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elniNEWS**International Environmental Impact
Assessment****European and Comparative; Law and Practical
Experience**

The new *elni* book assembles the papers of the elni Annual Conference in Milan in October 1996. It aims to highlight the latest developments in the use of EIA from an international perspective. Reports from Western and Eastern Europe, North America, Australia, and Africa give an impression of the regional differences in the application and design of EIA.

The book is divided into five sections: EIA - Ten Years of Experience in the European Community, EIA Procedures before national courts, Procedural Aspects of EIA, EIA in International Policy, Economic and Social Aspects of EIA. Authors of the eighth *elni* volume are: J.E. Bonine, T. Bunge, A. Churie, A. Curatolo, M.-F. de Jong, J.F. DiMento, F.S. Gertler, P. Hamblin, G. Haq, U. Kjellerup, K. Koussoulis, C. Loots, A. Massarutto, I. Melaki, V. Mischenko, P. Stein.

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EIA Working Group

The *elni* Conference in Milan on environmental impact assessment showed that the EIA is used as a tool of environmental protection all over the world. The contribution from the speakers and the following discussions revealed that in spite of similarities a lot of conceptual differences do exist. The international exchange of experiences can give new ideas for national measures. Therefore an EIA working group was established at the Öko-Institut. Up to now the group consists of 12 members from 8 countries.

If you are interested in receiving more information, contact our email address: gebers@oeko.de.

elni Conference - Call for Papers

The next *elni* conference was originally scheduled for October 1997. This date cannot be kept as our fundraising activities were not as successful as expected. However, we definitely plan to have the meeting in October 1998. The proposed topic is „De-regulation and privatization in environmental protection“. The *elni* Coordinating Bureau encourages everyone to submit papers on the topic or participate in the conceptual preparation of the conference.

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ARTICLES

Environmental Protection in the New South African Bill of Rights

by Cheryl Loots

1 Introduction

In April 1994 South Africa became a true democracy when, for the first time, people of all races voted for the government of their choice and a constitution containing a Bill of Rights¹ came into effect. That first constitution was interim. It established a Constitutional Assembly and mandated it to draft a new Constitution in accordance with principles laid down in the interim Constitution.² The new Constitution was enacted by the South African Parliament in December 1996 and came into operation on 4 February 1997³.

The Bill of Rights⁴ in the new Constitution includes environmental rights⁵, which are complemented by a provision which gives any person the right to claim relief from the courts where an infringement of the Bill of Rights is alleged, irrespective of whether that person is adversely affected by the infringement.⁶ There is also a right of access to information required for the exercise or protection of any of the rights guaranteed by the Constitution⁷ and a right to just administrative action.⁸ The combined effect of these clauses promises to make environmental law effective - an adjective which previously would have been inappropriate with regard to South African environmental law.⁹

2 The Environmental Rights

Section 24 of Constitution provides that everyone has the right

- (a) to an environment that is not harmful to their health or well being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure sustainable development and use of natural resources while promoting justifiable economic and social development.

The interim Constitution, which was in operation from 27 April 1994 until 4 February 1997, contained only the right to an environment not detrimental to health and well-being.¹⁰ While environmentalists welcomed the inclusion of an environmental right, many believed that the clause in the interim Constitution was weak because it was framed in the negative, and that it reflected a reluctance on the part of government to take responsibility for environmental protection. The clause in the new Constitution constitutes proof that the ANC-led Government of National Unity has no qualms about accepting such responsibility.

Jan Glazewski, a leading South African environmental law academic, said that the clause in the interim Constitution was open to criticism because it was anthropocentric, being focused on people at the expense of environmental integrity. He remarked that the narrow construction of the clause did not encompass the three generally accepted components of environmental law: resource utilization and conservation, pollution control and waste management, and planning and development law. He also observed that the clause failed to refer to generally accepted international environmental principles such as sustainable development, protection of biodiversity and the rights of future generations.¹¹

The drafters of the new Constitution responded by incorporating all these components and principles into a clause which, it is submitted, gives every person the right to compel state authorities to make appropriate legislation for the protection of the environment and ensure compliance therewith.

Ordinarily one would be wary of suggesting that the courts might make an order compelling the government to make law because in most jurisdictions the doctrine of separation of powers prevents a judicial authority from telling a legislative authority what law it should make.¹²

Section 24(b) guarantees the right 'to have the environment protected ... through reasonable legislative and other measures'. It is difficult to read this as anything other than express constitutional authority for the courts to order the legislature to make law to protect the environment if this is necessary to achieve the objects set out in the clause.

There are clauses in other national constitutions which impose a duty upon the state to protect the environment, but they tend to be framed as directives of state policy rather than as guarantees of individual rights. Constitutional directives of state policy are generally regarded as not being enforceable by the courts.¹³ For instance, the Indian Constitution, which contains a clause, under the heading 'Directive Principles of State Policy', imposing a duty upon the state to protect the environment and safeguard the forests and wildlife of the country,¹⁴ expressly provides that its directive principles are not enforceable by any court.¹⁵

The Namibian Constitution, which is particularly relevant because it is the constitution of a neighbouring state, enacted only a few years before the new South African Constitution, provides another example. It too differentiates between fundamental rights and directives of state policy and imposes duties upon the state with regard to environmental protection as directives of state policy.¹⁶ It is reasonable to assume that the drafters of the new South African Constitution considered the formulation in the Namibian Constitution and rejected it in favour of an enforceable right to require the state to enact and implement laws necessary to secure the objectives set out in s 24(b)(i)-(iii).

There is no doubt that the South African courts have the power to require state administrative authorities to implement environmental legislation. They have the same inherent power that English courts have to review the actions of and decisions of administrative agencies of the state, and to issue mandatory orders compelling state authorities to fulfil duties imposed by statute.

In a recent case¹⁷, at the request of a conservation organization, a South African court granted an order compelling the national Minister of Environmental Affairs and provincial authorities to comply with their statutory obligations to protect the beautiful, unspoilt coastline of the Transkei, a region on the east coast of South Africa. This case was brought without the benefit of the provisions of s 24(b) of the new Constitution, since it was decided under the interim Constitution, which contained no similar provision. It seems clear that under the new Constitution the position of an applicant for this kind of relief would be even stronger than it was at common law.

It is submitted that the drafters of s 24(b) of the new Constitution intended to create a right, enforceable against the state, to require legislative authorities to make laws necessary to achieve the environmental objectives of the clause and to require executive authorities to implement such laws. The use of the adjective 'reasonable' with regard to the legislative and other duties of the state in respect of environ-

mental protection tends to support this interpretation. The drafters would clearly have had in mind that the court would have to weigh the necessity for law or administrative action against the capacity of the relevant authority to do what was being demanded.

3 Standing to Claim Environmental Protection

Before 1994 South African courts, like courts in most other countries, required a plaintiff to have standing in the sense of having a personal interest in the relief claimed. The plaintiff had to claim relief in his, her or its own interest, not in the interest of other persons or in the public interest.¹⁸

In a number of cases courts refused even to allow an organization to claim relief in the interests of its members. Thus where an association representing farmers tried to interdict the spraying of hormonal herbicides, which were damaging the crops of its members, the court held that the organization had no standing and that the farmers should have approached the court themselves.¹⁹

The interim Constitution introduced a new approach to standing in that its Bill of Rights contained a clause which enabled any person, in the event of the infringement or threatened infringement of a guaranteed right, to claim appropriate relief from a court in his or her own interest, in the interest of another person unable to approach the court, in the interest of a group or class of persons or in the public interest.²⁰ Associations were expressly authorised to act in the interests of their members.²¹

These provisions have been re-enacted in s 38 of the new Constitution which provides that the following persons may approach a court alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.

This liberalisation of the standing principle is already having an impact on environmental law in South Africa. Whereas previously there had been virtually no environmental litigation, in 1996 three cases were reported in which the open standing clause of the interim constitution assisted parties claiming environment-related relief. Trustees of a

land-owning trust succeeded in interdicting provincial authorities from permitting the establishment of a steel mill in an ecologically sensitive area pending an investigation into the environmental impact of the development;²² the national Minister of Health and Welfare claimed an interdict in the interests of a community whose rights to a pollution-free environment were being infringed²³ and a conservation organization obtained an order compelling national and provincial environmental authorities to protect the environment in a coastal area.²⁴ This year, in a case which is not yet reported, the Eastern Cape division of the High Court, at the request of the South African Endangered Wildlife Trust, interdicted a development which would have destroyed the natural habitat of the endangered Brenton Blue Butterfly (*Orachrysops Niobe*), a red data book species, the entire habitat of which encompasses a two-hectare piece of land.

Class actions are an important procedure for making environmental law effective because large numbers of people are often adversely affected by pollution or environmental degradation. Class actions were completely unknown in South African law before the interim Constitution came into operation. The representative action which was developed by the English Court of Chancery²⁵ was received into the law of the United States, Canada, Australia and New Zealand, but not into South African law.

The courts in South Africa have accordingly not developed procedures appropriate to class actions, nor are there at present any rules of court which apply specifically to class actions.²⁶ This has given rise to some difficulties because s 38(c) and its predecessor, s 7(4)(b)(iv) of the interim Constitution have introduced the concept of a class action but the courts are uncertain as to the procedures to be followed.²⁷

In the United States, where class action law is best developed, a class action can be brought only by a member of the class who is adversely affected in the same way as other members of the class. The wording of s 38(c) embraces the concept of the ideological plaintiff, making it clear that a person claiming relief in a class action need not be personally adversely affected, for it refers to 'anyone acting as a member of, or in the interest of, a group or class of persons.' This opens the way for any person - a natural person, juristic person or state official²⁸ to claim relief in the interest of persons who are adversely affected by the infringement of the environmental rights contained in s 24 of the new Constitution.

4 Access to Information

With the new democracy has come an openness and transparency which was not at all characteristic

of the old South African regime, whose benchmark was secrecy. The Environment Conservation Act 73 of 1989 did require administrative officials to give reasons for decisions made in terms of that Act, but did not oblige them to furnish the information upon which their decisions were made. Other environment-related statutes contained, and still do contain, secrecy clauses which prohibit the disclosure by administrative officials of information acquired during the course of considering permit applications or undertaking other regulatory activities, often making the disclosure of such information a criminal offence.²⁹

Section 32 of the new Constitution guarantees a right of access to information held by the state, entitling a person who requires information for the purpose of enforcing an environmental right to access to information which is necessary for the enforcement of that right. The right to such information has already been acknowledged by the court in a matter in which the applicants claimed an order compelling the Minister of Environment Affairs and Tourism to make available certain documentary information, in terms of the access to information clause of the Interim Constitution, for the purpose of enabling the applicants to object to a rezoning of land which they alleged was environmentally undesirable.³⁰

There is no doubt that the validity of the secrecy clauses which still exist in many environment-related statutes are subject to attack on the basis of s 32. If the state relies on a secrecy clause, it will have to justify the limitation of the right to access to information in terms of s 36(1) of the Constitution, which provides that:

The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including -

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

5 Conclusion

The provisions of the South African Constitution which create environmental rights, guarantee standing to enforce those rights and facilitate access to information herald a new era for environmental protection in that country. Where previously environmentalists were faced to numerous barriers to litiga-

tion, they are now encouraged by the Bill of Rights to take action in their own interest, in the interest of others and in the public interest. •

References

- ¹ The Constitution of the Republic of South Africa, Act 200 of 1993.
- ² Chapter 5, ss 68-74.
- ³ The Constitution of the Republic of South Africa, Act 108 of 1996.
- ⁴ Chapter 2, ss 7-39.
- ⁵ Section 24.
- ⁶ Section 38.
- ⁷ Section 32.
- ⁸ Section 33 read together with item 23 of Schedule 6.
- ⁹ See Cheryl Loots, Making Environmental Law Effective, 1994 (1) South African Journal of Environmental Law and Policy, 17.
- ¹⁰ Section 29.
- ¹¹ Jan Glazewski, The Environment and the New Interim Constitution, 1994 (1), South African Journal of Environmental Law and Policy, 1 at 6.
- ¹² In Re Hoogbruin (1985) 24 DLR (4th) 718 a Canadian court contemplated ordering a provincial legislature to enact legislation, but did not do so.
- ¹³ Jan Glazewski, The Environment, Human Rights and a New South African Constitution, 1991, South African Journal of Human Rights, 167 at 176-8, citing R S Pathak, Human Rights and the Development of Environmental Law in India, 1988, Commonwealth Law Bulletin 1171.
- ¹⁴ Article 48A.
- ¹⁵ Article 37.
- ¹⁶ The Namibian Constitution does not expressly provide that directive principles of state policy are not enforceable by the courts: Jan Glazewski, The Environment, Human Rights and a New South African Constitution, 1991, South African Journal of Human Rights 167, at 177-8.
- ¹⁷ *Wildlife Society of Southern Africa & others v Minister of Environmental Affairs & Tourism of the Republic of South Africa & others* 1996 (3) SA 1095 (TK).
- ¹⁸ See R F Fuggle and M A Rabie, Environmental Management in South Africa, (1992) 132-7.
- ¹⁹ *Natal Fresh Produce Growers' Association and others v Agroserve (Pty) Ltd and others*, 1990 (4) SA 749 (N) at 758G-759D. See also *AAIL (SA) and another v Muslim Judicial Council (Cape) and others*, 1983 (4) SA 855 (C); *South African Optometric Association v Frames Distributors (Pty) Ltd t/a Frames Unlimited* 1985 (3) SA 100 (O).
- ²⁰ Section 7(4).
- ²¹ Section 7(4)(b)(ii).
- ²² *Van Huyssteen & others NNO v Minister of Environmental Affairs and Tourism & others* 1996 (1) SA 283 (C) at 300H-302H.
- ²³ *Minister of Health and Welfare v Woodcarb (Pty) Ltd & another* 1996 (3) SA 155 (N) at 164F-H.
- ²⁴ *Wildlife Society of Southern Africa & others v Minister of Environmental Affairs & Tourism of the Republic of South Africa & others*, 1996 (3) SA 1095 (TK) at 1104H-1106J.
- ²⁵ See Yeazell, From Medieval Group Litigation to Modern Class Action.
- ²⁶ The South African Law Commission published a working paper on class actions in November 1995 (Working paper 57, Project 88) and is working on a final report, acceptance of which will probably result in legislation.
- ²⁷ See, for instance *Beukes v Krugersdorp Transitional Local Council & another*, 1996 (3) SA 467 (W).
- ²⁸ See *Minister of Health & Welfare v Woodcarb (Pty) Ltd & another*, 1996 (3) SA 155 (N) at 164E-G.
- ²⁹ See, for instance, s 69 of the Nuclear Energy Act, 131 of 1993, which severely restricts the access of the public to information in connection with nuclear installations and sites; s 17 of the Hazardous Substances Act, 15 of 1973, which limits disclosure of information concerning the analysis or examination of a sample in terms of the Act and the divulging information relating to the business or affairs of any person; and s 166A of the Water Act, 54 of 1956 and s 41 of the Atmospheric Pollution Pre-

vention Act, 45 of 1965, which prohibit the disclosure of any information relating to any manufacturing process.

- ³⁰ *Van Huyssteen & others NNO v Minister of Environmental Affairs and Tourism & others*, 1996 (1) SA 283 (C).

Aspects législatifs et réglementaires de l'environnement au Maroc

par Rahhal Maarouf

1 Introduction

L'objet de cet article est d'essayer d'apporter un éclairage à la problématique de la prise en compte de l'environnement par le droit et contribuer un tant soit peu à la connaissance et à la promotion du droit de l'environnement en tant que nouvelle discipline juridique visant la protection des ressources naturelles et l'amélioration de la qualité de la vie au profit des générations présentes et futures.

L'environnement a été pris en compte par le droit de manière spécifique à partir du moment où la prolifération des pollutions et nuisances a paru compromettre la croissance économique et la santé publique.

Il faut dire que la solution du problème de l'environnement ne peut être uniquement juridique. Elle est aussi et surtout fonction de facteurs politiques, économiques et techniques. Mais l'importance de ces facteurs ne doit pas éclipser le rôle du droit en tant qu'élément de régulation sociale dans un domaine directement rattaché à l'intérêt général et touchant intimement le cadre de vie de la société toute entière.

La prise en compte de l'environnement par le droit est devenue plus que jamais une nécessité impérieuse dans les stratégies juridiques de protection et de mise en valeur de l'environnement de nombreux pays. Déjà en 1972 lors de la conférence de Stockholm la communauté internationale avait jeté les premiers fondements de base des politiques juridiques environnementales nationales.

Plus récemment, cette même communauté, lors de la conférence du sommet de la terre réuni à Rio de Janeiro en juin 1992 - à laquelle le Maroc a participé de manière très active et y a été représenté à un niveau très élevé - a affirmé, de manière solennelle l'importance des outils et supports juridiques de toute politique de protection et de mise en valeur de l'environnement, étant entendu que toute action notamment juridique doit s'inscrire dans le cadre d'un certains nombre d'orientations générales dont notamment:

- L'Environnement est une composante essentielle du développement durable: il existe une corrélation étroite entre la préservation de l'environnement et le développement durable (sans compromettre les besoins des générations présentes et futures).

- L'Environnement implique une approche globale et intégrée tant sur le plan interne qu'international.
- L'Environnement constitue une responsabilité collective: l'environnement doit être érigé en tant que patrimoine national dont la préservation constitue une préoccupation d'intérêt général, sa protection incombe à l'Etat, aux collectivités locales, aux associations et aux simples particuliers.

2 Le cadre législatif et réglementaire de l'environnement

L'étude du droit de l'environnement au Maroc ne constitue pas un thème de recherche favori. Il n'est que de constater le peu de travaux qui lui ont été consacrés à ce jour pour s'en convaincre. Si l'on excepte les rares contributions de certains juristes marocains, le domaine semble avoir été quelque peu oublié.

Comment expliquer cette méconnaissance par le droit d'un domaine qui prend actuellement dans les pays développés des proportions extrêmement politiques (l'électorat écologiste constitue un poids potentiellement influent).

Est-ce parce que c'est un domaine relativement nouveau ? Est-ce parce que c'est un domaine qui constitue un luxe pour les pays en voie de développement comme le soutient un certain nombre d'auteurs ?

