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**CONTENTS**

<b>elni News</b>	<b>1</b>
<b>Articles</b>	<b>3</b>
New Linkages between the US and the EU: The Transatlantic Economic Partnership and Its Possible Impacts on European Environmental Policy and Law <i>Matthias Buck and Roda Verheyen</i>	3
Approaches towards Environmental Policy Integration and Sustainable Development <i>Christian Hey</i>	9
<i>Locus Standi</i> and Access to Justice under EC Law - Where to Go after Greenpeace <i>Diana L. Torrens</i>	15
Technical Standards in the Area of Conflict of Environmental Protection and Free Single Market - A Problem-Oriented Overview <i>Andreas Furrer and Viola Bölscher</i>	19
The Costs to Industry of Environmental Regulation <i>Gary Haq</i>	26
Industrial Self-Control in the European Regulation of Chemicals <i>Martin Führ</i>	29
Environmental Law in the New South Africa: Developments since 1994 <i>Michael Kidd</i>	35
<b>Current Affairs</b>	<b>40</b>
Moldova Conference on Public Participation, Part I - Conference of ECO <i>Jeremy Wates</i>	40
Moldova Conference on Public Participation, Part II - First Meeting of Signatories to the Aarhus Convention <i>Jeremy Wates</i>	44
<b>News in Brief</b>	<b>47</b>
<b>Imprint</b>	<b>48</b>
<b>Tasks and Activities</b>	<b>49</b>
<b>elni Publications</b>	<b>50</b>
<b>Index of elni Issues from 1996-1998</b>	<b>51</b>

## elni NEWS

### elni Meeting in Brussels in February 1999

On 19 February 1999, a group of long-standing elni members met at the Hanse-Office in Brussels by invitation of Betty Gebers to discuss the future of elni. On the agenda were the following topics: Brief report about activities: Future communication within elni (web-page, newsletter), presentation of Council meetings agenda, elni workshops/conference, and possible issues for projects in the 5<sup>th</sup> framework research programme. The main results and follow-up activities are given below.

### elni Workshop „Practical Implications of Environmental Law Principles“ in Gent on 1 October 1999

The participants of the elni meeting agreed that it would be best to go on asking for a funding of smaller workshops, since the budget of DG XI for the organisation of conferences is very limited. It was also agreed that a horizontal topic rather than a special issue would find a broad interest among most elni members. The final suggestion was to discuss the "enforcement of environmental law" under different legal aspects on separate workshops. All in all, these workshops would then cover many important aspects and form a coherent overview on "enforcement of environmental law". Proposals made are:

- Enforcement, flexible licenses and involvement of third parties;
- Enforcement and implication of environmental principles;
- Enforcement and EMAS.

As a first step, the Center for Environmental Law and the Maritime Institute of the University of Gent, in collaboration with the Center for Environmental Law of the Facultés Universitaires Saint-Louis (Brussels) are organizing in the framework of elni a workshop on the practical implications of environmental law principles in general and the precautionary principle in particular. The Workshop will be held in Gent on Friday, the 1st of October.

Environmental law principles figure more and more in environmental treaties, they can be found in the Treaty on the European Community and in a growing number of national or regional environmental legislation. The question arises if they are only non-binding intentions or guidelines for policymakers without any legal value or if they are more than that?

Do they have legal effects? And if so, what kind of effects can they have? Should they be applied by the authorities and the polluters, or not? Moreover, can they be enforced, and if so, by whom and by which methods? Are there any sanctions if they are violated ?

These are some of the questions a lot of academics are working on. Also practitioners of environmental law are investigating the possible use they can make of these principles. Also judges are funding their decisions on these principles. Could it be that we are now at the beginning of a whole new evolution in environmental law practice?

The workshop is intended to discuss all these topics among environmental lawyers from different countries and with different occupations (academics, barristers, lawyers working within NGOs and government administrations) with the aim to learn from each other. The focus is on the precautionary principle, but other principles will also be discussed.

The following speakers have confirmed their participation: Dr. N. de Sadeleer, CEDRE/FUSL; Prof. Dr. M. Pallemarts, VUB; Prof. Dr. P. Gilhuis, KUB; Prof. Dr. F. Maes, Gent University; P. Verbeek, Mina-Raad; I. Sievers, VROM-Raad; N. D'hondt, University of Amsterdam; I. Larmuseau, University of Gent; M. Sheridan, FIELD.

See the workshop programme and organisational details at our elni website <http://www.oeko.de/elni> under the news section.

### New elni Proposal for Workshop on GMO Submitted

Last year's proposal for a conference on „Deregulation“ was rejected by DG XI for various reasons. IIDMA (International Institute for Law and Environment, Madrid and Barcelona) in cooperation with the Öko-Institut (Darmstadt) and CEDRE (Brussels) have submitted a joint tender to the EC Commission in January for co-funding of an elni workshop on new developments in the field of genetic engineering in the EU and its Member States. There is a growing awareness in many Member States on the need for a revision of current domestic and EU policy and legislation on Genetic Modified Organisms (GMO). The use of GMO - particularly in food crops - has been the focus of an intense public debate throughout the EU. Also a range of new developments in EU legislation that will effect the domestic legislation has occurred recently. For instance, Directive 90/219/EC on the contained use of GMO has

been substantially revised in 1998 and the Commission proposal for a revision of Directive 90/220/EC (deliberate release and placing on the market of GMO) is currently under discussion.

Therefore we think the proposal has good chances of getting funded. The decision of DG XI is expected soon.

### elni Newsletter and elni Homepage

In the 2/98 Newsletter we asked our members if they would prefer an electronic elni Newsletter to a paper version. This issue was also discussed in Brussels. Most participants stressed the importance and quality of the printed newsletter. The elni newsletter therefore is seen as an important part of the elni network. The relevance of new means of communication was also emphasized by different participants throughout the discussion.

