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Holding the travel industry to account – the role of the law.

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Ecotourism represented an aspiration to green tourism but it focussed attention on a fragment of the industry and the claims made for it were rarely either demonstrable or enforceable. Ecolabels do not enable a purchaser to hold a supplier to account. The growth of Responsible Tourism has encouraged operators and hoteliers to be explicit in their claims; claims for which they can be held accountable by purchasers, whether consumers or companies. Through advertising and trading standards legislation accessible redress is available. However, these processes bear disproportionately on suppliers in the developing world required to meet consumer legislation designed for the developed world.

Key words: ecotourism, ecolabels, responsible tourism, responsibility, accountability, liability, advertising standards, trading standards

This paper has been written to prompt discussion about

- 1. how the law can be used to ensure that green claims made by destinations, operators and accommodation providers are more than green washing and*
- 2. the implications for developing country suppliers of services who find themselves subject to EU consumer legislation but are unable to defend themselves, they nonetheless have to pay the compensation offered by the European principal.*

The greening of tourism is an oxymoron in the traditional sense: the conjunction of contradictory terms gives point to the question. As with other forms of human activity tourism is neither inherently green or not. The issue is how we engage in the activity and how it is managed. Presently it is largely an issue for us as consumers. The high profile of ecotourism has been generated by concerned individuals who have perceived and articulated it as a superior form of travel; and by companies who have seen the commercial opportunity to sell a premium priced product. The market for ecotourism has been generated by consumers, encouraged by conservationists, and facilitated by companies who have seen a market niche and occupied it. Ecotourism associations and labels have emerged as a mechanism for differentiating between ecotourism and other products, a differentiation essential to the maintenance of the niche and the sales and value proposition which makes an ecotourism business viable.

Whilst any travel aspiration, like ecotourism, which encourages individuals to travel in ways which have a lower impact on the environment, and which in some cases also includes a re-investment in conservation, is obviously to be encouraged. However, we do need to ask about the delivery and the net impact. The question is empirical. It is a question about the net impact of the whole activity, in the case of an ecotourism experience this necessarily includes any flights taken to reach the destination or to travel around it, the consequent Green House Gas (GHG) emissions and the impact which they have on our, and everyone else's, environment. The pollution caused by GHG's from flying and other forms of travel is a "tragedy of the commons"¹ issue, the impact of our polluting activity impacts on the global commons – the marginal utility we gain from flying is greater than the cost we assume that we will pay in terms of changes to our environment. Whilst this may not be empirically correct at the global level, at the individual level it is generally true. It is reasonable to assume for the majority of those who fly that the cost will be borne by others.

Voluntary schemes have the obvious advantages that those who take responsibility for mitigating or reducing their negative impacts feel good about their sacrifice or contribution by buying an ecotourism holiday, taking the train or purchasing a carbon offset. However, the disadvantages of the low level of uptake, free loading and the questionable contribution of some of the instruments are significant. Carbon offset programmes have been compared to the sale of indulgences or pardons in Medieval Europe eliminating the sense of guilt which might cause a reduction in flying. Offsets contribute to initiatives which may reduce carbon emissions elsewhere, and often in the future, whereas as the polluting impact to my flight is now. Where the offset is paid by the consumer their purchase places no pressure on the airline to fly more efficiently and to reduce GHG pollution per air mile².

Given the scale of the issues confronting both the global commons, and more local commons in destinations, it is difficult to believe that reliance on voluntary measures alone will be sufficient to green tourism. Certainly there is no evidence for it. Individuals can, by the choices they make, reduce their own impacts, but they cannot isolate themselves from the impacts and consequences of other people's irresponsible behaviour – particularly when many forms of environmentally damaging behaviour are not commonly identified as irresponsible. Ecotourists often fly to visit the natural area and will generally share their experience of the destination, their interaction with that environment, with other holidaymakers who may or may not ascribe to the principles of ecotourism let alone apply them.

¹ Hardin, G (1968) "The Tragedy of the Commons", Science, Vol. 162, No. 3859 (December 13, 1968), pp. 1243-1248

² See www.flysmart.org

One of the early principles formulated to address these generic issues was the polluter pays principle which is now well known. It was recommended by the OECD Council on Guiding Principles concerning International Economic Aspects of Environmental Policies and adopted by the OECD on 26th May 1972.