Les pays en voie de développement ne sont pas "gâtés" par la nature. Ils se trouvent pour la plupart d'entre eux dans des zones arides ou semi arides (Hémisphère Sud). De cette situation géographique découlent des conséquences fâcheuses pour l'environnement notamment la fragilité des écosystèmes et la rareté des ressources en eau. A cet handicap naturel viennent s'ajouter les constantes du surpeuplement et de la faiblesse des moyens financiers. De plus ces pays seront sans doute entraînés dans le même engrenage qui a conduit les pays développés à connaître l'état de l'environnement que l'on sait; développement industriel, concentration urbaine, surexploitation des ressources, pollutions de toutes sortes...

Compte tenu de ces considérations, on ne saurait soutenir le caractère fallacieux des problèmes de l'environnement dans les pays en voie de développement. Ceux-ci connaissent, à des degrés divers, des problèmes d'environnement qui risquent de se poser avec beaucoup plus d'acuité dans l'avenir si

l'on ne pense pas dès à présent à mener une politique cohérente de l'environnement basée sur une gestion rationnelle des ressources et sur une prévention des pollutions et des nuisances et consistant à éviter les erreurs commises en ce domaine par les pays développés.

Qu'en est-il de la situation du Maroc ? Le Maroc, à l'instar des pays en voie de développement, connaît un certain nombre de problèmes d'environnement d'ampleur variable. Ces problèmes sont soit d'origine naturelle, soit liés à l'activité de l'homme (pollutions et nuisances, dégradation des ressources naturelles notamment la déforestation, l'érosion, la désertification, la dégradation du patrimoine culturel et des sites ...).

Face à cette situation, quelle a été la réaction du législateur marocain? Cette réaction peut être qualifiée tout de suite d'abondante et de positive. En effet, il serait injuste de parler de vide juridique dans le domaine de l'environnement.

Les textes législatifs et réglementaires existant en la matière sont très nombreux, variés et embrassent un large éventail de secteurs: eau, faune, flore, sol et sous sol, hygiène et sécurité, monuments et sites. La liste n'est pas prête d'être close.

Le droit positif marocain de l'environnement, en dépit des mérites incontestables qu'il présente, souffre d'un certain nombre de faiblesses. Mais les actions menées par les pouvoirs publics dans les différents secteurs en vue de sa refonte et son actualisation peuvent être prometteuses.

3 Les mérites de la législation environnementale marocaine

Le cadre étroit de cet article ne permet pas d'examiner tout le système juridique de protection de l'environnement en vigueur, néanmoins, on essayera de dégager quelques constantes à travers l'examen de certaines techniques de protection appliquées à des domaines choisis arbitrairement: les établissements classés, l'eau et la forêt. Il s'agit des techniques de la domanialité publique, des actes administratifs unilatéraux et du contrôle et des sanctions.

3.1 La protection dans le cadre de la domanialité publique

S'agissant du domaine de l'eau, le législateur marocain, après des hésitations a consacré le principe de la domanialité publique de toutes les eaux. Il l'a fait par le dahir du 1^{er} Juillet 1914 modifié et complété par le dahir du 8 Novembre 1919.

En effet, toutes les eaux marocaines qu'elles soient superficielles ou souterraines sont des biens du domaine public sous la seule réserve des droits acquis sur elles avant 1914 ou 1919.

La loi n° 10-95 sur l'eau est venue renforcer ce principe de domanialité publique. La notion de domanialité publique des eaux telle qu'elle est consacrée au Maroc est alors une notion très large. Elle dépasse la conception du droit musulman selon laquelle seules les grandes masses d'eau sont hors du commerce et sont par conséquent la propriété de la communauté musulmane. Elle est également différente de ce qu'elle est en France par exemple où seuls les cours d'eau navigables ou flottables font partie du domaine public. Elle est faite dans l'intérêt de l'agriculture et non de la navigation. Enfin elle est sous-tendue par des considérations socio-politiques: la propriété publique de toutes les eaux permet à l'Etat de consolider sa pesée et son contrôle sur la société civile.

Cette notion large de domanialité publique assure-t-elle une protection efficace du patrimoine hydraulique?

Le régime de la domanialité publique se caractérise par un système particulier de protection contre les atteintes qui sont de nature à compromettre son affectation.

Le domaine public est protégé contre les risques de démembrements juridiques par les deux principes de l'inaliénabilité et de l'imprescriptibilité" consacrés par l'article 4 du dahir du 1er Juillet 1914 sur le domaine public.

Par ailleurs, les prises d'eau par lesquelles est opéré un prélèvement sur la ressource c'est-à-dire une utilisation privative d'un bien domanial sont accordées discrétionnairement, peuvent être à tout moment modifiées ou retirées et sont soumises au paiement de redevances.

Dans le domaine de la forêt, les terrains forestiers furent à leur tour incorporés au domaine public par le dahir du 10 Octobre 1917.

De même, les droits de pêche et de chasse ont été transférés à l'Etat respectivement par les dahirs du 11 Avril 1922 et du 21 Juillet 1923.

La protection de l'environnement telle qu'elle est assurée par la domanialité publique peut néanmoins se révéler limitée en raison des dérogations qui lui sont apportées. Ces restrictions apparaissent en particulier dans les droits reconnus aux usagers dans l'utilisation de l'eau et de la forêt.

3.2 Le système des autorisations et des déclarations

Dans le domaine de la forêt, le dahir du 10 octobre 1917 a institué en matière de défrichement un système de déclaration préalable s'il s'agit de particuliers ou d'autorisation pour les collectivités et les établissements publics.

L'article 25 du dahir du 10 octobre 1917 mentionne les cas pour lesquels l'opposition au défrichement peut être prise. Il s'agit notamment du maintien des terres sur les montagnes ou sur les pentes, de la défense du sol contre l'érosion, du maintien de l'équilibre économique et social des populations.

En cas de non respect de la législation sur les défrichements, le contrevenant est condamné à une amende de 240 à 480 Dirhams par hectare défriché. Il peut également lui être ordonné d'établir les lieux défrichés en état de bois dans un délai ne pouvant dépasser trois ans. Mieux encore, le propriétaire du fond défriché est tenu pour responsable pénalement même si le défrichement de ces bois a été effectué par une tierce personne à moins qu'il ne l'ait signalé à l'administration avant que celle-ci ne constate l'infraction.

En matière de lutte contre les incendies, la législation forestière a prévu des mesures strictes de prévention ainsi que des sanctions très sévères. C'est ainsi qu'elle interdit de porter ou d'allumer du feu en forêt et jusqu'à 200 mètres de sa lisière, en dehors des habitations et des bâtiments d'exploitation. En cas d'infraction, l'auteur d'incendie est puni d'un emprisonnement de 3 mois à deux ans sans préjudice des dommages et intérêts. Cette même législation prévoit également une solidarité quant à la lutte contre les incendies. Ainsi quand un feu se déclare en forêt, toute personne valide peut être requise pour aller le combattre. Et quiconque refuse son concours sans motif valable se verra infliger une amende et pourra être emprisonné de 5 jours à trois mois.

Plus significatives encore sont les dispositions de l'article 56 du dahir du 10 Octobre 1917 qui punissent de travaux forcés à temps toute personne qui aura volontairement mis le feu ou tenté de le mettre aux forêts.

S'agissant de la protection des ressources en eau et piscicoles, les dispositions du dahir du 25 Août 1914 sur les établissements insalubres, incommodes ou dangereux combinées à celles du dahir du 11 Avril 1922 sur la pêche fluviale sont très révélatrices. En effet, cette législation prévoit des règles qui permettent de contrôler les établissements qui, par leur fonctionnement peuvent engendrer une dégradation des ressources et du milieu aquatiques.

L'activité de ces établissements est soumise à un régime d'autorisation ou de déclaration selon la catégorie de l'établissement. Ainsi l'autorisation d'ouverture d'un établissement classé se caractérise par sa précarité. Elle est toujours révocable mais seulement dans un intérêt public et moyennant une juste indemnité. L'administration peut à tout moment retirer son autorisation si elle estime que l'établissement présente une atteinte à l'ordre public. L'admi-

nistration est seule maîtresse pour juger de l'existence d'une telle atteinte.

En outre, l'autorisation d'établissement d'usines à proximité du domaine fluvial ne pourra être accordée qu'à condition que les eaux résiduaires de ces usines ne seront en aucun cas déversées dans les eaux du domaine public terrestre.

Plus caractéristiques encore sont les dispositions de l'article 6 du dahir du 11 Avril 1922 qui interdisent de jeter ou d'amener dans les eaux des substances ou appâts de nature à enivrer le poisson ou le détruire. La nature seule de ces produits sans tenir compte de leur quantité ou de leur concentration suffit à caractériser le délit.

En cas d'inobservation des conditions imposées aux exploitants d'établissements classés, la fermeture de ces derniers peut être ordonnée soit par le juge soit par l'administration. En effet, le juge du tribunal de première instance de la situation des lieux peut sur réquisition de l'administration ordonner la suspension des travaux ou la fermeture d'établissements de la 1^{ère} ou la 2^{ème} catégorie jusqu'à l'intervention du tribunal, et la fermeture d'établissements de la 3^{ème} catégorie en cas d'inobservation persistante des conditions auxquelles ils sont soumis.

Dès lors l'on peut s'interroger sur la portée de ces techniques de protection que nous venons d'examiner et sur leur rôle en matière de protection de l'environnement.

4 Les limites de la législation marocaine de l'environnement

La législation nationale de l'environnement, bien qu'elle soit si riche et si fournie, elle n'a pas pu endiguer de manière efficace le phénomène de dégradation de l'environnement et ce à cause d'un certain nombre d'obstacles qui freinent son application et qui peuvent être résumés comme suit:

- a une législation ancienne et générale;
- b une législation peu appliquée;
- c une législation marquée par une diversité normative;
- d une législation disparate et éparpillée à travers une multitude de textes sectoriels;
- e une législation lacunaire;
- f les amendes prévues sont peu dissuasives;
- g c'est un droit peu connu et mal intériorisé;
- h reste enfin un dernier obstacle et non des moindres qui a trait au volet institutionnel.

5 L'action prometteuse des pouvoirs publics en vue de redynamiser la législation environnementale

- (a) Le projet de loi relatif aux installations classées.
- (b) Les projets de loi et de décret relatifs à la lutte contre la pollution de l'atmosphère.
- (c) Le projet de loi sur la protection et la mise en valeur de l'environnement.
- (d) Le projet de loi sur la protection de l'environnement marin.
- (e) Le projet de loi relatif à la protection du littoral.

Pour conclure très succinctement, on peut dire que l'efficacité d'un système juridique de protection de l'environnement ne dépend pas uniquement de l'importance de l'arsenal juridique de prévention et de répression, il dépend aussi et surtout de la volonté de tous les partenaires (administration, administrés) de respecter cet arsenal et de collaborer ensemble dans le but de protéger l'environnement national, partie intégrante de l'environnement mondial.

C'est pourquoi nous recommandons à tous ces partenaires de:

- veiller à l'application des textes déjà existants,
- activer l'adoption des projets de textes législatifs et réglementaires relatifs à l'environnement,
- réglementer les domaines non encore couverts par la législation environnementale,
- encourager et promouvoir la formation et la sensibilisation dans le domaine du droit de l'environnement,
- participer activement à l'oeuvre de codification du droit de l'environnement au niveau international et pouvoir ainsi tirer profit de la coopération internationale,
- accélérer le processus de ratification des conventions pertinentes et veiller à l'intégration de leurs dispositions dans le droit positif interne.

The „Space“ of EIA Law in Developing Countries: The Case of Suriname

by Jan De Mulder

1 The „Space“ of EIA Law

Impact assessment can be defined as a technique to improve the data base for decision making through a process of information generation related to the identification, prediction, and assessment of the effects of (in most countries) project implementation. Impact assessment deals with four key problem areas: identification (of effects), prediction and measurement (of impacts), interpretation (by developing and using criteria), and communication (between parties)¹. Impact prediction must give information in order to answer the question whether a certain proposed activity or policy² is desirable and acceptable.

Thus, impact prediction is especially important for decision makers in cases of politically sensitive topics, which attract the attention of the public opinion (e.g. dioxine emissions) and where (legal) standards, criteria etc. exist to determine the significance of impacts. „However most members of a sophisticated public are already well aware of the fact that EIAs are advocacy documents“³; one cannot deny that governments try to address environmental problems through the legal system by enacting and enforcing EIA legislation, which provides for a procedural approach - and not a clear outcome⁴ - in order to safeguard environmental considerations.

Where the state is used to playing the leading role in the normative system that constitutes the legal order comprising rules, institutions (courts, departments, etc.) and the behaviour of officials, one may say that the strict borderline between private and public law (including environmental law) and the corresponding interests is fading away. The fundamental aspect of public participation in the EIA process (Smith, 1993: 62) illustrates the tendency towards an „upgrading“ of the individual from a mere „subject of law“ to a person whose interactions are given normative significance through his participation within the social field as influenced by individual and collective preferences.

In order to gain realistic insights into the possibilities and limits of an EIA in a development context one must look further than the instrumentalist „top-down“ function of EIA law. In this article I will explore a few aspects of what has been called by legal philosophers „the space of law“⁵ particularly focusing on EIAs in developing countries and illustrated by the situation in the republic of Suriname.

2 The Emergence of EIAs in the International Political and Legal Frameworks Related to Sustainable Development

After the enactment of NEPA in the USA at the end of the sixties, EIA systems have been introduced in over a hundred jurisdictions throughout the world⁶. Though the application of these regulations was initially confined to the national jurisdictions, the internationalisation of environmental policy increasingly influences international and national law⁷. This development and the methodological specificity of EIAs explain the fact that countries are no longer solely interested in activities within their own borders.

The crucial adoption of Directive 85/337/EC of 25 June 1985 on the environmental impact assessment of certain public and private projects obliged the member states to introduce an EIA system. Also fundamental was the UN ECE Convention on Environmental Impact Assessment in a Transboundary Context, done at Espoo, on 25 February 1991 (and yet not in force). The Espoo Convention, still the first treaty focusing on EIAs, imposes more requirements than the actual Directive 85/337⁸, which will however soon be replaced.

Furthermore, there is no doubt that the UNCED process was of major importance. Two agreements (the Convention on Biological Diversity which was adopted on 5 June 1992 and came into force on 29 December 1993 and the Framework Convention on Climate Change which was adopted on 9 May 1992 and entered into force on 21 March 1994) include possibilities for EIA requirements:

- Article 4 of the Framework Convention on Climate Change provides that parties:
„(...) take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies and actions, and employ appropriate methods, for example impact assessments, formulated and determined nationally, (...)“⁹
- Article 14 of the Convention on Biological Diversity requires parties „as far as possible and appropriate“ to „introduce appropriate procedures“ requiring environmental impact assessment.
In a critical commentary A. Boyle considers this provision weak in comparison with e.g. the provisions of the 1991 Espoo Convention. On the other hand, it is far-reaching in one respect: „(...) Most of the earlier agreements which require EIA do so solely in the context of transboundary harm. Their purpose is to protect other states, or areas beyond national jurisdiction. The Rio Convention, in contrast, deals primarily with the assessment of effects within the territory of the party conducting it. (...) to that extent Art. 14 is important in empha-

sizing the responsibilities now undertaken by states for the management of their own national environment (...).“¹⁰

Environmental impact assessment is the subject of Principle 17 of the Rio Declaration on Environment and Development, a non-binding legal instrument:

„Environmental impact assessment, as a national instrument shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a national authority.“

and Agenda 21 contains a number of references to EIA (Sands, 1995: 581).

The Rio Declaration was the result of the major social and political changes that influenced the issues of development and the environment during the past decade. Where the intragenerational equity concept was previously the central moral issue in the developmental economic law debate, the already existing concept of the intergenerational equity has emerged as the core value on which the international legal framework for sustainable development should be based¹¹. Key aspects of this concept are intertemporal issues and the precautionary principle of which EIA forms an application¹².

3 The Appearance of EIA in Developing Countries

Regarding the practice of EIA in developing countries, one has to distinguish the following underlying reasons: domestic obligation (national legislation or contractual provision), externally imposed EIA (foreign aid requirement or contractual provision), or a voluntary EIA.

Literature shows that some developing countries such as the Philippines¹³ introduced EIA legislation rather early in comparison with developed countries (e.g. Belgium: 1985). A comparison of EIA legislations in developing and developed countries indicates that the same principles are incorporated. Without wanting to idealize the EIA practice in developed countries, one can not deny that a number of particular characteristics or factors are very influential on EIA in developing countries¹⁴:

- differences in environmental conditions (geographically, technically);
- differences in economical and technological conditions;
- differences in the significance of environmental impacts;
- differences in financing activities (often non-domestic actors play a major role: aid agencies, development banks, foreign companies);

Where the above-mentioned characteristics set the broader context within which EIA should become

operational, the following differences may be more obvious when comparing EIA practices:

- institutional and legal differences including compliance and enforcement:
„(...) Devising and promulgating environmental assessment laws increases the likelihood of EA being used for planning decisions, but there is no guarantee that this will occur in either industrial or developing countries.“¹⁵;
- differences in decision-making;
- differences in approach for consultation and public participation:
„(...) The lack of true representation in many governments, in itself, poses an obstacle to citizens attempting to give input into environmental decision-making. In some parts of the world, political situations such as single-party governments may strongly discourage any public opposition to major development projects, making those who have concerns regarding a proposal afraid of the reprisals that may result from speaking out. Incorporating the voiced concerns and information provided by the public during EA preparation remains problematic in both industrial and developing countries. Among other factors, this may be the result of a reluctance on the part of some experts to accept and respect information from those with less formal training, or it may stem from the subjective nature of some of the concerns of local citizens that are difficult to verify or mesh with the often technical and scientific focus of an EA.“ (MacDonald 1994: 31)

Therefore, from the above-mentioned range of particular differences which in fact reflect the developmental and environmental issues in developing countries, it can be concluded that solving the problems regarding lack of (comprehensive) EIA legislation or weak enforcement of existing EIA regulations is only a small but nevertheless necessary step forward. As the effectiveness of EIA is more than the compliance with a formal EIA law, a coordinated approach is necessary if the local EIA practices are to be improved.