However, one should be aware that either means of communication essentially depends on the contributions of the elni members. The main difficulty when editing the newsletter and keeping up the homepage is to ask for contributions, such as articles and national/international news. After discussing the advantages and disadvantages of printed and electronic communication the participants of the meeting agreed on the following:

1. The coordinating bureau at the Öko-Institut shall continue to publish two issues of the elni newsletter annually. If we do no longer receive enough contributions from elni members, the second best option will be reconsidered which is to edit only one edition a year. This issue could then be either a yearbook or an edition focusing on a subject of particular interest.
2. The elni homepage shall be used and promoted for a regular exchange of up-to-date information of brief news, events, announcements, links etc.
3. Articles will exclusively be printed in the newsletter. They will also be announced on the homepage. As stated, news will be put on the homepage and, if not yet outdated, be reprinted in the newsletter. Both news and articles may reflect national or international legal environmental developments.
4. Articles do no longer need to be written in English only. They can be written in other Latin languages in order to facilitate non English authors to contribute to the newsletter. (Of course, we still prefer articles written in English language).

In the follow-up of the meeting we sent a questionnaire to all elni members by mail, Email and fax to inquire about their willingness and possibilities to contribute to the elni Newsletter and the homepage.

The response was very encouraging. A lot of elni members offered to contribute to the elni Newsletter. We would like to thank them all in this place.

### Possible Issues for 5<sup>th</sup> Framework Research Programme Projects

Another issue discussed in Brussels were opportunities for new elni research projects within the 5<sup>th</sup> RTD Framework Programme. The funding programme of DG XII was approved in December 1998. First calls for tenders have been launched in March.

Possible activities of elni would be within the socio-economic fields of research which can basically be found all over the programme, primarily under the horizontal programme „Improving human research potential and the socio-economic knowledge base“. The general structure of the 5<sup>th</sup> RTD framework programme is very complex. It can be found at

<http://europa.eu.int/comm/dg12/rtdinf21/en/key/etoc.html>

In the following discussion different activities were mentioned:

- How to implement Kyoto correctly from a legal point of view;
- Methodology for an evaluation of different instruments;
- Implementing and monitoring of environmental plans;
- Instruments for the management of land (soil) use;
- End-of-life vehicles - Comparison of instruments applied in Member States.

If you have got more ideas or concrete proposals you are highly welcome to express them to the coordination bureau in Darmstadt (juelich@oeko.de).

### CAVA

The CAVA project (Concerted Action of Voluntary Approaches) is a network of European institutes (see elni Newsletter 1/98 or elni homepage). It offers an opportunity for legal and economic researchers and practitioners to present their experiences on voluntary instruments for environmental policy. A workshop addressing legal aspects of voluntary approaches will be held in February or March 2000 in Brussels. This workshop will provide a special forum for elni members and others to present and discuss voluntary approaches from a legal perspective. A call for papers and more detailed information on this workshop will be available in the next newsletter and on the elni homepage.

## ARTICLES

## New Linkages between the US and the EU: The Transatlantic Economic Partnership and Its Possible Impacts on European Environmental Policy and Law

Matthias Buck and Roda Verheyen

### 1 Introduction

With trade wars threatening and increasing discussion about the costs and benefits of international economic liberalisation, in the run-up to the next WTO Ministerial Meeting in November 1999 in Seattle, where WTO Members must decide whether they wish to embark on a "Millennium Round" of trade negotiations, the US and the EU<sup>1</sup> pursue a quite distinct agenda. While newspaper commentators wonder about the future of transatlantic business and trade relations that seem to be endangered because of WTO disputes on Bananas and Beef Hormones and US unilateral "punishment" (i.e. withdrawal of tariff concessions for some goods originating in the EU), the two trade superpowers have long embarked on a complex route to draw their economies closer together. In the framework of the **New Transatlantic Agenda (NTA)** the process towards a **Transatlantic Economic Partnership (TEP)** has been launched in winter 1998<sup>2</sup>. This undertaking - which in the past largely took place at a policy level and just begins to be fixated in legal instruments on both sides - will have a significant impact on U.S. and European environmental and consumer protection law. It is important to stress that despite its bilateral structure, TEP also has a strong *multi-lateral* dimension, as it also aims at closer policy coordination between the EU and the U.S. in multilateral fora such as WTO, and any consensus amongst TEP Parties will greatly enhance U.S./EU bargaining power in a number of areas relevant for sustainable development.

However, given the limited space available here, we - as European citizens - will focus our preliminary

analysis of TEP on the relationship between TEP and *European Policy and Law*.<sup>3</sup>

In the following we will therefore briefly outline the history and main features of the NTA and the TEP, describe some of the results reached so far, highlight areas in which TEP will be of importance to European Environmental Law, and raise some issues regarding the relationship between policy coordination in the TEP-process and policy coordination in the European institutions.

### 2 History and Characteristics of NTA and TEP

The NTA was launched on 3 December 1995 at the U.S.-European Summit held in Madrid, Spain.<sup>4</sup> Political guidance for the NTA is provided by the **Joint U.S./EU Action Plan** which laid out four shared goals for closer transatlantic cooperation: (1) promoting peace and stability, democracy and development around the world; (2) responding to global challenges; (3) contributing to the expansion of world trade and closer economic relations; (4) building bridges across the Atlantic. Despite its comprehensive co-operative agenda, NTA unfolded the highest political momentum in a rather limited area of trade and investment-issues.<sup>5</sup> The economic importance of a closer relationship in trade and investment issues between the two powers is illustrated by the fact that the EU and the U.S. share the largest two-way trade and investment relationship in the world. In 1996, two-way trade amounted to US \$366 billion, and approximately one half of all foreign investment into the EU comes from the US, and vice versa.<sup>6</sup>

<sup>1</sup> There is some confusion on the use of the terms 'European Union' (EU), respectively 'European Community' (EC). We use these terms as follows: if reference is made to European institutions as a *political* actor, the term 'EU' will be applied. In contrast, if a specific treaty provision is of relevance, we refer to the institutional arrangement governed by this provision.

<sup>2</sup> See for a general position on EU-US relations the Commission Communication on "Europe and the United States: The Way Forward" COM(95)411.