“The principle to be used for allocating costs of pollution prevention and control measures to encourage rational use of scarce environmental resources and to avoid distortions in international trade and investment is the so-called "Polluter-Pays Principle". This principle means that the polluter should bear the expenses of carrying out the above mentioned measures decided by public authorities to ensure that the environment is in an acceptable state. In other -words, the cost of these measures should be reflected in the cost of goods and services which cause pollution in production and/or consumption. Such measures should not be accompanied by subsidies that would create significant distortions in international trade and investment.”³

Regulatory measures are presently unpopular and the current fashion has been to use consumer choice and market forces to green tourism. Ecotourism and green labelling and the responsible tourism approach all focus on individual choice – providing information and encouraging individuals to take responsibility for reducing the negative environmental impacts of their travel and holiday activities. Whilst these approaches have had some success it is important to recognise that the primacy of these approaches has resulted from the neo-liberal consensus. The rise in airline fuel costs as a result of changes in market prices has resulted in airlines reducing surplus capacity; mothballing the least fuel efficient aircraft and reducing the amount of fuel used per passenger mile by a range of technical changes design to increase the efficiency of aircraft operation. This demonstrates the kind of changes which would result from pressure on fuel costs, perhaps through an aviation fuel tax.

The other issue is hypothecation. Where government has intervened, for example the introduction of Air Passenger Duty on UK flight departures, the revenue generated has contributed to general taxation rather than been used to mitigate negative environmental impacts from GHGs and certainly not in those more vulnerable parts of the world being impacted most seriously by climate change; emissions capping may be too generous as nation states seek to ensure that “their” airlines are not disadvantaged.

Most of the environmental impacts of tourism occur in the transportation of tourists to the destination⁴, and for international tourists international regulation is required. The greening of tourism in destinations requires active management by the responsible authorities: national

³ Guiding Principle 4.

⁴ “According to UNWTO-UNEP-WMO (2008), emissions from tourism, including transports, accommodation and activities (excluding the energy used for constructions and facilities for example) account for about 5% of global CO₂ emissions. However, other greenhouse gases also make significant contributions to global warming. In the tourism sector, this is particularly relevant for emissions from aviation. In 2005, tourism’s contribution to global warming was estimated to contribute between 5% and 14% to the overall warming caused by human emissions of greenhouse gasses

Of the 5% of the global total of CO₂ emissions contributed by tourism, transport generates around 75%, and in terms of the radiative forcing specific to transport, the share is significantly larger ranging from 82% to 90%, with air transport alone accounting for 54% to 75% of the total (UNWTO-UNEP-WMO 2008). There is tremendous variation in emissions across tourism sectors and within individual trips. Trips by coach and rail account for 34% of all trips, but for only 13% of all CO₂ emissions (excluding emissions from accommodation/activities). Conversely, long haul travel accounts for only 2.7% of all tourist trips, but contributes 17% to global tourist emissions. As for other trips, emissions can be close to zero (for instance a holiday by bicycle and tent) or amount to more than 10 t of CO₂ (South Pole crossing).” Simpson, M.C., Gössling, S., Scott, D., Hall, C.M. and Gladin, E. (2008) Climate Change Adaptation and Mitigation in the Tourism Sector: Frameworks, Tools and Practices. UNEP, University of Oxford, UNWTO, WMO: Paris, France.

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and local government and natural and cultural heritage site managers. Whilst many countries have good policy and regulatory frameworks they often lack adequate enforcement. For the last thirty years the main strategy has been through consumer choice and raising expectations of companies backed by consumer demand.

One of the most successful labels used to encourage the greening of tourism was ecotourism. However, the ecotourism label has been undermined by green washing. Work undertaken for the World Tourism Organization on the market for ecotourism in the UK in 2001 in preparation for the International Year of Ecotourism in 2002 found that the word ecotourism was only used in 3.5% of the nature based tourism brochures and most of the companies using the concept carried less than 500 passengers per year.⁵ A similar study carried out on the German market reported that amongst travellers surveyed at the ITB in Berlin only 4% reported that wildlife watching and enjoyment of nature in an unspoiled landscape was their main reason for choice of destination.⁶ Research on the US market suggested that the general US tourist spent only 0.7% of their time in ecotourism activities suggesting that the true ecotourism market is very small.⁷ In the UK market the ecotourism label was so abused that it became worthless in marketing terms and it has been abandoned. Funders, conservationists and students are still excited by the concept and papers are still written about it, but it has very limited value in the market place.

