signed, sealed and delivered?

the role of negotiated agreements in the UK

“green alliance…

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Green Alliance

Green Alliance is one of the UK's foremost environmental groups. An independent charity, its mission is to promote sustainable development by ensuring that the environment is at the heart of decision-making. It works with senior people in government, parliament, business and the environmental movement to encourage new ideas, dialogue and constructive solutions.

contents

introduction

Beyond command-and-control

Evidence of the need for action on the environment mounts every day. Yet governments are struggling to implement environmental policies. There is growing pressure, in the UK and globally, to cut red tape and deregulate. Business and labour representatives resist new regulatory measures for fear of the costs it will impose, and the loss of jobs. Consumers want to protect the environment, but resist higher prices or restrictions on their activities.

Government has always faced these pressures, and it is government's role to look beyond narrow sectoral and short-term interests in developing and implementing policy. Nevertheless, it does seem to be getting harder to develop appropriate policy responses to environmental problems. In addition to these ever-present economic and political pressures, there are problems with traditional environmental policy instruments and processes.

Traditionally, the 'command-and-control' approach to environmental policy has focused on preventing people and organisations from undertaking particular activities. Of course, these regulatory approaches have resulted in significant environmental benefits, particularly compliance with basic minimum environmental standards and improvements in local environmental conditions. However, a relationship between regulator and regulated, based on intervention and restriction of business activities, is unlikely to stimulate the dynamic and innovative approach to environmental performance now expected from business.

"regulation can place business and industry in a reactive and defensive position."

Regulation can place business and industry in a reactive and defensive position, and move responsibility for innovation to government rather than the polluter. More regulation may not necessarily result in more effective environmental protection. Regulation also risks a 'one size fits all' approach and may not always allow for sophisticated solutions to the complex environmental problems we are now experiencing. Taxes, too, are sometimes perceived as a blunt instrument, for although they create an incentive for change, the degree of change is hard to predict.

The development of new, more flexible policy tools, of which negotiated agreements are only one, is intended to address these kinds of problems. At the European level, the European Union's 5th Environmental Action Programme[1] explicitly called for the development of new environmental policy tools, including the development of new market-based mechanisms, economic instruments and voluntary approaches. The UK Government also wants to explore new approaches to environmental policy, including negotiated agreements.[2]

Negotiated agreements and voluntary agreements and initiatives have already been widely used in the rest of Europe, particularly in the Netherlands and Germany.

It is not just about the development of new tools in isolation. Thinking in terms of packages of complementary measures is also vital. Take the recently concluded Climate Change Levy negotiated agreements. Through a process of negotiation with government, companies have agreed to implement specified energy efficiency measures over the next ten years, in return for a rebate on the Climate Change Levy. The tax rebate is conditional on the terms of the agreement being met by the company. The package also includes rebates on national insurance contributions, enhanced capital allowances, exemptions for renewables and the setting up of the Carbon Trust.

Potential benefits and drawbacks

Advocates of negotiated agreements suggest a wide range of potential benefits. These include: the advantages of a consensual approach with business; improved economic efficiency and reduced costs compared to regulation; a shift of responsibility to business; the stimulation of innovation; and dissemination of best practice.

These benefits fit well with a number of the UK Government's objectives. They imply business support (although the business response to the Climate Change Levy might suggest otherwise); they stimulate flexible, innovative responses to environmental problems; and they reduce the regulatory burden, thereby maintaining competitiveness.

These and other benefits might suggest a wider role for negotiated agreements in UK environmental policy. However, there are drawbacks to their use. These include: problems of transparency and accountability; the human resources required to develop them; weak target-setting and poorly-defined outputs and objectives; a lack of significant sanctions for failure to meet targets; a lack of mechanisms for dealing with free-riders; questions about their economic efficiency; and a lack of credibility in the public eye. We return to these issues in the body of the report.

Scope and objectives for this project

Given these significant drawbacks, can negotiated agreements deliver the environmental benefits claimed for them? The aims of this project are to:

- assess the potential role of negotiated agreements in delivering environmental objectives in the UK;
- develop an agreed set of guidelines for stakeholder involvement in negotiated agreements;
- produce a protocol for the effective development of negotiated agreements.

To meet these aims, Green Alliance held a seminar on the role of negotiated agreements in UK environmental policy in February 2000. Representatives from stakeholder groups and speakers from government, business and Europe were present. The seminar revealed a lack of agreed understanding of the role that negotiated agreements could play in environmental policy, and the process that might be used to develop them.

The results of the project are contained in this report and the accompanying *Negotiated Agreements: Best practice checklist*. The checklist incorporates guidelines for stakeholder involvement, and a protocol for the development of effective agreements. It has been developed and consulted on with representatives from government, business, NGOs, environment agencies and trade unions in the UK and Europe.

This report discusses the issues raised in the checklist at greater length, provides the background to and examples of negotiated agreements in the UK and Europe, and offers recommendations for their future use.

"negotiated agreements could be discredited before they have been given a chance to succeed – or fail."

The perception of negotiated agreements by some key groups is already negative. There is a real risk that negotiated agreements could be discredited before they have been given a chance to succeed – or fail. This negative perception is partly due to the association of negotiated agreements with a previous generation of weak, non-binding voluntary agreements. But the process used to develop the Climate Change Levy negotiated agreements has not dispelled these concerns. It is not just environmental NGOs that are sceptical, but also parliament,[3] business and trade associations.

Credibility in the eyes of NGOs and the broader public will be essential to the success of any future agreements. Greater credibility will require negotiated agreements being developed through a process that is transparent and accountable to all stakeholders. There are numerous other issues surrounding the use of negotiated agreements, but the development of a transparent and accountable process creates the potential for other issues of concern to be resolved. The focus of this report and the checklist is on achieving accountability, transparency and credibility.

Green Alliance believes that negotiated agreements have the potential to be a useful tool of environmental policy in some situations. However, they will not always be appropriate. Where they are, they will only succeed if the concerns raised in this report are addressed. Generalisations suggesting that they are never appropriate, or are a panacea for all environmental problems, are wrong. A case-by-case assessment is needed. The best practice checklist is designed to allow such assessments to be made quickly and effectively.

what are negotiated agreements?

Negotiated agreements originated as one of a number of 'voluntary' approaches. Voluntary approaches range from self-initiated, non-binding, unilateral commitments from industry, to binding, formal agreements between government and business which are enforceable and have legal standing. [4]

The large number of similar terms results in a confused lexicon which includes amongst other things: negotiated agreements, environmental agreements, voluntary agreements, voluntary initiatives, covenants and codes of practice.

For the purposes of this report, negotiated agreements are considered to be:

> those commitments undertaken by firms and sectors which are the result of negotiation with public authorities and are explicitly recognised by the public authorities.

Purely voluntary approaches, such as unilateral codes of practice and voluntary registration with environmental management systems, are excluded by this definition. Although environmental management systems standards have been developed with the involvement of public authorities, the commitments made by a company in its environmental management system are not explicitly developed through negotiation. Neither are they explicitly recognised by government in the form of an agreement.

Even agreements which have been negotiated are vulnerable to the criticism that they are still voluntary. It is true that they are voluntary in the sense that there is generally no obligation for a business to enter into an agreement in the first place. Some early agreements were non-binding. For example, the first Dutch covenants were considered to be little more than 'gentlemen's agreements'.[5] But participation can be encouraged by the implicit or explicit threat of new regulations or taxes.

If it is to be effective, the agreement, once entered into, should place enforceable commitments on all parties. Compliance can be brought about through a mechanism in the agreement itself, or encouraged by the threat of more draconian alternatives for non-compliance. Recent agreements have been contractual in form, and binding. In the case of the UK Climate Change Levy negotiated agreements, for instance, a non-compliant company will lose its tax rebate, though these agreements are subject to public law rather than the private law of contract. Careful consideration of the means to enforce or encourage the agreement is an essential part of the negotiation and implementation processes.

"the agreement, once entered into, should place enforceable commitments on all parties."

Negotiated agreements and regulation

In some cases, negotiated agreements, far from being voluntary, differ little from regulation. Whilst there was a clear difference between early negotiated agreements and traditional command-and-control regulation as implemented in the 1970s, the difference between more recent negotiated agreements and regulations is less clear. Whereas some of the first negotiated agreements were quite loose and informal, regulation in the 1970s tended to be prescriptive, specifying processes and emissions limits to be met. It also tended to be developed by the regulatory authorities at arms length from the firms they were regulating. However, just as negotiated agreements have become more stringent, the process and content of regulation have become more participatory and flexible.[6] For example, the regulatory mechanics of Integrated Pollution Prevention and Control have been developed and implemented with the close involvement of industry, in a process that may be considered akin to that used to develop negotiated agreements. Likewise, protracted negotiation has led to the long-term innovation targets within the Californian zero emissions regulations.