<sup>3</sup> Clearly, the elaboration of a comprehensive analysis of the TEP-process from a US, a WTO, and a developing country perspective remain important tasks. Concerning the latter theme, this is especially true since both the US and EU administrations claim that the implementation of TEP will not have any negative impacts on third country trade and investment activities.

<sup>4</sup> See for example Bull. EC 11-1990 point 1.5.3 and Bull. EC 12-1995 point 1.4.104.

<sup>5</sup> For a historic overview of the policy process including links to political statements, declarations, and agreements consult: [www.state.gov/www/regions/eur/eureconindex.html](http://www.state.gov/www/regions/eur/eureconindex.html).

<sup>6</sup> For fact sheets about US-EU economic relations consult: [www.eurunion.org/news/euusfact.htm](http://www.eurunion.org/news/euusfact.htm).

So far, important outcomes of trade and investment cooperation under the NTA-framework include *inter alia*:

- a Joint Statement on Regulatory Cooperation released 5 December 1997;
- a Joint Statement on the Transatlantic Economic Partnership released 18 May 1998;
- an Agreement on Mutual Recognition (MRA) which was signed on the U.S.-EU Summit 18 May 1998 and entered into force 1 December 1998;
- the Transatlantic Economic Partnership Action Plan, released 9 November 1998 and approved on the EU-US Summit of heads of State and Governments in Washington, DC, 15 December 1998<sup>7</sup>.

Closer economic cooperation under the NTA, the planning and establishment of TEP was largely driven by the business community through the **Transatlantic Business Dialogue (TABD)**. Only recently representatives of other interest groups have been invited<sup>8</sup> to establish a Transatlantic Labour Dialogue (TALD), a Transatlantic Consumer Dialogue (TACD), a Transatlantic Donors Dialogue (TADD) and a **Transatlantic Environment Dialogue (TAED)**.

The **TABD** is an informal process that was initiated by the former US Commerce Secretary Ron Brown in Seville, Spain in November 1995. The TABD provides the framework in which European and American business leaders work together with and produce recommendations for senior decision-makers from the European Commission and the US Administration in order to develop joint EU-US trade policy recommendations that are submitted to the semi-annual U.S.-EU summits. The aim of this undertaking is to boost transatlantic trade and investment opportunities through the "removal of costly inefficiencies caused by excessive regulation, duplication and differences in the EU and US regulatory systems and procedures"<sup>9</sup>. Ultimately, the objective of the process is the creation of a New Transatlantic Marketplace (NTM) permitting goods, services and capital to flow more easily across the Atlantic.<sup>10</sup> According to its supporters, TABD has operated very effectively during the last years: "Virtually

every market-opening move undertaken by the United States and the EU in the last couple of years has been suggested by the TABD."<sup>11</sup>

Past TABD-work has resulted in a comprehensive set of recommendations that were presented to governments of the U.S. and the EU Member States. These cover a number of areas relevant for environmental policy such as product marking and labelling, biotechnology (particularly agri-food), chemicals, risk assessment methodologies, engine emissions, product liability etc. To maintain political momentum of the TEP-process, the TABD has introduced a "Scorecard-Approach" by which TABD-working groups measure government progress in implementing TABD-recommendations relative to individual deadlines set for specified government actions.<sup>12</sup>

The **TAED** was launched in September 1998 as counterpart to the TABD. At the moment there are approximately 30 U.S. and EU Environmental Citizen Organisations (ECOs) involved in the TAED and its first official meeting in May 1999 broadened the range of participants significantly. On the American side, the National Wildlife Federation (NWF) is coordinating input into the TEP process, on the EU side the responsibility lies with the European Environmental Bureau (EEB), which serves as an umbrella organisation for 130 European ECOs. Within the environmental community there are different perceptions of and opinions about the TEP. Basic criticism about the superpowers clearing a path for even more unsustainable, business-oriented policies goes along with the view that cooperation between the EC and the US is crucial to achieve progress in the WTO arena on issues like environmental standards and consumer protection<sup>13</sup>.

The ECOs participating in TAED have identified many potential areas of concern in relation to TEP. These include Mutual Recognition Agreements (MRAs), agriculture, genetically modified organisms (GMOs), labelling, accountability etc. The overall concern is that yet another rather non-transparent process is taking place the product of which might leave even less room to manoeuvre for domestic action (i.e. political pressure on one State to adopt progressive policies may become even more difficult for ECOs and consumer organisations). The transparency and participatory failures of the TEP have

<sup>7</sup> There are a number of other examples such as the Agreement on common comity principles, O.J. EC L173, 18 June 1998 or the Agreement on scientific and technology co-operation, O.J. EC L284, 22 October 1998 which may have some impact on environmental policy and law but will not be discussed in this article.

<sup>8</sup> See for the respective EU-US summit declaration Bull. EC 12-1998 point 1.3.105.

<sup>9</sup> The view that EU and US marketplaces are "over-regulated" is not shared by the authors but has been a driving force for the TABD and for the general discussion on "deregulation" that have led to substantive changes in EC law and domestic law (for example German administrative and environmental law).

<sup>10</sup> For information and links on the TABD consult: [www.usembassy.de/policy/dossiers/economic/tabd.htm](http://www.usembassy.de/policy/dossiers/economic/tabd.htm).

<sup>11</sup> Acting Under-secretary for Commerce for International Trade, Timothy J. Hauser, July 1998, quote taken from Paula Stern, "The Transatlantic Business Dialogue: A New Model for Trade Expansion and Regulatory Harmonization", 1997, to be viewed at: [www.tabd.org/resources/content/stern2.html](http://www.tabd.org/resources/content/stern2.html).

<sup>12</sup> The TABD 1998 Mid-Year Scorecard Report is available under: [www.tabd.com/recom/scorecard.html](http://www.tabd.com/recom/scorecard.html).

<sup>13</sup> See National Wildlife Federation "Discussion paper on the Opportunities for Environmental Advocacy in Trade Policy created by NGO Participation in the New Transatlantic Agenda", 1998.

been stressed several times<sup>14</sup> and the claim that the process fails to integrate policy areas and does not take into account the notion of Sustainable Development has not been discredited by the responsible bodies.

