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## CURRENT AFFAIRS

### WTO Panel on EC Measures Concerning Meat and Meat Products (Hormones)

by Sven Deimann

#### 1 Introduction

"Science has been the thorn in the side of environmental policy-makers since the dawn of environmental law."<sup>1</sup> This adage seems to have found dramatic confirmation in the recent WTO Panel ruling<sup>2</sup> concerning the European Community's ban on the use of synthetic or naturally occurring growth hormones in beef production. As will be shown below, the role attributed to 'science' and 'scientific evidence' by the Panel under the WTO Agreement on the Application of Sanitary and Phytosanitary Measures can have far-reaching consequences for European environmental and consumer protection policy. In particular, this case comment will argue that the Panel ruling almost certainly has the potential for severely curtailing recourse to the precautionary principle as a paradigm capable of justifying a vast array of sound environmental policy measures.

Before probing deeper into some of the more problematic aspects of the Panel ruling (IV), it will be necessary to describe briefly first the origins of the dispute (II) and then its disposition by the Panel (III).

#### 2 The Origins of the Dispute

The dispute, which had been in the offing for some fifteen years,<sup>3</sup> arose out of the application of certain EC directives<sup>4</sup> that ban the use of both synthetic and naturally occurring ('endogenous') growth hormones in bovine animal rearing.

#### 2.1 The EC Measures at Issue

The ban had been progressively adopted over a decade since the early 1980s, following a series of widely publicized scandals involving the use of illicit veterinary drugs and growth hormones in agricultural production. Altogether six substances were at issue in the dispute, three - oestradiol 17  $\beta$ , testosterone, and progesterone - that occur naturally but whose level in animals can vary dramatically, depending on age, sex, and pubertal development of the animal, and three further substances - trenbolone, zeranol, and melengestrol acetate (MGA) - that are produced synthetically to mimic, when applied to animals, the effect of the three naturally occurring hormones.

With respect to the three naturally occurring hormones, the EC measures allow for an exception: Oestradiol 17  $\beta$ , testosterone, and progesterone may be administered to animals where this is indicated for therapeutic reasons or for zootechnical purposes. Trade in animals that have received treatment with these substances and in meat from such animals is permitted only, however, upon expiry of a withdrawal period and if the treatment was not administered during the animals' fattening period at the end of their breeding life.

It should be noted that none of the EC directives at issue banned beef imports from countries that had not adopted similar measures in an indiscriminate fashion but rather restricted such imports to beef that complied with the EC measures. The ban thus constituted a facially neutral measure.<sup>5</sup>

#### 2.2 The Codex Alimentarius 'Standards'

For two of the synthetically produced hormones - trenbolone and zeranol - the Codex Alimentarius Commission, a joint advisory body to the World Health Organization and the Food and Agricultural Organization, has developed standards in the form of recommendations for what the Commission con-

<sup>1</sup> Wendy E. Wagner, "The Science Charade in Toxic Risk Regulation" (1995) 95 Col. L. Rev. 1613 at 1614.

<sup>2</sup> EC Measures Concerning Meat and Meat Products (Hormones). Complaint by the United States, WTO WT/DS 26/R/USA of 18 August 1997 and EC Measures Concerning Meat and Meat Products (Hormones). Complaint by Canada, WTO WT/DS 48/R/CAN.

<sup>3</sup> For a summary of the history of the dispute see also M. Hilf/B. Eggers, "Der WTO-Panelbericht im EG/USA Hormonstreit. Anstoß zum grenzenlosen Weltbinnenmarkt für Lebensmittel oder Eigentor der WTO?" (1997) 8 Europäische Zeitschrift für Wirtschaftsrecht 556.

<sup>4</sup> See Council Directive 81/602/EEC, [1981] O.J. L 222 of 7 August 1981, p. 32ff.; Council Directive 88/146/EEC, [1988] O.J. L 70 of 16 March 1988, p. 16ff.; Council Directive 88/229/EEC, [1988] O.J. L 128 of 21 May 1988, p. 36ff. The latter legislative acts were re-enacted and consolidated with Council Directive 96/22/EC, [1996] O.J. L 125 of 23 May 1996, p. 3ff.

<sup>5</sup> A fact to which the EC for reasons that will be explained below attached considerable importance and which it tried to underscore by furnishing figures for the development of beef imports into the EC for the relevant period of time. While the figures show a significant drop in the mid 1980s, imports seem to have increased again towards the end of the decade and over the early 1990s; see *ibid.* sub IV 2.

siders 'safe' acceptable daily intakes (ADI) and maximum residue levels (MRLs).

The Codex Commission, however, does not develop these 'standards' itself. ADIs and MRLs are formulated on the basis of technical and scientific analyses performed by the Joint FAO/WHO Expert Committee on Food Additives (JECFA). The latter body establishes ADIs on the basis of experimental 'No Observable Effect Levels' in the most appropriate animal species - in this case ovariectomized female cynomolgus monkeys for zeranol and castrated male rhesus macaque monkeys for trenbolone - to which a safety factor is then applied for purposes of extrapolating from animal testing to human exposure. This factor can range from 100 to 1000. The ADI thus constitutes an "estimate by JECFA of the amount of veterinary drug, expressed on a body weight basis, that can be ingested daily over a lifetime without appreciable health risk (standard man = 60 kg)".<sup>6</sup> The maximum residue level then is the corresponding concentration of drug residues that can be present in meat without causing the ADI to be exceeded in an assumed average consumer of meat products.

In relation to all of the substances at issue (with the exception of MGA), JECFA determined in 1988 and 1989 that their potential toxic effects were directly related to their hormonal activity. It therefore set an ADI for the two synthetic substances on the basis of a no-hormonal-effect level. For the three endogenous substances JECFA believed an ADI to be superfluous, as the amounts of residues of these hormones that could conceivably be ingested by a consumer would not be sufficient to trigger hormonal activity. Apparently, the Committee believed such standards 'unnecessary' also because of the difficulty associated with tracing residues of artificially raised levels of endogenous growth hormones in meat due to the naturally occurring variations of hormone levels in animals which could lead to residues from artificially raised levels of naturally occurring hormones being indistinguishable from residues of natural hormones in natural levels.<sup>7</sup>

Finally, while the Codex Commission usually adopts its non-binding 'recommendations' only unanimously, the recommendations for ADIs and MRLs in relation to zeranol and trenbolone as well as the decision not to develop ADIs and MRLs in relation to endogenous hormones were adopted, at the insistence of the United States, on the basis of a simple majority vote (33 for, 29 against with 7 abstaining) in a secret ballot.

<sup>6</sup> Ibid. sub II 3 (b).

<sup>7</sup> Ibid. sub II 3 (b).

### 2.3 The Complaint against the EC

Both the United States and Canada essentially alleged a violation of the 1994/95 Agreement on the Application of Sanitary and Phytosanitary Measures that was adopted as part of the package of multilateral trade agreements establishing the World Trade Organization. The complaining parties in both disputes in their submissions argued that such a violation of the SPS Agreement could be pursued through the establishment of a panel under the Understanding on Dispute Settlement *independently* of a violation of any of the substantive obligations under the GATT 1994, in particular the provision requiring national treatment in Art. III:4.

As for the supplementary agreement in question, the United States and Canada argued the EC ban on the use of growth hormones could not be justified as measures aimed at attaining a higher level of protection than relevant international standards. In particular, the United States alleged the EC directives in question violated the requirement under Art. 2.2 of the SPS Agreement to base sanitary or phytosanitary measures on scientific principles and to maintain them only if there is sufficient scientific evidence.<sup>8</sup> In a like manner, the United States argued the EC ban constituted an arbitrary and unjustifiable discrimination between WTO Members where identical conditions prevail and was applied in a manner that led to a disguised restriction on international trade.<sup>9</sup> In that respect the United States contended there was no scientific basis for the EC measures which, moreover, were designed not to further any legitimate objective of consumer protection or public health but to deprive the U.S. beef industry of a competitive advantage by alleviating the pressure on European markets due to beef overproduction.

Furthermore, the United States maintained the directives violated the EC's obligations under Art. 3.1 to base sanitary measures on international standards where they exist. In this case, the EC could not avail itself of the exception in Art. 3.3 of the Agreement which permitted Members to deviate from existing international standards and to set a higher level of sanitary or phytosanitary standards "if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate."<sup>10</sup> This justification was not available to the EC, according to the United States, because the 'level of protection' a Member wished to attain inevitably had to refer to protection against a particular identifiable *risk*.<sup>11</sup> In so far, however, as the EC measures in question

<sup>8</sup> Ibid. sub IV 2 (a).

<sup>9</sup> Ibid. sub IV 2 (b).

<sup>10</sup> SPS Agreement, Art. 3.3, BT-Drucks. 12/7986 at 99ff.

<sup>11</sup> WTO, *supra* note 2, sub IV 2 (d).

purported to achieve the aim of eliminating any veterinary drug residue from all meat, they did not constitute a 'level of protection' against a particular identifiable risk, but rather measures designed to prohibit use of the substances. The level of protection could not, however, be the total elimination of all residues of the substances concerned, since residues of endogenously occurring hormones could not be eliminated - neither in meat nor, as the United States submitted, in a number of other food-stuffs.

The United States also claimed the EC could not avail itself of the precautionary principle, either, as recourse to this principle still required production of some scientific evidence identifying a risk, "not just mere speculation."<sup>12</sup> In a similar vein, the United States alleged the EC measures had been adopted in violation of the EC's obligation under Art. 5.1 to base its sanitary or phytosanitary measures on a proper risk assessment. Within the European Community, however, the debate on whether to allow the substances had invariably focused on "consumer anxieties rather than any observable adverse effect on human health."<sup>13</sup>

Finally, the complaint alleged a violation of Art. 5.5 in that the EC measures amounted to marked inconsistency in the level of protection in comparable situations. For although the EC purported to follow a 'zero risk' policy with respect to the use of growth hormones in beef production, it did allow the use of carbadox, a known genotoxic substance, for growth promotion purposes in swine production.<sup>14</sup>

### 3 The Panel Ruling

In disposing of the complaint, the Panel first addressed the question of the Agreement's applicability independent of a violation of any of the substantive obligations under the GATT proper (e.g. Art. III:4).

#### 3.1 The Applicability of the SPS Agreement

On this point, the Panel inferred from the Agreement's terms, which create a presumption of compatibility for measures that are based on relevant international standards both with the Agreement and the GATT, that, contrary to the EC's submission, the former could apply independently of a violation of any of the substantive obligations under the latter.<sup>15</sup> According to the Panel, this interpretation was consistent not only with the Agreement's language but also, in accordance with Art. 31 of the

Vienna Convention of the Law of Treaties, with its object and purpose.

#### 3.2 Art. 3.3 and 5.1-5.2 of the Agreement

The bulk of the Panel's ruling addressed the 'thorny' question of science and scientific justification for the EC measures in question. On this point the Panel first proceeded to a determination of the respective burden of proof. In line with the general rule that a party challenging another Member's measures has to bear the burden of proof, the Panel held that the United States (and Canada) had to make a *prima facie* case that the EC measures in question were not based on relevant international standards. Once the complaining parties had succeeded in discharging their burden, the burden of proof would then shift to the EC to prove that its measures fell within the exception in Art. 3.3 and, to the extent that they departed from any relevant international standard, were justified.<sup>16</sup>

The Panel accepted the American submission that the 'recommendations' drawn up by the Codex Alimentarius Commission constituted 'relevant' international standards. In this respect, the Panel held it immaterial (i) whether the Codex recommendations reflected a particular level of protection, (ii) whether they had been adopted by a narrow or wide margin, and (iii) whether they predated the SPS Agreement.<sup>17</sup>

Consequently, in line with the above distribution of the burden of proof, it was now for the EC to demonstrate that its measures were justified under the exception spelled out in Art. 3.3:

*Members may introduce or maintain sanitary or phytosanitary measures which result in a higher level of sanitary protection than would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of Article 5. Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations shall not be inconsistent with any other provisions of this Agreement.*<sup>18</sup>

On the basis of a footnote to Art. 3.3,<sup>19</sup> the Panel construed this provision as requiring the defending

<sup>12</sup> Ibid.

<sup>13</sup> Ibid. sub IV 2 (e).

<sup>14</sup> Ibid. sub IV 2 (g).

<sup>15</sup> Ibid. sub VIII C 3.

<sup>16</sup> Ibid. sub VIII D 2.

<sup>17</sup> Ibid. sub VIII D 3 (a).

<sup>18</sup> SPS Agreement, Art. 3.3, supra note 10.