Whilst there are similarities between regulatory and negotiated approaches, there are a number of important distinctions, in terms of both process and content. First, and most crucially, the option of whether or not to enter an agreement does not exist for regulation, which is obligatory. Second, agreements may involve commitments from both government and business, creating more of a two-way relationship than generally exists under regulation. Third, negotiated agreements tend to be more complex instruments, often involving a package of policy tools rather than a single measure. Fourth, agreements attempt to create an incentive regime that rewards good performance, rather than threatening prosecution for failure to fulfil legal obligations. Fifth, the emphasis in agreements is often on long-term targets which create an incentive for continuous improvement, rather than the fixed or incremental targets characteristic of regulation. Generally negotiated agreements are also more outcome or objective-led than regulation, which tends to prescribe particular activities. Finally, regulatory relationships are mediated, monitored and enforced by dedicated agencies or regulators, whereas negotiated agreements generally stand directly between central government and individual sectors and firms.

There are also differences in the business constituencies for which the two types of instrument are best suited. Regulation tends to have a general application, whereas agreements are more versatile, and can be tailored to the needs of specific sectors. On the other hand, negotiated agreements can be more effective in dealing with national and international environmental problems related to climate change, resource use, or the overall assimilative capacities of the environment. This is because command-and-control regulation works best when it focuses on site-specific emission limits and local pollution issues. Even when individual plants are compliant, problems may still result from the aggregated activities of all polluters. This is one reason why negotiated agreements tend to be conducted with national government rather than local regulators.

Tool or Process?

A negotiated agreement can be considered as an individual policy tool in its own right to sit along side other tools such as tax or regulation. Alternatively, a negotiated agreement can be seen as a process for implementing another environmental policy tool or package of tools. An example of the first type of negotiated agreement would be an agreement to implement energy efficiency measures. The output of the agreement would be an improvement in energy efficiency. An example of the second type would be agreement to implement another policy such as an emissions trading scheme. The output of the agreement would be another policy implemented, in this case, emissions trading.

Both the above examples in the previous paragraph are *implementation agreements*. A further distinction can be drawn between *implementation* and *target-setting* agreements. Implementation agreements complement existing policy proposals or legislation and are used to deliver that policy. Target-setting agreements develop targets through a process of negotiation between stakeholders. Target-setting agreements may be appropriate in the case of a new or developing area of policy, where no targets exist, and where negotiation will result in better understanding and information exchange among stakeholders. However, they also run the risk that they will result in weak environmental targets.

Negotiated agreements in the UK

The history of negotiated agreements in the UK is short. They have been brought to prominence by the introduction of the Climate Change Levy, but this is not the only instance in which agreements are being considered or have been used in the UK.

A series of voluntary agreements were developed in the 1990s. These included one with the HFC end-users trade associations to minimise the impact of HFCs and a number with the detergents industry between 1972 and 1995 to phase out specific chemicals in soaps and detergents. Also in the early 1990s, attempts were made to implement producer responsibility for packaging waste through a voluntary approach. This failed, and a regulatory approach was used instead, at the request of the industry body formed to co-ordinate development of the voluntary approach. Problems occurred due to the inability of the relevant sectors to agree how to apportion responsibility for meeting the targets. They were due to the 'free rider' problem, ie, the unwillingness of some sectors to take any action at all. These failed attempts delayed progress on dealing with packaging waste, and prevented the involvement of NGOs at the first stages of policy development.[7]

There is also a range of mainly voluntary and non-binding agreements, or codes of practice from industry. These are not discussed in this paper as they lack the formal enforcement mechanisms which are considered essential to the success of negotiated agreements.[8]

More recently, attempts were made to negotiate an agreement with the quarry products sector to reduce the environmental costs of aggregates extraction. The Quarry Products Association made repeated attempts to devise a package of measures acceptable to the Government. However, their proposals were not considered adequate and, in the 2000 budget, the Government announced the introduction of an aggregates tax from April 2002.

Currently, at the request of the Government, the Crop Protection Association, on behalf of pesticides' manufacturers, is developing a package of voluntary measures to reduce the environmental impacts of pesticides. At the time of writing, two sets of proposals have been rejected by the Government as being too weak. Environmental NGOs have been critical of the process, especially the lack of opportunity for their involvement, and the absence of public information on the process and timetable.

Negotiated agreements are also being used in the market transformation of consumer products like televisions and washing machines. At a European Union level, manufacturers of consumer products have agreed to reduce the in-use environmental impact of products through the adoption of a long-term, staged approach to change. Complementary measures have been developed at the UK level.

A Better Quality of Life, the UK's sustainable development strategy, suggests that the Government will consider the use of negotiated agreements with industry in other areas as well. Business also appears to be supportive of their use. For example, the Advisory Committee on Business and the Environment (ACBE) has recommended that the Government should consider further use of negotiated agreements to achieve climate change policy objectives, and has supported greater use of voluntary agreements with targets.[9] The enthusiasm of both government and business suggests that negotiated agreements will be used more widely in the future. But can negotiated agreements be an effective tool for delivering environmental objectives and, if they can, what is required to make them successful? The following sections of this report examine these questions.

The Danish agreements on energy efficiency

This scheme is targeted at energy intensive companies. It comprises a package of measures combining negotiated agreements, sulphur dioxide and carbon dioxide taxes and subsidies for investment and advice on energy efficiency. Companies entering into an agreement with the government qualify for a significant tax rebate. Firms seeking an agreement with government apply either individually or collectively.

To qualify, individual firms must submit to an energy audit by a certified auditor, at their own cost, and develop an action plan for the plant. The plan typically requires implementation of all energy efficiency measures with a less than four-year payback period, although alternative measures can be specified. The plan must develop an environmental management system which addresses: energy accounting; staff management, motivation and education; and sourcing of energy efficiency advice and technology. The collective approach requires a general analysis of the potential for improvement across the sector, and the production of an action plan which all the companies sign up to.

Once an agreement is signed, the action plan must be implemented and reported on annually. Failure to meet the obligations of the agreement results in the loss of the tax rebate and a requirement to retrospectively refund tax not paid during any period of non-compliance. It is expected that the scheme as a whole will result in a 4.4 per cent reduction in carbon dioxide emissions between 1988 and 2005.[10]

The Dutch approach to negotiated agreements

The Dutch developed a National Environmental Policy Plan (NEPP) and NEPP Plus in 1989 and 1990. These plans set out a detailed strategy to achieve quantified pollution reduction targets for over 200 substances. Targets were set by consideration of sustainable levels of emissions, rather than by technological or political factors. A fundamental premise of the NEPP is that environmental objectives can only be achieved if government devolves much of its responsibility for developing and implementing environmental protection measures to other groups in society. The plans are revised regularly. The current version is NEPP 3.

The strategy and targets are implemented through Integrated Environmental Target Plans which set quantified targets for particular industrial sectors derived from the NEPP, and 'covenants' with industry to implement these targets. Developing a covenant requires strategic talks between the government and trade associations, to establish targets consistent with the NEPP. Individual firms are then asked to develop Company Environmental Plans, to set targets and define the means by which the targets will be achieved. The plans are developed in co-operation with the regulatory and licensing authorities. Development of the company plan can often be the first time that all these bodies have met at the same time, and allows any conflicting requirements made by different regulatory bodies to be reconciled. Once approved, the plan becomes an integral part of a firm's environmental authorisation, which is reviewed every four years. Firms not meeting the terms of their plan revert to a less flexible, more stringent regulatory regime. The covenants have legal status and are binding on firms. Covenants are not an alternative to regulation. They are implementation instruments which supplement a more general legal framework.

Agreements have reduction targets of between 50 and 90 per cent on 1985 levels by 2010 for energy and substances specified in the NEPP. They include the 'Long Term Agreements on Energy Efficiency', which aimed to achieve a 20 per cent improvement in energy efficiency between 1989 and 2000.