### 3 Outcomes of NTA/TEP-Process to Date

**Joint Statement on Regulatory Cooperation:** The Joint Statement on Regulatory Cooperation of 5 December 1997<sup>15</sup> includes a non-binding policy commitment to strengthen regulatory cooperation in the development, harmonisation and enforcement of regulations protecting health, safety, the environment and the consumer. Whenever possible, regulatory authorities in the U.S. and the EU are to consult with each other in early stages of drafting regulations, rely to a greater extent on each other's technical resources and expertise, and harmonise regulatory requirements or agree on mutual recognition. While mainly addressing regulatory cooperation in the area of trade in goods, it is also aimed to extend cooperation to the area of trade in services. In the TEP Action Plan, the U.S. and the EU agreed to push the agenda of regulatory cooperation further: based on an illustrative summary of existing cooperation between U.S. and EU authorities, general government principles and guidelines for effective regulatory cooperation shall be identified, on the basis of which mutual access to regulatory procedures shall be improved.

**Agreement on Mutual Recognition:** The Agreement on Mutual Recognition (MRA)<sup>16</sup> of 18 May 1998 - in the view of business representatives - constitutes a first step towards the establishment of a global system whereby standard conformity of a product or service is tested once and approved everywhere in the market place. In substance, the current MRA specifies the conditions under which the Parties - following a period of confidence building - will delegate the administration of their own product standards to administrative bodies of the other Party and agree to accept the results of such assessments as basis for their own decision on granting market access (Article 2 MRA). Insofar as standards and conformity assessment procedures coincide, the MRA-approach will effectively remove the need to test the same characteristics of a product or service twice. This will substantially reduce costs for market access: following some estimates, the base cost of product exports at present is increased by about 15 percent due to 'doubled' conformity assessments.<sup>17</sup> Although the current MRA only applies to sectors

of minor relevance to sustainable development<sup>18</sup>, governments as well as the TABD have expressed a clear commitment to extend the MRA-approach sector-by-sector to other more sensitive areas such as chemicals or biotechnology products. In this case mutual recognition may also include the acceptance of product related risk assessment and the like.

**TEP Action Plan:** After the EU-US Summit in May 1998 and following the Joint Statement on the Transatlantic European Partnership, the administrations of both sides drafted the so called TEP Action Plan<sup>19</sup> which aims to "intensify and extend multilateral and bilateral cooperation and common action in the field of trade and investment".<sup>20</sup> The Action Plan is divided in 2 parts: the first part addresses multilateral issues and actions such as common positions for the upcoming WTO Ministerial Round in Seattle. The second addresses issues to be discussed on the bilateral level. This part covers sections dealing with technical barriers to trade in goods, services, government procurement, intellectual property, agriculture (food safety, plant and animal health and biotechnology), environment, labour, consumers, competition law procedures and electronic commerce. For each of these sections the TEP Action Plan provides guidelines and recommendations for closer cooperation and sets out timetables for implementation; in this respect it closely mirrors the TABD scorecard-approach.

The procedural part of the TEP is brief - apart from policy impulse given from twice yearly U.S.-EU summits and Cabinet meetings, there are working groups for each sectoral topic which will report back to other, higher profile bodies such as the Senior Level Group operating under the initial umbrella of the NTA. Existing EU organisational arrangements in the institutions responsible for providing thematic and political guidance to the TEP-process (TEP Steering Group; Issue Areas Contact Points) create the impression of a rather imbalanced representation of interests. Even areas such as biotechnology, agriculture, food safety, plant and animal health are under the sole responsibility of DG I (External Relations) representatives.<sup>21</sup> Regarding the institutionalised involvement of environmental interests, the TEP Joint Action Plan "supports" the TAED<sup>22</sup>, but does not accrue to it a relevance within the TEP process similar to the TABD. The institutional a-

<sup>14</sup> See "Response of Environmental Citizens Organisations to the Draft Action Plan TEP", European Environmental Bureau, October 1998.

<sup>15</sup> See Bull. EC 12-1997 point 1.3.93 and 1.3.98.

<sup>16</sup> O.J. EC L 31 of 4 February 1999.

<sup>17</sup> See Stern (supra footnote 11).

<sup>18</sup> Sectors covered by the current MRA are telecommunication equipment, electromagnetic compatibility, electrical safety, recreational craft, pharmaceutical good manufacturing practice, medical devices.

<sup>19</sup> See Bull. EC 11-1998 point 1.3.98 and 2.2.1. The full text is available on the internet at: <http://www.europa.eu.int/comm/dg01/1109tep.html>.

<sup>20</sup> TEP Action Plan, section 1 (p.1).

<sup>21</sup> See "Transatlantic Economic Partnership - EU organisational arrangements", DG I, 9 March 1999. Overall, in the appointed working groups there are only 4 Members from other DGs listed as "contact points".

<sup>22</sup> TEP Action Plan section 3.6 (p.13).

rangements do not bind the Commission or the different working groups to consult with the TAED, nor are issues identified where input from TAED is desired or where it could be of significance. Although the environment is mentioned in the TEP, no visible effort is undertaken to actually *integrate* environmental interests into the other policy areas. In effect, issues of environmental protection are regarded as separate from issues of biotechnology, agriculture, food safety, plant and animal health. Only recently, a meeting of the TEP environment group has *inter alia* resulted in a recommendation concerning the integration of environmental concerns into the TEP process<sup>23</sup>. The group's guidelines suggest to establish a general exchange of information between trade and environment officials, for all working groups to take environmental and health considerations into account as an early priority. It is still too early to cast a judgement on how these in fact quite promising recommendations are put into practice.

Although the TEP Action Plan is not a legal document but rather a policy commitment, it is designed to create a political and legal framework for closer cooperation between the two economies. Many tasks set out in the Action Plan (especially comparative evaluation of current regulatory systems) have been carried out at the time of writing (April/May 1999) and it is the forward looking elements of the plan that are discussed in the working groups today (e.g. accelerating regulatory processes, implement regulatory cooperation, negotiate additional Mutual Recognition Agreements, establishing a common methodology and criteria for risk assessment etc.)<sup>24</sup>.