<sup>19</sup> The footnote reads:

For the purposes of paragraph 3 of Article 3, there is a scientific justifica-

party to demonstrate compliance with the requirements of Art. 5, notably the requirement in Art. 5.1 to base any measure on a proper assessment of risks, under both the first and the second element of the exception in the first sentence. In addition, even where a measure could be saved under the test of the first sentence, it would also have to pass the further hurdle of the second sentence and be consistent with any other provision of the Agreement, and here in particular Art. 2 (and the obligation in Art. 2.2 to ensure that any sanitary measure is applied only to the extent necessary to protect human or animal health, based on scientific principles and not maintained without sufficient scientific evidence).<sup>20</sup>

Consequently, the Panel then proceeded to examine whether the directives banning the use of growth hormones in beef production met the requirements of Art. 5. The first test the measures had to pass was the obligation to base them on a proper risk assessment. In this respect the Panel held the assessment of risks, as distinct from their management, to be a purely factual-scientific exercise in which socio-economic or any other public policy considerations and value judgments had no role to play:

*"As will be outlined below, an assessment of risks is, at least for risks to human life or health, a scientific examination of data and factual studies; it is not a policy exercise involving social value judgments made by political bodies."*<sup>21</sup>

As a result, only the numerous scientific publications, including the reports by JECFA, that the EC (and the complaining parties) had referred to in their submissions could qualify as risk assessments. In contrast, the Panel held the several reports by the European Parliament and its various committees that had examined the issue of growth hormones in animal rearing and that had concluded as to a substantial public health risk requiring a regulatory response not to be risk assessments within the meaning of Art. 5.1.<sup>22</sup>

Moreover, even if the EC had satisfied the requirement of performing a 'purely scientific' risk assessment, the Panel held it had failed to base its measures either procedurally or substantively on the risk assessment performed by it. Procedurally, the Panel

held the EC had failed to demonstrate that the various scientific reports had been *taken into account* in the legislative process. Substantively, the Panel concluded the results of the reports it had qualified as proper risk assessments were not reflected in the measures finally adopted:

*"In our view, the scientific conclusion reflected in the EC measures in dispute, i.e. the use of the hormones in dispute for growth promotion purposes, even in accordance with good practice, is not safe, does not conform to any of the scientific conclusions reached in the evidence referred to by the European Communities. All the evidence referred to by the European Communities which specifically relates to the use of the hormones at issue for growth promotion purposes concludes that the use of these hormones as growth promoters in accordance with good practice is safe. Moreover, none of the evidence referred to by the European Communities which generally deals with one or more of the hormones in dispute contradicts this conclusion."*<sup>23</sup>

In other words, on the basis of its own risk assessment, the EC had failed to show the presence of a risk. As a result of the shift in the burden of proof, it was, however, incumbent upon the EC to demonstrate that the directives targeted an identifiable risk. Conversely, the Panel held it was not for the complaining parties to demonstrate beyond doubt that no risk arose from the use of the substances.<sup>24</sup>

Furthermore, since the identification of a particular risk constituted a *conditio sine qua non* in the Panel's view for performing a risk assessment, the EC could not claim that its measures were aimed at risks arising from the limitations inherent in science and scientific knowledge: Since a measure had to be based on assessed risks, it could not be based on non-identifiable ones attributable to the uncertainties inherent in scientific inquiry and methods.<sup>25</sup> In a similar vein, the Panel ruled the EC could not rely on the precautionary principle to justify its measures, either. The latter principle had been explicitly incorporated into the Agreement in Art. 5.7 which, however, allowed only for temporary measures where in the absence of sufficient scientific knowledge no definitive determinations could be made as to the existence of a particular risk. Over and above Art. 5.7, however, the EC could not rely on the precautionary principle to justify its ban as a measure aimed at protecting against risks arising from the inherent limitations of scientific knowledge.<sup>26</sup>

tion if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this Agreement, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection.

<sup>20</sup> WTO, supra note 2, sub VIII D 3 (a).

<sup>21</sup> Ibid. sub VIII D 5 (a).

<sup>22</sup> Ibid. sub VIII D (b) (ii).

<sup>23</sup> Ibid. sub VIII D 5 (b) (iii).

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

While the Panel had thus already found that the EC measures did not muster the test of Art. 5 and, hence, could not be justified under Art. 3.3, it nevertheless went on to discuss the further submission by the United States and Canada that the directives constituted an arbitrary and unjustifiable distinction in the level of protection that resulted in discrimination and disguised restriction of international trade. The relevant paragraph 5 in Art. 5 reads as follows:

*With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trade. ...*<sup>27</sup>

On the first point of the test Art. 5.5 establishes, namely the presence of arbitrary or unjustifiable distinctions in the level of protection, the Panel found the necessary *tertium comparationis* by grouping elements of the EC measures in a number of comparisons. Adopting the Appellate Body's construction of "arbitrary and unjustifiable discrimination" resulting in a "disguised restriction on international trade" under the chapeau to Art. XX<sup>28</sup> in the Report on "*United States - Standards for Reformulated and Conventional Gasoline*"<sup>29</sup>, the Panel proposed to examine a violation of Art. 5.5 of the SPS Agreement on a very similar basis and noted:

*"However, we also agree that in some cases where a Member enacts, for comparable situations, sanitary measures which reflect different levels of protection, the significance of the difference in level of protection combined with the arbitrariness thereof may be sufficient to conclude that this difference in levels of protection 'result[s] in discrimination or a disguised restriction on international trade' in the sense of Article 5.5 (...)."*<sup>30</sup>

The Panel thus first compared the regulatory treatment of the three endogenous hormones used for

growth promotion purposes to the treatment of naturally occurring hormone levels in meat and other foods and to the treatment of the three endogenous hormones when used for zootechnical or therapeutic purposes. It then compared the regulatory level of protection aimed at in relation to the synthetic hormones for growth promotion and the three endogenously occurring hormones. Finally, the Panel considered the regulatory treatment afforded to the hormones on the one hand and to carbadox on the other.

For each and every comparison the Panel found an arbitrary and unjustifiable distinction in the level of protection, including the pair comparing the regulatory treatment of naturally occurring levels of hormones in both meat and other food stuffs with the regulatory treatment reserved to 'natural' hormones used for growth promotion purposes as well as the pair comparing the differences in regulatory response (*i.e.* unlimited residues) to naturally occurring levels of hormones with synthetic hormones. In other words, in order to avoid a verdict of arbitrariness and unjustifiable distinction, the EC would have had to justify why it had prescribed no regulatory limits to naturally occurring endogenous levels of hormones when it did so - in the form of a no residue level - for natural or synthetic hormones and their residues in meat administered for growth promotion purposes.<sup>31</sup>

As for the requirement of discrimination or disguised restriction of international trade, the Panel found such discrimination in the fact that 70% of U.S. beef production made use of either natural or synthetic growth hormones at the time the ban first came into force and was thus *de facto* shut out from the European market as a result of the directives (which at this point the Panel continuously referred to as an 'import ban').<sup>32</sup>

#### 4 The Shadow of Science over EC Environmental Policy

As will be readily seen from the above summary, the Panel ruling casts a shadow over the future of EC (and national) environmental policy, especially in its precautionary dimensions. But apart from the ruling's implications for the future of the precautionary principle, the resolution of the dispute raises a number of other legal and policy issues that require very careful examination indeed.

<sup>27</sup> SPS Agreement, Art. 5.5, *supra* note 10.

<sup>28</sup> The Provision reads:

Subject to the requirement that such measures are not applied in a manner which could constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: ...

<sup>29</sup> 29 April 1996, adopted 29 May 1996, WTO Doc. WT/DS2/AB/R, repr. in (1996) 35 I.L.M. 605; see also for an insightful comment of this ruling Arth. E. Appleton, "GATT Article XX's Chapeau: A Disguised 'Necessary' Test?: the WTO Appellate Body's Ruling in *United States - Standards for Reformulated and Conventional Gasoline*" (1997) 6 *Review of European Comm. & Int'l. Env'l. L.* [Reciel] 131.

<sup>30</sup> WTO, *supra* note 2, sub VIII D 5 (c) (ii).

<sup>31</sup> The Panel apparently considered such justification for the latter alternative necessary in the light of some of the scientific evidence which suggested the naturally present growth hormones may also have carcinogenic effects.

<sup>32</sup> WTO, *supra* note 2, sub VIII D 5 (c) (ii).

#### 4.1 *The Relation of the SPS Agreement to Substantive GATT Obligations*

For a start, the Panel's reading of the language of the Agreement, which creates a presumption in favour of compatibility not only with the substantive obligations under the main GATT but also with the Agreement itself, is by no means compelling and conclusive. For contrary to what the Panel asserted, the fact that the Agreement creates a presumption of compatibility for measures based on international standards not only with the GATT but with the Agreement itself does not exclude the alternative construction, namely that the Agreement is to function principally as an aid in interpreting Art. XX (b) GATT.

Moreover, if, as the Panel suggests, a purposive interpretation in line with Art. 31 of the Vienna Convention is meant to give full effect to all provisions of a treaty, then an argument could be made that prior to any inquiry into the SPS Agreement, a violation of Art. III:4 GATT should have been considered. Whatever the merits of this interpretation,<sup>33</sup> suffice it to say at this point that the Panel's approach obviates part of the normative content of that provision, *i.e.* that national regulatory measures that do afford imported goods treatment as favourable as domestic goods are in fundamental agreement with the basic obligations of the Members of the WTO.<sup>34</sup> The Panel's approach forecloses this possibility.

#### 4.2 *The Codex Alimentarius as a Binding Standard*

Much more serious policy implications are raised by the Panel's determination of the Codex Alimentarius recommendations as binding international standards within the meaning of Art. 3.1 of the SPS Agreement. This assertion by the Panel raises very serious concerns with respect to the democratic accountability, transparency, and composition of the Codex Alimentarius Commission and its scientific advisory bod-

ies.<sup>35</sup> Currently, this body functions with little, if any, democratic oversight and legitimacy. Yet, as became manifest in the panel proceedings against the EC, its decisions now have the potential for significantly impacting on the living conditions of a vast number of people (and, of course, animals!) all over the world. By attributing binding force to the Codex Commission's recommendations for purposes of the SPS Agreement, the Panel brought the acuteness of the problem of proper democratic oversight for international 'expert' bodies to the fore.<sup>36</sup> Without increased democratic oversight for institutions such as the Codex Commission and its scientific advisory bodies it is extremely unlikely that citizens in a vast number of countries will accept its decisions as having the legitimacy to regulate their living conditions.<sup>37</sup>

In addition, the Panel's ruling throws many governments' participation in the Commission into a completely different light: The recommendations that were heretofore thought to be merely of a non-binding nature have suddenly acquired binding force in dispute settlement proceedings before WTO panels.

#### 4.3 *Science and Policy under the SPS Agreement*

In part, of course, the Panel's finding as to the binding nature of the Codex 'recommendations' for purposes of the SPS Agreement might be related to its subsequent views on the role of science and policy in risk assessment. The Panel's views in this respect, however, are seriously flawed and misguided. They are premised upon a false dichotomy into purely factual scientific risk assessment and normative policy-guided risk management, especially in their treatment of the status and nature of the 1988 and 1989 JECFA reports establishing threshold levels in terms of ADIs and MRLs for two of the synthetically produced substances (zeranol and trenbolone).

Apparently, the Panel believes the JECFA studies to be purely factual and scientific inquiries into the risk arising from the use of these two substances as

<sup>33</sup> In any case, it is, contrary to the United States submission, not readily evident from the travaux préparatoires or the structure of the whole Uruguay Round Agreements that the SPS Agreement was to create obligations independent of any of the substantive obligations under the GATT. R. Howse & M. Trebilcock, *The Regulation of International Trade* (New York: Routledge, 1995) 213 at least suggest that the presumption of compatibility with the Agreement and GATT for measures based on international standards does not lead to any obligation independent of the substantive GATT obligations. These authors rather contemplate a presumption against a justification under Art. XX (b) where a measure is not based on international standards and found to be a prima facie violation of any of the substantive GATT obligations.

<sup>34</sup> To do the Panel justice, however, it is unlikely that a prior examination of Art. III:4 GATT would have yielded a substantially different result in this case. On the basis of the somewhat absurd outcome in the CAFE-dispute, an argument might be made that it is not enough that national regulatory measures are facially and de facto neutral with respect to imports but in fact have to accord a measure of more favourable treatment to imported goods, see E. Phillips, "World Trade and the Environment: The CAFE Case" (1996) 17 Mich. J. of Int'l L. 827.

<sup>35</sup> See Hilf/Eggers, *supra* note 3.

<sup>36</sup> For very sensible suggestions to remedy the democratic deficit in the ever more important structures of international governance see D. Held, *Democracy and the Global Order. From the Modern State to Cosmopolitan Governance* (Stanford: Stanford University Press, 1995).

<sup>37</sup> See esp. Hilf/Eggers, *supra* note 3, who openly wonder whether the likely lack of popular acceptance of the Panel ruling in the Member States of the European Union will not ultimately turn the ruling into an own goal for the WTO which, as a non-State actor in international economic relations, is obviously dependent upon its Members' willingness to abide by its rules (and hence ultimately the acceptability of its Panel rulings) if it wishes to survive as a rule based system. Indeed, the European Parliament's very strongly-worded resolution could be a very accurate indication as to the degree of popular resistance the WTO might encounter should the Panel ruling be allowed to stand, see European Parliament, Sessional Protocol of 26 June 1997 (describing Panel ruling as 'unacceptable').

growth promoters in animal rearing.<sup>38</sup> Contrary to what the Panel would have us believe, though, the JECFA reports are no such purely factual and scientific inquiries.

For a start, as the JECFA reports readily admit, an ADI is merely an *estimate* as to the "amount of a veterinary drug, expressed on a body weight basis, that can be ingested daily over a lifetime without appreciable health risk" by a "standard man = 60 kg".<sup>39</sup> Moreover, this estimate cannot be arrived at by way of 'pure' (mechanistic) science by simply observing the effect of the hormones directly, as human beings are not normally available as guinea pigs.<sup>40</sup> Consequently, for determining the cancerogenicity of toxic substances for humans, scientists are left with extrapolating from animal testing, and extrapolating from the results of animal testing on the basis of so-called safety factors is, contrary to what the Panel implies, *not* a scientific determination.<sup>41</sup> Whether the results obtained from administering zeranol to ovariectomized female cynomolgus monkeys can be used for setting an ADI for humans on the basis of a 'safety' factor of 1, 10, 100, 1,000, 10,000, 100,000 or 1,000,000 is *not* a scientific determination on the basis of empirical research but a question of *policy*.<sup>42</sup>

Similarly, where animals are tested not on the basis of low doses over an extended period of time but rather using high doses over a limited amount of time (as is frequently done because laboratories

rarely have the zootechnical facilities to house certain species over extended periods of time<sup>43</sup>), extrapolatory models have to be chosen to draw inferences from short-term high doses exposure to longer-term low doses exposure. The choice of one model over another, again contrary to what the Panel ruling implies, is *not* a scientific determination but a question of *policy*.<sup>44</sup> Generally speaking, the selection of a particular risk assessment technique, including individual factors, is not a purely factual exercise in 'science' but dependent upon certain policy decisions.<sup>45</sup>

In this context, the Panel's view as to the 'scientific' nature of the JECFA reports (as opposed to the policy-guided EC Parliamentary papers) turned out to be a decisive juncture in the whole proceedings.<sup>46</sup> For in conferring the sanctity of 'pure' science on the JECFA studies, the Panel effectively cut off the EC's defence which relied on very plausible alternative models for computing the risks arising from the use of growth hormones,<sup>47</sup> and it was only by ascribing a purely scientific status to the JECFA reports (and failing to see its numerous policy elements<sup>48</sup>) that the Panel could reach its finding that the EC had failed to demonstrate the presence of an identifiable risk.<sup>49</sup> Only in this way could the Panel

<sup>43</sup> Ibid. at note 38. The Panel ruling is silent as to the time-span covered and doses administered in the JECFA studies.