Over one hundred covenants have been agreed, and about 90 per cent of the Netherlands' industrial energy consumption is covered by Long Term Agreements on Energy Efficiency. In 1998, the average energy efficiency improvement of the 30 industrial long term agreements amounted to about 17.4 per cent compared with the 1989 level.[11]

are negotiated agreements effective tools of environmental policy?

The primary consideration in choosing any environmental policy tool must be its effectiveness in delivering environmental benefits. A wide range of advantages and disadvantages have been claimed for negotiated agreements. Advantages claimed are that they:

- are based on consensus and partnership;
- are based on incentives;
- integrate environmental improvement and business planning;
- can encourage innovation, through ambitious targets;
- give flexibility for companies in how they meet targets;
- cut down implementation time and costs compared to regulation;
- disseminate information well;
- overcome information asymmetry between government and business;
- promote proactive attitudes from companies;
- increase trust and understanding between government and business;
- allow a politically acceptable approach in sensitive sectors.

But the disadvantages claimed are that they:

- do little or nothing to reveal prices compared to taxes;
- postpone regulation;
- formalise weak targets;
- create free rider problems;
- restrict flexibility for company development;
- increase costs: negotiation, implementation, monitoring and reporting;
- risk regulatory capture;
- are subject to information asymmetry;
- require a policy process based on trust;
- lack transparency and third party involvement;
- lack accountability in implementation;
- lack sanctions or mechanisms if targets are not met;
- lack credibility in the public eye.

So do the advantages of the approach outweigh the disadvantages? And are the disadvantages inevitable, or the advantages guaranteed? These questions are hard to answer. The effectiveness of all policy instruments varies from case to case, making evaluation difficult. Due to their short history, and their very varied form, understanding of negotiated agreements is more limited, and the uncertainties far greater.

Voluntary and negotiated approaches have evolved and grown as a pragmatic response to the day-to-day experience of policy-makers in government, business and NGOs. There is no off-the-shelf model that can be used to forecast their effectiveness before use, or analyse their success after

implementation either alone or as a package of measures.[12] This contrasts with other instruments such as environmental taxes and tradable permits that were developed first in theory, and then implemented.

Studies of the effectiveness of negotiated agreements

It is surprising that there have been few formal efforts either to develop a theoretical underpinning, or to analyse the practical effectiveness of existing agreements. However, there is an emerging consensus among the few existing evaluation studies that the approach has the potential to yield effective environmental benefits. An OECD report, summarising these studies, argues that, whilst outcomes are by no means guaranteed, agreements can be effective if they fulfil certain conditions.[13] The report measures the effectiveness of negotiated agreements against seven criteria:

1. Environmental effectiveness – are challenging targets set and are they achieved?
2. Economic efficiency – can resources be allocated to a better use?
3. Administrative and compliance costs – what resources are required to develop and maintain the agreement, and who bears the costs of these?
4. Competitive implications – will the tool create opportunities for anti-competitive behaviour?
5. Dynamic effects – does the tool stimulate innovation in technology or encourage completely new approaches to pollution control and reduction?
6. Soft effects – how will the tool promote changes in attitudes and awareness, build capacity and create and disseminate information?
7. Viability and feasibility – is the suggested tool politically, socially and institutionally feasible?

“the environmental effectiveness of negotiated agreements is largely unproved.”

On the basis of these criteria, the OECD assembles a stylised ‘profile’ for the performance of existing negotiated agreements. It suggests that the environmental effectiveness of negotiated agreements is largely unproved – a worrying finding, given that the main criterion for the use of any environmental policy tool should be its environmental effectiveness. They appear to have been compromised by weak target setting, free riding, and the uncertainty of regulatory threats. Implementation has been poor because of hard-to-enforce commitments, poor monitoring and a lack of transparency. On economic efficiency, negotiated agreements perform well, but they are compromised by a lack of price-revealing mechanisms, especially compared with economic instruments. In terms of administrative costs, it is unclear whether negotiated agreements are better or worse than other instruments, but they can result in a redistribution of administrative costs and the creation of new types of cost, such as those for negotiation. Competition concerns are

possible but, again, a lack of evidence prevents assessment of their level. "Major positive 'soft effects' such as collective learning, generation and diffusion of information and consensus building" are more likely than with economic instruments. Finally, the OECD finds that credibility is considered a problem.

The German Öko Institute, in a separate report, concluded that the performance of agreements is positive, with three-quarters of agreements examined in case studies (eight in total) at least partially meeting their targets.[14] However, success was measured only against the agreements' own targets. When the absolute scale of improvements is figured in, they appear less successful. Only a third of the agreements have ambitious targets that come close to what is technically feasible, or what other policy instruments might have achieved.

The six case studies examined by the European Environment Agency, too, are inconclusive. They also highlight the difficulty of separating the effect of an agreement from that of other policy tools operating in parallel.[15]

Another Danish study attempts to solve this problem by evaluating the supplementary effects induced by five energy-related agreements in Europe.[16] This approach attempts to attribute effects to the different elements of a package of measures, rather than considering them as purely alternative approaches. It finds that the five agreements studied are 'more or less' successful in terms of meeting their own targets. This equivocation arises partly from the fact that not all the agreements have yet run their term, and the assessment is based on projections. Determining the degree of improvement that could be apportioned to the agreement was possible in only one case, the Dutch Long Term Energy Efficiency Agreements. The report found that a lack of appropriate data prevented analysis of the other case studies.

The contribution of the Dutch Long Term Energy Efficiency Agreements is estimated to be anything from 16 to 50 per cent of overall energy efficiency gains between 1989 and 1996. Given that the agreements are on course to meet their own goals, and that the national target is for a 20 per cent overall efficiency improvement between 1989 and 2000, this suggests that the agreements alone will result in an increase in industrial efficiency of between three and ten per cent.

These evaluations suggest that negotiated agreements have not for the most part delivered major environmental benefits. However, this should not be taken to mean that negotiated agreements can never deliver environmental benefits. Negotiated agreements have simply not been tested as an instrument for delivering radical changes in environmental performance. The Dutch Long Term Energy Efficiency Agreements do appear to have given benefits over and above what would have happened in their absence. This suggests that there is the potential for negotiated agreements to deliver more significant environmental benefits in the future. Many of the

agreements assessed are first generation attempts by governments to use a new policy tool. It will be several years before it is possible to evaluate the second and third generation of agreements.

It appears that negotiated agreements can be successful under certain conditions, and this has given a number of bodies enough cause for optimism to develop guidelines to make them perform better. The next section of this report looks briefly at some of the existing guidelines, before analysing the conditions necessary for successful negotiated agreements in the future.

making negotiated agreements work

The success of negotiated agreements is by no means a foregone conclusion. This is true of other policy tools too, but the complexity of the process and content of negotiated agreements makes it harder to guarantee their success.

Many policy-makers have acknowledged the complexity of agreements, and have responded with guidelines or recommendations for their development. These vary from the very detailed Guidance for Covenants produced by the Dutch Prime Minister, which contains actual draft agreement clauses, to more general statements about good practice.[17] The European Commission Communication of 1996[18] outlined the Commission's position on the use of voluntary agreements, including their view on the suitability of environmental agreements to implement Directives and Regulations at the member state level. In the UK, the Advisory Committee on Business and the Environment (ACBE) has also produced guidance for the use of voluntary agreements.[19]

Green Alliance's *Negotiated Agreements – Best practice checklist* draws together and develops existing guidelines, and incorporates recommendations from more recent work that has evaluated the effectiveness of agreements. The checklist has been developed through consultation with a representative range of stakeholders from government, business, trade unions, trade associations and NGOs in the UK and Europe. The checklist that emerges is comprehensive, appropriate to the UK context and commands broad-based support.

The discussion below goes into more detail than the checklist but follows its structure to allow easy cross referencing between the documents. The discussion is split into three sub-sections:

- when to use an agreement;
- the process used to develop an agreement;
- the content of an effective agreement.

In some situations, therefore, not all of the issues raised will be relevant. However, different issues concern different stakeholders. It is important to make clear justifications for not considering a particular issue, to aid transparency, improve credibility and, ultimately, to increase the chances of a successful outcome.

In developing this checklist, Green Alliance does not seek to promote negotiated agreements as alternatives to taxes or regulation. The checklist is intended to aid development of effective agreements, in whatever situation they are considered, whether as a stand alone measure or part of a package of measures.