#### 4 Importance of TEP for EU Environmental Law and Policy

If put into practice, envisaged activities specified in the TEP Action Plan will become of importance for a number of sectors of European law and policy relevant to sustainable development. In addition, some characteristics of the TEP-process raise a number of cross-cutting issues that we will briefly discuss.

Regarding the goal of *closer cooperation between U.S. and EU regulatory and administrative authorities* (see the Joint Statement on Regulatory Cooperation), such cooperation is important to improve mutual understanding of differences in regula-

tory approaches and administrative practices. It will likely result in a convergence of regulatory measures and enforcement practices, thereby effectively lowering technical barriers to trade between the EU and US-economies. This type of policy approach resembles processes of collective learning that are still underway between administrations of Member States in the European Union itself, and should in principle be regarded as positive. However, one needs to be aware that a transatlantic entanglement of regulatory and administrative procedures will inevitably establish new corridors for political cross-currents aimed at exerting an influence on regulatory and administrative outcomes on both sides of the Atlantic. Furthermore, it will facilitate strategic political games of 'blaming the other side' for the existence of yet another set of 'overriding necessities'. In order to counter such tendencies, additional efforts towards more democratic control, transparency and public accountability of regulatory and administrative procedures are required and indeed should go hand in hand with increased transatlantic cooperation. In this respect, a strong commitment to implement the Aarhus Convention<sup>25</sup> (signed by the Member States of the EU and by the US) and governmental support for an influential TAED should be regarded as essential.

Regarding the *general regulatory approach taken under the framework of the current MRA*, it remains unclear how this approach will be reconciled with basic principles of consumer protection, which enable consumers to actively pursue the protection of their own interests, in particular by taking action against breaches of consumer (or environmental) protection laws via the competent courts or administrative authorities in the Member States. Whilst the MRA-approach allows for European standards to be administered by U.S. authorities, it currently does not include elements that would give European consumers, respectively their representatives (consumer associations or other qualified entities) some type of access to information or justice in the U.S.. Instead, the respective procedures set up by the MRA are of an intergovernmental and consultative character: Effective functioning of the current MRA is supervised by a Joint Committee that consists of representatives of each Party and which can take decisions by unanimous consent (Article 14). Although Article 15 MRA stresses that the MRA does not „limit the authority of a Regulatory Authority to take all appropriate and immediate measures whenever it ascertains that a product may (a) compromise the health or safety of the persons in its territory; (b) not meet the legislative, regulatory, or administrative

<sup>23</sup> See "Integration of Environmental Considerations within the Transatlantic Economic Partnership, Recommendation to Transatlantic Economic Partnership Steering Group", TEP Environment Group, 16 February 1999.

<sup>24</sup> Recently, the officials of both sides have declared that the negotiation progress has been very uneven depending on the sector or area and that no major breakthrough should be expected until the EU-US summit in June 1999. Both sides were described as still being at the stage of "organising themselves" (see International Trade Reporter, Vol.16, No.14, 7 April 1999).

<sup>25</sup> Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, available as a PDF file under [www.participate.org/convention/Arhus-convention](http://www.participate.org/convention/Arhus-convention)

provisions within the scope of the applicable Sectoral Annex...“, the broader institutional framework of the MRA might render it difficult to effectively safeguard the own standards in practice. No explicit provision exists that would give European citizens a right to access to product-related information that are held by the regulatory and administrative bodies of the other Party. Particularly worrisome in this respect is Article 17 MRA that deals with the extent of confidentiality of information exchanged under the MRA, and which for example does not allow the disclosure of information that relates to an ongoing investigation. In sum, if the MRA approach is taken further and extended to sectors of greater relevance to sustainable development, it will effectively limit the possibilities of individuals or groups of individuals to freely pursue their rights to a healthy and safe environment.

## 5 EC External Competencies and Negotiating the TEP

The set of rules determining the roles and competencies of the European Commission, the European Council of Ministers and the European Parliament in EU external policy carry important implications for the range and diversity of interests reflected during the negotiation of international agreements. In the TEP context, institutions involved as well as first outcomes of this cooperation (see above) create the impression of a rather one-sided representation of interests that is not in accordance with the participatory element inherent in the paradigm of sustainable development. Also they largely neglect the international consensus that increased economic cooperation constitutes an *integral* element of sustainable development. Above, we already mentioned the various political claims of civil society representatives for broader participation in TEP as well as related political commitments by government officials. But is there any *legal* backing to this political claim? Put differently, how does the TEP process relate to the EU's order of competencies in external affairs?

**Exclusive or mixed competencies:** It has been said that the Joint Action Plan does not in itself constitute a relevant legal document but is clearly designed to result in binding (cooperation) agreements. The EC has the *capacity* to enter into agreements with third parties (Art 281 ECT new, Art. 210 ECT old), but whether it also has the *competence* to do so depends on explicit Treaty provisions or on the doctrine of implied powers.<sup>26</sup> When it comes to

trade issues, Art. 133 EC Treaty (113 EC Treaty old) on “common commercial policy“ gives the EC *exclusive* powers to negotiate and enter into agreements that influence *external trade*. Exclusive competence implies that only the Community has the right to conclude agreements with the outside world and that Member States are excluded from doing so. However, in most cases international agreements comprise subject matters where powers are divided between the Community and its Member States – this, for instance, is the case in the areas of consumer protection and environmental protection. In areas of divided competencies, Member States and the Community conclude so called „mixed agreements“, during the negotiation of which Member States have a much greater say.<sup>27</sup>