As already mentioned, EIA appears more than once in Agenda 21: e.g. in Chapter 34 „Transfer of environmentally sound technology, cooperation and capacity building“:

„Support should be provided for programmes of cooperation and assistance, including those provided by United Nations agencies, international organizations, and other appropriate public and private organizations, in particular to developing countries, in the areas of research and development, technological and human resources capacity building in the fields of training, maintenance, national technology needs

assessments, environmental impact assessments, and sustainable development planning.“

Furthermore, Chapter 39 „International legal instruments and mechanisms“ of Agenda 21 includes the following:

„Developing countries should also be provided with technical assistance in their attempts to enhance their national legislative capabilities in the field of environmental law.“

In his description of the demand of developing countries for help with environmental law illustrated by the case of Namibia, W. Wilson explicitly refers to EIA. Among the areas in which expert assistance may be required according to this author, I think the following are relevant concerning EIA: the review and development of national and secondary environmental legislation; the amending of inherited colonial legislation, capacity building by training of lawyers (e.g. with respect to the need for better contracts covering the exploitation of natural resources), and the entitlement and registration of land tenure by indigenous peoples.¹⁶ (Wilson, 1992: 973)

That legal technical assistance must necessarily take the form of a foreign activity is illustrated by his proposal that remedies could be developed whereby multinational companies are made liable in their home jurisdiction for serious environmental damage done in other jurisdictions. However, one may wonder if, in the case of a South-South investment agreement, this approach would lead to a real solution.

4 The Case of Suriname

In 1994 „The Economist“ (June 4th) reported the intention of the government of Suriname to grant logging concessions to a foreign investor, called MUSA. The article included the following sentence:

„MUSA will have to submit a cost-benefit analysis covering the environmental impact and measures to reduce damage, the effect of logging in areas destined for hydropower, and steps to secure the rights of indigenous peoples.“¹⁷

As this former Dutch colony is coping with serious economic problems, the government regarded the exploitation of the forests as one of the few existing development opportunities.

The proposed development drew the attention of the public. However, but public awareness of the relationship between economy and ecology was not a new topic. In 1977 the faculty of Law of the University of Suriname organised a conference on „Law and Development“ and one of the subjects addressed was „Some aspects of economic development and ecology“ (Surinaams Juristenblad, 1977, N 23:

39). These good intentions have, however, not been reflected in legislative programmes and daily legal practices. Unfortunately, this country has not been an exception in its post-colonial behaviour¹⁸. In 1985 one of the recommendations of a seminar on the environment included the amendment and codification of the existing environmental legislation and the improvement of compliance with an educational approach. Five years later in November 1990 the, then still active, National Environmental Commission organised a seminar on „Environment and Development“. A working group dealt with the issue of environmental legislation which resulted in a publication¹⁹. This publication presents the view that a lot of legislation is a colonial relic²⁰, but also that a number of different and rather inconsistent regulations have been introduced. In his conclusion L. Damen states that a few fundamental issues, such as disclosure of or access to environmental information, redress, compliance and enforcement, need to be dealt with.

He also recommends the introduction of EIA legislation as part of a framework for environmental law (Damen, 1990: 78). With exception of the Law on Forest Management of 18 September 1992 (Statute Book, 1992, N 80) no substantive new environmental act has been adopted since 1990²¹.

Although Suriname does not yet have EIA legislation, we nevertheless will try to outline the present situation from a legal perspective, including the opportunities for improvement.

When we take a closer look at the legal order of Suriname, we should not forget that due to its historical development the social structure of this state is characterized by pluralism²². This means that its legal system can be classified as pluralist which means predominantly civil (Roman Dutch) law but also including elements of customary, Islamic and Hindu law²³. However the Constitution of Suriname of 1987 (Statute Book, 1987, N 116, as amended by the Law of 8 April 1992, Statute Book, 1992 N 38) does not reflect this pluralism. This constitution has been described as programmatic²⁴. It contains a number of objectives of which the protection of nature and the conservation of the ecological balance is one. It is a social objective of the State provided for in Article 6. Furthermore, anyone is entitled to health (Article 36). Concerning the economic objectives and approaches, Article 41 stipulates that the natural resources are the property of the nation and are to be used for economic, social and cultural development and that for this reason the nation has the indefensible right to obtain possession of these resources.

As the interior of Suriname is populated by Maroons and Amerindians the exploitation of natural resources such as the forests may pose legal problems²⁵, as is already the case²⁶. The 1992 Forest

Management Law stipulates in Article 41 that the traditional rights of the indigenous peoples will be respected „as much as possible“. In case of violation of such traditional rights the indigenous people have a right of petition to the President of the Republic who shall establish an advisory commission. This rather weak provision is not in agreement with Suriname's signature on the ILO Convention Number 169 concerning Indigenous and Tribal Peoples in Independent Countries, which recognizes the common property rights of such peoples.

Regarding international (environmental) law instruments which may offer openings towards EIA in Suriname it should be mentioned that Suriname ratified the Convention on Biological Diversity on 12 January 1996. Suriname is also a Contracting Party to the 1978 Treaty for Amazonian Cooperation:

„(...) the only ecological obligation of the Treaty in Art. VII appears in a rather vague form: in order to rationally plan exploitation of fauna and flora and to maintain the ecological balance within the region, the Contracting Parties are obligated to promote scientific research, exchange of information and technical personnel among the competent agencies so as to increase their knowledge of the fauna and flora of their Amazonian territories and to prevent and control diseases in relevant territories.“ (Hohmann 1994: 265)

Furthermore, Suriname acceded to the CITES Convention in 1980, and to the RAMSAR Convention in 1985.

Treaties may currently be the only legal way to impose obligations but other opportunities should not be overlooked. Two other channels, which already have led to the preparation of an EIS, should be mentioned: the activities of foreign companies in the bauxite sector: Suralco (refining) and Billton (mining); and requirements by aid agencies: e.g. the Staatsolie oil refinery²⁷ for which an EIS was required by the Dutch development cooperation agency. The Dutch State operates as the guarantor for the financing of this project by a Dutch bank. The reports prepared by the bauxite companies are a result of a change in company approaches towards environmental management and accountability²⁸.

On the national level a number of interest groups are active: the NGO „Stichting Schoon Suriname“ (Foundation for a beautiful Suriname); a local branch of the American NGO „Conservation International“, which focuses on the environmental problems in the interior and pays attention to EIA²⁹; and decision makers interested in environmental issues from the public and private sectors.

Concerning the proposed exploitation of the forests in the interior of the country, the draft agreement³⁰

for granting a logging concession between the State of Suriname and the Berjaya Timber Industries company contained a safeguard of the rights of the indigenous peoples (Article 8) and a kind of an EIA requirement in Article 21. Still this article states that the EIS has to be prepared within one year after the implementation of the concerned agreement! Once the EIS is finished, the company is obliged to apply the recommendations of the report. This provision is very vague and does not state the contents of the EIS (scope) or the period within which the EIS has to be finished. Taking into consideration that there is no legal framework within which this EIA has to be made, it is not surprising that the approach of the government of Suriname concerning the proposed forest exploitation has been severely criticized and the subject of concern, not only domestically³¹. In a NGO report on the forest exploitation issue in Suriname, particular attention was given to the need for an EIA³².

The conclusion could be that the drafting of a comprehensive EIA law would be an improvement if possible. But even if only the EIA requirements in the concerned agreement are very clear and stringent, one may still wonder how the compliance (and enforcement) will be handled³³. It can not be denied that the administration of justice poses a problem in Suriname. This problem is well known and was one of the central issues in the 1991 Bonaire Protocol on closer cooperation between the government of Suriname and the government of the Netherlands: „(...) the following areas of cooperation: a. Development cooperation (...) b. Augmentation of the democracy and the constitutional state:- support for legislation and sectors of law enforcement (...)“.

Does this mean that there is a lack of lawyers in this country? Not exactly. Political and economic developments resulted in a brain drain mostly to the Netherlands and to the private sector. The result is that the capacity of the public sector is very limited³⁴.

In these actual societal circumstances it can be predicted that even the drafting of an EIA law (e.g. by a foreign consultant), would not lead to an effective result as „(...) the majority of the population has much more pressing concerns than abstract environmental notions.“ (Wilson, 1992: 971); which means that the ability of this law to structure its implementation would be almost *nihil* as non-statutory variables, such as socio-economic conditions and technology, public attitudes or official commitment would be presumably of no support for its implementation (Smith, 1993: 48).

Nonetheless, as the absence of a potential instrument offers no opportunity and perspective at all for the few pioneers like the above-mentioned interest

groups and does not enhance further development, an initiative may nevertheless be useful:

„(...) no one has figured out how, without bureaucracy, to carry out many of the tasks required for development. Third World governments must tame the beast. Taming it requires democratic participation in decision-making. Devising institutions to allow such participation, and drafting laws to create and bolster institutional structures, constitute the development drafter's highest calling.“³⁵.

5 Some Final Considerations

It is an established fact that EIA is being incorporated in more and more legal instruments as much on the international level as the national level. In the Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development (Geneva report, 1995) EIA is manifestly present. It forms part of two of the nineteen principles:

- EIA in a transboundary context is one of the five elements of the principle of „cooperation in a transboundary context“ as one of the three principles and concepts of „international cooperation“; and
- EIA and informed decision-making are part of the three principles and concepts of „participation, decision-making and transparency“.

However, the strength of the legislative base is only one of the elements upon which the success of impact assessment as a policy strategy appears to be dependent. Next to legislation, other crucial factors are: the intended role and function of impact assessment, political commitment, and the roles played by key stakeholders (the internal analyst-advocate, the administrative entrepreneur and external pressure groups). (Smith 1993: 49)

Therefore, when considering the „export“ of EIA through technical environmental law assistance to developing countries, it is worthwhile to keep in mind the history of the so-called „law and development movement.“³⁶ In recent literature this movement has been described as being revitalized and in crisis.³⁷ It seems that the attention towards technical environmental law assistance can be considered as part of a revitalized and amended „law and sustainable development movement“ the success of which should be judged with prudence.

Some years ago one could read the following in „The Economist“ (The greening of giving, December 25th 1993: 55): „(...) Today few donors would undertake a project for a road or plantation without an EIA. The project may not, as a result, be any different: mostly such assessments are conducted with the project already under way. And they are often

done in a rush, by foreign consultants with little or no local experience.(...)“. The need for foreign consultants stems from the fact that „(...) in most Third World countries there are few ecologists (...) with extensive knowledge and expertise. Such people exist, and their numbers are increasing, but in practice EIAs do suffer from the lack of indigenous skills.“ The response is to bring in expensive foreign consultants („experts“), sometimes described as „rural development tourists“, who may sometimes prove to be a poor substitute for local expertise, as their expertise is not always so valuable as regards the required local knowledge (Adams, 1990: 151). The same may be said about the use of foreign legal consultants as draftsman. As no two developing countries are the same, and the knowledge and abilities of developed countries, even as they have gained a valuable experience, remain limited, it seems unlikely that the adoption of unadapted western laws and practices will be of great benefit to developing countries (Wilson, 1992: 954). This has been called by Seidman „the law of non-transferability of law“³⁸.

On the other hand, the practice of technical assistance will not diminish; the sustainable development lawyer has a fascinating but complex task.

Law is not an independent variable which plays a modest but important reinforcing role in the process of social change (Von Mehren and Sawers 1992: 93). This means that the duties of the sustainable development lawyer are interesting from a technical and methodological point of view:

„Throughout the third world, experience teaches that neither simply changing the faces of those at the top, nor copying laws from 'successful' countries can ensure sustainable development. Third world peoples need theory grounded in reason informed by experience to guide them in discovering the country-specific legislation likely to help them throw off the chains of poverty and oppression. To discover laws (...) requires an extensive knowledge of the detailed facts of that particular country's social, political and economic milieu.“(Seidman and Seidman 1994: 351).

The concept of sustainable development needs further theoretical clarification. This includes exploration of „what patterns and levels of resource demand would be compatible with different forms or levels of ecological or social sustainability, and different notions of equity and justice.“³⁹ The sustainable development lawyer must also contribute to a morally meaningful legality, which is achievable only with „a dignified existence under law for all citizens and all social groups, and governmental action to achieve this.“⁴⁰ The question remains if the desired state of global justice can be achieved

within the existing conceptual framework of law⁴¹; and what direction the emerging civil society⁴² will take if the „classical approach“ does not lead to satisfying results. ●

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- ¹⁸ Menke, J. (1991), The state in the development process of Suriname 1948-1990, in: Jeffrey, H. and Menke, J. (ed), Problems of development of the Guianas, Anton de Kom University of Suriname, Paramaribo: 72.
- ¹⁹ Damen, L., Ahmad Ali B., Hoever-Venoaks, M., Hoever, S. (1990), Surinaams milieurecht, Centrum voor Milieu recht Un. Amsterdam - A. de Kom Un. Paramaribo.
- ²⁰ So it is no surprise to read in the Advisory review of the EIS concerning the Oil Refinery Tout Lui Faut in Suriname, under chapter 3.1 Legislation and policy:
 „The present legislation governing environmental quality is relatively limited and not suited for this type of projects.
 For the establishment of the refinery a license is required, granted by the District Commissioner of the district of Wanica. In this license conditions can be set according to the Nuisance Act ('Hinderwet', GB 1930, no. 64), the Safety Act ('Veiligheidswet', GB 1947, no. 142) and general safety regulations. Some general requirements are indicated qualitatively. However, no standards exist. Public reaction is possible. No public participation is required. Transport by ship is governed by the 'Havenverordening', which is enforced by the port authorities at Paramaribo. However, lack of facilities strongly reduces efficient execution of tasks. (...)” Commission for Environmental Impact Assessment, 7 July 1994, Utrecht-The Netherlands, p. 7.
- ²¹ Information received from M. Chin, A. Fat and M. Soeknandan, lawyers in the Office for Legislation of the Ministry of Justice in Paramaribo (Suriname).
- ²² Chin, M. and Buddingh, H. (1987), Surinam - Politics, Economics and Society, F. Pinter, London: 68.
- ²³ Reyntjens, F., Note sur l'utilité d'introduire un système juridique „pluraliste” dans la macro-comparaison des droits, Revue de Droit International et de Droit Comparé, 1991, N 1, 50.
- ²⁴ Munneke, H. (1990), De Surinaamse constitutionele orde, Ars Aequi Libri, Nijmegen: 1.
- ²⁵ Munneke, H. (1991), Customary Law and national legal system in the Dutch-speaking Caribbean, with special reference to Suriname, European Review of Latin American and Caribbean Studies, N 51, December 1991: 98.
- ²⁶ See: „Strijd om grond in Suriname” by I. Kanhai & J. Nelson (ed), Paramaribo, 1993; and also the commentary review of this book by E. Baerends in: Recht der Werkelijkheid, 1994, N 1, p. 61-68.
- ²⁷ Kolhoff, A. (1994), M.e.r. voor een Surinaamse olieraffinaderij, Kenmerken, juli 1995: 18.
- ²⁸ Information from P. Teunissen, Environmental Consultant in Suriname; J. Van den Bergh, Environmental Manager Suralco-Suriname; and M. Willems (E.U. Consultant in Suriname).
- ²⁹ Interview with N. Waagmeester (S.S.S.) and M. Merton (Conservation International).
- ³⁰ Copy received from M. Ng. A. Tam (advisor at the Ministry of Natural Resources, and member of the agreement negotiations team)
- ³¹ Written questions in the European Parliament:
 - Question E-1469/95 from C. Taubira-Delannon
 - Question E-1495:95 from J. Majj-Weggen
 (Publikatieblad Nr. C 230/42 NL. of 4 September 1995)
- ³² Sizer, N. and Rice, R. (1995), Suriname met de rug tegen de muur, World Resources Institute - IUCN Nederland, Washington-Amsterdam: 35-37.
- ³³ Regarding the situation in Suriname, I would like to refer to Ross' commentary on the situation in the Philippines:
 „(...) note that „using the courts to enforce the EIS System is ... untested in the Philippines... such an approach requires a level of organization, information, and technical sophistication that environmental groups presently lack. Much also depends on the receptivity of the Philippine courts to resolve EIS disputes through legislation.” It is my belief that the expertise of environmental groups has increased since 1987 (those I talked to were quite capable) and that the courts are more likely in 1993 than they would have been in 1987 to enforce compliance with the EIA legislation.”
 In a footnote, the author states that his argument about greater willingness of the courts to enforce compliance is based on nothing more than the political evolution of the Philippines since the overthrow of the Marcos regime. He believes that there is a greater respect for „the rule of law” (...) (ROSS, 1994: 229)
- ³⁴ Interview with M. Playfair, who was in the summer of 1995 the only remaining engineer with the Forest Service; interviews with the small private entrepreneurs D. Themen and R. Jawalapersad.
- ³⁵ Seidman, R., Drafting for the rule of law: maintaining legality in developing countries, Yale Journal of International Law, Vol. 12, 1987: 120.
- ³⁶ Galanter, M. and Trubek, D., Scholars in self-estrangement: some reflections on the crisis in law and development studies in the United States, Wisconsin Law Review, Vol. 1974, No 4; Merryman, J., Comparative law and social change: on the origins, style, decline and revival of the law and development movement, AJCL, Vol. 25, 1977.
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- ³⁸ Seidman, A. and Seidman, R. (1994), State and law in the development process - Problem solving and institutional change in the Third World, St. Martin's Press, New York: 44.
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EIA in the Netherlands: A Comparative Assessment

by Christopher Wood

1 Introduction

This paper¹ reviews the Netherlands environmental impact assessment (EIA) system from a comparative perspective. The Dutch EIA system is widely regarded as the strongest in Europe, not least because it provides for more rigorous assessment than does the European Directive on EIA. Observers from further afield are also interested in the operation of the Dutch EIA system and, in particular, in the role and effectiveness of the highly influential EIA Commission.

The Dutch EIA system (or MER - milieu-effectrapportage) system, which owes its parentage more to Canada than to the United States, was very carefully considered before its implementation. The Netherlands commissioned a series of research studies in the late 1970s and 'trial run' EIAs were undertaken to ensure that the procedures envisaged were practicable. By the time the first legislation on EIA was passed, in 1986, considerable experience of EIA had been gained. The current legislative basis for EIA contained in the Environmental Management Act 1994, is very similar to the 1986 Act.

The main features of the Dutch EIA system are shown in simplified form in Figure 1 (see end of this article; see also Glasson, Therivel and Chadwick, 1994). Several features of the EIA system should be noted:

- The EIA process is integrated into existing decision-making procedures.
- The EIA process is not confined to projects.
- There are statutory requirements relating to the treatment of alternatives, to scoping, (including the preparation of project-specific guidelines) to the review of EIA reports and to the monitoring of the impacts of implemented projects.
- There are provisions for public participation at both the scoping and EIA report review stage and there is a third party right of appeal against decisions.
- The Dutch EIA Commission plays a central role in the EIA process generally and at the scoping and EIA report review stages in particular.