When to use negotiated agreements

Policy objective

Before the decision is taken to use any policy tool, there needs to be a clearly defined policy objective. If a negotiated agreement is selected, it is vital to set a clear objective for the agreement itself, to define its scope. It may not be enough for government just to specify the objective. Consultation may be required, not only to fulfil basic democratic obligations, but also to demonstrate to the sector involved that there is broad public support. Such support strengthens government's negotiating position and can be used to demonstrate that it is acting in the common good, should it come under pressure from the target sector to weaken proposals.

The Climate Change Levy negotiated agreements were developed in advance of the publication of the final UK climate change strategy. As the Environmental Audit Committee points out,[20] this meant the agreements were developed without public knowledge of their relationship and contribution to the broader climate strategy. Whilst the Government internally was aware of the contribution the agreements would make to the overall strategy, groups outside government were not. This made it very difficult for third parties to assess the adequacy of the agreements, and reduced the transparency of the process.

Clear objectives are essential from the outset – but a process of negotiation can be used to develop these objectives themselves. In such cases, the determination of objectives is, in a sense, the aim of a set of negotiations preliminary to the start of negotiations proper. This may be the case in areas of policy where there is a lack of understanding around new and developing issues, and where an exchange of information could usefully improve dialogue between industry, government and regulators.

Choice of policy tool

Before going ahead with developing an agreement, comparisons should be made with other tools. The lack of formal evaluation methodologies for negotiated agreements can make this hard, especially as success is dependent on both the outcome of negotiations and the implementation of the agreement. However, it is possible to assess various tools in a qualitative way, by considering potential environmental benefits, the level of resources needed to develop, monitor and enforce the chosen tool, and so on.

The choice of negotiated agreements over other policy tools has to be made in the context of the nature of relationships between the parties involved in policy formation. Even within a single industrial sector, it may be appropriate to have a mixture of approaches that reflect different relationships with regulatory bodies, and differing attitudes to the environment. Progressive, forward-looking firms may embrace the opportunity to develop long term environmental objectives through the

negotiated agreement process, whereas others may be unwilling to do little more than meet minimum regulatory standards.

The use of agreements has traditionally been considered practical in countries such as the Netherlands, which have a different tradition of consensual policy-making and industrial relations, but inappropriate to the UK with its more adversarial system. The move to using negotiated agreements results partly from the failure or limits of traditional command-and-control approaches in developing environmental policy. The dialogue and exchange of views inherent in developing negotiated agreements may therefore have a role to play in helping develop a more consensual policy system in the UK.

"negotiated agreements may have a role to play in helping develop a more consensual policy system."

This trend is already under way. Recent UK governments have actively pursued deregulation and removed unnecessary restrictions on business activity. Also, as discussed above, the relationship between regulators and the firms they regulate is now much closer and more open than it used to be. There has also been a shift to more open policy formation, with greater involvement from business and NGOs. And a significant proportion of businesses now accept the need for better environmental performance. Negotiated agreements are therefore more suited to the UK policy system now than they once were.

In some situations a negotiated agreement may be implemented as a standalone measure. More likely, a package of measures will be required to deliver the policy objective and overcome some of the limitations of standalone agreements. Taxes send clear financial signals about the desirability of an activity whereas a negotiated agreement does not. However, a negotiated agreement disseminates information effectively within a sector whereas taxes are poor at communicating what action is possible.

Business participation

The key to ensuring business participation is the creation of an appropriate set of incentives or threats. Agreements which result in increased costs for business, without incentives, or the likelihood of more stringent alternatives, are unlikely to be attractive business propositions.

Incentives, such as exemptions from the Climate Change Levy, can be an integral part of the agreement. This is discussed below. Alternatives are generally taxes or regulation, the threat of which has been used with varying degrees of success by government. In the area of quarry products, where the sector's failure to deliver a suitable voluntary package resulted in the imposition of a tax, the Government demonstrated that its threat was more

than just a bargaining strategy. However, in the area of pesticides the threat so far seems much less real. The speed of the Government's introduction of the aggregates tax took many in the industry by surprise, losing the goodwill of the more progressive firms who wanted an agreement. In the case of pesticides, the process is moving much more slowly, perhaps due to current political sensitivities around farming.

Threats need to be credible, which may require more than unjustified and unsupported statements of intent from government. The publication of government research can help demonstrate both the scale of the problem and a desire to address problems and gain credibility. Published research on aggregates and pesticides, for example, certainly provided an impetus to these processes.[21]

Some suggest that industry may draw out the development of negotiated agreements to delay action. This risk needs to be addressed in the design of incentives. The Dutch model of a parallel and demanding licensing system that operates for firms not participating in agreements may be appropriate in such cases. The timing of the development and introduction of alternative instruments may also be used to drive the process. For example, regulations can be developed in advance so they are ready to be implemented if negotiations fail.

Costs and benefits

It is often claimed that negotiated agreements represent a cheap and quick way to deliver environmental objectives. There is plenty of evidence to the contrary. The Climate Change Levy negotiated agreements have been very time consuming to develop and have delayed other government work. In Europe some agreements have taken over 5 years to conclude.[22] Agreements can be concluded quickly, but speed is sometimes an indication that an agreement is environmentally weak. Whilst effective agreements may not save the time and effort some suppose, the investment of time may result in more challenging objectives and better performance in the long term.

Third party rights

An aspect of negotiated agreements that has not received much attention is the effect they may have on the legal rights of third parties.[23] There are two important dimensions to this issue, both of which bear on the legitimacy and accountability of negotiated agreements. Firstly, there is the general question of the legitimacy of negotiated agreements within a democratic process of policy formation. Secondly, there is a question about the ability of third parties to challenge the agreement if the terms are unacceptable to them, or are ultimately not met.

Traditional regulatory approaches are based on statutes that have the authority and democratic legitimacy of Parliament. Negotiated agreements between two parties can have the legal standing of contracts, which are

subject to private, rather than public law. This may restrict the ability of third parties to raise legal challenges if the courts treat such agreements as lying beyond the reach of judicial review. Whilst British environmental regulatory law has developed a number of provisions with statutory standing that protect third parties, there are no equivalent statutory provisions applying to the development of negotiated agreements. However, it appears that provided an agreement has some statutory basis, thus placing it under the rule of public law, then the process of judicial review will be applicable.[24]

There is also a danger that the use of negotiated agreements could result in less public involvement in decision making, a potential, running counter to the consensus that is developing on the need for greater public participation. The development of agreements between government and industry without the involvement of third parties will inevitably result in concerns about deals being made behind closed doors.

“negotiated agreements could result in less public involvement in decision making.”

These concerns can, to a degree, be addressed by careful design and the use of an appropriate process to develop agreements. For example, if targets are set outside the negotiation process, there will be less concern about regulatory capture and weakening of targets during negotiation.[25] Where failure to meet the agreement terms would directly affect third parties, the legal uncertainty around negotiated agreements would suggest that their use is inappropriate. In this situation, regulation might be better. In almost any negotiated agreement, third parties will want to be able to raise challenges. If there is a clear and well-understood mechanism for doing this, it will enhance both the credibility and effectiveness of agreements. Clarification from government on the legal standing of agreements, and on the process by which they can be challenged during negotiations and when commitments are not kept, would enhance their standing and help allay NGO and public concerns.

Implementation of EU legislation

Another issue that is dependent on the legal standing of negotiated agreements is their ability to be used to implement the requirements of EU directives. Currently, negotiated agreements are allowable tools for the implementation of Directives. However as “Member States have to be at any time in a position to guarantee the results imposed by those Directives” this implies “that the domestic law provides a clear legal framework and thus legal certainty.”[26] Hence if negotiated agreements are to be used to implement European Directives they need to be enforceable and this implies the need for certain legal forms.

Practicality of negotiation

Before committing to negotiated agreements, government should identify whether negotiation is going to be practical. Firstly, can the government provide sufficient human resources? Negotiation with a large number of bodies will complicate and draw out the process, which might make it desirable to work with representative bodies, like trade associations to negotiate on behalf of the target sector. Alternatively, eligibility criteria could be designed to limit the number of participants.

Several questions arise in relation to representative bodies. Do they cover a sufficient proportion of the target sector? Do they have the resources and expertise to negotiate on behalf of their members? Also, will trade associations that focus on the interests of large firms reach agreements that are not appropriate for small firms?