Certification has been one strategy used to validate and give meaning to the ecotourism label and the green claims of businesses or destinations. In 2005 it was estimated that there were some 7,000 certified products, two thirds of which were in Europe and most of the certified products were, and are, accommodation of one form or another, – but still less than 0.5% of accommodations in Europe are certified.⁸ One of the attractions of certification schemes for businesses was that they required the adoption of improved management practices and processes which brought increased efficiency and cost savings to larger businesses; although the schemes were often seen as bureaucratic and expensive by smaller enterprises. Consumer awareness is low and there is little or no evidence that certification schemes have secured greater market share for small businesses. The Sustainable Tourism Criteria Initiative backed by UNEP, UNWTO and IUCN and a limited number of industry organisations predominantly from the Americas is working to establish a set of criteria which can be used to validate certification schemes.⁹

There are three weaknesses of certification – they are opaque, they reduce competition and they disable the consumer.

One of the major problems about certification is that such schemes are opaque, the consumer does not know what is special about the hotel or resort – they know only that a certificate has been awarded – it carries no meaning, generates no stories, attracts little PR and few referrals.¹⁰

Blue Flag is one of the more successful certification schemes it carries a clear consumer benefit and promise – clean water to swim in. The consumer promise implicit in other

⁵ World Tourism Organisation (2001) The British Ecotourism Market , World Tourism Organisation 2001, Madrid

⁶ World Tourism Organisation (2001) The German Ecotourism Market, World Tourism Organisation 2001, Madrid

⁷ World Tourism Organisation (2001) The German Ecotourism Market, World Tourism Organisation 2001, Madrid p. 15

⁸ Dodds R and Joppe M (2005) CSR in the Tourism Industry? The Status of and Potential for Certification, Codes of Conduct and Guidelines Study prepared for the CSR Practice Foreign Investment Advisory Service Investment Climate Department, World Bank

⁹ See www.sustainabletourismcriteria.org

¹⁰ Goodwin H (2005) Responsible Tourism and the Market ICRT Leeds

schemes is much less clear. One of the problems inherent in the approach is reductionism – the certification schemes lack a clear and meaningful consumer proposition. What is the experience that the consumer is purchasing? The labels contribute to a regression to the mean, the playing field is levelled, differentiated and advantage is lost. The labels attempt to score and grade enterprises on the triple bottom line of sustainability but the balance between the different issues at a particular property is not revealed by the certificate label. The consumer cannot tell from the label what is being delivered. The labels tend to be process orientated and rarely indicate to a traveller what enhanced experiences they can expect – nor does labelling generate the stories which contribute to viral marketing.

Certification disables the consumer because the validity of the claim is judged entirely by the owner of the label. Provided that the enterprise is not claiming to have a label to which they are not entitled or which has expired the consumer can take no action to secure redress. If an enterprise has a label for its green credentials there is nothing a consumer can do to claim redress from a hotel which may be substantially less than green in its activities and impacts than the consumer expected. For example if a hotel has a green label and offers not to wash towels placed back on the rail, and the towels are changed, the consumer has no redress if the only claim being made is that the hotel has a particular label. No specific commitment has been made and therefore breached. The hotel has not explicitly made a commitment at the time of booking and it cannot be held responsible for its action.

The alternative approach which has been stronger in Europe and in parts of the developing world is the trend towards Responsible Tourism. This trend has been market driven and is predicated on the recognition that, as the Association of Independent Tour Operators¹¹, recognised “wherever a Tour Operator does business or sends clients it has a potential to do both good and harm, and we are aware that all too often in the past the harm has outweighed the good.”¹² Krippendorf saw that the “emancipation of tourists” was possible, that tourists were becoming more demanding and that they were demanding “contact with other people and self-realisation through creative activities, knowledge and exploration”. He called for “rebellious tourists and rebellious locals” and anticipated a “development away from a manipulated tourist to an informed and experienced one, to an emancipated and independent tourist, a critical consumer not only at home but also when travelling.” Krippendorf understood that the ideas of responsible tourism must be as “infectious” as possible. Orders and prohibitions will not do the job – “because it is not a bad conscience that we need to make progress but positive experience, not the feeling of compulsion but that of responsibility.”¹³

The Responsible Tourism approach requires the enterprise or destination to make explicit claims and commitments in order to satisfy consumer interest and to generate word-of-mouth or viral marketing as a consequence of which the consumer is empowered. Responsible Tourism carries the promise of a heightened experience, of self realisation, and assumes that tourists will become more assertive as they seek to realise their aspirations, tell others about their positive and negative experiences and complain when those expectations are not realised. Because holidaymakers travel to the factory to consume the product they are better able to identify issues and to complain. The internet has magnified the potential for consumer action there are positive examples of this on sites like Trip Adviser and Active Hotels¹⁴; and negative complaints sites like Holidays Uncovered, Holiday Truths, and Irresponsible Tourism.¹⁵

¹¹ 155 independently owned UK tour operating companies.

