del 17 de diciembre de 1998 y del 31 de marzo de 1999, expedidas por la Secretaria General de la Comunidad Andina, p 10 [1999] Proceso 24-AN-99. Tribunal de Justicia de la Comunidad Andina.

28 See Decision 523 of 2002; see also Agenda Ambiental Andina, Proceso de elaboración de la ERB, at:
<http://www.comunidadandina.org/desarrollo/talleres.htm>.

29 Luisa Elena Guinand, De cómo se Incorporo el Tema Ambiental y el Desarrollo Sostenible en la Agenda de Integración Andina y otras Reflexiones, Revista da la Integracion 40 Anos de Integrancion Andina, Avances y Perspectivas. (Jun 2009), at::
<http://www.comunidadandina.org/public/libro_100.htm>.

only understood as an instrument of regional policy and planning[30] without consideration of its legal form.

It is important to analyse the content of this instrument to see whether the strategy was only meant to be a common policy for the region or a legally binding instrument that can be enforced.

5 The real legal nature of Decision 523 on the Regional Biodiversity Strategy

Now we will examine whether the provisions have been weakened to the point of falling into the category of legal soft law or whether the Decision contains precise and clear obligations. The latter would mean that it could be enforced by the mechanisms available in the Andean legal system and therefore be regarded as hard law. To assess the legal nature of Decision 523 we draw upon the broad notions of soft law given by Baxter, Abbot and Snidal. This is because we consider that the criteria for identifying a norm as "soft" or "hard" should be based on its content or substance and the elements of obligations, precision and delegation rather than simply on the compulsory or non-compulsory character of the instrument that contains these provisions. Decision 523 comprises two parts. The first part instructs the Andean Committee of Environmental Authorities (CAAAM) to work on updating and strengthening the RBS by covering areas that require conceptual, methodological or technical development; to draw up the plan of action and the portfolio of projects; to report annually to the Andean Council of Ministers of Foreign Affairs through the General Secretariat on the progress made in updating the Regional Biodiversity Strategy and the development of the plan of action and associated projects. In this part of the decision obligations are clear, although addressed to the Andean Committee of Environmental Authorities rather than to the Member Countries, or citizens. In this particular case, this is due to the words specifically employed such as "the CAAAM *shall* work on […]"[31] or "*to instruct* the CAAAM to [...]"[32]. In these examples precise orders are given to the CAAAM which can be enforced if not complied with.

The second part of Decision 523 is the annex, which contains the strategy itself approved and integrated by Article 1. The Annex is a rather descriptive document. It states that the RBS is developed within the framework of the principles set out in the Convention on Biological Diversity, the Rio Declaration on Environment and Development (Agenda 21), the Andean Community legislation and the principle of regional integration[33]. The Annex, which contains the RBS, is divided into different sections that describe the main objective[34]of the strategy, lines of action[35] and the expected outcome. It further mentions the instruments or tools that will allow the strategy to be implemented and its viability. The RBS does not contain any obligation or commitment, and neither prohibits nor requests specific actions by the Member Countries. The strategy was drafted as a framework document which aims to set the basis of a community policy for common external relations on the subject of biodiversity[36]. The strategy was designed with a view to the challenges faced by Member Countries in international negotiation processes (chiefly those relating to the Convention on Biological Diversity, WTO, and the international Treaty on Plan Genetic Resources for Food and Agriculture). In addition the strategy was developed to contribute to the execution of other commitments such as those adopted by the Members Countries in the Cancun Declaration of Like-Minded Megadiverse Countries[37].

Regarding the instruments necessary to implement the strategy, the action plan needs to be drawn up by the CAAAM according to the lines of action and the expected results described in the strategy in order to execute it. This is attributable to the fact that the Regional Biodiversity Strategy is a framework document[38] and therefore non-self-executing.