Eligibility criteria also raise issues that require careful consideration. The principal eligibility criterion for the Climate Change Levy negotiated agreements is whether or not a site is subject to IPPC regulations. The justification for the use of this criterion is that it has a clear rationale, provides legal certainty and administrative simplicity and is consistent with EU State Aids rules. The criterion has, however, granted eligibility to a large number of sectors, with over 50 sectors seeking agreements. Some of these sectors are not very energy intensive, and may even be better off after the levy is introduced. That is, they will already gain more from the levy being recycled through national insurance contributions, than they will pay to the levy.[27] Conversely, the criterion excludes some of the most energy intensive sectors, including water, the third most energy intensive sector in the UK.[28] These problems would suggest that in future, more restrictive criteria should be used to define eligibility, or that agreements should be sector-based.

Process for developing a negotiated agreement

The process of developing a negotiated agreement is extremely important in establishing its credibility. There are bound to be suspicions about the benefits of agreements drawn up between government and business if there is no third party involvement. However, many of these concerns can be addressed through a carefully designed process. Third parties are unlikely to be willing or able to be involved at all stages of developing an agreement. However they will want to be aware before the negotiation process starts what opportunities there will be for scrutiny, comment and input. Clear information and good process design can reduce efforts required from all parties. The following points detailing the process for developing and concluding an agreement should be publicly and visibly stated in advance of the negotiation process:

- objective of agreement;
- relationship to broader government objectives;
- scope of negotiations;

- arrangements for information exchange;
- justification for choosing a negotiated agreement;
- indicative timetable for development of agreement;
- recognition of negotiating entities;
- eligibility criteria for participation in agreement;
- mechanisms for third party involvement.

Many of these points involve being clear about the reasons for choosing a negotiated agreement over other policy tools, which was discussed above. Others are examined later in the section on the content of an agreement. The remaining points are dealt with below.

Arrangements for information exchange

Government is often reliant on business and industry for detailed information relevant to many policy approaches besides agreements. It is very hard for the government to collect and evaluate information, and to assess the potential for future improvement. If industry possesses data that government is denied or unable to collect, the information asymmetry will make it easier for industry to negotiate advantageous terms, and weak targets may result.

Fortunately, in the case of the Climate Change Levy negotiated agreements, ETSU had previously undertaken assessments of cost effective energy efficiency measures for a wide range of sectors and processes. These assessments have been used as the basis for initial positions in the negotiations. Research on pesticides and aggregates has also assisted in the development of policy responses. But if data is not already available, time must be built into the process so that it can be acquired.

Recognition of negotiating entities

Except perhaps in the case of monopolistic or oligopolistic sectors, representative trade associations must exist to enable manageable negotiations. However, there should be a provision for including firms that are not members.

There is also an issue about who represents government. Departmental officials may be conversant with the technical issues under negotiation, but may lack the skills or independence to manage the process. It may therefore be appropriate to include representatives from environmental agencies, or experts in negotiation.

Mechanisms for third party involvement

Most formal negotiations are likely to be conducted in the absence of third parties. However, environmental NGOs and consumer groups will almost always want the opportunity to examine proposed agreements and offer recommendations for amendments. Both for credibility's sake and to

craft an optimal agreement, it is absolutely vital that there are opportunities for them to do so, particularly in the case of target-setting agreements. Whilst some information was made available during the development of the Climate Change Levy negotiated agreements, numerous third parties reported difficulties in obtaining it. This difficulty tarnished the reputation of the agreements that NGOs had actively supported.

Government negotiators also need to keep third parties within government informed. One industry representative involved in developing an agreement worried that, as the end of negotiations drew near, new issues would be raised by parts of government not previously involved in the process.

The New Directions Group in Canada have set clear criteria for openness and third party involvement.[29] This group was set up as a result of a meeting between 24 senior business and environmental representatives in 1990. They included Dow Chemicals Canada, Norrad Forest Inc and Friends of the Earth Canada. The work of the group is based on the hypothesis that environmental change can be achieved more quickly through partnership than through the existing policy process. It developed guidelines and criteria designed not just for negotiated agreements but also for other voluntary measures, aiming to ensure their quality, effectiveness and credibility. The Group makes it clear that negotiated agreements must be developed and implemented in a participatory manner that enables the interested and affected parties to contribute equitably. They must also be absolutely transparent in their design and operation.

Whilst these suggestions might be expected from environmental or consumer interest organisations, they are also supported by major and progressive businesses. This approach exemplifies Tony Blair's recent call for a new partnership on the environment between government, business and NGOs – a partnership which could form the basis for developing future agreements.[30]

Opportunities for third party involvement in the development of an agreement can be direct, along the lines of the New Directions Group guidelines, or indirect, through scrutiny involving, for example, Parliament. Direct and indirect opportunities might include, at the outset of the process, the scheduling of update meetings at which third parties can question both business and government on progress. Similar meetings may also be relevant during the implementation phase, particularly to allay fears about lack of progress towards agreed targets. Liaison groups may have a role to play in communicating and exchanging information. The Emissions Trading Group has collaborated successfully with an NGO liaison group that has met regularly. Not only has this arrangement allowed progress updates to be made to NGOs, but also it has resulted in a fruitful exchange of ideas and concerns on the design and implementation of the scheme. Parliamentary review could be undertaken prior to final adoption, as in the Netherlands, or during the course of agreements by, for example, Select Committees. Another

possibility would be to set up an independent body to oversee the development and implementation of negotiated agreements. This could act as a central collection point for information on the status of agreements and would gather information for the public record. This organisation could also assess the successes and failures of agreements, and co-ordinate dissemination of best practice information within industry.

Content of agreements

If negotiated agreements are to fulfil environmental objectives, each party's commitments and the mechanisms for delivering those commitments must be clear. The following points therefore need to be specified in the content of the agreement:

- objectives;
- parties to agreement;
- targets;
- substantive obligations and commitments;
- sanctions for non-compliance;
- duration;
- fulfilment of agreement;
- monitoring and verification;
- dissemination of best practice;
- revision mechanisms;
- dispute reconciliation process.

Some of these points have already been discussed in the preceding sections. The remaining points are discussed below.

Parties to agreement

There are two potential types of party to an agreement. The first is 'negotiating entities', the second is signatories to the agreement itself. These are not necessarily the same. For example, it may be appropriate for a representative body, such as a trade association, to negotiate on behalf of a number of individual firms, which then sign the agreement individually and directly. In other cases, for example when a trade association signs the agreement, or when individual companies negotiate on their own behalf, the negotiating entities and signatories may be one and the same.

Whilst trade associations may be appropriate negotiating entities, and certainly make negotiations more manageable, they should not be the sole signatories to agreements unless there is a mechanism to oblige the bodies they represent to fulfil the agreement. It may be possible, however, for trade associations to sign agreements to undertake activities that facilitate the agreement, such as monitoring and promoting best practice.

As an example of the structural options that can be adopted, the Climate Change Levy negotiated agreements provide three alternatives. Firstly,

agreements are signed between the government and trade associations. Secondly, agreements are signed between the government and both the trade association and firms. Thirdly, agreements are signed between the government and the trade associations, and separate agreements are signed between the trade associations and firms. The issue of which structure is optimal is intimately related to the way obligations and the fulfilment of targets are defined within particular agreements (see below).

When concluding agreements, careful consideration needs to be given to what happens when firms are taken over or go bankrupt, and also whether agreements place barriers in the way of new firms entering the sector. The latter issue will be of particular interest to competition authorities.

Targets

Although targets are arguably the most important component of the negotiated approach, existing agreements have been widely criticised for being weak and unambitious, moving scarcely beyond business-as-usual. This has undermined their credibility.

In the Netherlands, the problem has been overcome by setting non-negotiable targets, through the normal public consultation process, in advance of the negotiation of the agreements themselves. Agreements are then developed with the aim of implementing the previously agreed target. This has the benefit of reducing the work required to develop the agreement, improving democratic legitimacy and diminishing third party concerns.

Whether targets are set within or outside the negotiation process, ambitious targets can stimulate innovation whereas weak targets will institutionalise the status quo. Short-term, unambitious targets are likely to result in an incremental approach to environmental improvement, focusing on the efficiency of existing processes and end-of-pipe solutions. Negotiated agreements can provide the long-term framework that allows industry to plan its approach to innovation. Setting a demanding target, to be met in ten or more years, gives industry flexibility in how it will meet the target, certainty in its planning and investment decisions and time to achieve meaningful change. However, to achieve innovation benefits of this kind, long-term targets should focus on defining outputs rather than prescribing particular activities. Challenging targets linked to clear incentives can result in entirely new processes or completely different ways of delivering products and services.[31]

“ambitious targets can stimulate innovation whereas weak targets will institutionalise the status quo.”