Below, each aspect and stage of the Dutch EIA system is briefly reviewed in turn: legal basis, coverage, consideration of alternatives, screening of actions, scoping of impacts, environmental impact

statement (EIS) preparation, EIS review, decision making, monitoring and auditing of actions, mitigation of impacts, consultation and participation, EIA system monitoring, costs and benefits of EIA and strategic environmental assessment. In the conclusion to the paper the performance of the Dutch EIA system is tested against a set of evaluation criteria and a number of observations is made. Finally, the Dutch EIA system is compared with seven other EIA systems using the same evaluation criteria. Of the EIA systems in the United States of America, California, the United Kingdom, Canada, the Commonwealth of Australia, Western Australia and New Zealand only that in Western Australia compares favourably with that in the Netherlands.

2 The Netherlands EIA System

Legal Basis

The Environmental Management Act 1994 contains detailed requirements relating to the coverage of EIA, the content of the EIS, the preparation of the EIS, the preparation of the EIS, the decision-making procedure and the post-project evaluation. The Act provides for the EIA process to be integrated into existing decision-making procedures. Together with the Notification of Intent Decree and the EIA Decree, the EIA Act contains provisions relating to each step in the EIA process shown as obligatory in Figure 1. The one area not provided for in the Act relates to the provision of supplementary information as a result of the review of the EIS by the EIA Commission and the public.

There is a large handbook on the EIA procedure with an explanatory leaflet (Ministry of Housing, Physical Planning and Environment) and Ministry of Agriculture, nature Management and Fisheries, 1991). In addition, numerous other documents on more technical aspects of EIA exist. In general, there is probably more official information about EIA in the Netherlands than in any jurisdiction outside North America. The existence of this information, like that of the very clear and specific legal provisions relating to EIA in the Netherlands, reflects the careful preparation for (and subsequent administration of) the Dutch EIA system.

Coverage

The Dutch EIA system applies to both public and private projects though most of the EIAs under-

taken have been for private developments. The Act specifies that energy, resource, waste disposal and traffic impacts are included and indirect and cumulative impacts are now also included.

Alternatives

The Dutch EIA system lays considerable emphasis on the treatment of alternatives. In the Netherlands alternatives may include measures which would be described as mitigatory elsewhere (e.g. technical controls over pollution). The Environmental Management Act 1994 specifies the minimum contents of an EIS and lays great emphasis on the coverage of reasonable alternatives. Alternatives to the proposed activity and their environmental consequences must be described both in the EIS and in the non-technical summary. Further, a comparison between the environmental impacts of the proposed development and of the alternatives considered is required.

There are different views about how well alternatives are treated in the Netherlands. Many Government and business participants in the EIA process believe that the treatment of alternatives is broadly satisfactory whereas environmental groups believe that the analysis of alternatives is frequently the weakest part of an EIS. Alternatives appear often to involve changes at the margin, rather than radically different approaches.

Screening of Actions

Part C of the Schedule to the Environmental Impact Assessment Decree contains a list of activities for which EIA is mandatory, and a list of criteria to be applied. The thresholds are usually based on area (e.g. an industrial estate of more than 100 ha) or weight (e.g. an industrial waste incinerator for 25,000 tonnes pa or more). Little discretion is seemingly allowed: implementation of EIA is mandatory if the extent of the proposed activity exceeds the threshold. (Proponents may, if they choose, voluntarily undertake EIA.) There have been cases where EIA has not been undertaken because of over-liberal interpretation of the guidelines and thresholds but, in general, EIA is carried out if the project is listed and its size exceeds the relevant threshold.

While there is consultation of selected bodies (e.g. the provincial environmental inspectorate) during screening there is no public participation. There is a third party right of appeal to the competent authority at the decision stage of the EIA process which may relate to screening decisions. On balance, while too many projects have escaped the EIA process in the past, screening has worked well for the limited range of projects subject to EIA in the Netherlands.

Scoping of Impacts

The Environmental Management Act 1994 makes it a requirement that project-specific guidelines be prepared for each EIA. The notification of intent prepared by the proponent alerts the competent authority that an EIA is to be undertaken and that guidelines are to be prepared. In turn, the competent authority must publish the notification of intent and alert the EIA Commission.

The EIA Commission's advice, which is made public, provides the competent authority with a draft of the scoping guidelines. Indeed, guidelines written by the EIA Commission are often (but by no means always) simply adopted by the competent authority. The scoping guidelines tend to be somewhat general (despite lengths of 20-30 pages or more) and not to eliminate potentially irrelevant topics. However, guidelines very rarely neglect relevant impacts, largely because of the expertise of the increasingly influential EIA Commission. In general, scoping works well. The main problem appears to be making the competent authorities take full responsibility for, and commit themselves to, the guidelines issued in their name.

EIS Preparation

The Environmental Management Act 1994 specifies the minimum contents of an environmental impact statement. Information held by the competent authority must be made available to the proponent who prepares the EIS in accordance with that authority's guidelines for the action. As shown in Figure 1 the competent authority evaluates the acceptability of the EIS before it is made available for public review. This check ensures that the requirements of the Act and the recommendations in the guidelines are met.

While a few proponents still see the EIS merely as a paper exercise, their number is diminishing rapidly. On the whole (and with exceptions) EIA report preparation is thought to take place reasonably effectively in the Netherlands. There is a noticeable improvement in the efficiency of preparation and in quality when proponents or their consultants are preparing a second or subsequent EIS rather than their first.

EIS Review

Once the competent authority has accepted the EIS, the public must be notified and the EIS is made public together with the draft decision on the proposal. The public review period of at least 5 weeks for the EIS coincides with the public review period for the application to which the EIS relates. The EIA Commission checks the EIS against the legislation and the regulations and against the scoping guidelines to see whether it is complete. The Commission must

also make a judgement about whether the EIS is adequate for decision-making purposes. The review findings of the EIA Commission are published. These findings, which are confined to the contents of the EIS rather than to the advisability or otherwise of the proposal, are almost always accepted by the competent authority.

In general the EIA review process is working reasonably well. The level of expertise within the competent authorities is growing, the public is becoming increasingly involved and increasingly sophisticated: as a result, the quality of EISs is improving. While there is no right of appeal against the EIA Commission's review findings, they are widely regarded as authoritative and are very seldom challenged by proponents, by the competent authority or by environmental groups.

Decision-Making

The competent authority is obliged by the Environmental Management Act 1994 to incorporate the findings of the EIS, of the EIA Commission's review and of the comments of the consultees and the public in its deliberations on the decision. The competent authority must explain fully the reasons for its decision in writing. These reasons must also indicate the weight which has been attached to environmental parameters in comparison to other factors.

It is generally accepted that EIA is actually affecting decisions in the Netherlands, even if the reasons given for the decision are occasionally invented to justify it. Some decision-makers decline to read EISs or to consider their findings, so that environmental arguments are sometimes used to explain economic decisions. However, proponents are often more positive than competent authorities about the EIA process and they (and the authorities) are modifying proposals as a result of it.

Monitoring and Auditing of Actions

The Dutch Environmental Management Act 1994 does not require any information on monitoring to be submitted as part of the EIS. However, the EIA Commission advises that the proponent covers monitoring and auditing in the EIS by specifying, in the scoping guideline recommendations, that impact measurement and possible corrective arrangements should be described. Most guidelines issued by the competent authorities make this advice a requirement.

The Act also contains five sections devoted to 'evaluation', i.e. to auditing. In summary, these are:

- (1) The competent authority must monitor the consequences of the implemented action.
- (2) The proponent must provide the competent authority with monitoring information.

- (3) The competent authority must prepare a post-auditing report (or evaluation) comparing impacts with those predicted in the EIS, publish it and send it to the EIA Commission and the statutory consultees.
- (4) The competent authority must take action (eg by tightening licence conditions) if impacts are more severe than anticipated.
- (5) Detailed regulations relating to monitoring can be made (none have not yet been issued).

There is, therefore more than adequate provision for monitoring and auditing in the Dutch EIA system. However, this provision is not proving to be effective.

No mention has been made of monitoring in about half of the decisions reached to date. There has been detailed reference to auditing only in about 25% of the decisions made. So far, very few auditing reports have been published. While relatively few projects have been fully implemented, the main reason for the failure to prepare more auditing reports is the lack of attention paid to monitoring by many competent authorities. The authorities are not pressing proponents for the necessary information and not preparing the monitoring reports for publication and transmittal to the EIA Commission.

Mitigation

Mitigation is not referred to by name in the Dutch Environmental Management Act 1994. It is not a requirement that mitigation be mentioned in the notice of intention and, frequently, mitigation measures are not specifically included in the scoping guidelines. EISs frequently (but not invariably) contain specific reference to mitigation measures. Perhaps surprisingly, the suite of EIA guidance documents does not include a volume on mitigation. Mitigation is largely subsumed in the treatment of alternatives in the Dutch EIA system. There is no doubt that mitigation of environmental impacts is taking place as a result of the EIA process and the involvement of the EIA Commission. Though not universal, changes to improve the proposal's environmental compatibility usually take place by iteration in the EIA process. Changes in location, in design and in technical controls are all common. There is, perhaps, a view that many of these changes, while significant, are relatively minor in nature.

Consultation and Participation

The Dutch Environmental Management Act 1994 specifies two occasions in the EIA process on which the statutory consultees and the public must be given the opportunity to comment. The first is public participation in regard to the establishment of the scoping guidelines. The second is when the EIS

is reviewed. The notification of intent, the decision and the auditing report by the EIA Commission are also published.

Generally, consultation and public participation in the Netherlands work reasonably effectively. Many members of the public object to the proposal at both the scoping and EIS review stages but others make useful comments on such matters as alternatives, vulnerable people or receptors, potential damage to people and difficulties in predicting impacts. There have been instances where an additional alternative has been put forward as a result of public participation, and public comments have often helped to refine proposals. More important to the decision, however, is the informal consultation between the proponent, the competent authority and the EIA Commission. The open nature of the Dutch EIA process, with consequent minimisation of the possibility of abuse, must be seen as one of its great strengths.

EIA System Monitoring

The Netherlands EIA system is subject to several monitoring provisions. Perhaps the most important is the requirement of the Environmental Management Act 1994 for the EIA system to be reviewed every 5 years. To undertake that review an evaluation committee was set up to advise on how the EIA system was working. Many of its recommendations (Evaluation Committee on EIA, 1990; VROM, 1991) have now been implemented.

Despite the amount of information available about the EIA system in the Netherlands, the results of individual EIAs are not sufficiently fed back into the system. The EIA Commission is able to utilise previous experience in drawing up scoping guideline recommendations and, to a lesser extent, in reviewing EISs but many developers and consultants are failing to utilise fully the available information. Competent authorities are not utilising sufficiently the experience of similar projects gained elsewhere. There is, therefore, some scope for improving practice in the well-monitored Dutch EIA system.

Costs and Benefits

No records of financial costs or time are kept. However, it is believed that the total costs of EIA are generally limited to 0.0001-0.01% of the cost of large projects but, perhaps, constitute 1% or more of the cost of smaller projects. The total Government annual budget on EIA is about NLG6M, including the research it funds but excluding the cost of its own staff. This is a very substantial sum. There is no doubt that the substantial sums of money spent by the government, by proponents and by third parties in the EIA process considerably exceed those which would have been expended on proposals in any

event. The main delays in the EIA process result from the activities of the developer (especially if supplementary information is required) and the competent authority.

It is widely believed that the EIA system has changed the behaviour of the participants but this is very difficult to measure. There is no empirical evidence to prove that EIA has altered the outcome of decisions, especially if this is measured in terms of the number of cancellations of projects. However, some projects have been cancelled and in other cases a less damaging alternative has been chosen. In almost every case, further consideration has been given to the environment than it would have been given without EIA.

Strategic Environmental Assessment

Environmental Impact Assessment Decree makes provision for certain types of plans and programmes to be subject to EIA. These relate to structure plans for electricity supply, industrial and drinking water supply, landscaping, nature conservation and outdoor recreation, to provincial waste management proposals, mineral extraction plans and certain types of land use plans (Verheem, 1993). The Decree does not apply to national policy plans. Experience of the EIA of over 30 plans and programmes has been gained to date (van Eck, 1993). However, decisions have been reached on only a few of these plans and programmes and even fewer have been implemented. Experience has shown that the EIA approach for projects generally worked satisfactorily for plans and programmes, largely as a result of formal scoping and the preparation of guidelines and that practice was bound to improve (van Eck, 1993).

3 Conclusions

A set of evaluation criteria can be advanced to evaluate the formal legal procedures, the arrangements for their application, and practice in their implementation in any EIA system (Hollick, 1986; Australian and New Zealand Environment and Conservation Council, 1991; Gibson 1993; Wood, 1995).

The Netherlands EIA system meets almost every one of the evaluation criteria utilised in this review (Figure 1). The only criterion which is not met relates to monitoring and even here the legal provisions meet the criteria: it is practice which falls short. On the other hand, the mitigation of environmental impacts is not separately specified in the law but there appears to be no inherent weakness in the treatment of mitigation in the EIA system. Mitigation is subsumed under the very extensive coverage of alternatives in the Dutch EIA system and, in particular, in the environmentally preferable alternative. However, since Article 5(2) of the European EIA Directive requires the EIS to include „a description

of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects“ it is somewhat surprising that the omission of mention of mitigation measures in the Dutch EIA legislation persists.

Glaring omissions in the implementation of the monitoring and auditing provisions of the Environmental Management Act 1994 exist. It would assist the operation of the EIA system, and the knowledge base for EIA, if these provisions were strengthened, perhaps by time-limiting permissions and requiring the submission of satisfactory monitoring information. This would improve the feed-back of knowledge into the EIA system, where weaknesses in utilising previous experience are apparent. This is, perhaps, symptomatic of the failure, in some instances, fully to integrate the results of the EIA into the proponent's own planning and project development at a sufficiently early stage to genuinely influence project design. It may also reflect the willingness of the competent authorities to leave too much of the operation of the EIA process to the increasingly influential EIA Commission and not to make EIA truly central to their decisions.

The Evaluation Committee on EIA (1990) made a number of recommendations relating to the EIA system including broadening the types and numbers of activities subject to EIA, improving safeguards where the proponent and the competent authority are one and the same, expanding the scope of the notification of intent, spelling out the least damaging alternative more fully and expanding the coverage of EIA to include energy use. All these recom-

mendations have now been implemented. Further improvements in the effectiveness of the Dutch EIA system can therefore be anticipated.

The Dutch EIA system compares very well with other EIA systems (see figure). Only the Western Australian EIA system performs as well as the Dutch system and it is quite likely that the crucial decision-making stage in that system may be weakened. The EIA system in the Netherlands has sometimes been criticised as overly cumbersome, expensive, time-consuming and limited in application: a Rolls Royce where a Ford would suffice. The Dutch would generally argue that the wealth of their concern about the environment of their small and vulnerable country justifies their extensive preparation for, and introduction of, the best EIA system their money could purchase. They would also argue that the EIA system is flexible enough to allow them only to use a car when absolutely necessary: that detailed EIA is needed to address only the most acute problems. As the Evaluation Committee on EIA (1990, p.13) put it:

... the Evaluation Committee can only express its satisfaction about the way the regulation has operated in the first years since its introduction. Experience to date gives ground for optimism.

Most observers from abroad can only agree. •

Note

¹ This paper was presented at the Seminar on the occasion of the Tenth Anniversary of the Commission for EIA in May 1996 in The Hague.

The Convention on Environmental Impact Assessment in a Transboundary Context

by Wiek Schrage

1 Introduction

Environmental impact assessment (EIA) has already proven to be a very important instrument for implementing and strengthening sustainable development. It combines the precautionary principle with the principle of preventing environmental damage and arranges for public participation. EIA has become the major tool for an integrated approach to the protection of the environment since it requires a comprehensive assessment of the impacts of an activity on the environment, contrary to the traditional sectoral approach. Moreover, it looks into alternatives to the proposed activity and brings facts and information on environmental impacts to the attention of the decision makers and the public. EIA is already used as an effective instrument for improving the quality of the environment at the national level. It is understood that the ECE Convention on Environmental Impact Assessment in a Transboundary Context (after this called the EIA Convention) will lead to environmentally sound and sustainable development by providing information on the interrelationship between economic activities and their environmental consequences, in particular in a transboundary context. The EIA Convention, elaborated under the auspices of the United Nations Economic Commission for Europe (ECE), was adopted at Espoo (Finland) on 25 February 1991. It was signed by twenty-nine countries (Albania, Austria, Belarus, Belgium, Bulgaria, Canada, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Spain, Sweden, Ukraine, United Kingdom and United States of America) and by the European Community. The Convention will enter into force ninety days after the date of deposit of the sixteenth instrument of ratification, acceptance, approval or accession which has not yet happened.

This Convention is the first multilateral treaty to specify the procedural rights and duties of Parties with regard to transboundary impacts of proposed activities and to provide procedures, in a transboundary context, for the consideration of environmental impacts in decision-making procedures. The EIA Convention stipulates the obligations of Parties to assess the environmental impacts at an early

stage of planning. The EIA Convention prescribes measures and procedures to prevent, control or reduce any significant adverse effect on the environment, particularly any transboundary effect, likely caused by a proposed activity or any major change to an existing activity. Appendix I to this Convention covers seventeen groups of activities to which the Convention applies, including activities such as nuclear and thermal power stations, road and railway construction, chemical installations, waste disposal facilities, oil refineries, oil and gas pipelines, mining, steel production, pulp and paper manufacturing as well as water management activities such as the construction of dams and reservoirs, groundwater abstraction and the construction of ports and water ways.

The EIA Convention includes a preamble, twenty articles and seven appendices. The preamble sets out the underlying principles of the EIA Convention, such as the interrelationship between economic activities and their environmental consequences, the need to ensure environmentally sound and sustainable development, the need to give explicit consideration to environmental factors at an early stage in the decision-making process and to use EIA as a necessary tool to improve the quality of the information presented to decision makers. The preamble also stresses the need and importance of developing anticipatory policies and of preventing, mitigating and monitoring significant adverse transboundary impact.