The other instruments mentioned in the strategy are: institutional tools, in which the General Secretariat is indicated as responsible for managing the implementation process and the CAAAM as responsible for its supervision; information and planning tools, such as monitoring systems, dissemination campaigns, workshops; finances, which could come from internal contributions of Member Countries or sale of services, or external resources, coming from official or private sources; and finally political and legislative tools that could be either decisions or declarations.

A final part of the decision relevant in this context is the inclusion of the viability[39] of the Regional Biodiversity Strategy. It could be argued that the viability,

30 Guinand, *supra* note 29, p. 140

31 Decision 523 of 2002, Art. 2

32 Decision 523 of 2002, Art. 3 and 4.

33" Principle of Regional Integration: the Regional Biodiversity Strategy addresses matters of regional concern only. The achievement of a synergy effect should be a primary consideration in any action planned within its framework". Annex to Decision 523 of 2002

34 General objective: "To identify and agree on joint priority actions for the conservation and sustainable use of biological diversity components in areas where member countries of the Andean Community can make the best of their comparative advantage to promote the region's sustainable socio-economic development". Annex to Decision 523 of 2002.

35 Some examples of lines of action mentioned in the strategy are the following: "Reinforce subregional initiative aimed at achieving the coordinated management of cross-border and shared ecosystems"; "Develop, reinforce and share *ex situ* conservation management capabilities"; "Establish mechanisms for information gathering and dissemination of the conservation and sustainable use of biodiversity".

36 Annex to Decision 523 of 2002.

37 See Annex to Decision 523 of 2002.

38 Secretaría General de la Comunidad Andina, Octava Reunión Ordinaria del Comité Andino de Autoridades Ambientales (CAAAM). Marzo 8 de 2002, Lima - Peru. SG/R.CAAAM/VIII/INFORME, at <http://intranet.comunidadandina.org/IDocumentos/c_Newdocs.asp?GruDoc=RR >.

39 Secretaría General de la Comunidad Andina, *supra* note 38.

as it is described clearly, shows the soft character attributed to this legal instrument. This part reads: "***[i]ts viability and outcome will ultimately depend*** *on the level of support and involvement it manages to elicit from the peoples of the Member Countries, and,* ***more particularly, on the way the political will of the Member Countries translates into concrete actions****. Also central to its success will be the level of technical and financial support provided by the international community*".[40] (bold added).

All in all, this legal instrument has more characteristics of soft law than hard law. If we take the definition provided by Abbott and Snidal it is clear that the elements of *precision* and *delegation* have been softened. Member Countries, to whom a decision is normally addressed, are not bound by any rule or commitment. There is a vision and a general objective in the strategy, but there are no real commitments.

The dimension of precision is weakened since there is not a required or prohibited conduct for the Member Countries. The decision only contains general objectives, lines of actions with the expectation of a final result that could be attained in the long term.[41] Regarding the element of *delegation* this has also been weakened indirectly. The General Secretariat and the Andean Court of Justice have been granted the power to interpret and enforce the rules and obligations contained in decisions and resolutions of the Andean legal system. However, it becomes almost impossible for these bodies to interpret or enforce the execution of Decision 523 when it does not contain any precise rule, obligation or commitment.

Regarding the first element of the notion of soft law we consider that the element of *obligation* still remains; this is because it refers to the recognition of the strategy as a legal or non-legal instrument, binding or non-binding. We have already acknowledged that Decision 523 is a legally binding instrument that is part of the Andean legal system.

Another aspect considered is the wording used in the decision. This legal instrument is based on soft expressions;[42] it is a descriptive document that only provides for general goals and programmed actions. It does not contain any exact obligation to be undertaken by the parties, neither does it include any right granted. This will lead us to conclude one more time that this legally binding document was meant to be soft. Decision 523 is what some would call 'legal soft law',[43] which refers to legally binding instruments, but with vague, weak language expressions or a lack of clear obligations.

It seems that the policy makers decided to take all the advantages offered by soft law,[44] such as flexibility for Member Countries to cope with the uncertainties and learn over time, and the limited interference in their sovereignty, particularly the sovereign right over their own biological resources,[45] etc.