Ever since international economic cooperation has broadened to include other issues than just tariffs and trade in goods (e.g. services, intellectual property rights), Member States and the Commission have been in constant discussion about the range of exclusive Community competence.<sup>28</sup> Whilst in the past case-law of the European Court of Justice (ECJ) on the matter was ambiguous, but seemed to favour a wide interpretation of the old Art 113 EC Treaty, the ECJ, in a recent legal opinion on the WTO Agreements on Services (GATS) and Intellectual Property Rights (TRIPS), held that „new trade issues“ were only covered by Article 113 EC Treaty insofar as they are comparable to trade in goods. Following the ECJ this can only be the case in the direct provision of cross-frontier services without movement of persons, and measures at the Community frontier to combat counterfeit goods and other infringements of intellectual property rights.<sup>29</sup> As shown above, the TEP Joint Action Plan encompasses traditional trade issues, but addresses several issues where competencies are mixed between the Community and the Member States and for which the Commission will not as easily obtain a negotiating mandate (Art. 113 III EC Treaty) as it has for the 1998 Mutual Recognition Agreement. This is certainly true for the areas services and intellectual property rights, but also for subject-matters such as the approximation of standards in fields of con-

and Rosas, *Mixed Union – Mixed Agreements*, in: Koskenniemi (see above) at pp.125 ff.

<sup>27</sup> As regards „mixed agreements“, the institutional framework set up by the EC Treaty is rudimentary. In consequence, co-ordination between European Commission and Council/Member States largely depends on political will. For a comprehensive account in the area of negotiating international environmental agreements see Macrory and Hession, „The European Community and Climate Change“, in O’Riordan and Jäger (eds.), *Politics of Climate Change: A European Perspective*, London: Routledge, 1996, pp.106-154.

<sup>28</sup> See for more detail Kapteyn and van Themaat, *Introduction to the Law of the European Communities*, London: Kluwer Law International, 1998, p.1275 ff.

<sup>29</sup> Opinion 1/94 WTO - GATS and TRIPS, [1994] ECR I-5267.

<sup>26</sup> See ECJ cases 22/70 *Commission v. Council* [1971] ECR 263/275: 6/76 Kramer et al. [1976] ECR 1279/1309 (where the so called ERTA doctrine was established). For a comprehensive analysis see Dashwood, *Implied External Powers of the European Community*, in: Koskenniemi (ed.), *International Law Aspects of the European Union* (1998) at pp.113 ff.

sumer, health and environmental protection. Thus, in the process of future negotiations under TEP, the Community will have to ask the question if and what kind of competencies are conferred to it by the EC Treaty. This is not only a legal, but also a legitimacy requirement. Powers confined to the Community are beyond the reach of domestic democratic decision making and possibly also largely beyond the reach of the European Parliament.

**The Role of the European Parliament<sup>30</sup>:** Outside the limited scope of Article 133 EC Treaty (113 EC Treaty old), when the Community is negotiating an international agreement, the European Parliament in general has to be *consulted* (Article 300 para.3 subpara.1 EC Treaty) before the Council may go ahead and conclude the agreement in question. However, some types of agreements explicitly listed in Article 300 para.3 subpara.2 EC Treaty do need the *assent* of the European Parliament before their conclusion. Of particular relevance in the TEP context may become the case of „agreements entailing amendment of an act *adopted under the co-decision procedure* of Article 251 EC Treaty“ (emphasis added).

In the area of environmental legislation, before the entry into force of the Treaty of Amsterdam, the co-decision procedure had to be invoked only in cases of environmental measures aimed at *harmonising* Community environmental standards, Article 100a para.4 ECT old (Article 95 ECT new). Insofar as international agreements concluded under TEP will entail amendments of these measures, the assent of the European Parliament will be required.

Clearly, the same goes for entailed amendments in areas in which in the past the co-decision procedure did not apply, but only recently has been introduced by the Treaty of Amsterdam<sup>31</sup>. Among others, this is the case for the main body of EU environmental legislation formerly adopted under Article 130s EC Treaty old by use of the *cooperation* procedure.

The wording of Art. 300 para.3 subpara.2 EC Treaty seems to imply that in such cases assent of the European Parliament will not be a necessary prerequisite to conclude an international agreement („entailing amendment of an act *adopted under the co-decision procedure*“, emphasis added). However, a teleological and systematic interpretation of Art. 300 para.3 subpara.2 EC Treaty has a different outcome. The very sense of Art. 300 para.3 subpara.2 EC

Treaty is to avoid that participatory rights of the European Parliament are compromised if the Commission and the Council decide to negotiate international agreements in areas in which internal European legislative processes have been obstructed by differences between the European Parliament and the Commission, respectively the Council. Thus, *Article 300 para.3 subpara.2 EC Treaty seeks to establish a balance between external and internal competencies of the European Parliament*. Only this interpretation is in line with the ECJ rulings on the relationship between involvement of the European Parliament and corresponding democratic legitimacy of EC legal acts.<sup>32</sup>

Thus, we conclude that *assent* of the European Parliament will be required if future cooperation under the TEP will entail amendments to Community environmental legislation<sup>33</sup>.

## 6 Conclusions

In the light of the few issues we have discussed above, the TEP clearly does not constitute a process that will easily make its way through EC institutions and public opinion. TEP's short history does not give much reason to assume that trade officials would be willing to allow for a greater involvement of democratically elected representatives in the negotiation of closer economic cooperation. However, the growing body of international law in the field of investment and trade makes transparency and legal certainty crucial in the development of any new agreements.

Although one might view the MRA as a pioneering step in the effective elimination of Technical Barriers to trade and as a crucial agenda item for the future of the WTO Agreement on Technical Barriers to Trade (TBT), it has to be kept in mind that different perceptions of risk and necessary protection remain untouched by purely administrative negotiation. If one looks at the recent developments in the field of genetically modified organisms (GMO), these differences might not only constitute a deadlock to further agreements under the TEP umbrella, but illustrate just how important this perception can be<sup>34</sup>.

A general area of concern is that the general makeup of the TEP imitates the rather old fashioned WTO-approach to the interface between economic integration, environmental protection and social issues: Economic liberalisation is first agreed upon and afterwards steps are undertaken to address potentially negative environmental and social side-effects.

<sup>30</sup> The European Parliament has on several occasions welcomed the NTA and TEP in general but also called for transparency and cautious treatment of consumer and environmental issues. See for example O.J. EC C 34, 2 February 1998 and O.J. EC C 371, 8 December 1997.