2 Definitions

Article 1 contains the definitions. The definition of „proposed activity“ comprises not only new or planned activities but also „any major change to an activity“. The EIA Convention does not define what a major change is and the decision of whether the EIA Convention should be applied in a specific situation will therefore be partly based on judgement. The basic criteria for that judgement could be that the existing activity subject to a major change is included in Appendix I to the EIA Convention and that the authorisation from a competent authority is required for that change. Examples of major changes may include the construction of additional production capacities, large-scale employment of new technology in an existing activity, rerouting of motorways, express roads or airport runways changing

the direction of takeoff and landing. Consideration would have to be given to a change in investments and production (volume and/or type), physical structure or emissions, in particular to those that may have an impact on water. Cases where the major change would represent an increase of the same magnitude as the threshold specified in Appendix I to this Convention might be examined first. Particular consideration should also be given to cases where the proposed changes would bring existing activities up to such thresholds. For example, where for groundwater abstraction activities the annual volume of water to be abstracted will be brought up to ten million cubic metres or more.

Although article 1 (vi) defines „environmental impact assessment“ as a national procedure for evaluating the likely impact of a proposed activity on the environment, it can be concluded that the EIA Convention includes international standards, for instance for the content of EIA documentation as well as procedures for public participation. The EIA Convention describes an „impact“ as any effect caused by a proposed activity on the environment including human health and safety, flora, fauna, soil, air, water, climate, landscape, and historical monuments or other physical structures or the interaction among these factors. It also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors. It seems that some countries lack experience with the latter part of this definition, as these types of effects have only recently been introduced in relevant legislation. The definition of „transboundary impact“ explicitly excludes impacts of a global nature and therefore concentrates on impacts of a local or subregional character in the ECE region.

The reference to „air“, „human health and safety“ and „water in the definition of impact“ and the description of the content of the EIA documentation as included in Appendix II could lead to the conclusion that a so-called risk assessment has to be undertaken for a proposed activity as part of the EIA procedure as laid down by the EIA Convention. Accordingly, Article 4, paragraph 4, of the ECE Convention on the Transboundary Effects of Industrial Accidents (Helsinki, 1992) explicitly states that:

„When a hazardous activity is subject to an environmental impact assessment in accordance with the Convention on Environmental Impact Assessment in a Transboundary Context and that assessment includes an evaluation of the transboundary effects of industrial accidents from the hazardous activity performed in conformity with the terms of this Convention, the final decision taken for the purposes of the Convention on Environmental Impact Assessment in

a Transboundary Context shall fulfil the relevant requirements of this Convention“.

3 Field of Application

Normally, Parties must apply the provisions of the EIA Convention when two requirements are met. According to Article 2, a Party has to take the necessary legal, administrative or other measures to implement the provisions of this Convention, such as the establishment of an EIA procedure that permits public participation and the preparation of the EIA documentation according to Appendix II, for proposed activities (i) listed in Appendix I to the EIA Convention and (ii) likely to cause a significant adverse transboundary impact.

3.1 Proposed Activities Listed in Appendix I

Many activities listed in Appendix I to the EIA Convention are fairly well defined. However, the words „major“, „integrated“ and „large“ could be found by examining the frequency distribution of activities relative to their size (measured in appropriate units). Difficulties in determining thresholds may rise due to the differences in environmental, social and economic conditions in a geographical area under consideration for the purposes of the EIA Convention. Despite many difficulties, specific thresholds would serve as useful initial guidance in the application of the EIA Convention. It must be decided whether an activity is referred to in the list of proposed activities in Appendix I to the EIA Convention, before the significance of the likely transboundary impact can be considered.

3.2 Significant Impact

The consideration of the „significance“ of an adverse transboundary impact will always be part of the decision to apply the EIA Convention. Criteria on the significance of any impact should be set in a general decision-making framework. In some cases, it may be possible to establish generally acceptable criteria on significance. Mostly, however, the conclusion that an adverse transboundary impact is likely significant would be based on a comprehensive consideration of the characteristics of the activity and its possible impact. An element of judgement would always be present. At the national level, various approaches to determining the significance of an impact has been developed in ECE countries. They are described in the ECE publication „Policies and Systems of Environmental Impact Assessment“¹. Within a country, detailed criteria can be applied taking into account the national EIA legislation, administrative practices, and environmental conditions. In some countries, particular criteria have been used to draw up lists of activities subject to an EIA at the national level. These so-called positive lists are usually more extensive than the one

included in Appendix I to the EIA Convention. The advantage of establishing and applying lists of activities, considered a priori to have a significant adverse impact, is that both authorities and proponents know when an EIA has to be carried out.

According to Article 3 of the EIA Convention, the identification of likely transboundary impacts and the determination of significance for transmitting the notification to the affected country could be set in a general framework, which would give a structured starting point for further discussions between the competent authorities in the country of origin, the proponent, and the affected country. The key element in such a framework is the format for the listing and identification of impacts. The advantage would be that a common format listing the impact clarifies the considerations of the competent authority and its discussion with the proponent after it has received information on a proposed activity. When the competent authority in the country of origin has identified possible transboundary impacts, it continues to evaluate their significance. This evaluation will often take the form of a dialogue between the proponent and the competent authority. The scale or characteristics of the impacts are the basis for determining their significance. Case-studies on transboundary impacts show that it may be difficult to obtain even tentative quantitative information on the characteristics of the likely transboundary impacts at this stage. Therefore, the competent authority of the country of origin may also consider the general characteristics of a proposed activity. The information to be submitted to the affected country in the notification in accordance with Article 3 of the EIA Convention could include a description of the impacts and indicate which impacts are considered possibly significant. In all cases of likely transboundary impacts, a central consideration will be the likely area of impact relative to the border. This consideration covers two aspects:

- (i) The border between the country of origin and the affected country. The key points of interest are the areas where the greatest impacts are expected in the affected country; and
- (ii) A specified area of likely impact in the affected country.

The competent authority in the country of origin must decide on the likely area of impact and on the criteria by which it is delimited. Reference should be made to relevant environmental standards and threshold values. These values should be derived from national laws or regulations, international agreements, or experience. The area of impact is seldom unambiguously defined, because the type of emission or other factors determine the spatial distribution of the impact. In practice, the affected country may have different standards, thresholds, or

experiences for determining the area of impact. This could result in different perceptions in the affected country and in the country of origin regarding the significance of the impacts. The exchange of environmental information may provide details for determining the possible area of impact for specific types of activities. The harmonisation of standards and threshold values between parties to the EIA Convention are likely to alleviate this problem. It is generally understood that a notification should be transmitted whenever there is a possibility, no matter how uncertain, that an impact may be significant. This additional information on the characteristics of the impacts and uncertainties should also form part of the notification.

According to Article 2, paragraph 5, it is also possible to apply the EIA Convention to activities not included in Appendix I. If the concerned Parties agree that one or more activities (not listed in Appendix I) are likely to cause a significant adverse transboundary impact, they should be treated as if they were listed. General guidance for identifying criteria to determine significant adverse impacts is included in Appendix III and, although these criteria are clearly linked to activities not listed in Appendix I, they might be expected to help settle the question of „significance“.

Article 2, paragraph 7 of the EIA Convention requires Parties to undertake EIA following the provisions of this Convention at the project level and calls upon Parties to endeavour to apply the principles of EIA to policies, plans and programmes. Although the wording of this article clearly indicates that a Party is not obliged to apply EIA to policies, plans, and programmes, some countries introduced legislation a number of years ago to arrange for the application of EIA to decisions at the plan level, for instance for energy, waste management, water supply, and land use. Policies, plans, and programmes adopted at all levels of government may have significant environmental impacts, either directly or indirectly. To take these impacts fully into account, such policies, plans and programmes should be subject to EIA. It is increasingly recognised that principles of EIA at the project level could be applicable to the assessment of relevant policies, plans and programmes. It is equally important that the responsibility for protecting the principles to policies, plans, and programmes is widely considered as a way of substantially strengthening environmental management. Suitable approaches in this respect are documented in the ECE publication „Application of Environmental Impact Assessment Principles to Policies, Plans and Programmes“².

4 EIA Procedure

If a planned activity is listed in Appendix I to the EIA Convention and this activity is likely to cause a significant adverse transboundary impact, the EIA procedure as indicated in this Convention must be implemented. This procedure starts with a notification by the Party of origin to any Party that it considers an affected Party as early as possible and no later than when informing its own public about the proposed activity. The purpose of the notification under Article 3, paragraph 1, is to alert the affected Party at the earliest possible stage to the fact that an activity likely to cause a significant adverse transboundary impact is proposed, and to give the affected Party the opportunity of indicating (under Article 3, paragraph 3) whether it wishes to participate in the EIA procedure. The earlier it is given, the more useful the notification will be. The timing of the notification depends also on the time that the authorities in the Party of origin become aware of the proposed project. The application of this provision may therefore vary according to the procedural system in the Party of origin, especially as regards the scoping procedure.

The wording of Article 3, paragraph 1, of the EIA Convention should, in principle, pose no problem for countries that have introduced a national scoping procedure as part of the EIA procedure, which includes the mandatory participation of the public. These countries must notify affected countries no later than when informing their own public in the scoping procedure. Where other countries have introduced a scoping procedure without public participation, there will be an opportunity, following a notification under Article 3, paragraph 1, for the affected Party to help in the scoping procedure by making comments. It will generally be beneficial for the Party of origin to involve the affected Party in that procedure to clarify the issues at stake. Therefore Parties of origin that have a scoping procedure without public participation should notify an affected Party during that scoping procedure. In countries where no formal scoping procedure is required, it may not always be possible to notify an affected Party at the time most expedient for the purposes of Article 3. In these countries proponents of activities are not required to inform the authorities about their plans before preparing the EIA information required under domestic provisions. Where no scoping procedure exists, the Party of origin should notify any Party that it deems an affected Party as soon as the authorities of the Party of origin are informed about the proposed activity. There could be cases where the Party of origin finds that a proposed activity is likely to cause a significant adverse transboundary impact only after informing its own public. In such situations, which are contrary to the provisions

included in Article 3, paragraph 1, of the EIA Convention, the Party of origin should notify the affected Party immediately. Furthermore, the Party of origin should recognise that its EIA procedure may be delayed to accommodate the interests of the affected Party pursuant to the provisions and procedures of the EIA Convention.

Article 3 furthermore requires the affected Party to respond to the Party of origin and to indicate whether it intends to participate in the EIA procedure. As this Convention in particular deals with transboundary impacts the potentially affected environment should also be considered when preparing the EIA documentation and this article therefore provides the affected Party with the opportunity to transmit relevant information in this respect to the Party of origin. The purpose of this provision is to help the Party of origin to prepare the EIA documentation. The information shall be furnished „promptly“. The definition of the term „promptly“ in this context depends on the specific circumstances of the proposed activity in question. However, a number of criteria can be given on which this specification should be based. These include the nature, size and location of the proposed activity; the extent of the area in question; the environmental status of this area; existing information systems; the type and state of the licensing process for the activity, information access and ways and means of information transmittal, etc. Article 3, paragraph 6, does not require the affected Party to carry out lengthy research, but only to provide the Party of origin with „reasonable obtainable information“. The EIA Convention sets a standard for the minimum requirements for the content of the EIA documentation to be submitted to the competent authority. These requirements are referred to in Appendix II of the Convention and include elements such as the elaboration of alternatives including the no-action alternative, a description of mitigation measures and predictive methods, an identification of gaps in knowledge and uncertainties and an outline of monitoring and management programmes and any plans for postproject analysis.

When the EIA documentation has been prepared, it is transmitted to the competent authority of the Party of origin, which has to transmit the documentation to the affected Party. The documentation is to be used for further consultations between the concerned Parties. Consultations are held to allow the concerned Parties to discuss possible solutions to specific problems. The topics and scope of the consultations are left open to the concerned Parties; the Convention gives only examples such as the potential transboundary impact, measures to reduce or eliminate the impact, alternatives and forms of mutual assistance. Article 6 provides that in the final

decision due account has to be taken of the outcome of the EIA, the EIA documentation, the comments received and the outcome of the consultations. The EIA Convention does not specify the consequences of failing to take due account of these issues, which seems to indicate that the affected Party has no right of veto in the decision to implement the proposed activity. However, the Party of origin would be in a difficult position if all the available facts indicate that a significant adverse transboundary environmental impact is likely and it does not take account of these facts in the final decision. Some countries also have legal remedies to appeal against the final decision with respect to a proposed activity, although it is not clear whether such national remedies are also open to the affected Party. In this respect it should be mentioned that Article 2, paragraph 6, provides that the Party of origin shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin.

The EIA Convention includes provisions that aim at establishing mechanisms to prevent a dispute about the application or interpretation of the agreement. Article 3 of this Convention stipulates that if a country considers that it would be affected by a significant adverse transboundary impact of a proposed activity, and no notification has taken place the concerned countries shall, at the request of the affected country, exchange sufficient information for holding discussions on whether there is likely to be a significant adverse transboundary impact. If those countries agree that there is likely to be a significant adverse transboundary impact, the provisions of this Convention will apply accordingly. If those countries cannot agree whether there is likely to be a significant adverse transboundary impact, any such country may submit that question to an inquiry commission according to the provisions of Appendix IV to the EIA Convention to advise the concerned Parties on the likelihood of a significant adverse transboundary impact. The 1992 ECE Convention on Transboundary Effects of Industrial Accidents contains a similar procedure in relation to the identification of hazardous activities capable of causing transboundary effects.

5 Public Participation

The EIA Convention contains three references to public participation. Article 2, paragraph 6, includes a general reference to this issue and Articles 3 and 4 mention more specific parts in the EIA procedure where the public has the right to participate. Article 3, paragraph 8, of the EIA Convention requires the concerned Parties to ensure that the public of the affected Party in the areas likely to be affected is informed of, and provided with possibilities for making comments on or objections to the proposed activity and for the transmittal of these comments or objections to the competent authority of the Party of

origin. Similarly, under Article 4, paragraph 2, the concerned Parties shall arrange for distribution of the EIA documentation to the authorities and the public of the affected Party in the areas likely to be affected and for the submission of comments to the competent authority of the Party of origin. In either case the following questions should be answered:

- Whether the concerned parties are to carry out those tasks jointly; or, if not;
- Which Party is responsible for which tasks in this contents.

In this matter, the rights and obligations of each Party under international law should be borne in mind. For instance, the Party of origin will be able to conduct public hearings in the territory of the affected Party only with the consent of the latter Party. For reasons of expediency and unless the concerned Parties agree otherwise, the tasks should be divided between them, and each Party should fulfil such tasks as fall within its own range of competence. Thus, the Party of origin should according to Article 3, paragraph 8, provide the relevant information on the proposed activity to the affected Party, and receive these comments and objections, unless the comments and objections by the public of the affected Party are to be sent directly to the competent authority. The affected Party, on the other hand, should be responsible for specifying the arrangements for distributing the information on the proposed activity in its own country (by means of the press, posters, or other media). And it should collect these comments and objections and forward them to the Party of origin or to its competent authority, unless the comments and objections are to be transmitted directly to the Party of origin or its competent authority. According to Article 4, paragraph 2, the Party of origin should transmit the EIA documentation to the affected Party and, unless the comments are transmitted directly to the competent authority, receive these comments. The affected Party should specify the arrangements for distributing the documentation to its own authorities and the public, and, unless the comments are to be forwarded directly to the Party of origin or its competent authority, collect these comments and transmit them to the Party of origin or its competent authority. The way in which the tasks mentioned in Article 4, paragraph 2, are fulfilled should conform to the EIA procedure of the Party of origin, as this procedure is relevant to the proposed activity. The information should be made available to the public of the affected Party according to the normal practice of that Party for the distribution of information.

6 Effect on International Law

The elaboration and signing of the Convention on Environmental Impact Assessment in a Transboundary Context has influence and will continue to influence other international instruments such as Conventions and Ministerial Declarations. The already mentioned 1992 Convention on the Trans-

boundary Effects of Industrial Accidents includes procedures compatible with those set out in the EIA Convention. Article 7 of the Convention on the Marine Environment of the Baltic Sea Area (Helsinki, 1992) also makes reference to EIA in a transboundary context. The EIA Convention is also recognised in, for example, the Final Declaration of the Ministerial Meeting of the Oslo and Paris Commissions (September 1992), the Ministerial Declaration on Cooperation in the Barents Euro-Arctic Region (January 1993) and the Nuuk Declaration on Environment and Development in the Arctic (September 1993).

7 Interim Implementation

In their Resolution on Environmental Impact Assessment in a Transboundary Context (ECE/ENVWA/19), the Signatories to the EIA Convention decided to strive for its entry into force as soon as possible and to seek to implement it to the maximum extent possible pending its entry into force. Four meetings of the Signatories to the EIA Convention, open to all ECE member countries, were held in 1991, 1992, 1994, 1995, and 1996. These meetings reviewed the actions taken by Signatories to implement the EIA Convention pending its entry into force, considered legal, administrative and methodological aspects of its practical application, discussed ways and means of strengthening the capability of future Parties, particularly countries with economies in transition, to comply with the obligations under this Convention, and established a work programme. Draft rules of procedures for the Meeting of Parties have been prepared. ECE member countries are making the necessary arrangements to implement the provisions of the EIA Convention at the subregional level, in particular through bilateral and multilateral agreements or other arrangements of relevance to this Convention. A number of existing bilateral and multilateral agreements are being used to implement the Convention.

For example, in Hungary, bilateral agreements on transboundary waters with neighbouring countries relate to activities that might have an adverse impact on the quality and quantity of these waters, and include provisions for the submission of information on such impact. The bilateral agreement between Hungary and Ukraine on environmental co-operation provides for co-operation in the field of EIA in relation to proposed activities that may have an adverse environmental transboundary impact. In Finland, in many cases the relevant co-operation regarding EIA in a transboundary context is done through joint bodies. The mandate of these joint bodies and the means of co-operation are defined in agreements. Finland is a party to such joint bodies or otherwise regularly co-operates with other countries according to several agreements. In some agreements there are provisions on the right of parties to obtain information on a planned project and participate in the relevant planning and permit pro-

cedures. Also new agreements are being elaborated for this purpose and other co-operative arrangements are being made. For instance, in the Netherlands, initiatives were taken to start bilateral discussions, with Belgium and Germany. Examples of specific experiences with transboundary EIA include the application of the Convention between Croatia and Hungary, Hungary and Slovakia and the Netherlands and Germany. In Finland, the first notification according to the Convention was sent to Sweden in later autumn 1994. The notification included information on plans to build the Vuotos artificial lake (i.e. large dam and reservoir) in Lapland. It is likely that the building of the reservoir will have an adverse impact on the water quality in the Bothnian Bay, which is also on Swedish territory. According to some other agreements and arrangements Finland and neighbouring countries have co-operated concerning permission procedures for the planned projects. Co-operation usually consists in transmitting information and relevant authorities further negotiating. Procedures may vary from case to case. ECE member countries are increasingly applying the provision of the EIA Convention pending its entry into force in case where significant transboundary impacts are likely. New regulations have been introduced or existing regulations modified at national level to arrange for the EIA process, in particular in a transboundary context. A number of countries have decided to amend existing EIA legislation by inserting the relevant provisions of the Convention, which in other countries specific legislation related to EIA in a transboundary context is being elaborated.