For example, the short-term benefits that resulted from European regulations on catalytic converters may have come at the expense of even greater benefits

that might have been gained by adopting a whole-system approach to emissions reduction. Compare this with Californian emissions regulations that used ambitious performance-based standards. These formalised the need to innovate, without specifying a particular technology, and gave the motor industry time to react to the challenge.

Industry will typically object to challenging targets, as it is generally perceived that increased environmental efficiency will increase costs. Abatement costs for end-of-pipe technologies will often rise with increasing levels of abatement, yet innovation may lead to new processes or ways of delivering services with lower costs altogether. Hence, it should be possible to address concerns over business competitiveness through the careful design of targets in a broader framework for agreement.

Targets must be chosen on the basis of technically sound information, as well as open debate. It is important to take account of the scale of the environmental challenge, information about business-as-usual projections and the potential of known technological changes. As well as allowing for the potential of known opportunities, room should be built into targets to help stimulate new technologies and organisational approaches.

Targets may be quantitative – a target to reduce carbon emissions by 12 per cent – or qualitative – to implement a particular process. Absolute targets such as reducing emissions to a particular tonnage give greater certainty about the eventual outcome of an agreement. However, this type of target may constrain sectors that are expanding or, in the case of contracting sectors, actually discourage efficiency. Hence, relative targets, like reductions in carbon per unit of output, may be more appropriate to allow expansion and improve efficiency at the same time. However, depending on whether firms are exchanging market share or if the sector is undergoing overall growth, absolute targets or linked mechanisms like emissions trading may be required to limit overall environmental damage.

Targets, once agreed, should be clearly defined in the agreement. Analyses of European agreements have found that a lack of clarity about targets made it hard to evaluate whether or not they had actually been met.[32] To avoid this problem, it is essential to provide a clear, unambiguous statement of the dates by which intermediate and final targets are to be met, and precise metrics. In the case of relative or efficiency targets, a statement of baselines and targets is needed. If an agreement is run over a long period, intermediate targets will be needed to ensure progress and to trigger sanctions if appropriate. ‘Best effort’ clauses, for example, requiring a firm to take all possible efforts to reduce its emissions, should be rejected, as they are very hard to measure objectively.

Finally, there is the question of achieving a balance between targets determined by an ecological imperative and targets based on political and economic or social acceptability. The Royal Commission on Environmental Pollution, for instance, has declared that carbon cuts of at least 60 per cent will be necessary by the middle of this century, and this should not be forgotten when agreements are drawn up.[33]

Substantive obligations and commitments

The commitments made by business are obviously central to any agreement. However, government may also need to make commitments to monitor progress, disseminate information or withhold new regulations. Government can also agree to mitigate business costs by, for example, giving tax rebates to participating companies. All commitments need to be easily verifiable and unambiguous.

Clauses that preclude further government action to address the environmental objective under consideration during the term of the agreement should be avoided. This is partly because subsequent governments cannot be bound by a predecessor's promises, but mainly because it is important to retain the flexibility to respond to new evidence on environmental problems.

Sanctions for non-compliance

Crucial to the effectiveness and credibility of an agreement are sanctions that can be brought to bear should targets not be met. These can be either actively punitive, or can operate passively through the removal of an incentive.

"Those national schemes that are most substantial in their offers and demands, are also those that have come closest to establishing a working sanction system – and those which promise to have the greatest additional impact on industrial energy efficiency."[34] This comment refers to the Dutch and Danish experience of voluntary agreements. The Danish energy efficiency agreements give firms the clear benefit of a tax rebate, with the sanction being its removal. The Dutch system is more complex and punitive, involving the transfer of non-compliant firms into a more stringent regulatory regime. It is the presence and the threat of this sanction that is essential to achieving target fulfilment. Other sanctions that may be appropriate include the threat of new regulations and 'naming and shaming' of poor performers. These techniques can be effective, provided that firms consider them to be significant and likely.

Punishment proportional to the level of performance may be appropriate in some cases, rather than all-or-nothing penalties. Proportionality can also be applied to incentives, in order to reward better and best practice. In the case of the Climate Change Levy, if the quantitative targets are not met, there is a series of qualitative criteria to assess the effort expended by the firm. If these qualitative criteria are met, the tax rebate will continue. This is one way to prevent firms that are acting in good faith from being penalised unnecessarily, although it should be used carefully to avoid the charge of weakness and a loss of credibility. Alternatively, negotiated agreements could be linked to other mechanisms, such as emissions trading, enabling firms who are unable to meet their targets to buy in the required shortfall, at a cost.

Duration

A demanding but realistic start date for implementation must be made explicit. The start date should encourage prompt action, but allow signatories and government adequate time to prepare. The agreement should run over a sufficiently long period so that there is time for industry to develop and invest in the means to address ambitious targets.

Dates for meeting targets or other obligations or milestones should also be set. These may be fixed dates for reaching fixed targets or, to allow greater flexibility and impose lower costs, may be 'commitment periods' within which averaged targets must be achieved.

Finally, it may be appropriate to define a series of interim targets and dates. Such a staged or incremental approach guarantees early action and incremental improvement, or more importantly indicates inaction early on, and facilitates evaluation and monitoring (see below).

Fulfilment of the agreement

A clear and mutually understood definition of what constitutes fulfilment of the agreement is essential. With a target to reduce emissions by 20 per cent, is the agreement fulfilled when the sector averages a 20 per cent reduction – but good performers subsidise bad; when all companies have achieved a 20 per cent reduction – so the target acts as a minimum standard; or on a company by company basis – which requires individual companies to sign up?

The fulfilment mechanism has implications for how the burden is shared within a sector, determines the economic efficiency of target fulfilment, and influences the likelihood of success. For example, the first mechanism suggested above encourages free riding and the second does not reward sector leaders. On the other hand, if all firms have to meet the same target, it may be less economically efficient than the group target. Firms will have different abatement costs, and an efficient allocation of economic resources will be achieved if firms with lower abatement costs achieve higher abatement.

Post agreement issues

The following points refer to activities that occur, or mechanisms that may be required, after the agreement has been signed and during the period of the agreement itself. However, they are all issues that require specification and agreement during the negotiation phase.

Negotiated agreements may require significant resources to manage their implementation, monitoring and review. Consideration should therefore be given at the outset as to whether or not the parties to the agreement have this capability. If they do not, and there are no appropriate third party organisations such as regulatory bodies that can assist, a negotiated agreement is unlikely to be the right policy tool.

Monitoring and verification

Monitoring is vital to ensuring delivery and credibility of an agreement. It must be carried out by a body acceptable to the parties to the agreement, and to other stakeholders. Agreements involving self-assessment by signatories are unlikely to be robust, and will lack credibility.

During negotiation consideration must therefore be given to: who collects data; what data is collected; collection frequency; who bears the costs of collection; how issues of commercial confidentiality are dealt with; and whether and how data is placed in the public domain. Except in cases where commercial confidentiality or national security could be compromised, there should be a presumption of disclosure of information relevant to the delivery of the agreement's terms. The subsequent refusal, without good reason, to provide the specified monitoring information should be considered a breach of contract that triggers sanctions.

In order to monitor and evaluate progress towards a goal, it is important to have suitable baseline data to begin with. It is equally important that data collected for monitoring be compatible with the baseline. A number of agreements have run into problems because of the incompatibility between monitoring and baseline data.[35]

Consideration needs to be given to whether or not appropriate institutions exist that can monitor and evaluate negotiated agreements. The Environment Agency has many of the required capabilities to undertake this role. However, as suggested above, an independent body that collects and disseminates information, monitors, evaluates and arbitrates in any disputes on negotiated agreements may be appropriate.

Dissemination of best practice

Dissemination of best practice is frequently claimed as one of the main advantages of negotiated agreements. Other policy tools, by contrast, can restrict information exchange and the sharing of best practice. For example, in emissions trading schemes it is in a firm's interest to reduce its own emissions whilst preventing other firms from learning how it did so, in order to maintain a market demand for savings.

"dissemination of best practice is frequently claimed as one of the main advantages of negotiated agreements."

The agreement should therefore identify and communicate ways of contributing to target fulfilment. It should set objectives for learning – the dissemination of energy efficiency best practice throughout a sector, for example – and define mechanisms to

achieve this, like R&D programmes, best practice guides and so on. Consideration also needs to be given to the institutional arrangements and resource requirements for delivering these benefits.