Although we regard Decision 523 as falling under the classification of legal soft law, it will not change its legal character. It will always be a legal norm. Therefore, we agree with Weil when he states that whether a rule is 'hard' or 'soft' does not affect its normative character. A rule may be vague, but it does not thereby cease to be a legal norm.[46]

6 Conclusion

In the literature there are still discrepancies regarding the definitions of soft and hard law, and even in some circumstances its existence has been criticised. As mentioned earlier the binary definitions comprehend hard and soft law as legally binding and non-legally binding norms respectively, without considering content. Other writers[47]classify norms as soft or hard law based on their content rather than their legal character. According to these writers a legally binding norm can fall into the category of soft law when some of the elements of legalisation, which are obligation, precision and delegation are weakened or non-existent.

Regarding the element *obligation*, we acknowledge that this has not been softened, since Decision 523 was adopted as a legally binding instrument, according to the Andean legal system. As a result, and due to the principle of direct effect, it is directly applicable in all Member Countries upon the date of publication in the Official Gazette, without any further measures such as transposition being necessary. Thus, all Member Countries are bound by this decision and must comply with it.

40 Annex to Decision 523 of 2002.

41 "*Without any doubt, the implementation of the Strategy will be a complex, interactive and long-term process*". Foreword of the Annex to Decision 523 of 2002.

42 "*the Regional Biodiversity Strategy has been conceived as a flexible instrument…*", "*the success of the proposal will depend on several factors: the capability of different sectors of society to understand and adopt it, the articulation of the different interest of common work agenda; and a sound transparent and pragmatic process of execution that will make specific results possible to benefit the inhabitants of the Andean Subregion*". "*Its viability and outcome will ultimately depend… on the way the political will of the Member Countries translate into concrete actions*", Annex to Decision 523 of 2002.

43 This term was mentioned in C.M. Chinkin, The Challenge of Soft Law: development and change in international law, 38 Int'l & Comp. L.Q., 1989, 850-866, p. 851.

44 Gregory Shaffer & Mark Pollack. Hard VS. Soft law: Alternative, complements, and antagonist in International Governance, 94 Minn. L. Rev. issue 3, 2010, 706-799, p. 719.

45 "*Successful execution of the Strategy will enable the Andean countries to reaffirm and exercise their sovereignty rights over their own biological resources, in particular those resources of which they are the countries of origin*". Foreword of the Annex to Decision 523 of 2002.

46 Prosper Weil, Towards Relative Normativity in International law?, 77 Am. J. Int't L. issue 3, 1983, pp. 413-442 (414).

47 Kenneth W. Abbott, Robert O. Keohane, Andrew Moravcsik, Anne-Marie Slaughter & Duncan Snidal, The Concept of Legalization, 54 Int'l Org, issue 3, 2000, 401-419. Also see Richard Baxter, International Law in "Her Infinite Variety", 29 Int'l & Comp. L.Q., 1980, pp. 549-566 (554).

However, when analysing the remaining elements of legalisation it was found that *precision* and *delegation* were softened. Within Decision 523 there is not a precise or clear rule that unambiguously expresses what Member Countries are required to do. There are only guidelines, general goals and lines of action with expected results describing the framework of the Regional Biodiversity Strategy. This circumstance also weakens the element of *delegation* since the lack of precise obligations makes it difficult for the Andean authorities to compel Member Countries to comply with the decision.

In this legal instrument soft expressions have been included in order to reaffirm its soft character. For instance, we found phrases in the Regional Biodiversity Strategy suggesting that its viability will mainly depend on the political will of the Member Countries to translate the Strategy into concrete actions as well as on the technical and financial support coming from the international community.

We can conclude that the elements of *precision* and *delegation* of this legal instrument have been softened to the point that this norm falls under the category of legal soft law and is therefore difficult to enforce.

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sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements – The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
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On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.

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