The EIA Convention is understood to be an innovative international legal instrument for achieving sustainable development and for preventing, reducing and controlling transboundary environmental impacts. The importance of this legal instrument as an efficient tool to promote active, direct and action-oriented international co-operation at the regional level is growing in view of the increasing membership of the ECE. The EIA Convention will halt the growing potential for transboundary environmental problems, emanating due to the creation of new national frontiers, if it is rapidly and efficiently implemented and complied with by as many member countries as possible, in particular by the countries in transition and thus eliminate the former dividing line between east and west and to integrate countries with economies in transition into a pan-European legal and economic space. •

References

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CURRENT AFFAIRS

The Environmental Results of the Amsterdam EU Summit

by Ralph Hallo

1 Introduction

Environmentalists have reason to be pleased - and disappointed - and perhaps even a little confused at the results of the Intergovernmental Conference (IGC) on the revision of the Treaty on European Union. On the positive side, a number of the key proposals made by the European environmental organisations in Greening the Treaty II: Sustainable Development in a Democratic Union have found their way into the text of the new Treaty of Amsterdam. At the same time, the EU Member State failed to make a number of essential changes. And on one point, there is doubt.

2 Two Fundamental Changes

2.1 Sustainable Development Now an Explicit Objective

The EU leaders agreed to two major changes which establish sustainable development and environmental protection as a fundamental priority for the EU's policies and activities. The new Treaty now explicitly includes sustainable development as one of the main objectives of the EU. After 40 years of commitment to economic growth pure and simple, this marks a remarkable change of course.

2.2 Integration Requirement Strengthened

Second, in order to underline the commitment to sustainable development, the EU leaders also moved forward to the front of the Treaty the requirement that environmental protection be integrated into the definition and implementation of Community policies and activities. This is a signal that this requirement, which had previously been in the Treaty's environment article, can no longer be ignored. The new provision occupies a prominent place in the Treaty and is of general application. Thus, environmental protection requirements must be integrated into each of the EU's areas of activity; agriculture, transport, trade, regional policy, everything which may affect the environment. The Commission is expected to come forward soon with concrete measures to translate the Treaty provision into action.

3 Three Steps to Reduce the Democratic Deficit

The Amsterdam Summit also produced three changes which had been called for in Greening the Treaty to reduce the EU's democratic deficit.

3.1 Expanded Role of the European Parliament in Environmental Decisionmaking

The Treaty extends the right of the European Parliament to decide on environmental legislation on an equal footing with the Council. For the majority of environmental decisionmaking, the codecision procedure replaces the cooperation procedure. The role and influence of the European Parliament is thereby increased.

3.2 End of Secrecy in the Council

Second, a new provision requires the Council to open its decisionmaking to public view. In a reform which is long overdue, the Council will now, when it acts in its legislative capacity, make public its votes, any explanations attached to votes as well as statements in the minutes relating to votes. This provision should end the secrecy which has always surrounded the lawmaking by the Council.

3.3 Right of Access to EU Documents now in the Treaty

Further, the Treaty now also includes a provision giving EU citizens and others the right of access to the documents of the three principal EU institutions, namely the Parliament, the Council, and the Commission. Although the provision has some defects, it does anchor the right of access to documents in the Treaty for the first time. The general principles and any limits to the right of access remain to be worked out in rules to be adopted within two years under the codecision procedure. It can be expected that these rules will be more generous than the ones under which the Commission and the Council currently operate.

4 Failures

4.1 No Extension of Majority Voting in the Environmental Area

No change was made in the power of a single Member State to veto environmental progress by the others. For several important areas of environmental policy (Art. 130s(2)), including notably fiscal instruments, the existing requirement of unanimous support remains unchanged. This means that the obstacles to the introduction of taxes or charges in support of environmental objectives remain as high as ever.

4.2 No Improvements in Access to Justice

The EU leaders refused to even consider making any change to the Treaty to open access to the courts for citizens and their organisations. In particular, this means that the hurdles for bringing cases against the European Commission before the European Court of Justice have not been cleared. It now remains to await the Court's decision in a case that Greenpeace has brought against the Commission.

4.3 No Right to a Clean and Healthy Environment in the Treaty

In their Declaration at the Dublin Summit in 1990, the EU leaders made known their commitment to the right to a clean and healthy environment. In Greening the Treaty II, the environmental organisations proposed including the right to a clean and healthy environment in the Treaty. Although there was considerable discussion during the IGC on the fundamental rights of the EU citizen, this right has not been included in the new Treaty.

4.4 No Reform of the EURATOM Treaty

There was also no meaningful discussion at the IGC on how to eliminate the promotional objective of the EURATOM Treaty concerning nuclear energy. Greening the Treaty II called for phasing out EURATOM and shifting investment from nuclear energy to renewable energy.

5 The Open Question: Has the Environmental Guarantee Been Strengthened?

The question remains if it is possible for a Member State to maintain or introduce stricter national measures to protect its environment than the EU's internal market rules? Under the Maastricht Treaty, it was unclear whether a Member State could introduce new national measures that are stricter than those agreed at EU level in the framework of the internal market. The right to maintain or introduce stricter measures is sometimes called the 'environmental guarantee'. (Art. 100a(4))

The Treaty of Amsterdam now makes clear that both existing and new stricter measures are possible. The right is subject to several conditions however which make it uncertain whether it will, in practice, be possible to make much use of the right to have stricter measures to protect health and the environment. Under the new provisions, a Member State will have to show that its new standards are 'based on new scientific evidence', address 'a problem specific to that Member State', and do 'not constitute an obstacle to the functioning of the internal market'.

The environmental organisations are now attempting to obtain clear confirmation of these rights in a formal manner before the signature of the Treaty. It is obvious however that the intention of the new provisions is to extend the 'environmental guarantee'

and that these amendments should therefore be interpreted generously.

6 Subsidiarity and Flexibility

The concepts subsidiarity and flexibility have also entered the Treaty. Existing agreements on subsidiarity have been given a binding status because the new Treaty incorporates them in a protocol to the Treaty. Whether this formalisation of the existing agreements on subsidiarity will have any additional impact on environmental policy remains to be seen. This is not, however, a development which the environmental movement called for.

The Treaty also includes new clauses on 'flexibility' or 'closer cooperation'. The idea behind these provisions is that it should be possible for a significant number of Member States to move forward together even if it is not possible to obtain the agreement of all Member States to a particular measure. The Treaty includes both general provisions on flexibility and provisions for the Community pillar (also known as the first pillar which includes environment policy) and the pillar concerning Justice and Home Affairs. Again, the environmental movement did not call for these changes. However, the introduction of flexibility into the first pillar may open the way to the adoption of the carbon/energy tax or other measures for which unanimity would otherwise be required.

A more detailed analysis of the provisions concerning subsidiarity and flexibility is needed before a conclusion can be drawn concerning their impact on environmental policy.

7 Conclusion

In sum, the Treaty of Amsterdam represents a decided step forward. Two fundamental principles - concerning sustainable development and environmental protection requirements - have been given particular prominence. The democratic deficit has been reduced by increasing the role of the European Parliament, ending Council secrecy, and establishing the right of access to documents. The 'environmental guarantee' has in principle been enlarged. Unfortunately, the EU has failed to take a number of steps - such as making the adoption of fiscal instruments easier or opening up access to justice for its citizens - which would make its task of achieving sustainable development easier.

The adoption of Treaty reforms is moreover but the beginning of a process. Attention in the coming months and years will need to be paid to such steps as the implementation of the integration principle, Parliament's strengthened legislative role and the adoption of rules governing access to the EU's documents. And campaigning will continue to accomplish those much-needed reforms which this IGC did not achieve, in particular extending majority voting, access to justice and reform of EURATOM. •

The Public Participation Convention - Progress Report on the Negotiation

by *Jeremy Wates*

1 Introduction

In just over a year's time, Ministers from throughout the UN ECE region will gather in Aarhus, Denmark, to sign a new international law on public participation and the right to know.

The idea of an international law on access to environmental information and public participation is certainly an attractive one. There are few environmentalists who have not at some stage felt the frustration of not being able to obtain environmental information held by public authorities, or of being excluded from decisionmaking processes. Whether one is fighting against climate change, toxic waste or destructive road plans, access to information and public participation, backed up by access to justice, are prerequisites to effective campaigning.

When environmentalists called on the European Environment Ministers meeting in Sofia in October 1995 to develop an international law on access to information and public participation, few would have imagined that a year and a half later, we would be in the thick of negotiations over a draft legal text. Indeed, the decision by the Ministers to explore the possibility of such a Convention was regarded as one of the more pleasant surprises of the Sofia conference and the Environment for Europe process generally.

The negotiations began in June 1996 in an intergovernmental Working Group around a text known as 'Draft Elements', produced by the ECE Secretariat. This text served as the main basis for discussion for the first four sessions, after which a revised text for the articles of Draft Elements dealing with information and participation was produced by a small drafting group (April 1997). When the negotiations continue in June and July, the focus will be on the revised text, the remaining parts of Draft Elements and on developing a new text on the issue of access to justice.

The task of producing a strong text for the Convention is proving challenging, to say the least. An active NGO presence in the negotiations does not alter the fact that the process is dominated by government officials, some of whom are actively hostile to public 'interference' in their work. After four sessions of the Working Group, and with perhaps a further six sessions to go, environmentalists are now facing the reality that many governments are less than enthusiastic about making concrete legally binding commitments to strengthen information and participation rights.

Of course, there is still another year to go before the Convention is due to be signed, so there is much

scope to influence the outcome. What the first phase of the negotiations has shown is that it will be important to put pressure on governments in their own countries to support a strong Convention.

2 Origin and Scope of the Convention

Various international decisions and instruments paved the way to the present Convention. Principle 10 of the Rio Declaration was clearly an important stepping stone, and likewise the UN ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decisionmaking, endorsed by European Environment Ministers at the Third 'Environment for Europe' conference in Sofia in October 1995.

The idea of an ECE Convention specifically on public participation issues was first put forward (at least in recent years) by ECOs in 1994 during the process of drafting the ECE Guidelines. As well as arguing over the content of the draft Guidelines, ECOs argued that Guidelines were not a sufficiently strong kind of instrument, and that a legally binding Convention should be adopted. ECOs were soon supported in this call by other groups, such as GLOBE (Global Legislators Organisation for a Balanced Environment) Europe, the European Parliament and the European Green Parties. For once, the Ministers listened.

The Convention will cover the UN ECE (Economic Commission for Europe) region - the whole of Europe, the five Central Asian Republics of the CIS, the US, Canada and Israel (though the last three have not participated in the negotiations).

3 Key Issues in the Negotiations

It has been generally accepted that the Public Participation Convention - its full working title, the 'Convention on Access to Environmental Information and Public Participation in Environmental Decisionmaking', is a bit of a mouthful - should have three pillars: access to information, public participation (or access to decisionmaking) and access to justice.

There are many controversial issues in the negotiations. These are some of the questions being discussed:

- Should the definition of environmental information include data on human health, socioeconomic conditions or cultural heritage? Some countries would like to see quite a narrow definition, limited to information on the state of the environment in a scientific sense; others feel it is important to include these other elements, noting that they are

already included in other ECE Conventions (e.g. Transboundary EIA, Industrial Accidents).

- Within what time limit should a public authority provide information requested? A core of EU countries (France, Germany, Netherlands, UK) want to keep at or close to two months, and are resisting more progressive proposals.
- Should a public authority have to provide information in the form specified by the requester? Most countries think so, but Germany is against.
- When should it be possible to exempt information from disclosure, and should there always be an overriding public interest test? Another controversial area, with even the more progressive countries being reluctant to give up their traditional exemption provisions. Most countries support the public interest test.
- Will the Convention require countries to introduce Pollutant Release and Transfer Registers, one of the most powerful tools for getting the corporate sector to clean up its act?
- Should state-of-the-environment reports be obligatory, produced annually and required to have certain minimum contents? Norway has proposed an annex or protocol setting out the information requirements of such reports.
- Will the Convention require certain types of environmental information to be available on the Internet? Putting information on Websites could save a lot of hassle for officials responsible for responding to information requests - so this issue separates governments who just want their officials to have an easy life from those who are just addicted to secrecy.
- Should anyone be entitled to participate in a decisionmaking process, or just those who can prove an interest? Most governments seem to want some kind of 'interest' test, with some wanting special recognition of the role of NGOs.
- To what extent should public authorities be obliged to explicitly take account of public input into a decisionmaking process?
- Should the access to justice pillar just establish the right to appeal against violations of the rights to information or participation - or should it extend to citizen suits, giving the right to mount legal challenges against any breach of environmental law?
- Should international bodies and processes be covered, and if so, how? ECOs have argued that the internationalisation of decisionmaking should not be accompanied by a loss of transparency and accountability, and that bodies such as EU institutions should follow the same rules as national governments. So far, government delegations

seem to think it would be too complicated to address this.

- What about legislative bodies and processes? Traditionally these have been exempt in many countries, but should they be?

4 Who Are the Troublemakers?

Russia and Germany stand out as by far the two most obstructive countries in the negotiations, opposing almost any provision which would strengthen the text or require them to make changes at home. Indeed, given the strength of their opposition, it is difficult to see why they ever agreed that a Convention should be developed. At this stage, it appears that these countries are aiming to wreck the prospects of a meaningful Convention, as they successfully draw the middleground consensus in a minimalist direction.

Several of the EU countries - France, Italy, UK - are also adopting quite conservative positions, though their input is more mixed. Albania, Belgium, Poland and the Nordic countries have for the most part been quite progressive but much too quiet. And many of the CEE/NIS countries also remain silent for most of the time - regrettably so in some cases, because some of them have quite good examples of public participation.

There can be little doubt that many countries are hiding behind the extreme positions of Russia and Germany - so it would be a mistake to imagine that changes in those two countries' positions would be enough to solve the problem. Governments in all countries need to be put under pressure to play a more positive role in the negotiations. (For a detailed account of the positions adopted by countries, see the 'Countries Overview' section of the ECO reports on the negotiations.)

5 NGO Participation

NGOs have participated in the drafting process to a degree which is probably unprecedented in the history of international law, taking part not only in the plenary sessions of the Working Group but in each small drafting group or advisory group. Apart from the ECO coalition, the Regional Environmental Center for Central and Eastern Europe (REC) and GLOBE Europe have participated actively. Initially, participation was on a more or less equal basis. More recently, a slight distinction has been made between governmental and non-governmental delegations.

ECO representation in the negotiations was initially arranged by the Steering Committee of the NGO Working Group on the Pan-European Environment. Then, in October 1996, a new structure for determining ECO participation in the negotiations was adopted at the pan-European ECOs conference 'Towards Sustainability in Europe: from Sofia to Aarhus', held in Brussels. This involved setting up a Public Participation Campaigns Committee, respon-

sible among other things for organising ECO representation in the Convention negotiations. The Committee for the time being consists of Friends of the Earth Europe, the European Environmental Bureau, Stichting Natuur en Milieu (Netherlands) and Borrowed Nature (Bulgaria), but has the goal of expanding its membership to strengthen regional representation.

ECO participation in the negotiations involves a three-tiered structure:

- An open-ended network currently consisting of some 200 or so people who have asked to be kept in touch with the progress of the negotiations and to have the opportunity to submit ideas into the process;
- A resource group of some 16 people with relevant expertise, acting as a critical sounding board and helping to formulate the positions put forward in the negotiations;
- A delegation of four people, two from Eastern Europe and two from Western Europe (in practice, some of the resource group people attend the negotiations under the banner of the delegation, so there are usually six or seven present).
- During the first year of the negotiations, ECO participation in the process has been supported financially by the Danish and Dutch governments.
- As well as agreeing on a structure for ECO participation, the October '96 meeting also adopted a declaration on the content of the Convention. This Declaration has provided an important reference point for the ECO delegation (see Further Information).

6 Timetable

- October 1995 Sofia Ministerial Conference: UN ECE Guidelines endorsed; Decision to consider development of a Convention
- January 1996: Committee on Environmental Policy (CEP) gives go-ahead to starting preparation of Convention, sets up special Working Group to prepare draft text
- April 1996: UN ECE secretariat prepares first draft with NGO input
- June 1996: Negotiations begin in the Working Group
- Early 1998: Working Group to complete draft text, submit to CEP
- Spring 1998: CEP to amend/adopt draft text, forward to the Ministers
- 23-25 June 1998: ECE Environment Ministers sign Convention in Aarhus, Denmark

7 Call for Action

Over the past 10 months, a small group of us have been actively participating in the negotiations in

Geneva. We have been presenting a lot of arguments and sometimes even seeming to win them, but this is not enough. Many delegations continue to just take the narrow point of view of officials, and manifestly fail to serve the interests of the public they are supposed to represent. They continue to regard public participation as a nuisance which they must reluctantly tolerate, rather than an asset. They can get away with this because back at home, the public do not know how they are being represented. Only by building up pressure at national level will we succeed in shifting some of those stubborn governments. And that is where you (hopefully) come in.

Here are some suggestions for how you might help in the struggle for a strong Convention:

- Get yourself on the (e-)mailing list to receive the ECO reports on the negotiations. You can get the long version (up to 60 pages per session) or the summary version. (See Further Information for contact details.)
- Use the ECO reports on the session to find out what your government has been up to - are they good guys or bad guys, or part of the apathetic silent majority? Then use this information to build up pressure to strengthen your government's position.
- Ask for ECO representatives to be included in your government's delegation, in an advisory capacity, citing the fact that this has already been done in Poland, the Netherlands and Slovenia and will probably be done in Georgia.
- Demand that your Minister and/or the government officials on the delegation meet with a representative group of the main ECOs interested in this issue - and insist on ongoing consultation throughout the negotiations. If necessary, ask how they can possibly negotiate a Convention about public participation and at the same time refuse to allow public involvement in the negotiations themselves.
- Get opposition politicians to raise questions in your parliament. Parliaments should also be consulted by governments during the drafting process, not just asked to ratify the Convention after it has been signed.
- Generate publicity in your national media. Write articles for the specialist environmental media (you are welcome to translate/copy/adapt this one) and send out a press release to the mainstream media focusing on your criticism of the position your government is taking where this is justified.
- Keep the international ECO delegation informed of developments in your country, and submit your views on the current draft texts being proposed.