<sup>44</sup> Ibid.

<sup>45</sup> Wagner, *supra* note 1, at 1622, note 29. Wagner identifies a host of factors in risk assessment that cannot properly be characterized as being exclusively scientific in nature, among them such important considerations as the precise features of the average consumer for whom threshold levels are to be set, the selection of an 'appropriate' animal species for carrying out animal testing, or the choice of an appropriate-linear or non-linear - extrapolatory model, leading either to the determination of threshold levels or possibly to a scientific determination of 'unsafe,' see *ibid.* at 1625, note 36 and at 1703, note 347.

<sup>46</sup> To the Panel's defence, it should be noted, however, that the EC may have unwittingly contributed to this constellation by taking the Panel's (and the complaining parties') views as to the non-policy nature of risk assessment at face value and agreeing with it.

<sup>47</sup> In particular, in light of the policy elements in risk assessment, especially in choosing a particular methodology, the Panel's dismissal of the testimony by Dr. Liehr as irrelevant - because confined to the study of high dose effects of oestrogens - cannot be regarded as disposing solely of a question of fact. The same would appear to hold true with respect to the Panel's refusal to discuss evidence adduced by the EC which was based on different extrapolatory models and which threw into doubt the JECFA reports' assertion that threshold levels could be established on the basis of the substances' hormonal activity, see WTO, *supra* note 2, sub IV 2 (e) (i).

<sup>48</sup> One policy element in JECFA's methodology that appears particularly open to challenge is the calculation of an Acceptable Daily Intake on the basis of the metabolic processes in an average adult male consumer weighing some 60 kg. Why not on the basis of an infant's metabolism? Or a pregnant female consumer's metabolic processes? Why on the basis of a male consumer having almost ideal body weight of 60 kg (and presumably showing no signs of obesity)?

<sup>49</sup> And this despite the fact that resolving the various uncertainties involved in assessing the risks arising from a particular substance through policy determinations can lead to immense divergences in the computation of quantitative risk, see Wagner, *supra* note 1 at 1651, note 133: "This great range of uncertainty can be attributed in large part to the compounding effect of numerous trans-scientific sub-questions embedded within a single risk assessment. For example, in a model attempting

<sup>38</sup> See especially WTO, *supra* note 2, sub VIII D 5 (b) (i):

"None of the parties suggest that there are 'risk assessment techniques developed by the relevant international organizations' in the sense of Article 5.1 which have to be taken into account in a risk assessment for the hormones at issue. We note, however, that, even though no formal decision has as yet been taken by Codex with respect to risk assessment techniques, Codex, and more particularly JECFA, has a long-standing practice with respect to the assessment of risks related to veterinary drug residues (including hormone residues). The techniques thus developed have been outlined above. ..." (emphasis added)

The reference to the outline can only be a reference to the passage in the Panel ruling discussing the nature of the Codex 'recommendations' as international standards within the meaning of Art. 3.1 of the SPS Agreement and describing JECFA's methodology in establishing ADIs and MRLs, see *ibid.* sub VIII D 3 (a) and *supra* sub II in the text.

<sup>39</sup> Ibid.

<sup>40</sup> Which of course does not mean that the boundlessness of western scientific thinking has not at times tempted lunatics to attempt even that, and not just in fascist regimes, see Wagner, *supra* note 1 at note 24 (citing Th. O. McGarity, "Substantive and Procedural Discretion in Administrative Resolution of Science Policy Questions: Regulating Carcinogens in EPA and OSHA" (1979) 67 Georgia L. J. 729 at 743, note 67 who reported proposition by U.S. EPA officials to administer substantial doses of cancer-causing fungicides to Mexican citizens and volunteering inmates in U.S. state penitentiary institutions).

<sup>41</sup> Wagner, *supra* note 1 at 1626, see esp. note 41:

"In extrapolating from animals to humans, several methods are used to adjust for differences in size and metabolic rates. Although some conversion methods are used more frequently than others, 'a scientific basis for choosing one over the other is not established' (citing Committee on the Institutional Means for Assessment of Risks to Public Health, Risk Assessment in the Federal Government: Managing the Process (National Research Council, 1983) at 24-27.

<sup>42</sup> Wagner, *supra* note 1 at 1626.

completely ignore the possibility that even on the basis of allegedly purely 'scientific' risk assessments scientists can indeed very credibly differ in their judgments as to the necessity of regulating a substance or not.<sup>50</sup>

None of this is to suggest that scientists should not be involved in resolving some of the policy aspects of risk assessment and in particular selecting a particular risk assessment technique. Indeed, frequently the policy nature of some of the determinations necessary in risk assessment will only be detectable by scientists themselves.<sup>51</sup> But it is one thing to acknowledge the importance of science in risk assessment, it is another to decree risk assessment to be a purely factual exercise in science.

Finally, the wording of the definition of 'risk assessment' in paragraph 4 of Annex A to the SPS Agreement by no means mandated the Panel's determination of 'risk assessment' as a purely factual scientific inquiry.<sup>52</sup>

#### 4.4 The Precautionary Principle and the SPS Agreement

While the Panel's deficient view of risk assessment, which, as shown in the preceding paragraph, allowed it simply to define away the risks alleged by the EC, already has the potential for wreaking havoc on the environmental or consumer protection legislation of many WTO Members, it is undoubtedly the Panel's treatment of the precautionary principle that most concretely raises the spectre of future WTO panels striking down a large number of regulatory

measures designed to address risks and corresponding consumer concerns.

For once the Panel had dismissed the EC's evidence showing the presence of a risk associated with the use of the substances in issue for growth promotion purposes, the EC tried to save its measure by pointing out the intrinsic risks inherent in scientific knowledge and methods. It is precisely these risks that, according to the EC's submission, the precautionary principle was designed to address.

The Panel rejected this argument by holding the precautionary principle, as an element of customary international law, inapplicable to the dispute before it. Rather, the Panel held, the SPS Agreement had incorporated the principle in its Art. 5.7 which, however, authorized WTO Members only to adopt *temporary* measures (and was, consequently, not relied on by the EC). Over and above Art. 5.7, the Panel held the precautionary principle inapplicable and hence without bearing on the dispute before it.

There is nothing in the language of Art. 5.7 of the SPS Agreement that suggests such an excessively narrow reading of the precautionary principle under customary international law. In construing Art. 5.7 of the Agreement as an exhaustive and exclusive treatment of the precautionary principle, as it relates to SPS measures, the Panel subjects the sovereign right of WTO Members to address unidentifiable, but - in the magnitude of their theoretically possible damage - potentially catastrophic risks to very severe disciplines that, as the EC correctly observed in its submission, will make it virtually impossible to justify a measure by recourse to the principle. This squares ill with the WTO's preambular commitment to sustainability.

The Panel's successful elimination<sup>53</sup> of the precautionary principle as a justification for environmental or consumer protection measures bodes extremely ill for the EC's recent enactment of the novel food regulation<sup>54</sup> with its labelling requirements for biotech foodstuffs.<sup>55</sup> For the regulation of biotechnology is largely premised upon notions of precaution against *theoretical* hazards associated with producing, using, and releasing trans-

to estimate the risk of perchloroethylene, experts used only two alternative values for each of the three trans-scientific sub-questions, but the final 'risk estimates varied by a factor of 35,000 - ranging from a low estimate derived from a nonlinear, weight-based extrapolation from a rat study, to a high estimate derived from a linear, surface-area-based extrapolation from a mouse study' (citing A. L. Nichols & Rich. J. Zeckhauser, "The Perils of Prudence: How Conservative Risk Assessments Distort Regulation" (11/12 of 1986) Regulation 13 at 18).

<sup>50</sup> Ibid. at 1639f. (there also with most illuminating examples of differences in opinion among scientists with respect to one and the same epidemiological study, a difference solely attributable to the divergent but each time unexpressed resolution of policy elements in seemingly 'scientific' risk assessment); see also *ibid.* at 1623, note 33 (noting the huge divergence in the final estimate of risk for saccharin - one death per billion exposed versus 1200 cancer cases per one million persons exposed - due to different policy determinations in the course of the concrete risk assessment process).

<sup>51</sup> Wagner, *supra* note 1 at 1618, see also *ibid.* at 1623 (noting that although the choice of a particular extrapolatory model for predicting at low doses on the basis of high doses exposure is a determination of policy, the possible types of curves for the models chosen originate in scientific theory).

<sup>52</sup> The definition speaks of "the evaluation of the potential for adverse effects on human or animal health arising from the presence of ... contaminants ... food, beverages or feedstuffs" (emphasis added). Indeed, use of the word 'evaluation' would lend further support to a view of 'risk assessment' that readily acknowledges the presence of non-factual, normative policy factors that come into play when assessing the risks associated with a substance.

<sup>53</sup> In this respect the interpretation of the ruling by Hilf/Eggers, *supra* note 3, who lay great emphasis on the Panel's explicit recognition of the precautionary principle in Art. 5.7, appears rather benevolent.

<sup>54</sup> See European Parliament and Council Regulation 258/97/EC of 27 January 1997 on novel foods and novel food ingredients, [1997] O.J. L 43, p. 1ff.

<sup>55</sup> Proposed regulatory measures to address risks associated with biotechnology under the proposed amendments to the Canadian Environmental Protection Act would appear to be equally at risk against hostile challenges before the WTO. This throws into some doubt the judgment of those responsible for bringing the challenge against the EC ban on the use of growth hormones.

genic plants and foodstuffs.<sup>56</sup> Here, because thus far empirical scientific evidence of concrete damage to human or animal health has proven extremely difficult to compile, the concrete risks remain largely unidentifiable - and on the Panel's view of the precautionary principle in relation to the SPS Agreement subject to regulation only on a temporary basis within the narrow confines set by Art. 5.7 of the Agreement.<sup>57</sup> This runs counter to one of the principal purposes of the Uruguay Round Agreements, and in particular the SPS Agreement, namely to reaffirm WTO Members' sovereign right to determine what they deem is an appropriate level of protection.<sup>58</sup>

#### 4.5 Equality in Wrongfulness

While the panel's discussion of risk assessment and the role it attributes to the precautionary principle have much to confirm environmentalists' worst fears with respect to the world trading order and its com-

patibility with sustainability, the Panel's treatment of Art. 5.5 of the SPS Agreement can only add to these fears and raise serious doubts as to the sincerity of the commitment to sustainability made in the preamble to the Agreement establishing the World Trade Organisation. In fact, it is at this point that the Panel ruling is no longer just questionable in the light of any commitment to sustainability, but downright exasperating.

One of the decisive criteria the Panel deduced from the Appellate Body's previous jurisprudence for determining whether a level of protection amounted to an 'arbitrary and unjustifiable distinction' bears repeating:

*"However, we also agree that in some cases where a Member enacts, for comparable situations, sanitary measures which reflect different levels of protection, the significance of the difference in level of protection combined with the arbitrariness thereof may be sufficient to conclude that this difference in levels of protection 'result[s] in discrimination or a disguised restriction on international trade' in the sense of Article 5.5 (...)"<sup>59</sup>*

With all due respect, it takes a fair amount of incredulity and gullibility to suggest, as the Panel does, that *naturally occurring* levels of hormones in meat - and their residues - are 'comparable' to the levels of *specifically administered synthetic* hormones in meat (or, for that matter, that naturally occurring levels of hormones in beef and other foodstuffs are 'comparable' to the *artificially* raised levels of naturally occurring hormones in cattle during their fattening period).<sup>60</sup> In this context, the panel failed to provide a rigorous treatment of its criterion of 'comparability'. It simply followed blindly its incantation of 'scientificity', noted the absence of any 'scientific' evidence suggesting that, from the point of view of adverse health effects on humans, the level of naturally occurring hormones could make a difference compared to artificially induced levels or the presence of synthetic growth hormones, and ultimately failed - utterly and completely - to notice the fundamentally different *essence* of the situations contemplated,<sup>61</sup> notably in their *ethical* dimension.<sup>62</sup>

<sup>56</sup> Readers familiar with the categories of German constitutional law will have observed that the Panel thus severely restricted a WTO Member's possibility to address what the Federal Constitutional Court had described as the Restrisiko (remaining risk) attributable to the inherent limitations of human knowledge and epistemological capacity in its Kalmar judgment, see [1978] 49 Entscheidungen des Bundesverfassungsgerichts 89 at 143 (holding German Nuclear Energy Protection and Enhancement Act of 1959 in so far as it permits licensing of fast-breeding reactor involving plutonium compatible with constitutional guarantee of life, liberty and security of the person in Art. 2 (2) of the Basic Law, in particular with obligation of the State, derived from Art. 2 (2), to afford positive protection against State-licensed hazards threatening full effectuation of the rights concerned). Note, however, the different constellation: the German case concerned the submission that the constitutional guarantee of life, liberty and security of the person (including its physical aspects) required the State to prohibit certain activities - such as the operation of nuclear power stations - which entailed the theoretical possibility of 'damage' of unknown magnitude to these rights due to the lack of empirical data that are otherwise readily available for the evaluation of other activities using the tools of mechanistic science. To the extent that the constitutional guarantee of life, liberty, and security of the person, while not mandating a total ban on certain activities that entail the theoretical possibility of damage of unknown magnitude, nevertheless creates a constitutional duty to afford positive protection against these hazards in the form of statutorily regulating the activities or substances concerned - this was notably the position of the Hesse Administrative Court of Appeal with respect to biotechnology, see Hessischer Verwaltungsgerichtshof, ruling of 6 November 1989, reported in (1990) Juristische Zeitung 88 -, the Panel ruling precluding recourse, as it does, to the precautionary principle as justification for statutory regulation of certain activities and substances raises very serious issues of constitutional compatibility for the Federal Republic's legislation ratifying the Uruguay Round Agreements.