¹² AITO Responsible Tourism Guidelines 2000 www.aito.co.uk

¹³ Krippendorf Jost (1984) *The Holiday Makers* First published in English 1987 Butterworth Heinemann

¹⁴ www.tripadvisor.com, www.activehotels.com and www.responsibletravel.com

¹⁵ www.holidays-uncovered.co.uk, www.holidaytruths.co.uk, www.holidaytravelwatch.net and www.irresponsibletourism.info

Krippendorff and others involved in the Responsible Tourism movement are optimistic about the ability of active consumers, with high and rising expectations of the products which they expect to be able to consume, to press for improvements in the performance of enterprises and destinations. Given rising expectations amongst consumers and the consequent response to market demand by enterprises and destinations, two consumer law approaches have traction: advertising and trading standards. Ecolabels do not enable a consumer to hold the supplier to account advertising and trading standards legislation does.

The UK Advertising Standards Authority (ASA) reports¹⁶ that in 2007 it received 561 complaints about the environmental claims made in 410 adverts; this compares with 117 complaints about 83 adverts in 2006. One of these was a complaint against Devon County Council which ran a national press advertising campaign

"THE PERFECT ANSWER TO GLOBAL WARMING? DEVON CHILLIN."

"Find peace in England's most popular holiday destination? Relax, we're also England's greenest county ... In fact over half of Devon's stunning countryside is protected. We're leading the country with initiatives that encourage sustainable tourism and yes, in our way, combat global warming. That's why we've championed sustainable tourism with more green businesses and more organic food producers than anywhere in the UK. It's also why we've put our best foot forward and created enough paths and cycle tracks to stretch from Devon to Florida. And we're planning a Devon Carbon Day ... when well be offsetting 2500 tonnes of CO₂. Less exciting perhaps, but equally important, we are one of the top three recycling counties ... you can rest assured its cool to holiday at home and visit England's greenest county".¹⁷

The ASA held that the claim "England's greenest county" was likely to mislead because Devon County Council had not been able to demonstrate that it "held substantiation to show they were ahead of all other county councils in terms of environmental issues." The ASA instructed the council to remove the claim "England's greenest county" from future marketing. The less precise claim that "Devon is leading the country with initiatives that ... combat global warming" was successfully defended¹⁸; the claim was less specific, therefore easier to substantiate.

Councillor Brian Greenslade, Leader of Devon County Council, respond to the ASA ruling by saying that "Provoking public debate and raising awareness of climate change was our top priority when we started the campaign" and pointing out that ASA accepted that "Devon is leading the country with initiatives that ... combat global warming," and also "half of Devon's stunning countryside is protected."¹⁹

The Non-Broadcast (CAP) Code and the Broadcast (BCAP) Codes both require that all advertisements should be legal, decent, honest and truthful in line with the principles of fair competition. Specifically television advertisements must not make unsubstantiated claims about environmental impact. The UK government's Green Claims Code most recently revised in 2000²⁰ requires that green claims should be truthful, accurate and able to be substantiated and it needs to be clear what environmental issue or aspect of the product the claim refers to. General clause 3.1 of the CAP Code requires that "marketers must hold documentary evidence to prove all claims, whether direct or implied, that are capable of objective

¹⁶ www.asa.org.uk

¹⁷ Sourced from www.asa.org.uk/asa/adjudications/Public/TF_ADJ_43132.htm 30 August 2008

¹⁸ *ibid.*

¹⁹ www.devon.gov.uk/press-releases September 5, 2007

²⁰ Available at www.defra.gov.uk/Environment/consumerprod/gcc/pdf/gcc.pdf

substantiation” before publication and 7.1 “no marketing communication should mislead, or be likely to mislead, by inaccuracy, ambiguity, exaggeration, omission or otherwise”²¹

There are however weaknesses in the ASA approach. The ASA can only react to public complaints. It then asks the company concerned to justify its claims, if it is not satisfied that the claim made in the advertisement can be substantiated it asks the company not to make the same claim again. The advertising campaign may well have been concluded and if the media do not pick it up, there is little or no embarrassment. The extent to which complaints to the ASA will be used by consumers and possibly competitors to regulate the claims of enterprises and destinations remains to be seen but clearly the existence of the regulations and the codes imposes some restraints on the making of unsubstantiated claims. Of course where a claim is not “capable of objective substantiation” the advertiser is not required to hold and provide documentary evidence.