Revision mechanisms

Both government and business are unlikely to be willing to sign agreements that do not allow responses to changing social, economic and environmental circumstances. Given that flexibility is one of the main advantages claimed for negotiated agreements, mechanisms to modify them following review are important. However, as with other flexibility mechanisms, care must be taken to prevent undermining both the agreement itself and the confidence of other stakeholders, by creating options which are, or are perceived to be, potential loopholes. Review should be conducted in a transparent way with its justification and outcome reported publicly.

Dispute resolution process

The agreement should set up arbitration processes, identify organisations suitable for resolving disputes, and indicate competent jurisdiction, looking at whether the agreement is covered by UK private or public law, for example. This is mainly for the benefit of the parties to the agreement, but also so that third parties can raise challenges if the terms of the agreement are not met.

recommendations for the future use of negotiated agreements

The checklist that accompanies this report contains a series of recommendations, to ensure that negotiated agreements are used in appropriate situations, and to ensure that they are successful and effective when they are chosen. Our first recommendation is therefore that government, business and other organisations involved in developing negotiated agreements use the checklist.

All the issues raised in the checklist are important, but there are five aspects that are especially critical: credibility; targets and the target-setting process; sanctions; combination with other policy tools; and opportunities for third party involvement. The first of these, credibility, is very much dependent on the other four.

The checklist is not intended just to assist government and other policy-makers in the internal development of policy. It may also be useful to compare publicly how actual agreements measure up.

Negotiated agreements are relatively new tools, and each new set will provide important lessons for the next. Whilst we hope that our checklist will help produce negotiated agreements that are acceptable to all stakeholders, it will not ensure perfection or be the final word. Negotiated agreements will continue to evolve.

The Climate Change Levy and associated negotiated agreements provide an excellent opportunity for learning. The environmental outcomes of the Climate Change Levy and associated negotiated agreements will make a significant contribution to climate change mitigation. However, their development has been time consuming and, at times, controversial. We would hope that once all the agreements have been signed, a full and open evaluation of the process will be undertaken, enabling issues of concern from all stakeholders to be heard. This would result in greater credibility for both the Climate Change Levy negotiated agreements themselves, and for any new agreements. Further general studies of the effectiveness of negotiated agreements are also urgently required to resolve the uncertainties left by existing evaluations. These should examine the use of negotiated agreements as part of a package of measures, rather than in isolation.

There remain unanswered questions about the legal standing of negotiated agreements, their enforceability and the ability of third parties to challenge them. We would urge the Government to clarify these issues, especially their statutory basis and standing in public law.

Another issue of importance is the implication that the growing use of negotiated agreements may have for the relationship between business and

the regulator, especially the Environment Agency. Traditional command-and-control has generally focused on site-specific, local pollution, a focus that will certainly continue. Agreements, on the other hand, tend to be geared towards resolving national environmental problems, in which local pollution is aggregated to achieve broader geographical goals. At the very least, this implies the need for strong links, direct involvement, and good communication between regulators and central government when developing and implementing agreements. It may even imply a more pivotal role for the Environment Agency and require institutional change.

There are a number of areas where negotiated agreements could next be used. The most promising may be resource-use and waste reduction and producer responsibility. The UK could consider moving, as the Dutch are, towards agreements on raw materials and product in-use impacts. The development of sectoral sustainability strategies, as suggested in the UK Sustainable Development Strategy, creates opportunities for individual industrial and business sectors to develop agreements with government. The use of negotiated agreements which meet the criteria contained in the checklist would demonstrate that the sector concerned intends concrete action to flow from its strategy. Given the difficulties with concluding the Climate Change Levy negotiated agreements on time, it is clear that more restrictive eligibility criteria are necessary, and the boundaries inherent in sectoral strategies may help here.

Negotiated agreements could have two future roles. The first is as a means of enhancing the effectiveness of existing policy, for example, to improve industrial energy efficiency or reduce waste from production processes. The second is to use them in a more radical context, as one of the elements for connecting current policy objectives with the much more ambitious long-term targets implied by, for example, climate change. These possibilities raise a number of points about how environmental policy and institutions may need to develop in future.

Negotiated agreements in the short term

In the short term there is the potential to develop further negotiated agreements along the same lines as the Climate Change Levy negotiated agreements – a package of measures that combines the dynamic incentives of a tax, with the clear signal of long-term targets. The Climate Change Levy negotiated agreements themselves could be extended to the water industry and other non-IPPC regulated sectors. The ‘tax and rebate’ model of the Climate Change Levy negotiated agreements could be extended to the aggregates tax. This could help maximise the incentive to use aggregates efficiently, thereby simultaneously stimulating innovation and reducing environmental impact. It could also utilise the benefits of negotiated agreements in disseminating information across the industries that consume aggregates.

Negotiated agreements could also help to deliver other aspects of the climate change strategy, or other objectives as outlined in Government

strategies, including those on transport, waste, air quality, and urban and rural issues. For example, elements of the Government's white paper on waste, *Waste Strategy 2000*, could be implemented in part through the use of negotiated agreements. The strategy sets a target to reduce business waste sent to landfill to 85 per cent of 1998 levels by 2005. Waste reduction, or at least avoiding landfill, will be stimulated by the landfill tax escalator and other measures in the strategy. However, the strategy only "look[s] to business" to take voluntary action, including the setting of targets, reporting and producer responsibility. In place of this weak requirement, more formal, binding commitments and action could be agreed through negotiation. Agreements could also yield information that would 'lubricate' the existing package of measures in the waste strategy, and would shift responsibility for meeting targets to industry. Agreements in this area could also be linked to the work that the Department of Trade and Industry is doing to develop resource productivity metrics and targets. Here, a package of measures, including negotiated agreements, may be appropriate.[36] This would be an excellent example of how agreements can help develop understanding and targets in new policy areas.

Negotiated agreements could also be developed to implement other aspects of the waste strategy. They could be used, for example, to assist with the phase-out of toxic waste streams; to put voluntary producer responsibility and product policy initiatives into a more formal, binding framework; and to enhance markets for recycling by requiring minimum percentage recycled content in products.

Negotiated agreements and transformation strategies

The above suggestions for future negotiated agreements are based on a traditional model in which government develops policy and business and others react. In the Netherlands, the government acknowledges that to meet the environmental challenges it faces, it must shift responsibility away from government and towards various 'Target Groups'. These include industry, agriculture, transport and consumers. The Dutch approach also makes explicit the link between long-term sustainability targets and current policy debates and the action that flows from these.

The seeds of this approach are apparent in the UK in the Government's desire to see industry develop sectoral sustainability strategies. If these are to succeed they will need to contain elements of the Dutch approach, especially an acceptance of the need for broader-based processes of transparent and participatory goal and target setting. The strategies will need to go beyond improving environmental efficiency to address how sectors can become sustainable in the long term. In particular, the sectors will need to accept responsibility for achieving long-term targets. Negotiated agreements will have a role to play in both developing these strategies and explicitly laying out the commitments companies intend to take over the short, medium and long term. Agreements containing commitments, incentives and enforcement mechanisms would change the strategies from purely aspirational statements to action plans. Their credibility would increase as a result.

If sectoral sustainability strategies are to be developed along these lines, consideration will need to be given to the institutional arrangements required to deliver them. These arrangements will need to provide a framework for debate on what national level targets need to be set, what those targets are and a mechanism for determining each sector's contribution to the overall targets. At the sector level, assistance is likely to be required from government, environment agencies, NGOs, academia and others to develop strategies of this type.

conclusions

The limited evidence on negotiated agreements suggests that they are not yet ideal tools of environmental policy. However, most of the existing evaluations focus on early examples that, for the most part, had weak targets. Sceptics may consider that weak targets are an inevitable result of the process of a negotiated approach, but this is not necessarily the case. A carefully designed agreement could have a considerable impact on environmental objectives.

There is a growing awareness from governments and business that much more radical action needs to be taken to protect the environment. For example, ten years ago many governments would have been unwilling to acknowledge the scale of greenhouse gas reductions required to mitigate climate change. Now it is accepted, at least in the UK, that sixty per cent or greater reductions in carbon emissions will be required by 2050.[37] This suggests there is potentially a brighter future for negotiated agreements, in which the flexibility of a partnership approach can be combined with more ambitious targets.