<sup>57</sup> Another candidate for legal challenges before WTO panels on the Panel's reading of the pre-cautionary principle would be statutes currently under discussion and deliberation in a number of countries that would ban the use of nuclear energy - and by implication also the importation of reactors and other equipment. Although such a statutory ban on the use of nuclear energy might not necessarily fall within the scope of the SPS Agreement (the Agreement on Technical Barriers to Trade might be a more appropriate *sedes materiae*), such an outcome cannot be excluded a priori, either, were another panel to adopt this Panel's construction of the pre-cautionary principle.

<sup>58</sup> J. Atik, "Science and International Regulatory Convergence" (1997) Nw. J. of Int'l L. & Bus. 736. In this respect as well, the Panel's determination that the SPS Agreement intended to promote recourse to available international standards, would, it is submitted, appear to be a rather narrow and one-sided reading of the Agreement's various objects and purposes.

<sup>59</sup> See above note 30 (emphasis added).

<sup>60</sup> Among the different groups of situations the Panel groups together the only comparison that stands scrutiny would appear to be the one between the level of naturally occurring hormones artificially administered for growth promotion purposes and the level of naturally occurring hormones artificially administered for zootechnical and therapeutic purposes.

<sup>61</sup> Again, to give the Panel some credit, its grouping of 'comparable situations' is somewhat reminiscent of previous panels' treatment of the criterion of 'like' products in which very similar attempts were made to abstract from the 'real' world so as to conclude that products originating in dramatically different production processes and methods bore 'likeness' for the purposes of Art. III:4 of the GATT and its requirement of according

Thus the Panel reached its patently absurd result that the EC could *not* leave the naturally occurring residues of hormones in beef and other meat products *unregulated* if it wished to apply a measure leading to no residues in meat of synthetic hormones or of artificially raised levels of naturally occurring hormones as part of a 'zero risk' policy.

At first glance, the Panel's further comparison between, on the one hand, the EC's ban on the use of naturally occurring or synthetic growth hormones in cattle rearing and, on the other, the lack of a comparable ban on the use of carbadox in pig rearing appears more plausible. It should be noted, though, that what the complaint alleged amounted, in substance, to no less than a demand to be treated 'equally in wrongfulness.'<sup>63</sup> For the complaint readily acknowledged, indeed pointed out, that carbadox was carcinogenic as well and for this reason prohibited in a number of countries - and the only inference one can draw, and that, indeed, was drawn by the complaint, was that it should have been prohibited in the EC as well. If, moreover, the complaining parties believed the EC afforded its pig farmers an undue competitive advantage *vis-à-vis* their own farmers by continuing to allow use of a known carcinogenic, the proper remedy to this grievance would have been to attack the EC's regulatory omission in this respect, its failure to act on carbadox.<sup>64</sup>

Regrettably, the Panel ignored this aspect to the complainants' submission. As a result, not only will the EC continue to be able to allow, as a matter of WTO/GATT law, use of a known carcinogenic in pig farming, but the existing ban on the use of other

carcinogenic substances in cattle rearing will have to be repealed<sup>65</sup> - and this despite the *further* inference that must *compellingly* be drawn from the complaining parties' submission, namely that carcinogenic substances should not be used in animal rearing *period*.

Moreover, on the Panel's reasoning that views the regulatory measures with respect to different aspects of agriculture - cattle rearing on the one hand and pig farming on the other - as 'comparable situations' for the purposes of Art. 5.5 a whole host of food, additives, and narcotic drugs regulations may be open to challenge now. For if the ban on growth hormones in cattle rearing amounts to an 'arbitrary and unjustifiable distinction in the levels [a Member] considers to be appropriate in different situations' because no such ban had been adopted with respect to the use of carbadox in pig-farming, why should the ban on cannabis be any less 'arbitrary and unjustifiable' (and be any less a 'disguised restriction on international trade') when neither nicotine - a known carcinogenic - nor alcohol have been banned?

Finally, it should be remembered that a finding of 'arbitrary or unjustifiable distinction in the levels [a Member] considers to be appropriate in different situations' constitutes only the first element in reaching a conclusion that a measure has been adopted in violation of Art. 5.5. Over and above an 'arbitrary and unjustifiable distinction' the measure must lead to 'discrimination or a disguised restriction on international trade.' Pointing out the varying degree to which the substances in issue had found application in the United States and in Europe at the time the ban was first introduced - in up to 70% of all cattle in the United States with significantly lower levels in Europe -, the Panel concluded:

*"By banning the internal sale and import of meat treated with natural hormones for growth promotion purposes (which represents a significantly higher proportion of the total US meat supply than of the total European Communities meat supply) but continuing to allow any level of residues of these natural hormones present endogenously in meat, the European Communities favoured the consumption of domestic meat and, therefore, de facto discriminates against US meat in favour of EC meat."*

In other words, the intentional thrust of the EC measures in question as well as the substantial intra-European costs that the measures must have incurred in at least one of the EC Member States (where possibly up to 40% of all cattle were treated with growth hormones in the early 1980s) were *im-*

'like' foreign products national treatment; on this point see Howse & Trebilcock, *supra* note 33 at 339ff.

<sup>62</sup> The fundamental difference being, of course, that in the case of naturally occurring levels of hormones in animals and their residues in meat products one is confronted with the - at least until the arrival of (post-)modern western science - immutable laws of nature that form part of the human condition and to which humans have, as the EC rightly pointed out in its submission, adapted both culturally and physically, whereas administering either additional amounts of naturally occurring growth hormones to animals or synthetic hormones implies a concrete interference with natural growth processes, no matter whether hormone residues can be detected in meat or not.

<sup>63</sup> The expression is derived from another category of German public law - Gleichheit im Unrecht -, a concept developed in German administrative jurisprudence under the Basic Law's equal protection- clause in Art. 3, see with further references to the German courts' jurisprudence F. Ossenbühl, "Arten der Rechtsquellen" in H.-U. Erichsen (ed.), *Allgemeines Verwaltungsrecht*, 10th ed. (Berlin: de Gruyter, 1995), § 6, para. 47, note 102.

<sup>64</sup> An argument might have been made that the lack of regulation in this respect constitutes an undue subsidization of European pig farming, although it might have been difficult for the complaining parties to establish a 'subsidy' for purposes of Art. XVI GATT, as it is questionable whether failure to adopt appropriate regulation fits any of the legal constructions that are deemed to be subsidies under the Uruguay Round Subsidies Agreement, on the latter see Howse & Trebilcock, *supra* note 30 at 131ff. but see also J.P. Trachtman, "International Regulatory Competition, Externalisation and Jurisdiction" (1993) 34 *Harv. Int'l. L.J.* 47, for the notional possibility of so defining irregularity omission.

<sup>65</sup> This, of course, only provided the Appellate Body affirms the Panel ruling.

*material* to a finding of discrimination. On the contrary, the mere 'fact' of the extent to which growth hormones were already being employed in cattle rearing and beef production in the United States when the EC measures came into force is sufficient for a determination of *de facto* discrimination. What this does is attributing a binding *normative* effect to the purely *factual* development of (agricultural) business and *production practices in the United States* for *European* legislators. Moreover, it creates, one might say, 'property rights' or 'legitimate expectations' on the part of trading partners in the continued existence of a certain state of regulatory affairs *solely on the basis of present production practices and existing market developments*.

This again, it is submitted with all respect, cannot be right. The inevitable consequence of such a doctrine must be the ossification of environmental, consumer protection and other regulation of the market that is necessary in order to be able to pursue important public purposes. While good reasons of international comity suggest that the commercial (or employment!) interests of private third parties in other countries not be totally ignored (just as private property or other commercial interests in the regulating country), democratically legitimated institutions must have a measure of leeway when deciding public policy issues. Were the commercial interests of third parties to be allowed to inhibit the necessary policy-making functions of democratically elected institutions, the whole system of entrusting, subject to certain limitations enforceable by judicial review, either to elected representatives or direct-democratic procedures the power to balance different public and private interests would no longer make sense. As a result, any producer who relies for his or her business decisions on the continuing legal force of democratic decisions of a regulatory nature (and thus ignores the dynamic moment that must inhere in democratic procedures in order to respond to new public challenges and hazards) must do so at his or her own peril.<sup>66</sup>

The vesting of 'legitimate expectations' in the continuation of a particular regulatory state of affairs appears all the more surprising, as in other contexts GATT/WTO panels have shown themselves quite capable of completely abstracting from the factual distribution of market shares and conditions of pro-

duction - with potentially far more devastating social consequences<sup>67</sup> and with the further significant difference that in the particular case of the EC's banana import regulation<sup>68</sup> some of the actors concerned have, unlike U.S. and Canadian farmers, absolutely no control and choice over the factual circumstances of production which are dictated by geography and climate.

On this point, the Panel's findings bespeak a considerable deregulatory bias that, against the backdrop of public choice analysis of political processes, suspects pernicious protectionism and undue 'rent-seeking' on the part of producers behind just about any type of regulation,<sup>69</sup> regardless of whether other legitimate concerns found quite forceful expression during the legislative process. Quite apart from any fundamental objection to the public choice reading of political processes and its deregulatory thrust<sup>70</sup> - a thrust that some have attempted to translate into a deregulatory programme not only for the WTO, but for the EC under Art. 3 (c) of the EC-Treaty as well<sup>71</sup>

<sup>67</sup> See St. Bates, "Banana Growers Facing Ruin", The Guardian [International Edition] of 9 September 1997, p. 3. The devastating social consequences the GATT/WTP panel ruling concerning the EC's banana import marketing scheme will have for small Caribbean island states that cannot compete with industrial style plantations in Latin America under U.S. control due to climatic and geographic circumstances that are largely beyond their control is regularly overlooked in the virulent attacks on the EC's banana import regulation and its castigation as 'protectionist' in the political debate in Germany.

<sup>68</sup> Council Regulation 404/93 of 13 February 1993 on the Common organization of the Market in Bananas, [1993] O.J. L 47, p. 1ff.

<sup>69</sup> For a particularly forceful statement of the public choice case against regulation as essentially protectionist in nature see E.-U. Petersmann, "Constitutionalism and International Organizations" (1997) 17 Nw. J. of Int'l. L. & Business 398 at 408-413, esp. at 408; for an even more radical statement of this view (that denounces even the WTO/GATT with its various exceptions to pure 'free' trade as protectionist) see R. W. McGee, "The Moral Case for Free Trade" (1995) 29 J. of World Trade 69, esp. at 72:

"Governments that expand beyond this minimalist, nightwatchman State model become plunderers, who loot the general public and distribute the proceeds to some special interest group or subset of the general population."

For an effective critique see H. Ward, "Common But Differentiated Debates: Environment, Labour and the World Trade Organization" (1996) 45 Int'l & Comp. L. Quart. 592 at 616, note 113.

<sup>70</sup> If, as the public choice analysis of political processes claims, particular, but highly concentrated interests are easier to organize than more diffuse and wide-spread interests affecting a large number of individuals and, consequently, enjoy a disproportionate influence over public decision making, then what grounds do we have to believe that this inordinate redistributive and 'rent-seeking' influence should make itself felt in the same democratic political processes only through regulation, but not through deregulation? The impeccable logic behind this reasoning is most lucidly explored by P. Kahn, "The Politics of Unregulation and Limits to Government" (1990) 75 Cornell L. Rev. 280. Indeed, could one not argue in the present dispute that it is not so much special interest beef producers who have made their influence on the EC's legislative procedures felt through regulating beef growth hormones but rather producers of porc who make their undue influence on public decision making within the EC felt through the lack of appropriate regulation? - This objection is, of course, in addition to even more fundamental concerns whether anything is to be gained by depicting democratic institutions rather cynically as nothing more than 'political markets' that are open to capture by superior 'market' forces.

<sup>71</sup> Th. Schilling, "A New Dimension of Subsidiarity: Subsidiarity as a Rule and a Principle" (1994) 14 Ybk. Eur. L. 203 at 231:

<sup>66</sup> To the extent, then, that the Panel ruling has the contrary effect and does create legitimate expectations in the continuation of a certain regulatory state of affairs on the basis of existing production practices in the United States, one might argue with D. Schneiderman, "NAFTA's Takings Rule: American Constitutionalism Comes to Canada" (1996) 46 Univ. of Toronto L. J. 499 that American constitutionalism has extended its tentacles across the Atlantic to the European Community through a judicially crafted WTO/GATT takings rule as well (with the sole difference that the WTO/GATT Agreements, obviously, do not create private interests but public ones, held by individual WTO Members).

-, a public choice reading of this dispute would appear to be inappropriate in light of the fact that in at least one of the EC Member States at the time - *in casu* the U.K. - (within the Community of the Ten!) no less than 40% of cattle were likely being treated with some of the substances in issue. In any case, should the Appellate Body affirm the Panel's ruling, European consumers and members of the public will have ample opportunity to prove such public choice-inspired analyses wrong by galvanizing Europe's public interest in hormone-free beef much more powerfully and in a direction other than many a WTO bureaucrat might have expected.<sup>72</sup>

### 5 After Beef Hormones: What Next?

Apparently, the Panel must have had some misgivings about the wider implications of its ruling itself. For it undertook an attempt - somewhat lamely, though - at attenuating the force of its inevitably controversial findings in its 'concluding remarks':

*"In order to avoid any misunderstanding as to the scope and implications of the findings above, we would like to stress that it was not our task to examine generally the desirability or necessity of the EC Council Directives in dispute. The ability of any Member to take sanitary measures which do not affect international trade was not at issue in the present case. ... Likewise, the ability of any Member to enact measures which are intended to protect not consumer health but other consumer concerns was not addressed. In this regard, we are aware that in some countries where the use of growth promoting hormones is permitted in beef production, voluntary labelling schemes operate whereby beef from animals which have not received such treatment may be so labelled."*<sup>73</sup>

First of all, one sort of wonders what kind of measure the Panel had in mind that, in the light of its own findings with respect to a *de facto* discrimination, could *not* affect international trade. Secondly, that the suggestion of attaching 'warning' labels to beef originating from more or less conventional agricultural practices rather than to beef produced on the basis of practices involving additional risks borders on the grotesque is almost self-explanatory from an environmental policy point of view.