8 Further Information

As a starting point, the following are the most important documents to look out for:

- ECO Declaration on Access to Environmental Information and Public Participation, Brussels, October 1996: Adopted by the pan-European ECO conference last autumn, this is the most recent general statement of what a broad grouping of European ECOs want the Convention to achieve.
- Draft Elements for the Convention (CEP/AC.3/R.1, 11th April 1996): This document served as the main framework for the negotiations for most of the first year.
- Revised text for Articles 3, 4 and 5 (April 1997): Prepared by a small drafting group in April 1997, these are the articles containing the main operative provisions relating to information and participation. They supersede the corresponding articles in the Draft Elements.
- ECO reports on the sessions of the Working Group: The ECO coalition provides very detailed reports and analysis of each session of the negotiations. A word-search for a given country name can pull out all significant interventions by that country.
- Official (UN ECE) reports on the sessions of the Working Group: Initially these reports were remarkable for how little politically interesting information they contained. However, the reports from the third and fourth sessions are more detailed and include as annexes the reports from the informal groups and the written proposals circulated by various delegations.
- Other documents (e.g. written proposals from individual countries, list of participants etc.) are also available.
- UN ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decisionmaking, endorsed by ECE Ministers at the Sofia conference in October 1995: Published by the ECE in three languages (English, French and Russian) in a handy booklet.
- UNECE Guidelines: from Theory to Practice', by Jeremy Wates, published by EEB, April 1996: As well as containing the text of the aforementioned UNECE Guidelines in English and French, this booklet contains an introduction and commentary

on the Guidelines and the text of the pan-European ECOs statement adopted at Groznanj, Croatia, in July 1995.

- Access to Environmental Information in Europe: the Implementation and Implications of Directive 90/313/EEC', published by Kluwer Law International, ed. Ralph E. Hallo, 1996: Probably the most comprehensive overview of the subject, covering 23 countries, mainly in Western Europe but also in Central and Eastern Europe.

More detailed information on the Convention negotiations can be found on a new Website. Details from the ECO delegation contact address below.

Useful Contact Addresses

ECE Secretariat, Wiek Schrage, Environment and Human Settlements Division, Economic Commission for Europe, Office 415, Palais des Nations, CH-1211 Geneva 10, Switzerland, Ph: +41-22-917-2448, Fax: +41-22-907-0107 (short messages only), E-mail: wiecher.schrage@unece.org or schrage.ece@unog.ch

ECO Coalition, Jeremy Wates (EEB/FoE Ireland), Coordinator of the ECO delegation to Convention negotiations, Millbeg, Coomhola, Bantry, County Cork, Ireland, Ph/fax: +353-27-51333, E-mail: jwates@foeire.iol.ie

Forthcoming Events

Convention negotiations schedule

- 7-10/7/97: 6th session of Working Group
- 29/9 - 2/10/97: 7th session of Working Group
- 1-4/12/97: 8th session of Working Group
- 12-15/1/98: 9th session of Working Group
- 30/3 - 3/4/98? 10th session of Working Group?
- Spring 1998: Committee on Environmental Policy to amend/adopt Working Group text
- 23-25/6/98: Convention open for signature at Aarhus Ministerial Conference

Other Events

- 4/9/98: GLOBE Europe/ OECD parliamentary conference on the Convention, Stockholm•

Second Session of the Open-Ended Working Group on Biosafety

by Beatrix Tappeser

1 Introduction

The second session of the open-ended working group took place from the 12-16 May in Montreal,

Canada. The attendance at the meeting was not as favorable as that of the first one in Århus (see *elni* 2/96, page 32 ff). This holds true for government delegations as well as for NGOs. It seems that there

have been some serious conflicts regarding the travelling support for developing countries. The rumour says that UNEP has not been willing to pay (though they spend a lot of money to promote their technical guidelines in regional meetings all over the world). Therefore, only least-developed countries and small islands got some funding. In all, only delegations from 85 countries took part. Many delegations sent only one delegate; however, the US delegation had twelve members.

Val Giddings, an important member of the US delegation in Århus, is now vice-president of BIO, the American Industry Organisation. Two other US Government employees have also joined biotech-industry. Mickey Kantor, a former US trade representative, is now a member of the board of directors of Monsanto while Marcia Hale, a former assistant of the US-President for intergovernmental affairs has become a senior official of Monsanto to coordinate public affairs and corporate strategies in the UK and Ireland. Maybe this is the reason why Monsanto has got an unregulated status for its insect-resistant and glyphosate-resistant corn. In any case, it clearly shows the growing industrial influence on any piece of legislation and the close connection between business and policy making.

2 Results of the Conference

The negotiations followed the list of items produced in Århus. In conference room papers each item was covered and the different opinions about how they should be dealt with. The submitted papers that were circulated among the delegations will form the basis for the forthcoming legal negotiations due to start at the next meeting in October. All those aspects or ways of handling the different topics which had not been introduced before or at the Montreal session will not be negotiated. The results of this meeting are quite satisfying, or at least more than was expected. All items which are very controversial like liability, socio-economic impacts, contained use, and labelling issues are now included in the negotiation catalogue.

Quite a long discussion took place on AIA procedure (Advanced Informed Agreement) to be implemented in the framework of a biosafety protocol. The German government especially, took a position which nearly no-one understood. Though a consensus item in Århus, the Germans wanted to remove it from the list. This was also the reason why the European Union did not come up with a common statement before meeting in Montreal.

Particularly controversial regarding AIA procedures were the issues of registration, risk assessment,

which data to be submitted and approval requirements. Concerning approval requirements, many developing countries stated that for *each* introduction of any living modified organism an approval should be obligatory, which means any shipment, including repeated shipments, of the same organism. However, many industrialized countries took the stand that those organisms thought to be inherently safe should be excluded from approval requirements.

3 Additional Incidents

A delegate from Sri Lanka brought to our attention the unregistered introduction of a biological rodenticide called Biorat in his country. Biorat is a bacteria preparation consisting of *Salmonella enterica sub-species enterica*, which are quite pathogenic organisms. On a short information sheet it was stated that these bacteria are species specific for rats and mice and do not pose threats to humans. Until now it is not clear whether or not these bacteria are genetically engineered. But even if they are not genetically engineered, such an introduction is very dangerous because *Salmonella* species normally are not very species-specific. According to a *Salmonella* specialist of the Massachusetts Institute of Technology, it is nearly impossible to make these bacteria specific for certain species. The bacteria can cause severe health problems in humans, especially children. This example illustrates further the urgent need for a biosafety protocol and shows the difficulties developing countries have in receiving the proper information in order to conduct their own risk assessments.

Another topic at the conference which was also discussed among delegates and NGO representatives was the recall of herbicide-resistant canola seeds by Monsanto. Originally, Monsanto had delivered seeds for more than 60.000 hectares. After marketing them, they detected that their seeds were contaminated with a „bad gene“. The subsequent information policy of Monsanto was very dubious, as is the whole story. Until now the nature of this „bad gene“ seems to be unknown.

In addition, the way this gene managed to integrate itself in Monsanto's seeds also remains mysterious. The seed production company Limagrain stated that it would be impossible to find out the causes since the parent generation had been destroyed, a highly incredible claim. Maybe, some form of outcrossing happened or the contamination had already been caused in the lab. In any case, it would indicate a very bad quality control and hurt the credibility of a biotechnology industry that repeatedly claims that nothing can happen and all is safe. •

NEW REGULATIONS

Amendments to EIA Directive Passed

The amendment to the European Directive on Environmental Impact Assessment for certain public and private projects was finally passed on 3 March 1997 (OJ L 73/5).

The amendment clarifies some passages of the Directive of 1985 that were misinterpreted by the Member States. This applies especially to the provision concerning the use of Annex II, that lists the projects in which the Member States can decide whether it is necessary or not to carry out an EIA. The new Art. 4 para. 2 now contains certain requirements for this decision. The Member States are now obliged to either examine every single case or to set up criteria or general thresholds for the decision. The decision has to be accessible for the public. Under the new directive it will therefore be clear that a Member State cannot exclude in general Annex II projects from EIA obligations.

Another novelty pertains to provisions relating to transborder impacts. Art. 7 now contains more detailed rules for crossborder information exchange and participation of citizens and administrations.

Additionally, the list of projects that fall within the scope of the Directive has been specified and also enlarged. Annex I (list of projects for which an EIA is mandatory) now describes the projects in greater

detail. For example „integrated chemical installations“ continue to be subject to an EIA, but it is now specified that an integrated installation consists of several units which are functionally connected. However, in spite of these specifications it remains rather doubtful whether these new definitions will lead to a more intense application of the EIA regarding chemical installations.

Some projects have been newly introduced to Annex I, such as the reprocessing installations for radioactive material, groundwater extraction of more than 10 Mio. m³ annually. Some projects have been „zoned up“ from Annex II to Annex I, such as oil and gas pipelines of more than 800 mm diameters and a length of more than 40 kilometers.

The list of Annex II is now considerably longer. It also requires the recreation industry to assess the impacts on the environment. For example, when new skiing slopes and lift installations are projected.

The overview shows that one can only expect moderate changes in the application of the EIA Directive. However, a lot of new processes and projects are newly drawn under the scope of the Directive and in the future, will lead to a broader usage of this political tool. •

New Community Strategy to Combat Acidification

In 1995 the Environmental Council asked the European Commission to develop a coherent strategy for the reduction of acidification. A proposal for this strategy was presented in April 1997. The long term goal of this strategy is not to exceed critical loads and levels of acidification. The strategy defines acidification as the effects of the introduction of acidifying substances (e.g. sulfur dioxide (SO₂), nitrogen oxide (NO_x) and ammonia (NH₃) into the environment by means of atmospheric deposition.

In setting the scientific basis for its strategy the Commission has worked with the International Institute for Applied Systems Analysis (IIASA). The resulting analysis showed that even when assuming the application of current best available technologies to all emission sources throughout Europe, it would not be possible to reach the long-term goal by 2010. For this reason the Commission examined interim targets and came to the conclusion that a 50

per cent reduction by 2010 (from the 1990 level) would be appropriate.

In order to achieve this target level it will be necessary to reduce SO₂ emissions to 2.7 million tons by 2010 (In 1990, 16.5 million tons were released). It will also be necessary to reduce the NO_x production from 13.4 million tons to 6.0 million tons.

Key elements of the proposed strategy to achieve these goals are:

- definition of national emission ceilings
- ratification of the 1994 Sulfur Protocol
- revision of the directive on sulfur content of certain liquid fuels
- introduction of economic instruments, especially in the energy sector
- action related to the convention on long range transboundary air pollution

- several activities to reduce emissions of ammonia
- the use of economic instruments (esp. in the energy sector)
- action related to the recently passed IPPC Directive and LCP Directive which is in the process of revision. The LCP Directive sets limits on the emissions of certain pollutants from large combustion plants.

The European Commission announces in its strategy that it will propose a directive establishing national emission ceilings for SO₂, NO_x, NH₃ and VOCs in 1998. It also intends to consider the conse-

quences of the proposed ceilings with regard to economic and social development requirements.

An overview of the additional emission control costs of meeting the interim target gives some ideas about the difficulties this ambitious strategy will face. The additional costs in Europe amount to 7040 million ECU, of which Germany alone will have to cover 2645 Million ECU. The UK will face additional costs of 1719 ECU. However, for Austria, Portugal, Finland, Luxembourg, and Greece no additional costs are expected. •

Communication on Environmental Taxes in the Single Market

The European Commission presented in January 1997 a communication which shall establish guidelines for the Member States for the introduction of eco taxes (Com(97) fin. 9). With this paper the Commission wants to support the use of fiscal instruments to make environmental policy and at the same time ensures that the environmental taxes and charges are compatible with Community legislation, especially with the jurisdiction of the European Court of Justice.

In the past, Member States were often unsure whether a levy or a tax would be in compliance with principles of European Union law.

A levy might, for example, be regarded as the equivalent of customs duty. According to Art. 9 to 12 of the EC Treaty new customs duties shall not be introduced by the Member States. The Commission makes clear that a levy that only falls on a foreign product may be regarded as having equivalent effect. This might also be the case if a large portion of the national production is exempt, or if the revenue is fully used to compensate domestic producers.

Art. 95 of the Treaty obliges the Member States to neutrality of the taxation system by prohibiting discrimination of other Member States and the protection of domestic products.

In this respect the Commission summarizes the jurisprudence developed by the Court of Justice as follows:

- Member States are, subject to certain limits, free to choose the system of taxation which they consider most suitable, but differentiation must be based on objective criteria, direct or indirect discrimination has to be avoided.
- The system applied to domestic products constitutes the point of reference for determining whether products of other Member States are taxed more heavily than domestic products.

- Art. 95 is infringed if a product of another Member State is charged more heavily than a domestic product.

According to Art. 92 of the Treaty any aid granted by a Member State which distorts or threatens to distort competition shall be incompatible with the common market. This might be the case when the revenue of a tax is redistributed for a certain purpose.

When the revenue is used to support environmental investment activities the Commission will consider:

- whether the revenue is spent in the same sector of economic activity as it was collected, or in a different sector (net benefit of a certain sector),
- whether the activities financed can be provided on a normal commercial basis with a satisfactory result or whether some form of state aid is needed,
- whether the money paid to firms can be considered compensation for undertaking activities that they would otherwise not perform and that they are in the public interest,
- if the aid element is intended to be reduced over time.

With regard to cases where the revenue is used to financing systems for collection and disposal of dangerous substances the Commission points to its assessment of several cases (e.g. the Danish scheme for the collection of environmentally harmful batteries).

The main elements of the assessment are as follows:

- the charge is imposed on all importers/producers of the product concerned in a non-discriminatory way,
- the payment to the collecting firms is based on normal commercial terms,
- the system does not allow, direct or indirectly, the collecting companies to sell the collected products below market price,

- the systems should be open, transparent, and economically efficient.

In contrast to other models the redistribution of revenues from emission levies to the collective that paid the levy will not be problematic unless the system favors a specific domestic sector.

A conflict with Art. 30 of the Treaty will only arise in a few cases. The Commission cites a case where a levy is imposed on a product that does not have similar or competing national production and the

levy is of such amount that the free movement of products may be impeded.

The Commission also gives some guidelines on the necessary notification procedures:

The redistribution of the revenue of a levy that might be regarded as state aid must be notified with the Commission. Attached to the communication is a very informative annex with a table showing an overview of the eco-taxes and charges in the EU and EEA countries as of October 1996. •

Proposal for a New Framework for Energy Taxes

On 12 March 1997, the European Commission proposed a new directive for the reconstruction of the Community framework on taxation of energy products. The proposal will not imply new taxes, but rather establish a framework for national energy taxes. The Commission proposes to establish higher minimum rates for the taxation of all mineral oils and energy products.

By 1 January 1998, the minimum tax rate for petrol will be 417 ECU per 1000 liters (15 C°). For kerosene and gas oil the minimum tax level will be 310 ECU per 1000 liters. However, the directive allows privileges for certain purposes, e.g. to passenger transport. Thus, the tax rate for kerosene which is used for passenger transports by air can be reduced up to 30 ECU per 1000 l through the proposal. The sense of this privilege is dubious when one considers the adverse climate impacts of increasing numbers of flights. Nevertheless, the proposed directive shows some environmentally friendly effects.

It furthermore suggests allowing greater flexibility with regard to environmental, transportation or energy policy goals. The Member States shall be able to define the level of taxation of a product in relation to its environmental standards. A notification for such a taxation will not be necessary any more,

provided that the minimum tax level has been observed.

Moreover, it shall be possible to exempt certain products from taxation or to allow for tax benefits, e.g. bio fuels, renewables, rail transport, inland waterway navigation, or heating generated through cogeneration. Member States are allowed through Art. 15 to reimburse taxes up to the amount which were paid by enterprises for a specific exclusive improvement of a rational energy use.

The Member States are also free to reimburse the tax amount paid by an enterprise for production energy which exceeds 10% of the production costs. According to Art. 16 of the directive proposal the Member States can deviate from the obligatory minimum standard if they adhere to certain political goals. An example is the reduction of mineral oil taxes, with which costs caused by road traffic shall be covered (e.g. congestion of roads, infrastructure, and environmental costs). An overview of the effects of the new minimum tax rates shows that for example the fuel costs at petrol stations will rise in Greece (9%), in Spain (6%), and in Luxemburg (8%). In all other countries the fuel price will not increase. Therefore the effects of the proposal are limited. •

NEWS IN BRIEF**Public Participation and Right to Know Newsletter**

In May 1997 the first issue of „Participate“ was released by Friends of the Earth Europe, Stichting Natuur en Milieu, the EEB, and the Borrowed Nature Association. The newsletter is intended to be an important tool to inform the public about Public Participation and Access to Environmental Information. It is part of a Pan European Campaign for transparency and participation by European Environmental citizens organisations.

The campaign shall ensure that the UN ECE Guidelines on Access to Environmental Information and Public Participation in Environmental Decisionmaking (endorsed in Sofia in 1995 by the European Environmental ministers) are fully implemented and that

the Convention on the same topic will be signed in 1998 by the same ministers in Århus, Denmark.

The first issue gives a background on the planned convention, reports on the progress in the negotiations and the role of NGO participation (see article by Jeremy Wates in this issue). Other articles cover a report on the access to information campaign coordinated by Stichting Natuur en Milieu and a report about the impact of access to information at the national level.

Further information: Mara Silina - FOE Europe, 29 rue Blanche , B-1060 Brussels, Fax: +32 2 537 55 96, e-mail: 106001.2140@compuserve.com. •

EAA: Improved Access to Information is a Driving Force for Environmental Improvement

The European Environment Agency (EEA) published an Experts' Corner Report on Public Access to Environmental Information in Europe. The report, written by Ralph Hallo (Stichting Natuur en Milieu, The Netherlands) a long-standing elni member, with a foreword by Ken Collins, MEP, Chairman of the European Parliament Committee on the Environment, Public Health and Consumer Protection, describes the issues at stake in the current debate about improved access to environmental information and public participation in environmental decisionmaking in both the European Union and the UN ECE framework. The report offers an overview of the principal instruments for providing the public with access to environmental information. It covers the 15 EU Member States, as well as the situation in countries of the European Economic Area and Central and Eastern Europe.