Negotiated agreements are the result of a desire to develop environmental policy tools that can transcend and supplement the limits of command-and-control. Regulatory approaches have focused on addressing and mitigating the effects of local pollution, and have resulted in huge improvements in local environmental quality. One of the key advantages of negotiated agreements is that they can address environmental problems at the national or international level. They can deal with a myriad of small sources of pollution that in themselves are not a problem, but whose aggregated impact can be significant. Their arrival on the policy scene implies a strong need for the close involvement of regulatory agencies in national policy and target-setting negotiations.

In addition to the potential to deliver environmental objectives, one of their key benefits is their ability to communicate information. This includes best practice within a sector, as well as mutual understanding between government and business.

The diminishing returns from regulatory interventions mean that new policy approaches are needed. Negotiated agreements have a role to play, alongside other tools such as trading schemes and environmental taxes. Packages of all these complementary measures will be vital in solving environmental problems.

Underlying much of the discussion of the ability of negotiated agreements to deliver radical change in the environmental performance of the UK are more fundamental questions about the environmental policy system. In the end, negotiated agreements, or any other policy tool, will only deliver significant environmental benefits in the context of clear and ambitious government objectives for environmental policy as a whole.

notes and references

1 European Commission, *Towards Sustainability, A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development*, COM (92) 23 Final, 27 March 1992.

2 This desire is expressed in the UK Sustainable Development Strategy, *A Better Quality of Life*, in the literature from the DETR's Market Transformation Programme and in statements from the Treasury and Cabinet Office.

3 House of Commons Environmental Audit Committee, *4th Report: The Pre-Budget Report 1999: Pesticides, Aggregates and the Climate Change Levy, HC 76, Session* 1999-2000.

4 The focus of this report is on agreements between government and business. There are also examples of agreements between business and NGOs, trade unions or community groups. See for example p47, OECD, *Voluntary Approaches for Environmental Policy: An Assessment*, 1999, OECD, Paris.

5 For a description of the evolution of increasingly more binding Dutch agreements see p9 of Pascal Lefèvre, *Voluntary Agreement In EU Environmental Policy – Critical Review and Perspectives*, CAVA Working Paper no 2000/2/7, August 2000, or pp34-35 of Öko Institute, *New Instruments for Sustainability – The New Contribution of Voluntary Agreements to Environmental Policy*, 1998, Öko Institute, Darmstadt, Germany.

6 This trend is a theme which runs throughout the Environment Agency's *An Environmental Vision: The Environment Agency's Contribution to Sustainable Development*, January 2001.

7 For a fuller discussion of this see *A Superficial Attraction: the Voluntary Approach and Sustainable Development*, Friends of the Earth, December 1995.

8 Examples of these include the Chemical Industries Association's energy efficiency agreement made prior to the Climate Change Levy, the newspapers voluntary recycling agreements, and agricultural codes of practice promoted by the government.

9 Advisory Committee on Business and the Environment (ACBE), *Climate Change: a strategic issue for business*, 1998.

10 For more information, see *The Danish Agreements on Energy Efficiency*, May 1999, available from Energistyrelsen, Amaliegade 44, 1256 Copenhagen, Denmark.

11 For more information, see *Silent Revolution*, October 1998, a report on the Dutch approach to industrial agreements jointly published by the Dutch government and industry and available from Ministry of Housing, Spatial Planning and Environment (VROM), Distribution Centre, PO Box 351, 2700 AJ Zoetermeer, The Netherlands; Signe Krarup, Stephen Ramesohl, *Voluntary Agreements in Energy Policy – Implementation and Efficiency*, January 2000, Final Report from the project Voluntary Agreements – Implementation and Efficiency (VAIE), AKF Institute of Local Government Studies Denmark; and Michael Carley and Ian Christie, *Managing Sustainable Development*, 2nd Edition, Earthscan, 2000, London.

12 OECD, *Voluntary Approaches for Environmental Policy: An Assessment*, 1999, Paris.

13 See note 12.

14 Öko Institute, *New Instruments for Sustainability – The New Contribution of Voluntary Agreements to Environmental Policy*, 1998, Darmstadt, Germany.

15 European Environment Agency, *Environmental Agreements: Environmental Effectiveness*, Environmental Issues Series No 3 vol. 1, 1997, Copenhagen.

16 Signe Krarup, Stephen Ramesohl, *Voluntary Agreements in Energy Policy – Implementation and Efficiency*, January 2000, Final Report from the project Voluntary Agreements – Implementation and Efficiency (VAIE), AKF Institute of Local Government Studies Denmark.

17 The Guidelines for Covenants were issued by the Dutch Prime Minister as a regulation in itself. (Regulation number 95M009543, 18 December 1995).

18 Communication from the Commission to the Council and the European Parliament on Environmental Agreements, COM (96) 561 final 27.11.1996.

19 See Advisory Committee on Business and the Environment, *Seventh Progress Report to and Response from the President of the Board of Trade and Secretary of State for the Environment*, DOE/DTI, 1997.

20 See note 3.

21 For example, with regard to pesticides, the DETR commissioned research that estimated cost-effective savings from reduced pesticides use by farmers to be about £274million. Also in regard to aggregates the DETR-commissioned report *The Environmental Costs and Benefits of the Supply of Aggregates* was published in April 1998. The Environmental Audit Committee, 4th Report (see note 3) contains further details.

22 P146, Öko Institute, *New Instruments for Sustainability*, see note 14.

23 Third parties might include environmental NGOs, consumer interest bodies, trade unions, parliament, the Office of Fair Trading and the European Commission.

24 This is a summary of a more detailed discussion of the legal issues raised by negotiated agreements in: Ichiro Sumikara, *Environmental Voluntary Agreements and the Rule of Law in England and Japan: A Common Law Perspective and a Civil Law Perspective*, CAVA Working Paper no 2000/2/15, February 2000.

25 Targets are set through the democratic process in, for example, Denmark where parliament formulates carbon dioxide targets, see p3 of *The Danish Agreements on Energy Efficiency* (see note 10), or the Netherlands where targets are developed in the National Environmental Policy Plan with involvement from all sectors, see p11 of *Silent Revolution* (see note 11).

26 From the *Communication from the European Commission to the Council and the European Parliament on Environmental Agreements of 27 November 1996*, COM (96) 561, 27.11.1996, discussed in Pascal Lefèvre, *Voluntary Agreement In EU Environmental Policy – Critical Review and Perspectives*, CAVA Working Paper no 2000/2/7, August 2000.

27 See paragraph 71, Environmental Audit Committee, *4th Report* (see note 3).

28 Table C.3, *Economic instruments and the business use of energy, A report by Lord Marshall*, 1998. Available from the Public Enquiry Unit HM Treasury.

29 See Chapter 18 of Robert B Gibson, *Voluntary Initiatives: the new politics of corporate greening*, Broadview Press, Ontario, 1999 (available in the UK via Turpin Distribution Services Ltd, Letchworth).

30 *Richer and Greener*. Speech given by the Prime Minister, the Rt Hon Tony Blair MP to CBI/Green Alliance conference on the Environment, 24 October 2000. Copies are available from the Green Alliance website. The focus of this paper has been on negotiated agreements between government and business but there are instances of agreements between business and NGOs. An example of this sort of agreement is the agreement between Rainforest Action Network (RAN) and Mitsubushi in the US. The agreement required Misubishi to set up a forest products procurement systems, a forest community support programme and to implement an ecological auditing system in return for RAN ceasing boycotts on Mitsubishi products and publicising the agreement with its stakeholders. For further details see p47, *Voluntary Approaches for Environmental Policy?* (see note 12).

31 For more examples of this see Charles Leadbeater, *Mind Over Matter: Greening the new economy*, Green Alliance, September 2000.

32 *Environmental Agreements: Environmental Effectiveness* (see note 15).

33 Royal Commission on Environmental Pollution, Twenty-second Report, *Energy – The Changing Climate*, Cm 4794, HMSO.

34 See *Voluntary Agreements in Energy Policy* (see note 16).

35 See *New Instruments for Sustainability* (see note 14).

36 Green Alliance and the Department of Trade and Industry held a joint conference on 14 February 2001 to address the issues around the development of measures, goals and policies to improve resource productivity. The issues raised by the conference and related issues will be developed in Green Alliance's *Bright Green Economy* work programme that runs through 2001.

37 The UK Government acknowledges the Royal Commission's 60 per cent target for carbon reduction, see, for example, Tony Blair's speech (see note 30).