Trading Standards Departments are able to assist consumers where there is evidence that a retailer or tour operator has provided misleading information about a package and the retailer or operator would be liable to compensate the consumer for any loss which the consumer consequently suffers; compensation could include consequential loss for disappointment, as well as direct financial loss, and under Clause 15 this extends to overseas suppliers.²² The Package Travel Regulations apply only to packages²³, but the consumer also has rights under The Supply of Goods and Services Act 1982 and the Trades Descriptions Act 1968 which could be used by independent travellers choosing and booking hotels and transport independently.

Tour operators and hoteliers are generally familiar with the trading standards legislation which pertains to the contracts which they enter into and this makes them cautious about what they print in brochures, on the web and in advertisements. Clearly where a traveller books a holiday or travel product in another jurisdiction they are unlikely to take a legal action there to seek redress over misleading claims. However, the Package Travel Regulations which followed a European Union Directive²⁴ had the effect of extending to EU consumers the same rights they have in their home country to services supplied in to suppliers in developing countries.²⁵

²¹ There are two Committees of Advertising Practise (Broadcast and Non-broadcast) details can be found at www.cap.org.uk

²² The Package Travel, Package Holidays and Package Tours Regulations 1992 Clause 4
Descriptive matter relating to packages must not be misleading

4.—(1) No organiser or retailer shall supply to a consumer any descriptive matter concerning a package, the price of a package or any other conditions applying to the contract which contains any misleading information.

(2) If an organiser or retailer is in breach of paragraph (1) he shall be liable to compensate the consumer for any loss which the consumer suffers in consequence.

²³ For the purposes of the Package Travel Regulations "package" means the pre-arranged combination of at least two of the following components when sold or offered for sale at an inclusive price and when the service covers a period of more than twenty-four hours or includes overnight accommodation: (a) transport; (b) accommodation; (c) other tourist services not ancillary to transport or accommodation and accounting for a significant proportion of the package,

²⁴ European Directive (90/314/EEC) The Package Travel, Package Holidays and Package Tours Regulations 1992 Statutory Instrument 1992 No. 3288 available at www.opsi.gov.uk/si/si1992/Uksi_19923288_en_1.htm

²⁵ The ECTAA published a Joint submission on the Working Document of the European Commission concerning the Directive 90/314/EEC on Package Travel which in “the light of the changes to the market and in order to ensure fair competition between all market players and that all consumers have the same level of protection” called for “the adoption of a horizontal legal instrument, which would develop consistent definitions and impose a full set of fundamental obligations to all providers/suppliers of services/goods, in any business sector, who sell or offer for sale their services or

The consequence of this is that EU based operators recover the costs of claims against them as the principal from their overseas suppliers. Tour operators tend to settle rather than go to court particularly where they can recover the costs from their suppliers. It is not unusual for suppliers to UK based tour operators to be required to achieve minimum customer satisfaction ratings, failure to achieve the minimum average level specified in the contract or if there are particular failures in service delivery, the originating market operator will exercise their right to claim from the supplier the discretionary compensation paid to customers; and the costs involved in arranging and providing alternative service.

These monies are often deducted from monies owed to the supplier by the originating market operator and the contractual right to terminate the contract, often without notice, if the monies are not paid, or if the level of service remains below the standard defined in the contract. Often complaints originate only after the client returns home and this makes it more difficult for the local supplier to respond to the complaint. Recoveries are dealt with from the originating market offices and resort managers and representatives have to maintain good working relationships with local suppliers and live there; there is anecdotal evidence to suggest that representatives are therefore prone to encourage clients to “write when you get home”, making it more difficult for the overseas supplier to defend themselves. .

The problem is that the overseas supplier is thus liable to pay for the compensation which the UK tour operator considers reasonable without being a party to the negotiations between complainant and the principal, and may not even be consulted. In some companies tour operating staff are expected to reach recovery targets of 60% in order to achieve bonuses, although the evidence is anecdotal – no one wants to go on the record about this aspect of tour operations. In most destinations the large overseas buyers are significantly more powerful than the suppliers, they have contractual arrangements which permit payment in arrears and non-negotiated claims compensation amounts are simply deducted from monies owed; and hoteliers and ground handlers are scared about losing contracts when they are dependent on a few overseas operators.

Several of the tour operator employees with whom these issues have been discussed have speculated about whether consumers would always pursue their claims if they realised that it was not the European tour operator but the developing country enterprise which was effectively paying the compensation.

goods in their own name to consumers, such as for instance general information obligations.” The submission can be downloaded at www.ectaa.org/Portals/0/IL07-304-4400.pdf