It is equally self-explanatory that the Panel's findings made a mockery of what some have claimed to be the essence of the SPS Agreement, *i.e.* the sover-

eign right of WTO Members to determine a level of protection that they deem appropriate.<sup>74</sup> In effect, the Panel ruling deprives citizens of what one might term their 'right to doubt,' their right to err on the side of caution and be sceptical when contemplating technologies or agricultural practices involving empirically unsolvable uncertainty.<sup>75</sup> Furthermore, given the Panel's construction of 'risk' and 'risk assessment' in Art. 5 of the Agreement on the one hand and its extremely narrow reading of the precautionary principle on the other, it is to be feared that henceforth a WTO Member can only adopt SPS measures more stringent than relevant international standards or recommendations if it can "outscience" either the relevant international scientific body or the science of another complaining Member.<sup>76</sup> This essentially spells disaster for those WTO Members that for reasons of precaution, for example, wish to depart from relevant international standards but possess neither the 'scientific' expertise nor the material means to demonstrate the well-foundedness of their concerns.<sup>77</sup>

In addition, the Panel ruling dramatically thrusts to the fore the problem of 'science' and 'scientific' risk assessment in international trade disciplines operating on supra-national or national environmental policy. Here, the Panel's determination of what constitutes a 'scientific' risk assessment has all the potential to replicate the experience made at the national level. Consequently, it might be useful to discuss some of the remedies suggested for the "science charade" at the national level in the context of the ever more frequent recourse to science in international environmental or trade law documents. Concretely, it is to be wondered whether, in line with Wagner's suggestions in the American context,<sup>78</sup> jurisdiction should not be vested in the International

<sup>74</sup> See Atik, *supra* note 58.

<sup>75</sup> Quite apart from any consideration of a mature citizen's right to doubt, the Panel ruling raises another very serious ethical issue: On the Panel's construction of the relevant international economic law documents, the United States interest in the American farmers' foregone profits of roughly \$100 million due to the introduction of the EC ban on growth hormones outweighs not only Europeans' right to doubt, but also the unspeakable pain inflicted on ovariectomized female cynomolgus monkeys and castrated rhesus macaque monkeys in order to demonstrate the alleged innocuousness of the substances at issue!

<sup>76</sup> What this can entail in terms of delay was vividly demonstrated by Canadian efforts to persuade the U.S. authorities to do something about sulphurdioxide emissions as one of the principal causes of acid rain, efforts that bore fruit only once the Canadians had managed to 'outscience' (at their own costs!) the Americans, see B. Bruce Doern & Th. Conway, *The Greening of Canada. Federal Institutions and Decisions* (Toronto: Univ. of Toronto Press, 1994), 126.

<sup>77</sup> That in this sense the SPS Agreement has the potential for instrumentalizing science, has been pointed out notably by Atik, *supra* note 58, who also at 755, note 67 correctly points out that a Member that has been unable to obtain the repeal of a particular measure by one of its economically and politically powerful trading partners might be tempted to target a weaker Member that has identical or similar measures on the books!

<sup>78</sup> Wagner, *supra* note 1.

"The Treaty on European Union has 'characterized' the establishment of the internal market, in Article 3 (c) EC-Treaty, as a deregulatory exercise."

<sup>72</sup> See *supra* note 57.

<sup>73</sup> WTO, *supra* note 2, sub VIII F (emphasis added).

Court of Justice, or another judicial body, to supervise an international organization's, or its scientific advisory bodies', delineation of the science-policy

divide, prior to basing any further international trade or environmental policy act on 'science.'<sup>79</sup> •

<sup>79</sup> This, of course, in addition to a thorough democratic reform of many of the institutions of international governance, perhaps along the lines suggested by Held, *supra* note 36.

## European Commission: 15% Reduction of Greenhouse Gas Emissions in Europe Is Possible

by Ralf Jülich

### 1 EU Institutions Explain Their Position for Climate Negotiations in Kyoto

In October 1997 the EU Council and the EU Commission published their concept for the climate negotiations in Kyoto. In early December delegates from more than 150 parties to the Framework Convention on Climate Change (FCCC) meet in Kyoto (Japan) to negotiate a Protocol with concrete reduction targets for greenhouse gas emissions (GHG). The EU Council of Ministers has proposed a 15% reduction target for all industrialised parties. The EU position covers an average reduction for a basket of the three greenhouse gases carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), and nitrous oxide (N<sub>2</sub>O) for the year 2010 compared to emission figures in 1990. In June the environment ministers of the Member States also agreed on an interim reduction objective of at least 7.5% for 2005.

The 15% target has not been set for each Member State but shall be achieved within the Community as a whole. This position, which is known as the "EU bubble", acknowledges the different potential of the EU Member States to tackle the problem of greenhouse gas emissions. The EU bubble has so far been based on current commitments of Member States that range from emission reduction targets by 30% (Luxembourg) or 25% (Austria, Denmark, Germany) to an increase by 30% (Greece) or even 40% (Portugal) until 2010 (base year 1990). Altogether, the national targets so far add up to a 10% reduction - which leaves another 5% that needs to be allocated.

A finalised equitable burden-sharing among Member States has not yet been set. According to the conclusions of the last meeting of the EU Council of Environment Ministers in October, a burden-sharing agreement will be made on the basis of the Kyoto results.

The EU bubble has been criticised by other states, mainly for two reasons. They blame the EU for setting a target that sounds good but

- a) lacks binding national commitments to ensure that, in the case of non-achievement of the tar-

get no Member State of the Community will be responsible for the failure, and

- b) does not explain how the Community will act in order to achieve its target particularly with regard to the remaining 5%.

These objections led the EU Council to agree on a distinct text proposal for the climate negotiations<sup>1</sup>. The EU Commission, meanwhile, published its Communication<sup>2</sup> to show that it is both technically feasible and that within a sound policy framework it is economically manageable to achieve the 15% reduction target.

### 2 EU Council Suggests Double Liability

With regard to the liability question the EU Council proposed the inclusion of a new paragraph in the negotiating text of the Kyoto conference. The paragraph reads as follows:

*"if Parties acting jointly do so in the framework of and together with a regional economic integration organisation (REIO) which is itself a Party to the Protocol, each Member State of that REIO individually and together with the REIO acting in accordance with Article [x] shall, in the event of failure to achieve the total combined level of emission reductions, be responsible for its level of emissions as notified in accordance with this Article."*

For the EU this would mean that the Community is responsible for its notified joint target whilst each single Member State is additionally directly liable for its single burden which will also be notified. Normally, it is either the Member States or the EU which are/is responsible for the achievement of their commitments under international law.

The Montreal Protocol, for example, has been ratified by all EU Member States and the Community itself. With regard to this international treaty, it is primarily

<sup>1</sup> Outcome of proceedings of the Environment Council, European Union, the Council, Interinstitutional File 11468/97 of 17 October 1997.

<sup>2</sup> Climate Change - The EU Approach for Kyoto, Communication from the Commission, COM (97) 481 final of 1 October 1997.

the single Member State that is responsible for meeting the commitments of the Protocol. The EC as a legal entity has taken over certain obligations from its Member States in order to control production and consumption within the Community of certain ozone-depleting substances. However, it remains the primary duty of a Member State to meet the production and consumption level related commitments of the Protocol.

The agreed text for the climate negotiations would in contrast establish a direct double liability system of a REIO and its Member States. Therefore it would create an unique and exemplary model of international environmental law.

### 3 High Technical Potential for Emissions Reduction

In its Communication of 1.10.97 the Commission obviously intends to respond to the other criticism. According to the Communication, it will be necessary to achieve a reduction of CO<sub>2</sub> emissions above 10% in order to meet a 15% overall target, because of the high relative weight of this greenhouse gas. The Commission assumes an 8% increase in total CO<sub>2</sub> emissions to 3,460 million tonnes by 2010 compared to 1990, when they were 3,200 million tonnes, provided no additional new measures are taken. However, technical reduction possibilities for reducing CO<sub>2</sub> emissions would amount to 800 million tonnes. The figures thus imply a technical reduction potential of up to 17% in relation to the base year 1990. Consequently, the technical potential of reduction measures needs to be exploited almost completely to achieve the 15% goal.

#### 3.1 New Ambitious Measures Required

A bunch of proposals for a joint strategy of the EU has already been tabled by the Commission. They include (among others)

- a proposal for a Council Directive to restructure the Community framework for the taxation of energy products
- a proposal for Rational Planning Techniques in the supply and demand cycle
- proposals for the revitalisation and liberalisation of the railway sector in order to encourage the shift from road to rail

The EU Commission admits that those proposals are not sufficient to meet the EU targets proposed for Kyoto. It proposes additional measures that should be discussed after the Kyoto conference. The proposals aim at

- increasing the share of renewable energies in the EU's energy consumption by 2010 along the lines spelled out in the Commission's Green Paper. Doubling the share of renewables from the present

6% of overall EU energy consumption to 12% in 2010 has been regarded as a realistic target,

- increasing the share of cogeneration (production of electricity and heat) in electricity production from the present 9% to 18% in 2010,
- a series of actions regarding standardisation, harmonisation and liability to promote intermodal freight transport,
- a revision of the Trans-Europe Network guidelines to integrate strategic environmental considerations,
- significantly improving the overall thermal efficiency of power plants.

Fiscal measures and fuel economy labelling to influence the vehicle market are also part of the Commission's strategy. Moreover, the Commission is now negotiating mandatory standards on a extensive product range with the relevant industrial sectors in order to improve energy efficiency.

Unfortunately, the Communication of 1.10.97 gives no clear answer as to whether the existing technical potential can be exhausted with these strategies and measures in order to achieve the 15% target. For example, in the transport sector which is one of the most relevant concerning CO<sub>2</sub> emissions, 100 million tonnes emissions reduction shall exclusively be achieved by means of technical improvements of cars. The Council already has an emissions target which corresponds to an improvement in the average fuel economy of new cars in the market in the order of 30 % by 2005, over today's average. Comparing this target with the fact that the average fuel consumption of the German car fleet decreased by just 4 % between 1991 and 1995 this target may be unrealistic. Lower fuel consumption that was technically achieved in recent years has mostly been compensated through the production of more powerful and heavier cars. Moreover, it is doubtful whether the technical potential will have any effect, if the number of cars continues to steadily increase.

Finally, the success of emission reduction strategies depends largely on whether single measures can be enforced. The EU Commission qualifies this by saying that it depends on what levels of economic, social or political cost are deemed acceptable. It states that through implementation with the right mix of cost-effective policies, the technically feasible reduction potential of 800 million tonnes can become both economically manageable and political acceptable.

#### 3.2 Economic Impacts of Climate Protection Measures Remain Unclear

In particular the economic impacts of climate protection measures can hardly be predicted. For a 15% reduction in CO<sub>2</sub> emissions the EU Commission

estimates direct compliance costs related to energy supply/demand mitigation actions from around 15 billion ECU to about 35 billion ECU annually. The assessment of the macro-economic impact shows even wider ranges. Estimates in available studies range from a positive impact on GDP of about 1% to a negative impact of up to 1.5%.

On the other hand the benefits of climate strategies are difficult to quantify in monetary terms. The Commission estimates the global primary and secondary<sup>3</sup> benefits of a 15% reduction between 15 and (!) 137 billion ECU per year depending on the as-

<sup>3</sup> Secondary benefits mean avoided damage costs due to the reduction in other pollutants.

sumptions made on discount rates, climate sensitivity, the reference point for the emissions and the weight attached to damage in developing countries. In this context the Commission stresses the necessity of joint action of industrialised countries as a condition for a proper balance of costs for all countries concerned, because unilateral action would imply that the EU would carry the full costs of the policy alone.

One can only hope that even a failure of Kyoto will not hinder the EU from taking the lead concerning unilateral implementation of the ambitious climate protection strategies that have been outlined in the Communication. •

## Revision of the EMAS Regulation

by Betty Gebers

### 1 Introduction

The European Commission has presented a proposal for the revision of the European EMAS Regulation<sup>1</sup>. The document serves as a basis for further discussion in the so-called Art. 19 Committee that consists of representatives of the Member States and is chaired by a representative of the Commission. The document has not yet been officially published.

The current discussions on a revision of the Regulation have their basis in Art. 20, which provides for a review of the scheme after a period of no more than five years after the Regulation's entry into force. The Commission receives through this provision the mandate to propose necessary amendments to the Council.

In this article the main proposals for revision will be described and evaluated with regard to the level of environmental protection achieved.<sup>2</sup> The evaluation is based on the following considerations:

The revised EMAS Regulation should not fall behind the Regulation currently in force esp. with regard to

- the level of environmental protection;

- information and participation of the public.

Furthermore the opportunity of revision should be used to improve some parts of the Regulation. This especially applies to the annexes.

### 2 Objectives

It has to be regarded as positive that the draft continues to contain as an objective the improvement of the environmental performance of the participants in the scheme and the provision of environmental information to the public. In this respect the proposal distinguishes itself positively from private-sector ISO standard series on environmental management which aims to support the implementation of the internal goals of the participating organisations.

### 3 Enlargement of the Scope

In Art. 3 para. 1 of the draft the Commission proposes to open up the scope of the Regulation. In the future the EMAS scheme shall be open to all organisations which have significant environmental effects. In this the Commission takes up requests from municipalities and non industrial businesses to participate as well.

The revision will thus potentially lead to an improvement of the environmental performance of all economic sectors and activities that are significant to the quality of the environment. The opening up of the scope to all kinds of organisations is therefore to be regarded as positive.

### 4 Withdrawal from Site Specific Approach

The proposal for revision of the EMAS Regulation shifts the reference system of the EMAS scheme

<sup>1</sup> Council Regulation (EEC) No. 1836/93 of 29 June 1993 allowing voluntary participation by companies in the industrial sector in a community eco management and audit scheme, OJ No. L 168, 10.7.1993.