<sup>31</sup> The Treaty of Amsterdam has entered into force on 1 May 1999. It substantially alters and amends the EC Treaty as well as the Treaty on the European Union. See for an analysis Bär and Kraemer, "European Environmental Policy after Amsterdam", *Journal of Environmental Law*, Vol.10, No.2, 1998, pp.315-330.

<sup>32</sup> See for example Case C-300/89 *Commission v. Council* [1991] ECR-I 2867 (2900).

<sup>33</sup> A similar interpretation could be reached in the fields of public health and consumer protection, Arts. 152, 153 EC Treaty.

<sup>34</sup> See for example ENDS daily, 18/03/1999: "US sends Europe trade warning on GMOs".

Although certain efforts are being made to take aboard interest groups and issues other than business, it currently is hard to imagine how the TEP can be a way forward on the path to sustainable development - a notion so highly praised by the leaders of every State involved. Economic cooperation is an essential part of sustainable development. However, it is also an *integral* part of it, which at current is not reflected in the TEP's institutional structure.

By the same token, the EU organisational arrangements in the TEP Steering Group need to reflect the diversity of interests involved, particularly in areas such as biotechnology, agriculture, environmental protection. The subject matters are too diverse to be tackled in the responsibility of DG I and the need for an effective inter-DG co-ordination should be self-evident.

At the very least, to serve sustainable development, policy co-ordination within TEP will require transparent and accountable policies aimed at broader

goals than just short-term economic gains. As we argued above, at least in part this *political* claim can be backed by *legal* arguments based on the current EU order of competencies; this is of particular relevance for the possible involvement of the European Parliament.

In our view, every effort needs to be undertaken to ensure that the TEP process will set a positive benchmark for international sustainability cooperation: Outcomes of the TEP will have a profound impact on the international trade and environment agenda. Thus, the EU and US in their bilateral strive for closer cooperation need to be aware of their global responsibility for sustainable development. If the EU and the US with their deeply rooted democratic traditions and their outstanding administrative, financial, and technical capabilities fail to accrue to this frequently declared goal even amongst themselves, how could they expect to build or even maintain credibility on a global scale?

## Approaches towards Environmental Policy Integration and Sustainable Development

*Christian Hey*

### 1 Introduction

Environmental Policy Integration has been politically accepted as an important element of any policy towards sustainable development. It has been endorsed in the Treaty in 1987 and continuously strengthened in the Maastricht and the Amsterdam Treaties. The Rio Declaration and many national policy plans towards sustainable development insist on the need to integrate the environment into sectoral policies.

This wide consensus is evident. Environmental policy integration promises to be efficient and effective. It is more efficient to modify sectoral policies in early stages of their development than to cause environmental damage first and then to repair them at high costs later on. The experience of 20 years of technically oriented environmental policies furthermore shows that they go some way to reduce environmental pressures, but that they are not sufficient to reduce them to levels which are acceptable from the point of view of future generations and the needs of present generations and nature. Since environmental problems derive more and more from diffuse sources (agriculture, traffic, housing) the traditional technical approaches of environmental protection do not address properly the problem.

Despite of all agreement on the principle environmental policy integration meets a lot of political and institutional barriers. So any policy, which tries to promote sustainable development has to address the question: Which strategies work and which do not work to promote sustainable development.

The 1998 EEB conference has collected scientific and political evidence on different strategic approaches. This paper is a follow up of the thoughts collected during the conference and tries to develop a systematic assessment of available strategies for environmental policy integration both on the basis of some theoretical thinking and some empirical evidence. One can distinguish the following approaches:

- Self-regulation – strengthening sectoral self-responsibility
- Dissolving Environmental Ministries
- Empowerment – giving a right to the environment: targets, timetables
- Mainstreaming – getting political leaders involved
- Horizontal cooperation: Let the environmental administration participate – coalition building
- Vertical environmental alliances and vertical sectoral disintegration: use the multilevel EU system for the benefit of the environment

- External coalition building – policy assessment or success: indicators and criteria

Each of those strategies has its strengths and shortcomings. It is for sure that none of them will manage to achieve environmental policy integration separately. What matters is to develop the right strategy mix. The following article is a contribution to this discussion.

## 2 Self-Regulation – Strengthening Sectoral Self-Responsibility

The Commission's Communication on "Partnership for integration" (1998) contains strong elements of a strategy to strengthen sectoral self-responsibility. Basic elements of this strategy are reporting on best practice, identification of priority actions, environmental assessment of sectoral policy proposals and the review of organisational arrangements. Such elements of sectoral self-responsibility are mixed with weak elements of mainstreaming (see below). The approach of the Commission is that heads of governments (the European Council) give a mandate to this work and supervise it. Sectoral councils have to set-up strategies and review mechanisms.

It is, however, the responsibility of the sectoral councils to do the work. The control of the process and of the content remains sectoralized. There will be little outside intervention but by heads of government. The Commission's approach is an explicit departure from the *"horizontal principles"* which *"have resulted in bureaucratic and mechanistic requirements which have failed to deliver"*.

It is, however, far from being evident, that sectoral councils will deliver without the continuous need to coordinate and negotiate with those, who are defending the environment. The experience with sectoral self-regulation is not very encouraging.

In 1998, the agricultural, the transport and the energy councils presented sectoral reports to the Vienna Summit. All those sectoral councils did not dare to make commitments beyond already agreed sectoral policies. The agriculture council even had difficulty in finding clear wording that shows that the disastrous effects of past and present agricultural policies on the environment are acknowledged. The transport council went as far as recognising that *"the inclusion over time of a quantified environmental component in transport pricing should be pursued"*. The industry council from April 1999 even used the opportunity to reverse integration: it asked for more cost-benefit analysis and strategic assessment of environmental policies on competitiveness. Furthermore it stated, that voluntary approaches would be preferable to legislation.