Directive 90/313/EEC on freedom of access to environmental information, which has been in effect since 1993, is the most significant law concerning public access to environmental information. It establishes a general right of any person to environmental information held by public (and quasi-public) au-

thorities subject to specified exceptions. The Directive represents a dramatic change for most Member States, introducing openness where secrecy was the rule. Four years of experience have shown, however, that the process of change is a gradual one and that continued progress, both in terms of the quantity and the quality of the information available, is still desirable.

The report covers in particular the developments at EU level and the UN ECE efforts to elaborate a draft Convention on Access to Environmental Information and Public Participation in Environmental Decisionmaking. This draft Convention will be on the agenda of the next Pan-European Environment Ministers' Conference, scheduled to take place in Århus, Denmark, in June 1998.

The Experts' Corner Report on Public Access to Environmental Information is available free of charge from the European Environment Agency (EEA). It can also be accessed at the EEA's homepage at: <http://www.eea.eu.int>. For more information please contact Ernst R. Klatte, Communications Officer, EEA, Copenhagen, Denmark, Tel.: +45 33 36 71 53, Fax: +45 33 36 71 99. •

European Round Table of Industrialists on Climate Change

The European Round Table of Industrialists represents 45 major European multinational companies. The organisation has just published a report „Climate Change: An ERT report on Positive Action“. Those who are expecting commitments and concepts on how the companies plan to reduce green house gases will be disappointed. The paper is directed towards governments which, in the view of ERT, seem to be mainly responsible for the necessary reductions. The report provides several „tests“ which any climate change policy should pass before adoption. („12 positive ways for government to limit greenhouses gases in partnership with business and

industry“, „The rights and wrongs“). The main concern of ERT seems to be that climate change policy might harm the competitiveness of European industry. The paper explicitly neglects energy taxes and among other things promotes the use of nuclear energy, the establishment of incentives for the development and use of renewable sources and the development of a system of tradeable permits.

Copies in English or French can be ordered from Catherine de Windt, ERT Secretariat, 113, Avenue H. Jaspar, B-1060 Brussels, Fax: +32 2 534 73 48.●

Environmental Crime - Prosecution Practice in Germany

The German Criminal Code contains in Art. 324-330 d regulations on criminal acts against the environment. Under these regulations the following actions are punishable by imprisonment by the Criminal Courts:

- illegal pollution of water and air,
- illegal cause of noise,
- illegal disposal of waste,
- unauthorized use of nuclear fuel,
- unauthorized operation of plants,
- endangerment of especially protected areas,
- serious endangerment to the environment,
- serious endangerment by release of poison.

The Federal Government has released statistics on the prosecution practice in Germany (BT-Drs. 13/6923). The latest data available reflects the situation in the year 1994.

The overview shows that in most cases where it came to a conviction the offender only had to pay a relatively low fine. In connection with the planned amendment of the Criminal Code it is now being discussed whether or not to impose a more severe punishment for serious crimes against the environment. ●

Prosecutions	4155
of which are	
refrainments from punishment	2
acquittals	124
suspensions	1389
convictions	2640
of which were imprisonments	105
under 6 months	49
6 months	9
6-9 months	21
9 months-1 year	11
1 year-2 years	10
2-3 years	4
3-5 years	1
of which were fines (equivalent of prison days, amount varies depending on income)	
5-15 day rates	2509
16-30 day rates	1129
31-90 day rates	1028
91-180 day rates	94
181-360 day rates	12
matured (forfeit or seizure)	16

De-Regulation in Russia?

On May 15, 1997 the Environment Committee of the Russian Duma rejected a draft law that would have led to a severe cut down of Russian environmental legislation. The draft law would have made all environmental impact reviews (environmental expertise) voluntary and would have allowed projects to go forward even if they had been judged harmful by the environmental assessment. The draft also reduces the rights of non-governmental organisations.

The current Law on Environmental Expertise came into force in 1995. The Russian system of environmental expertise differs from the western approach of environmental impact assessment. (See Stec, in elni newsletter 2/96 p.17). One significant difference is that a positive result of the environmental expertise is a prerequisite to receive a license. On the basis of this law 1000 citizens and 40 organisations filed a court suit in order to challenge government decrees that authorized the construction and financing of the St. Petersburg-Moscow high speed railroad. The railroad will cross protected areas and

wetlands and would cause considerable harm to the environment. The case has been referred to the constitutional court by the supreme court. This is the first big „test“ case concerning the Environmental Expertise Law in Russia. The new draft might be a reaction to this case.

The plaintiffs of the St. Petersburg-Moscow railroad are represented by the Public Interest Law Firm Ecojuris. Ecojuris will be able to give more information on the case: Vera Mischenko/Olga Yakoleva, Ecojuris Institute, Moscow, Russia, Fax/Tel.: +7 095 921 51 74, email: ecojuri@glas.apc.org

Letters of support of the current law shall be faxed to Tamara Zlotnikova, Chair of the Environment Committee of the State Duma, Fax: +7 095 292 6023. International support of the activity will be welcomed. Ecojuris will be grateful for a copy of the letters sent to the Environment Committee. •

BOOK REVIEW

Sevine Ercmann

Pollution Control in the European Community

Kluwer Law International, London, The Hague, Boston 1996, ISBN 90-411-0889-0, USD 244, NLG 375, GBP 165pb

Ercmann's publication seeks to provide readers with a compilation of Community pollution control legislation and relevant legislative measures implemented by Member States. The materials, consolidated up to the end of 1995, are restated in the form of short abstracts or simple references.

The book is divided into two parts. Part I consists of a compilation of the relevant EC legislation (including directives, regulations, and declarations). The materials are assembled into seven chapters of which the first two are related to general issues. Chapter one presents constitutional, administrative, economic and liability provisions (including EIA, FOI, EMAS). Chapter two describes general provisions and programs. The five subsequent chapters devoted exclusively to pollution control legislation follow under the subject headings: water, air, noise, waste, and harmful substances.

Part II of the book aims to provide a guide to the implementation of EC pollution control legislation by twelve Member States. It refers back to all the main directives and regulations considered in Part I. In relation to particular Member States, Part II emphasizes both European Commission's findings about compliance with the Community legislation, and the relevant judgments by the European Court of Justice.

Bearing in mind the scope of legal texts covered, the author must be credited for undertaking this task alone. No doubt however, the author of the book is extremely well prepared to come to grips with such a task: Dr. Sevine Ercmann has served for years as Principal Legal Officer at the Council of Europe with responsibilities pertaining to human rights and environmental protection.

The book is meant to serve as a „guide“ and provides fully what such „guides“ should provide: comprehensive coverage of the relevant issues, clear structure to enable comparisons, and a right balance between the broad scope of legal texts covered and level of detail at which they are presented. It is apparent that, as usually happens with comparative studies of this kind, scholars and practitioners from particular Member States may find materials con-

cerning their respective legal systems either not sufficiently included or not always adequately summarized. Similarly, those more familiar with the Community legislation may have slightly different views as to the importance of certain legal instruments or their affiliations (for example: one may argue if indeed IPPC Directive should be placed in the chapter dealing with air pollution control). Another problem which the book seems to share with most comparative studies is translation. The book altogether is written in lucid English but sometimes gives rise to doubts as to the consistency of English terminology used (for example: what is the difference between „covenants“ and „eco-contracts“ in Denmark?)

The above remarks by no means serve to diminish the value of the book. In fact, when confronted with

the amount of information concerning legal systems which have been gathered and processed for the purpose, the publication is surprisingly balanced and „reader-friendly“. It should be recommended to all those who seek initial understanding of EC pollution control legislation and its implementation by Member States. In particular, this book may prove to be extremely useful for legal scholars, practitioners and administrators from countries willing to join the European Union, and who, facing the task of harmonizing their countries' legislations with the Community requirements, need to have a concise and handy compilation of relevant information. •

Jerzy Jendroska

TASKS AND ACTIVITIES

What is elni?

The Environmental Law Network International (elni) is a network of individuals and organisations who share an interest in environmental law. *elni* provides an international forum for the exchange of news, views, ideas and experiences in environmental law and in so doing promotes international communication and cooperation of those working in this field.

elni was set up in 1990 and now has over 300 members including legal practitioners and academic lawyers from all over the world.

Why is elni Necessary?

In many countries lawyers are working on aspects of environmental law, often with environmental initiatives and organisations or as legislators, but without contact with other lawyers abroad. Such contact and communication is vital for the successful and effective implementation of environmental law. For example:

For the legal practitioner offering advice to affected groups or persons, a wider knowledge of environmental law and international contacts with others working in the same field will enable him to draw on wider legal arguments based on European and international law allowing him to be more creative in the presentation of his case.

For the legislator or executive authorities, and those advising or aiming to influence them, a knowledge and understanding of different systems of environmental regulation of different states, countries or continents and of the effectiveness of their practical implementation allows comparisons and enables the legislator or authority to learn from wide and diverse

experiences when faced with the task of developing and improving environmental legislation and its practical application.

How are elni's Objectives Achieved?

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

1 Studies of the Environmental Law Network International

elni publishes a series of books entitled „Publications of the Environmental Law Network International“. Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference. There are eight volumes to date:

- International Environmental Impact Assessment
- Participation and Litigation Rights of Environmental Associations in Europe,
- Civil Liability for Waste,
- Licensing procedures for Industrial Plants and the Influence of EC Directives,
- Environmentally Sound Waste Management,
- Dynamic International Regimes,
- Environmental Control of Products and Substances,
- Environmental Rights - Law, Litigation and Access to Justice.

2 elni Newsletter

The *elni* Coordinating Bureau in Darmstadt, Germany, produces and sends to each member the *elni* Newsletter twice a year containing member's reports on pro-

jects, legal cases and developments in environmental law. *elni* therefore encourages its members to submit such articles to be published in the Newsletter, in English, in order to allow the exchange and sharing of experiences with other members.

3 Annual Conference

The annual conference focuses on a different theme in environmental law and is held at a different venue each year. This event allows members to meet, exchange ideas and plan cooperative projects as well as being legally informative with talks from lawyers and others from all over the world.

4 Coordinating Bureau

The Coordinating Bureau is at the Öko-Institut in Darmstadt, Germany, which is a non-governmental, non-profit making research institute. The Bureau acts as an information centre where members can obtain information about others working in certain areas thus promoting the development of international projects and cooperation.

elni's BOARD

At the *elni* annual conference in 1991, the participating members decided to create a board that assumes partial responsibility for the Network's future development. Members of the Board are:

James Cameron, Barrister, Foundation for International Environmental Law and Development (FIELD), SOAS, University of London, U.K.

Jerzy Jendroska, Lawyer, member of the Research Group on Environmental Law at the Polish Academy of Science in Wroclaw, Poland

Sanford Lewis, Lawyer, the Good Neighbor Project for Sustainable Industries, Waverly, USA

Stefano Nessor, Lawyer, editor of the "Rivista Giuridica dell'Ambiente", Milano, Italy

Nelly Paleologou, Member of the board of the Greek Environmental Law Association, Birdlife International, Brussels, Belgium.

Marga Robesin, Staff Lawyer with the Stichting Natuur en Milieu, Utrecht, the Netherlands

Gerhard Roller, Staff Lawyer with the ÖKO-Institut, Darmstadt, Germany

Nicolas de Sadeleer, Lawyer and Academic for the centre d'étude du droit de l'environnement (CEDRE) at the facultés universitaires Saint-Louis, Brussels, Belgium

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Manuscripts should be submitted to the Editors on a 3.5 floppy disk using an IBM compatible word processing package. Articles that are not signed are in the responsibility of the Editors.

The *elni* Newsletter is the Newsletter of the Environmental Law Network International. It is distributed twice a year to its members at the following price levels: commercial users (consultants, law firms,

government administrations): DM100/US\$60; private users, students, libraries: DM40/US\$25. Members from Central and Eastern Europe will receive the *elni* Newsletter free of charge. Non-members can order single issues at a fee of DM10 incl. packaging. The Environmental Law Network International also welcomes an exchange of publications as a way of payment. Private members and libraries who feel that the charge is exceeding their financial capability can subscribe to the newsletter at a reduced rate on request.

The *elni* Newsletter is prepared with the financial and organisational support of the Öko-Institut e.V., a non-profit private research institute. The address of the main office is: Öko-Institut e.V., P.O. Box 62 26, 79038 Freiburg, Germany.

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elni PUBLICATIONS

Sven Deimann / Bernard Dyssli (Eds.)

*Environmental Rights**Law, Litigation and Access to Justice*

Cameron My Ltd. London 1995, 340pp, ISBN 1 874698-11-2, pb., £40 post paid UK, £45 post paid EU, £50 post paid outside the EU

The new *elni* volume assembles the papers of the *elni* conference on Citizens Rights and Litigation in Environmental Law in Strasburg. The contributions describe the efforts at the constitutional and institutional level to establish a right to a healthy environment, and the strategies pursued to ensure those rights. It offers an overview of recent NGO litigation experience, and essential advice on how to mount such actions. The title covers information essential to practitioners and academics who wish to have an analysis of the comparative aspects of environmental laws.

Betty Gebers / Jerzy Jendroska

*Environmental Control of Products and Substances**Legal Concepts in Europe and the United States*

Peter Lang Verlag Frankfurt/M., Bern, New York, Paris 1994, Vol. 6, 179pp., ISBN 3-631-47672-8, pb., DM65,00

Traditionally, environmental law has focused on the impacts of industrial plants. Although far from being comprehensive, there exists a broad range of directives covering the classical environmental issues of air pollution and water pollution in the European Community and in national legislations. Future environmental law and policy will have to consider much more than in the past the effects of products and substances. New models, like concepts for a regulation of materials flows, will have to be developed.

This volume assembles the contributions of the 1993 Annual Conference of the Environmental Law Network International, which was devoted to this particular issue. The book starts with an outline of recent developments in the EC and in Central and Eastern Europe. The impacts of substances during the life cycle of a product and the existing regulatory to handle these impacts are a further focus of the book. Further contributions relating to the field of conflict between product control and the internal market are followed by reviews of new instruments that could lead to a better information and control.

Thomas Gehring

*Dynamic International Regimes**Institutions for International Environmental Governance*

Peter Lang Verlag Frankfurt/M., Bern, New York, Paris 1994, Vol. 5, 515pp., 22 fig. 12 tab., ISBN 3-631-47631-0, pb., DM128,00

International environmental regimes are dynamic institutions for international governance in rapidly changing issue-areas. They comprise cooperative arrangements and permanent negotiation processes. This volume examines international governance by environmental regimes empirically and theoretically. It thoroughly explores the formation and development of the regimes on long-range transboundary air pollution and the protection of the ozone layer. Subsequently it develops a theoretical concept of norms and institutions that draws attention to the important role of negotiations and collective decision-making for the improvement of sub-optimal outcomes. Dynamic international regimes are conceived of as institutions that are highly suitable for international policy-making.

Andrea Sander / Peter Küppers (Eds.)

*Environmentally Sound Waste Management?**Current Legal Situation and Practical Experience in Europe*

Peter Lang Verlag Frankfurt/M., Bern, New York, Paris, 1993, Vol. 4, 241pp., ISBN 3-631-45863-0, pb., DM74,00

The book assembles the revised papers presented to an international working conference on international waste policy convened by the Environmental Law Network International in Germany in May 1991. The focus is on EC, national and regional waste management law, and implementation and practice in 15 countries of Europe. This is supplemented by analyses of relevant organisations and rich statistical material; thus volume 4 in the *elni* publication series offers a unique comparative overview. The pan-European perspective showed a serious risk of "eco-dumping", i.e. the export of waste to countries with lower disposal standards. Therefore "global domestic policy" must become the guiding principle of national and international regulation and one of the main tasks of environmental organisations.

Betty Gebers / Marga Robensin (Eds.)

*Licensing Procedures for Industrial Plants and the
Influence of EC Directives*

Peter Lang Verlag Frankfurt/M., Bern, New York,
Paris 1993, Vol. 3, 166pp., ISBN 3-631-45580-1, pb.,
DM59,00

The contributions of this volume illustrate the influence EC legislation already has on licensing procedures for industrial installations in the Member States of the European Communities. For a number of the most important EC Directives, overviews of the current state of implementation in the Member States are given. This is complemented by country reports on the formal transposition and practical implementation of the obligations arising from EC law in selected Member States. In order to be able to assess EC environmental legislation it is highly interesting to look at the legislation in countries outside the European Communities. Reports on the regulation of licensing procedures in the USA and Australia give an impression of how the instrument of Environmental Impact Assessment, which is relatively new to the EC, has proven itself there.

Peter v. Wilmsky / Gerhard Roller

Civil Liability Waste

A Legal Analysis of the Proposed EC Directive

Peter Lang Verlag Frankfurt/M., Bern, New York,
Paris 1992, Vol. 2, 196pp., ISBN 3-631-45172-5, pb.,
DM59,00

In recent years there has been an increase in the use of new strategies in environmental law which aim at supplementing command and control regulation with economic incentives in order to reduce pollution. Such incentives also aim to incorporate improved civil law remedies. Against this background the Commission of the European Communities has

proposed a directive on civil liability for damage caused by waste which is carefully examined by this study. Although the Commission's proposal dates from 1991 the key issues of the proposal are still highly relevant in current political discussions on environmental civil liability. The importance of the issue has been highlighted by the recently adopted "Greenpaper on Civil Liability". The authors of this study scrutinise the provisions of this proposed EC directive and develop policy recommendations on the key issues of waste liability law. The main chapters deal with the question of who should be subject to strict liability, requirements in relation to causation, legal remedies which should be available in case of damage to the environment, and the question of compulsory environmental insurance.

Martin Führ / Gerhard Roller (Eds.)

*Participation and Litigation Rights of
Environmental Associations in Europe*

Current Legal Situation and Practical Experience

Peter Lang Verlag Frankfurt/M., Bern, New York,
Paris 1991, Vol. 1, 196pp., ISBN 3-631-43648-3, pb.,
DM59,00

The first volume in the network's publication series contains the revised papers presented at the network's first conference in 1990. It provides a comprehensive comparative overview of participation and litigation rights for environmental associations across Europe. The individual contributions to this volume are supplemented by a compilation of the relevant statutory law in force. As indicated in the title, the focus is not only on a discussion of the relevant legal provisions. In addition the contributors illustrate the practical aspects to association law suits brought by environmental groups and organizations.