<sup>2</sup> See also, with specific proposals for wording: Gebers/Peter, Revision of the EMAS Regulation, Suggestions for amendment of the draft presented by the European Commission on 10.10.1997, on behalf of the Deutscher Naturschutzring, Bonn, Darmstadt 1997; and Gebers/Peter, Revision der EMAS-Verordnung: Stellungnahmen und Änderungsvorschläge zum Entwurf der Europäischen Kommission vom 10.10.1997, Darmstadt 1997.

from the site to the organisation. According to the current Regulation the sites are registered for their successful participation in the scheme. A company with a number of different sites has to register each site separately. This seems at first sight to burden the company with much effort. But the site by site registration does actually make sense:

According to the proposal these companies would only publish one uniform environmental statement. This might then contain accumulated information from all sites. The environmental statement would lose its informational value. The neighbours of the specific site will often not be able to extract the information that concerns the specific site. In many other respects the site specific approach offers advantages. The initial environmental review will offer more detailed information when it is site specific. The environmental management system will have to handle a number of tasks that are site specific, for example in the prevention of accidents and the handling of emergency situations. For these reasons it is recommended to maintain the site specific approach.

## 5 EMAS and Regulatory Relief

The relationship between environmental legislation and the EMAS Regulation has been subject to discussion in some Member States such as Germany and the Netherlands. In Art. 1 para. 3 the proposal takes up the position of the Regulation that is currently in force. It makes clear that: EMAS shall be without prejudice to existing Community and national laws or technical standards regarding environmental controls and without prejudice to duties of organisations under those laws and standards. EMAS shall not be a substitute but a complement to environmental legislation.

This principle is watered down by the proposal for a new Art. 3 para. 2 d which allows the participating organisation to use the environmental statement to fulfil legal reporting duties but at the same time asks that it must be written so that it is understandable to the public. Both approaches - reporting duties and understandable information - can not readily be combined. Reporting duties usually concern specific installations, while the environmental statement concerns a site or even an organisation with a number of sites and installations. Furthermore a reporting obligation might ask for very specific data. The experience with environmental statements that have already been conducted shows that the statements mostly contain aggregated data. The provision might thus lead either to unintelligible environmental statements or to a slackening of reporting obligations.

In the proposal for a new Art. 10 the Commission suggests that the Member States may consider the potential synergy between relevant environmental

legislation and the value of EMAS participation in order to avoid unnecessary regulatory burdens on organisations.

This provision is negative in several respects:

The Principle of Art. 1 can be undermined by the implementation of this provision.

The term "unnecessary" will be subject to interpretation. The wording might lead to far reaching relief from regulatory requirements in connection with a participation in the EMAS System. The provision might be used to justify deregulation and might lead to a lower level of environmental protection. It is therefore recommended to allow the suggested reward for the participation in the EMAS system only under the condition that the organisation actually reaches the same level of environmental protection under EMAS as under the law. A further precondition should be that public participation and public access to information requirements shall not be undermined.

If a country allows EMAS participants to substitute state monitoring by EMAS participation a vacuum might be left. Annex 5 describes the examination of "legal compliance" through the verifier. It states:

*"The verifier should establish that an organisation has procedures in place to control those aspects of its operations subject to relevant Community and national laws and that these procedures are capable of delivering compliance."*

In other words: The verifier will not examine the compliance itself but the procedures to deliver compliance. He will check whether the company possesses monitoring devices and has established a monitoring system, but he will not check whether the monitored data complies with legal emission limitation requirements.

## 6 The Use of EMAS for Advertising Purposes

The draft maintains the principle that participants should not use successful participation in the EMAS scheme for product related advertisement. This principle makes sense because the EMAS scheme does not cover the quality of products. A company might be registered under EMAS because it has set up an environmental management scheme and at the same time produce environmentally harmful products. An advertisement on products will thus be misleading. The draft now introduces the possibility of such advertising provided the claims are covered in the Environmental Statement and have been validated by the verifier. This provision might lead to the effect that certain points are drawn out of the context of the environmental statement and are used in a misleading way. If product related advertisements are allowed at all, the preconditions

have to be formulated more precisely (e.g. consequences in case of misuse). A confusion with the European Eco Label for products has to be avoided.

### **7 Accreditation and Supervision of Verifiers**

The draft contains in Art. 4 and 5 as well as in Annex V requirements for the accreditation and the supervision of verifiers. The requirements for the accreditation remain superficial and do not go beyond the respective ISO norm. They might even be less specific. The proposal just asks for knowledge in environmental protection but does not specify the depth of this knowledge and does not ask for a specific training or education. This becomes all the more important when EMAS substitutes enforcement activities of authorities. In order to secure a high quality of work of the verifiers it should be considered to oblige the accreditation bodies to explicitly limit the scope of each verifier on the basis of his/her proven experience.

The supervision of verifiers is improved in the proposal, but it still lacks clear provisions concerning the consequences of low quality performance.

### **8 Relationship between Verifier and Organisation**

The relationship between the verifier and the organisation that asks him/her to review the EMAS system has not been quite clear in the past. It was often questioned whether the verifier is obliged to keep his knowledge secret even in cases of illegal activities and breaches of the laws. He would then have a status which could be compared to that of a priest or a medical doctor. The draft proposal contains a provision in Annex 5 which asks the verifier not to give a satisfactory report if he discovers non compliance even though he is in general not obliged to actually secure compliance. This provision makes clear that verifiers are not forced to keep silent, even though they might in many cases prefer to do so. The draft Regulation does not make a statement concerning the liability of verifiers for their work. The inclusion of such a provision might be helpful in order to reduce uncertainties.

### **9 No More Commitment to BAT?**

Annex I formulates requirements for the environmental management system. The structure of this Annex compared to the current Regulation has improved significantly. However, the content embodies some critical points that will weaken the EMAS.

For example, the draft does not any more contain the requirement for participating companies or organisations to oblige themselves to apply best available technology (BAT). In this respect the Annex lags behind the current law.

The draft no longer contains the provisions concerning "good management practices". This amendment is quite astonishing as these provisions have been very valuable in practice.

The draft also no longer contains the obligation to integrate the workers in the process. This has in practice also proven to be a positive requirement as workers have developed a great deal of creativity to improve environmental performance.

### **10 Environmental Review and Environmental Statement**

The main strengths of EMAS in comparison with ISO are the environmental statement and the environmental review. Both elements should be strengthened through more specific and advanced provisions. However, the Draft for the revision weakens them in several respects. The new text only ask for an environmental review in the first EMAS cycle. This will have a significant negative effect on the quality of the EMAS system: Changes of the environmental effects might be ignored by the system, the measurement of the extent to which the objectives and targets are reached might deteriorate. It is for this reason very important to maintain the obligation to conduct an initial environmental review for each cycle. However, the participants of the system might find ways to rationalise the updating of the review.

The review should require the preparation of input-output balances. These balances have in practice proven to provide valuable information e.g. for the identification of waste prevention potentials.

In order to assess performance the creation of environmental performance indicators could be of help.

### **11 Conclusions**

The draft raises some concerns regarding its several references to relief from environmental legislation (as a reward) for organisations that participate in the EMAS system. The draft should be more specific in this respect. It must be avoided that the EMAS Regulation is used to justify all kinds of deregulation.

The draft makes reference to "organisations" as participants in the EMAS system instead of sites. This leads to several disadvantages with regard to the transparency of the environmental statement and the possibilities for a substitution of legal obligations concerning specific sites or even installations. It is therefore suggested to maintain the site specific approach.

The draft contains a number of new provisions that regulate the accreditation and supervision of environmental verifiers as well as their functioning. In order to secure a high quality the necessary qualifi-

cations of the verifiers need to be described more specifically and should relate to certain education requirements and experiences.

The role of the verifier needs even more clarification. According to the draft it is not the obligation of the verifier to secure legal compliance but to check whether the procedures that are in place are capable of delivering compliance.

But according to the draft he should not give a satisfactory statement when he finds that the organisation is obviously not in compliance. If the EMAS scheme can be used by the Member States to substitute reporting or monitoring or other legal obligations this strictly procedural control will be not sufficient.

The obligations of the verifier toward the organisation and towards public authorities are still not clearly regulated. For example, is the verifier obliged to report breaches of the law or is he - as often said - obliged to keep them secret?

It should be considered to strengthen the environmental statement and the environmental review through more specific and advanced provisions, e.g. the environmental review should encompass input output balances. The environmental statement could

become more transparent through the inclusion of environmental performance indicators.

The new text only asks for an environmental review in the first EMAS cycle. This will have a significant negative effect on the quality of the EMAS system: Changes of the environmental effects might be ignored by the system, the measurement of the extent to which the objectives and targets are reached might be hindered.

The Commission proposes a Regulation that differs in wording and structure from the current text. The changes of the actual content are comparatively small. The Commission preserves the current concept of EMAS with a few modifications.

In general it has to be questioned whether the extent of changes to the existing text with regard to wording and structure is actually justified. It has taken some time until the current Regulation has been fully understood and implemented. Continuity might contribute more to the level of environmental protection than a new Regulation which will naturally result in a period of confusion. European legislation might achieve more if it limits itself to a few amendments, like the enlargement of the scope of the Regulation. ●

## Implementing EC Directive 97/11/EC in the UK

*by Paul Hamblin*

### 1 Introduction

The final adoption of the amended EIA Directive provides all Member States within Europe with the opportunity to review their own domestic procedures and improve their effectiveness. This could potentially be wider ranging and go beyond the fairly minor changes to the original Directive on which agreement could be reached. This paper explains what progress is being made in the UK where the Government is intent on undertaking a thorough overhaul of the procedures for determining whether EIA is, or is not, necessary for a particular project (known as screening).

In July the UK Government issued a consultation paper which explained how the UK was to implement the new requirements of Directive 97/11/EC. The Government did not enact primary legislation to implement the original Directive (85/337/EC), preferring rather to implement it through issuing a large number (44 at the last count) of Regulations. The desire was to integrate (as far as is possible) EIA provisions into the existing and well established UK planning system. It is intended that this system

should continue, although this will be a complex task given the variety of consent procedures covered by the Directive, many of which fall outside the UK planning system.

### 2 Screening Decisions for Annex II Projects

The Directive significantly extended the number of projects which were covered by the Directive. How many Environmental Statements (ES's) are produced as a result will to a large degree depend upon what effect the changes to the existing screening procedures have. Projects which are listed under Annex I of the EIA Directive require EIA in all cases, those contained in Annex II may require EIA if "significant environmental effects" are likely. The Government have used the opportunity presented by the amended Directive to re-examine its procedures for Annex II projects. Within the UK over 90% of Environmental Statements (ES's) which have been produced fall under Annex II so the proposed changes warrant special attention. It is understood that while some countries (such as the Netherlands, France, Denmark and Ireland) will contend themselves with making small alterations to existing systems, others

are taking a keen interest in how the approach advocated by the UK Government might operate. Furthermore, it is understood that the UK's plans were the subject of discussion at a meeting between the European Commission and EIA experts within the governments of Member States.

At present, a local planning authority, in determining if an Annex II project should require EIA, will adopt a case by case approach and use *indicative* thresholds which have been set by the UK Government to help it reach a decision. Official guidance to local authorities and developers stresses that these thresholds should only be guides and that the key test will be whether significant environmental effects are likely. The government now wish to amend this procedure by adopting *binding* thresholds for Annex II projects. Under the arrangements a local authority (or other competent authority) would examine the project to see whether it fell above certain 'inclusive', or below pre-determined 'exclusive' binding thresholds. By way of example, an inclusive threshold could constitute a development which is more than 100ha in size, while an 'exclusive' thresholds was one smaller than 50ha. Competent authorities would therefore automatically require EIA for developments above 100ha, but automatically exclude those which fell below 50ha. Projects which were between these two thresholds would need to be assessed on a case basis as before. It is envisaged, therefore, that the binding thresholds be used as a surrogate for whether "significant" environmental effects are likely.

It is argued that the new system will simplify screening decisions and lead to greater certainty. If the proposals were to be introduced, it would represent a significant, and in CPRE's view detrimental, change in the way screening decisions were undertaken.

The EC Directive makes it clear that Annex II projects should require EIA where they are likely to have "significant environmental effects" and that this should involve examining a combination of factors including the nature of the project, its size and location. The size of a new industrial facility, for example, is an important consideration, but needs to be placed in the context of the surrounding environment, the cumulative impact when considered alongside other developments which might result and the other stresses being placed upon the area. There are very real dangers that decision makers will focus overly on whether binding thresholds have been breached rather than if significant environmental effects are likely to occur. Furthermore it is questionable whether the setting of thresholds could ever be as comprehensive as to account for the variation which exists in the receiving environment without becoming over burdensome.

The EC Directive makes it clear that projects which are listed in Annex II may require an EIA if significant environmental effects are likely. As such there are no absolutes for whether EIA is, or is not, necessary. The proposal to introduce a mandatory test in which an Annex II project which falls below an exclusive threshold does not require EIA is not equivalent to the tests under Annex II of the Directive. Indeed the Government accept in their consultation paper that it "*will be a considerable challenge to establish meaningful 'exclusive' thresholds*". This should mean that any thresholds which are set should help to inform a decision, but not determine it.

CPRE has other concerns related to the introduction of binding inclusive and exclusive thresholds. These include:

- the inability of decision makers to look beyond the rigid thresholds which have been set to take account of wider public concerns for the environment, when deciding on whether an EIA is required;
- the way in which the setting of a certain number of thresholds will diminish or restrict the number of reasons why an EIA may be required simply because only some factors (such as the size of the project or its location) have been identified;
- the problems associated with identifying any cumulative environmental impacts which might occur, or in requiring EIA for those developments falling just beneath the thresholds which have been set;
- the reduced ability of binding thresholds to be sufficiently flexible in order to accommodate changes in policy, knowledge of environmental impacts or public concerns over time;
- worries that the appeal system which is proposed so that projects falling below the exclusive thresholds may need EIA if significant environmental effects are likely will be unwieldy and lead to numerous appeals over screening decisions for Annex II projects.

As a consequence, of these concerns CPRE has urged the UK Government to abandon the proposed inclusive and exclusive thresholds. In order to achieve a high level of environmental protection, whilst maintaining flexibility, CPRE has argued that the use of a case by case approach guided by indicative thresholds continue, and for those thresholds to be updated to reflect current thinking.

### 3 Other Proposed Changes

#### *Scoping*

Numerous research reports have shown that early discussions which look at which issues should be

covered in an environmental impact assessment (a process known as scoping) tends to lead to better quality environmental statements (ES's). The UK Government believes, however, that this should be undertaken on a voluntary basis. The failure to use the opportunity presented by Article 5 (2) of the amended Directive (which allows Member States to introduce mandatory scoping) indicates a somewhat *de minimus* approach by the Government in this area. Instead, developers may approach a competent authority and ask what issues should be covered in the ES, although they are under no obligation to do so.

#### *Alternatives*

The Directive places a higher emphasis on the examination of alternatives in EIA. Yet it fails to explain what "alternatives" refers to and there is continuing frustration that the UK Government has not specified what it believes this to mean in its consultation paper. It is left to developers to include details of any alternatives which they have chosen to look at. CPRE has urged the Government to require developers to explain what the do-nothing and the best practicable environmental options might be in an environmental statement.

#### *Other Projects*

A clause in the *Planning and Compensation Act 1991* allows the UK Government to introduce new projects under the UK Regulations on EIA. It is

proposed that 'golf courses' be included under the equivalent of Annex II because of their impact of water resources and landscape. Finally, the Government has attempted to explain the term 'urban development projects' which is included in Annex II of the Directive (10b). In addition to the car parks and shopping centres added to the Directive, it is proposed that it should also cover leisure centres, sports stadium's and large cinema's.

#### **4 Conclusion**

The UK Government is proposing to significantly change the way in which decisions over whether EIA is required are taken. Meanwhile in other areas (such as scoping and the consideration given to alternatives) little change is suggested to existing arrangements. The Government is expecting that the longer lists in both Annex I and II will mean an extra 55 ES's being published each year, on top of the 350 already produced. Just as important arguably as how many environmental statements are produced, is the quality of that information and whether projects are modified to reduce their environmental damage. Research commissioned by the UK Government has highlighted that less than half of 50 ES's which were selected for the study met the minimum legal requirements. If environmental impact assessment as it is currently practised is to meet the objectives of the EC Directive then substantial improvements will be required - and bolder changes to the existing Regulations. •

## The Bled Declaration

Environmentalists from all over Europe and further afield met recently in Bled, Slovenia to review progress in the negotiations over the proposed UN ECE Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making, and to identify priorities for the final stages of the negotiations. The meeting was organised within the framework of the European ECO Forum and attended by more than 140 representatives of Environmental Citizens' Organisations (ECOs) and other NGOs. Members of the ECO delegation to the negotiations for the Convention briefed the meeting on their efforts over the past seventeen months to strengthen the draft text. While they were able to report on some successes, they also referred to many areas where a small number of governments are continuing to block any meaningful progress. The Convention is due to be signed at the fourth 'Environment for Europe' Ministerial conference due to take place in Århus in June 1998. The meeting culminated in the adoption of the following declaration:

### The Bled Declaration

#### **TO: Governments of the UN ECE Region**

We, members and representatives of Environmental Citizens Organisations from thirty-eight countries in the UN ECE region, have adopted in Bled, Slovenia on 10 November 1997, the following Declaration:

#### *General*

1. Negotiations for the UN ECE Convention on Access to Environmental Information, Public Participation in Environmental Decision-making and Access to Justice in Environmental Matters are now approaching a critical stage. We welcome both the commitment to develop a Convention and the level of ECO participation which we consider to be a model for the drafting of international environmental law in general.

2. However, we deplore the trend within the negotiations to create a minimalist Convention and the willingness of delegations to allow the positions of a

minority of obstructive States to weaken the provisions of the Convention.

3. In addition to requiring the Convention to cover the European Union and to guarantee the right to a clean and healthy environment, we set out in this Declaration our particularly urgent requirements for the three main pillars of the Convention at this stage of the negotiations.

#### *Access to Information*

4. We start from the principle that governments exist to serve the people and are funded by the people, that the information they hold is public information, held on behalf of the people, and that the decisions they take are taken on behalf of the people.

5. We consider that the time limits proposed for the supply of information to the public are excessively long, particularly when an information request is refused. The value and relevance of information often depends upon it being provided to the requester in a timely manner.

6. Information must be made available and actively disseminated to the public in a usable, comprehensible form. We call for an unequivocal obligation on public authorities to provide information in the form specified by the requester (such as electronic or paper form, etc.) where it is held in that form. We deplore the recent dilution of the text pertaining to this point in the draft Convention.

7. We strongly support the inclusion in the Convention of an overriding public interest test to be applied to all exempt categories of information. Under no circumstance should information be withheld unless it can be established that the harm that may result from disclosure would outweigh the public interest in its disclosure. The burden of proof should rest with those seeking to withhold the information.

8. It is essential that the Convention contains a clear obligation on Parties to introduce national Pollutant Release and Transfer Registers (PRTRs) as a means of giving citizens access to critical information held by the private sector. PRTRs benefit Governments, industry, workers, citizens and the environment. Weak, non-binding language on this issue will leave a major gap in the effectiveness of the Convention.

9. In recognition of the growing use of electronic means of information exchange we demand that certain important categories of environmental information be legally required to be made accessible through the Internet or its equivalent. This requirement would save officials from the burden of responding to many individual requests at the same time that it allows the public to instantaneous access to a large amount of information and, emphatically, is cost effective. Failure to set clear and con-

crete targets in this area will be a failure of Parties to use new information tools to accomplish the Convention's goals.

10. We consider that the issue of genetically modified organisms has not been adequately addressed in the draft Convention and we call for an explicit reference to both in the definition of environmental information and in the provision pertaining to PRTRs. The release of genetically modified organisms into the environment is increasing rapidly, with inadequate controls across the UN ECE region.

#### *Public Participation*

11. Adequate public participation in environmental decision making involves many important components, ranging from early notification about a proposal to complete citizen involvement in post-decision implementation and monitoring. The present draft of the Convention falls short in a number of instances with respect to specific components.

12. A primary concern is the definition of "public concerned." There should be absolutely no threshold test establishing who is or is not the "public concerned" in any context. It is for all members of the public and organisations to themselves determine whether they have a concern with respect to a proposed activity, and determine whether they wish to participate, without restrictions or thresholds.

13. The reference to Annex I contained in section 5.1 is a wholly inadequate basis for establishing the activities to which public participation will apply. We strongly believe that any proposed activity with "an appreciable effect on the environment" must be subject to public participation, and that citizen participation is essential in determining which activities pass the "appreciable effect" test.

14. It is critical that the Convention require Parties to provide an opportunity for the public to participate fully in the development of general rules, policies, strategies, plans and programs affecting the environment. These instruments define the context in which activities affecting the environment are undertaken, and therefore must themselves be developed in a participatory manner. Information must be widely disseminated (including through the media) to alert citizens and communities.

15. The draft Convention almost totally fails to incorporate the concept of active identification of interested parties and elements to be included in the public participation process (scooping). In particular, there is a lack of quantifiable and objectively assessable targets (see Appendix 1). Thorough scooping at an early stage, conducted with thorough public participation, fundamentally shapes the further progress of any public participation process.

Therefore, we regard scoping as a priority issue which is essential to effective public participation.

16. In addition to these specific concerns, in many respects the draft Convention falls woefully short of incorporating the good practices for public participation (see Appendix 2). We strongly believe that incorporation of these good practices into the Convention is the only way to ensure that the public fully realises the rights that the convention was originally intended to provide.

#### *Access to Justice*

17. We strongly support the fact that access to justice has been accepted as a pillar of the Convention. We demand that access to justice cover not only the right to complain about inappropriate implementation of the right to know or public participation, but as well to include the right to sue both private entities and public authorities who are breaking laws and procedures concerning environment and nature conservation.

18. Both citizens and NGOs must be able to practically exercise their rights to access to justice. As a priority, this requires the removal of legal and financial obstacles which prevent citizens and NGOs from exercising such rights. Without their removal, the access to justice provisions in the Convention will be virtually worthless.

19. In particular, it is unacceptable for citizens or organisations who have exercised their rights to participate in environmental decision-making to be denied access to administrative or judicial appeal mechanisms.

#### *Other Provisions*

20. We strongly believe that the Convention should protect persons exercising their rights to information, participation and justice from penalisation, harassment or persecution, and are deeply concerned that a provision to similar effect was recently removed from the draft text. This should be reinstated as a general provision.

21. Furthermore, we consider that the practical significance of the Convention will be greatly diminished if it fails to include strong legal protection for "whistle-blowers" (including environmental journalists).

22. We demand the right to participate in international decision-making processes.

23. We demand the right to participate in an effective non-compliance mechanism.

#### *Conclusion*

24. There is still sufficient time to prevent the Convention from becoming ineffective and irrelevant. Therefore, we call on Governments to provide the

political will to ensure that the Convention becomes a major new instrument for strengthening democracy.

## Appendix 1

### *Public Participation*

#### *Lack of Quantifiable, Assessable Targets*

Currently, the participation provisions of the Convention (Article 5, especially) lack targets that are quantifiable or objectively can be assessed. These can be addressed as follows:

1. The proposer of any major development should fund or undertake an analysis of all those that they believe to be stakeholders in the proposal. This analysis should be submitted with the proposal, should be published, and should be open to challenge or amendment by those who believe that they have been wrongly left out.

2. There should be an integral statement, as part of the development proposal, that shows how stakeholder access will be supported. This should cover language issues (both the availability of non-technical summaries as well as full documentation, and an analysis of the language needs of stakeholders, e.g., those from ethnic minority backgrounds) and access issues (disability, timing of hearings, etc.).

3. A clear budget for a participation process should be identified and published. A working budget approximation of 1% of total development cost has been suggested (in the UK).

4. There is much discussion over what represents a "major" or "significant" development. Projects with values related to average national per capita income (e.g., 100 times average p.c.i.) could, for example, be automatically included.

5. Participation is a developing process. Each signatory should undertake to produce a review (perhaps once every two years) of participation processes that have happened (and this could also be done at city level). This review should include interviews with or surveys of people and NGOs who have been participating in such processes.

The principle of "informed consent" - that all those who participate receive information and explanation as to why and how the final decisions were made - should be incorporated into the Convention and relevant national processes.

## Appendix 2

### *Criteria for Assessing Good Practice in Public Participation in Environmental Decision-Making*

There should be adequate and effective publicity (including the use of all relevant media) as early as possible in the participation process, well before any public hearings.

The objectives of the participation process should be clearly defined in advance. Links between local decisions and national policy (and vice versa) and any resulting implications should be identified.

Public and interested organisations should have full access to all background documents. These should include all relevant information, should be clearly presented, and understandable to the general public.

All appropriate levels of government decision-making should be included in the process.

All interested parties, including those identified or identifying themselves as stakeholders, should have a right to comment and to participate at all relevant stages of a decision-making process.

All comments should be considered without any discrimination regarding the source of the comments.

Full minutes of all hearings and meetings in the process should be made available promptly and freely to all those taking part.

There should be adequate financial support for the process of citizen participation with a published budget. This should include adequate provision for funding independent NGO expertise.

There should be independent facilitation of the decision-making process by qualified professionals.

There should be adequate opportunities for civil society involvement in all stages of the process, including post-decision implementation.

Citizens and interested parties should receive clear knowledge of final decisions and the reasons for them.

The decision-making process should be subject to objective review after the end of the process. This review should include assessment by those who took part from all sectors. No process should be claimed as 'good practice' without such a review taking place.

*For more information and comments contact Jeremy Wates, E-mail: [jwates@foeire.iol.ie](mailto:jwates@foeire.iol.ie); website <http://www.ljudmila.org/retina/eco-forum/> •*

## Report on the Implementation of the 1991 Nitrates Directive

On 2.10.1997 the European Commission published a report on the implementation of Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources (Com (97) 473 fin.). The objectives of the Directive have been to reduce water pollution caused or induced by nitrates originating from agricultural lands and to prevent such pollution in the future. The Directive obliges Member States to identify waters polluted or likely to be affected by pollution and possibly designate these areas as vulnerable zones. The necessary information is to be drawn from the monitoring requirements in the Directive.

The Member States are furthermore obliged to draw up action programmes that contain among other measures maximum quantities of manure that can be applied to land every year. The Directive limits application to a maximum of 210 kg/ha. Additionally, the Member States must establish at least one Code of Good Agricultural Practice which is mandatory in the zones. The zones should have been established by the end of 1993. The code of environmental practice was due at the same time.

The first four-year action programme should be established by the end of 1995. The European Commission has come to the conclusion that six years after the adoption of the Nitrates Directive the status of its implementation is still unsatisfactory in most Member States. Only three countries have completed their designations of regionally differentiated vulnerable zones. Some countries, such as Denmark, Germany, and Austria have declared their whole territory a vulnerable zone. So far, only five Member States have notified their first action programmes. Three of these programmes are under examination by the Commission and in two cases (Germany and Luxembourg) the Commission found that the programmes did not comply with the Directive. The Commission views these deficits as "difficult to justify", because the action programmes are one of the key requirements stated in the Directive.

All together, all Member States have failed to implement the Directive in time regarding one requirement or the other. On 30.7.1997 only four Member States have implemented the Directive into national law. The Commission has decided to file infringement proceedings under Art. 169 of the Treaty against 13 of the 15 Member States. The Commission still sees

the Directive as a suitable contribution to solving the nitrate problem and propose not to revise the

Directive - provided it is taken more seriously by the Member States.

Betty Gebers

## To protect the Last Remaining Wilderness in Japan

by *Morihiro Ichikawa*

### 1 The Last Wilderness in Japan

Hokkaido is the northernmost island of Japan, extending from 42° to 46° N latitude. In its central part is the Daisetsuzan National Park, sometimes called the "Roof of Hokkaido". This park, 230,000 ha in area, is the largest national park in Japan. It preserves multiple marvels - rocky peaks, active volcanoes, grassy meadows with Alpine flora, rapid rivers, waterfalls, tranquil lakes, beautiful forests, and various species of animals. In a word, this park protects the last remaining wilderness in Japan.

### 2 The Road Plan

Now the Hokkaido prefecture government has a plan to construct a major road named Shihoro Plateau Road in the park. Thirty years ago, the government decided to construct this road through a southern part of the park to connect Shikaribetu Lake to Shihoro town. In 1972, however, the project was suspended because of public opinion that the road would damage ecosystems and wilderness. They have not been able to proceed with construction of the road since then; so, about 2.6 km of the road has been left uncompleted.

In 1994, the Hokkaido prefecture government decided to continue working on the construction the road, but in the form of a tunnel instead of an open road. The reason to construct this road is to promote the local economy, especially the tourist industry. However, another road already exists connecting Shihoro and Shikaribetu Lake, but it is 11 km longer. The new road would shorten the travelling hour by 11 minutes. In 1995, the Environment Agency permitted this new plan of construction.

### 3 Unique Species

There are many unique species and many diverse ecosystems in this park which is home to the largest area of cool microclimates in Japan. Although the park sits about only 800 m above sea level, many alpine plants grow within this area. There is also the Pika (*Ochotona hyperborea esoensis*: living fossil of the glacial period) habitat, which is the largest area of such a low elevation in Japan. There are also some newly identified species of spiders. The presence of this unique diversity of plants, mammals, and insects depends on these cool microclimates.

Therefore, members of the Nature Conservation Society of Hokkaido and environmentalists joined together in a lawsuit against the Hokkaido prefecture government in August 1996. Their objective is to protect the wilderness, species diversity, and ecosystems in the Daisetsuzan National Park.

### 4 Lawsuit

The plaintiffs consist of 21 members including the author of this article. The head of the plaintiffs is Yagi Kenzo, Emeritus Professor of Hokkaido University. This case is to date one of the biggest lawsuits to protect wilderness in Japan. The plaintiffs are technically supported by many botanists, zoologists, entomologists, lawyers, and many active co-workers. The group insists in this case that this road plan violates the mandates of the 1992 Biodiversity Convention, signed by the Japanese Government in 1993. Articles 7 and 8 mandate the governments to take measures to conserve this biological diversity, and not to destroy it. Article 4 defines the prefecture's authority: prefectures have to promote the protection of ecosystems and natural habitats, and have the obligation to protect wilderness when it would be explicitly destroyed. This road, Shihoro Plateau Road, will clearly destroy the structure of cool microclimates, the ecosystem, and the species diversity.

Unfortunately, there aren't any effective acts protecting wilderness in Japan. Only 51 species are listed under the Conservation of Species Act in Japan. Pika is not listed. Many species in danger of extinction are also not listed and there isn't any right of petition to list them. As these species and their critical habitats are not legally protected, there is no way to protect them other than under the auspices of the Biodiversity Convention.

This suit is a taxpayer's suit. As taxpayers, the plaintiffs insist that it is illegal for the Hokkaido prefecture government to further expend public expenditure, amounting to about 83 million dollars, for a project which violates the Biodiversity Convention. The Japanese Government has not been positive in protecting wilderness and in conserving the environment, and has also not taken effective measures to stem global warming. It admits importing ivory from Africa and hunting whales despite the international anti-whaling campaign. The Japanese Parlia-

ment, the *Diet*, does not enforce environmental assessments under the environmental impact act. The plaintiffs want to win this case and for this reason wish to co-operate with organisations, scientists and lawyers of countries outside of Japan.

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## NEW REGULATIONS

### New Legislative Initiatives in 1998

The European Commission has presented its work programme for 1998. The programme contains only new measures. Proposals already programmed in previous years and adaptations or technical amendments of existing legislation are not included.

Only three new initiatives are planned for the environmental policy sector:

- Proposal on national emission ceilings (SO<sub>2</sub>, NO<sub>x</sub>, NH<sub>3</sub>, VOCs);
- Proposal on air quality;

- Proposal on electronic waste.

A number of initiatives are planned in the field of agriculture concerning the common market for agricultural products (beef, milk, olive oil, tobacco and wine). A number of structural policy instruments will also be newly introduced. Among the proposals are new regulations on the Cohesion Fund, the European Regional Development Fund and a pre-accession structural instrument.

### New Waste Management Law in Italy

Italy implemented the European Directives on Waste, on Hazardous Waste and on Packaging and Packaging Waste through a governmental decree that became a law in November 1997 (Decreto Legislativo 5 febbraio 1997, n. 22 integrato con D. Lgs. N. 389 del 8/11/1997, Attuazione delle direttive

91/156/CEE sui rifiuti pericoloso e 94/62 /CE sugli imballaggi e sui rifiuti di imballaggio). The law might be in conflict with European legislation because it does not take up the European definition of waste and it does not include residues that are recycled under its definition.

### Swiss Energy Tax Law Blocked

In June 1997 the Swiss Parliament voted in favour of a law that would impose an energy tax on the use of uranium and fossil energy. The revenue was supposed to be used to create incentives for investments in the field of renewable energy. The tax rate would have been 1 Rappen per kilowatt-hour. In

twenty years time Switzerland wants to cover 50% of its energy supply through renewable sources.

The Council of the Swiss Cantons has voted against this law and directed it to the environmental commissions. The law will now be blocked until at least spring 1998.

## NEWS IN BRIEF

### Environment and Employment

The Amsterdam Treaty includes a new objective on employment and a stronger commitment to the environment. Both employment and environment are considered matters of common concern, and the Treaty requires these two areas to be integrated in all other policies. In November 1997 the European Commission published in connection with the employment or "job" summit in Luxembourg a Communication on environment and employment (Com (97) 592 fin.).

The Communication seeks to outline a strategy through which environment and employment can be made mutually beneficial. It summarises and analyses the state of the discussion and takes up some positions that have long been promoted by environmentalists. For example, one of the main problems concerning unemployment is seen in the „underuse“ of labour resources and in the „overuse“ of environmental resources. To reduce this imbalance the Commission promotes the transition towards sustainable production patterns. The communication suggests the following key actions in the sector:

- Benchmarking of employment and environmental achievements of companies and economic sectors, so as to encourage public authorities and private and public enterprises in their reorientation towards cleaner and eco-efficient consumption.
- Promoting technology assessment and development, including new emerging sectors and technologies and broadening the scope of existing „Best Available Technologies“ screening so as to include employment effects as well as detailed assessment of energy and resource use.
- Building upon Agenda 2000, continue and increase efforts to ensure that Community Funds and Instruments support in an integrated way employment and sustainable development. In

this respect a focus on urban renovation and rural development is said to look promising.

- Continuation of the gradual restructuring of tax systems by reducing non-wage labour costs on the one hand and on the other, by incorporating environmental and resource costs into market prices of goods and services.
- Promotion of education and training to support the implementation of new environmentally friendly technologies and working practices.

The annexes to this Communication give an informative overview of the activities of the so-called „eco industries“ and highlight best practices for creating environmental jobs in the Member States.

According to Annex I the most important activities of eco industries are: water and waste water treatment (42 % of total EU output), waste management and recycling (29%), air pollution control (19%), noise and vibration control, contaminated land and water remediation works, environmental research and development and environmental services/consultancy. The output of the sector was worth 90 billion ECUs in 1994 (public and private buyers).

The largest markets for these activities and jobs are: Germany (35% of the EU output) followed by France (20%), UK (12%), Italy (10%), Netherlands (8%) Austria (4%). In national terms eco businesses are the most important in Austria (turnover equals 2,3% of GDP), The Netherlands (2,3%), Germany (2%), France (1,5%), Sweden (1,5%).

A broader definition of environmental jobs gives a total nearer to 3.5 million in Europe, if renewable energy, recycling, nature and landscape protection and eco renovation of urban areas is included (figures quoted from the Communication on Environment and Employment: Building a Sustainable Europe, Annex 1).

## EMAS: List of Registered Sites Published

According to Art. 9 of the EMAS Regulation (EEC) No. 1836/93 (OJ L 168 of 10.7.1993, p.1) a list of all sites that are registered in the Community is published annually in the Official Journal of the European Community. Only those sites can register that have set up an environmental management system and auditing system according to the requirements of the Directive and that have been examined and validated by an accredited environmental verifier.

The latest list that includes all registrations that have been submitted by the Member States until 15.4.1997 shows that the instrument is overwhelm-

ingly popular in Germany, while in some of the Member States it has in fact not or hardly been used. An overview of the number of registered sites per country is given below:

Austria: 563	Belgium: 3
Denmark: 17	Finland: 4
France: 7	Germany: 517
Ireland: 2	Norway: 17
Spain: 4	Sweden: 48
The Netherlands: 13	United Kingdom: 26

## Charter of Permanent Peoples' Tribunal on Human Rights and Industrial Hazards

The Permanent Peoples' Tribunal has presented a draft Charter of Rights against Industrial Hazards. The PPT is an international court of public opinion and is the permanent successor to the Russell Tribunals. The PPT is an independent forum that examines violations of human rights and suggest remedies for such violations. Evidence is presented to a panel of 7-11 judges chosen from the 61 members of the tribunal who are senior judges, scientists, writers, states people and artists from all over the world. The tribunal submits its findings to the Secretary General of the United Nations and to other UN organisations as appropriate and to other national and international bodies. The Permanent Peoples Tribunal on Human Rights and Industrial Hazards convened four sessions in New Haven, Bangkok, Bhopal, and London since 1991 to receive testimony on the issue.

The Charter of Rights against industrial hazards contains provisions concerning non discrimination, liability, rights to appropriate health care, the permanent sovereignty over living environments, the right to environmental information, the right to a living environment free from hazards and the right to effective monitoring.

The Coordination against Bayer Dangers e.V. has published the draft and started a campaign in order to promote the Charter, so that it will become an official UN Charter.

*The publication and campaign material can be ordered at the Coordination against Bayer Dangers, PF 15 04 18, 40081 Düsseldorf, Germany, Fax: +49 211 333 940, e-mail: Co\_gegen\_Bayer@Nadeshda.gun.de Contact PPT: Permanent Peoples' Tribunal, Via della Dogana Vecchia 5, 00186 Rome, Italy, Fax: +39 6 68 77 774.*

## Human Rights and the Environment in Ecuador

The Inter-American Commission on Human Rights - the principal organ of the Organisation of American States - issued a report on the Situation of Human Rights in Ecuador in July 1997. The report is based on the Commission's own research and an on-site visit, on information from independent NGOs, local communities, government authorities and other sources and covers the period from 1992 to September 1996. The report shows the link between human rights and environmental degradation. The indigenous population in the Amazon region is heavily

affected by oil and mineral development activities which are carried out by the state-run oil company or by its licensees. As a result of the environmental pollution people suffer from severe health problems, poor food supply and malnutrition. The Ecuadorian Constitution (Art. 19), the American Convention on Human Rights (Art. 4. u. 5) and the American Declaration of the Rights and Duties of Man (Art. I and XI), however, guarantee the right to life and to physical integrity of individuals. The Commission points out that if these rights are not adequately

ensured through legislative and other means, the State must take the necessary corrective measures to protect the affected persons from a further degradation of their environment. Individuals should have access to information and judicial recourse and should be able to participate in relevant decision-making processes which affect them.

*More information on the report can be obtained from: Adriana Fabra, International Institute for*

*Law and the Environment, c/ Luis Antúnez 6, 3<sup>d</sup> floor, 08006 Barcelona, Spain, Tel.: +34 3415 2762, Fax: +34 3 415 2440, email: iidmab@arrakis.es; or*

*Neil A.F. Popovic, Heller Ehrman, White & McAuliffe, 333 Bush Street, Suite 3100, San Francisco, California 94104 USA, Tel.: +1 415 772 6245, Fax: +1 415 772 6268, email: npopovic@hewm.com*

## REC's 1998 Junior Fellowship Program

The Regional Environmental Center for Central and Eastern Europe (REC) is an independent, non-profit, regional organisation in Szentendre, Hungary. It was established in 1990 by the United States, Hungary, and the Commission of the European Union. Since 1993, the Center has offered Junior Fellowship Programs for young environmental activists between 20 and 30 years of age, primarily from Central and Eastern Europe. The 4-week program at the REC includes training in NGO organizational development issues, establishing relationships with environmentalists from other countries and learning about the activi-

ties of the REC. The fellows obtain experience in project proposals writing, in computer applications, presentations, networking and project management. All costs for accommodation, travel and daily expenses, except for applicants from Western countries, are covered by the REC.

*For detailed information on the application requirements contact:*

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## BOOK REVIEW

*Edward H.P. Brans, Esther J. de Haan, André Nollkaemper, Jan Rinzema (Eds.)*

*The Scarcity of Water  
Emerging Legal and Policy Responses*

Kluwer Law International; London, The Hague, Boston 1997, International Environmental Law and Policy Series, 299p., ISBN 90-411-0657-X, 124 USD

The book assembles papers from the Oct. 1995 conference in Rotterdam entitled „Scarcity of Water - International, European and National Legal Aspects“. It also contains additional contributions from other experts in the field of water law and policy. The book is divided into five parts. The first part analyses the current situation and gives an outlook on future challenges. Part two provides an overview of the role of international law relating to water. The contributions analyse the applicability of legal procedures to avoid interstate conflicts as well as legal possibilities to prevent pollution and waste of water resources and to preserve these resources for future generations.

Contractual agreements to settle the common use and distribution of water resources and the sharing of costs of water facilities are analysed in the part on Water Scarcity in Selected River Basins. Here the strained situation in the torrid Middle East and in Africa is examined more closely. In another part, specific problems of the US, which, due to financial and environmental reasons, had to restructure its laws with regard to water use and the Netherlands, with its scarcity of fresh water, are described. In the last part, the authors respond to questions related to water as a commodity in the context of international law and agreements.

The reader receives in-depth, cogent information on the complex issue of water scarcity and gains a comprehensive overview of the development of water law. The book provides many helpful references and is very useful for academics as well as students and any other interested persons.

Sonja Zadler

## 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 projects, 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 Nespore**, 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

**Todd True**, Lawyer, Sierra Club Legal Defense Fund, Seattle, USA

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**elniPUBLICATIONS**

*International Environmental Impact  
elni (Ed.)  
Environmental Impact Assessment  
European and Comparative; Law and Practical  
Experience*

Cameron My Ltd. London 1997, 284pp, ISBN 1 874698 074, pb. £40 post paid UK, £45 post paid EU, £50 post paid other countries.

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.

*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 other countries.

The *elni* volume no 7 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 a 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 May 1991 in Germany. 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. Wilmowsky / 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.

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