Sectoral self-regulation meets strong barriers, to go beyond a historical consensus:

- Sectoral ministers tend to defend the interests of their sectoral economic communities. Generally, such interests are growth interests, such as growing income and turnovers. The environment does not belong to their core business, but is a rather peripheral business. Sometimes – as in the transport sector – physical and environmental limits to transport growth might form a potential for synergies. But it is far from evident that a synergistic path is chosen – especially if also other options to extend the limits to growth (e.g. via telecommunication) are available.
- Sectoral ministers get advice from closed policy communities, which have developed their own identity, their own values and their own systems of knowledge. One cannot assume that learning processes or even more fundamental changes in values and priorities take place without some outside pressure.
- Sectoral policy communities have now a long tradition to make lip-service to the environment without accepting the challenge the environmental dimension is creating to their traditional policy approaches.

These are some of the reasons, why pure sectoral self-regulation only will lead to minimalist change. The environmental dimension will only be integrated to the extent that it does not lead to a modification of the core activities and the core interests of the sector. The preferred policy approach hence is an additive one (e.g. agro-environmental measures or noise protection walls for motorways). Even potential synergies between sectoral and environmental objectives may not be identified, because there is no pressure to systematically sort out, where such synergies might exist. Creative arguments and innovative ideas may not be listened to, because there is no pressure.

Therefore, it is structurally doubtful if self-regulation will deliver an added value for the environment. However, there is some risk, that sectoral ministers grasp the opportunity to reverse the direction of integration: the integration of sectoral objectives into the environment.

## 3 Dissolving Environmental Ministries

A widespread argument on environmental policy integration is that once integration has been achieved there is no need any more for sectoral environmental policy. In theory this might even be true: once "structural ecologisation" (Prittwitz 1990) of sectors has been achieved and all sectoral policy makers have internalised the environment as part of their core business then there is no need for an environmental ministry anymore. The concept of internalisation is for instance a key concept of

Dutch environmental policies (see: Liefferink 1997, De Jongh 1998).

The risk with this argument is that it starts with something, which at the best is the final result of a long process of deep cultural change. It is not realistic to assume, that this type of cultural change is already sufficiently strong to start with disintegration of the environmental administration. This would considerably weaken the cause of the environment. Sectoral mirror departments responsible for the environment have to work under and to adjust to a hierarchy, which itself has little own interests on the environment. Such departments have little own power to develop ambitious programmes which go beyond the existing mainstream of the hierarchy (Müller 1986). Environmental policy integration has to start with a proper definition of the environment and with a strategic vision. Both is beyond the competence of sectoral subunits responsible for the environment.

Eventually dissolving environmental ministries is an element to reverse the direction of integration: to strengthen the subordination of the environment under short term economic and sectoral interests.

#### 4 Empowerment – Giving a Right to the Environment: Targets and Timetables

The integration of the environment into other sectors first at all requires a substantive definition of what the environment is. Compared to natural persons the environment is without rights. Property in market societies is the most protected right, which must not be affected by other activities. The integration of the environmental dimension therefore needs some kind of artificial property right to the environment, which is to be respected by other activities. There are different approaches to allocate such as legal rights to the environment or the formulation of policy objectives.

- The designation of protected areas is the most obvious one. The EU Habitats and the Birds Directive only allow for a violation of protected areas if there is an overriding public interest and if no alternatives, which are less damaging, are available. In practice, those exemptions did not prevent nature damaging activities, but some legal hurdles could be defined. Enforcement could be however improved by strict liability regimes on biodiversity damage, access to justice for environmental organisations and a stronger burden of proof as regards “overriding public” interest and the non-availability of alternatives.
- The definition of environmental quality objectives: Quality objectives are thresholds which should not be exceeded. Clean water and clean air legislation of the 70ies and 80ies contained such quality

objectives, which have been revised, extended and partially strengthened in the 90ies. Quality objectives may create pressure to change sectoral policies, if they are demanding. From the air quality values, which have been or will be decided by the clean air daughter directives, it is expected that some pressure on the transport sector will be created to go beyond technical means. Environmental policy via objectives gives a mandate but also flexibility to actors to change behaviour. This policy approach, however, seems to create a dilemma in practice: if the quality objectives are too weak, little pressure for a change is exerted, if they are too strong, they tend to be ignored. This is the historical case with the Drinking Water and the Nitrates Directives. This means that even legal rights to the environment may not be sufficient to enforce them in practice. But they nevertheless may be an important tool to give the environmental authorities some negotiation power against sectoral ones.

- The formulation of environmental targets is generally a legally weaker instrument. With the exception of targets from international conventions many reduction targets in national environmental policy plans are only indicative and not obligatory in a strict legal sense. In international conventions and national environmental policy plans target setting is frequently used as an approach: CO<sub>2</sub>, NO<sub>x</sub>, SO<sub>2</sub>, CFCs and HCFC, Ammonium, Nitrates, VOC's are some of the substances, where reduction targets have been formulated. Also the EU Biodiversity Strategy belongs to this target-led approach. In some countries, target setting is the beginning of a consensus-oriented discussion process on the optimal way to achieve those targets. Thus, targets are not seen as a legally binding criterium (like e.g. the Maastricht criteria on public debts), but rather as a socially agreed benchmark, which guides action. The targets of international conventions have a more binding nature, but their legal enforcement also remains difficult. In some countries however, targets only have been used as a symbolic exercise with little effective action behind. The German CO<sub>2</sub>-reduction target certainly lacks the policy follow-up, which such an ambitious target would need. Even though the use of targets and timetables is a widespread instrument of environmental policy making, a sectoral break-down of overall targets can hardly be found. Such a sectoral break down would constrain sectoral decision-making and hence is frequently opposed by sectoral decision-makers. On the other side, only a sectoral break down of targets clarifies responsibilities, which are a precondition for action.

Thus, rights to the environment and environmental targets are important elements to initiate the integra-

tion process, but as a standing-alone strategy target setting might be undermined by non-compliance.

## 5 Mainstreaming - Getting Political Leaders Involved

Mainstreaming is one of the principal demands of the EEB and other environmental organisations. It was also mentioned as a strategy in the Vienna Declarations from December 1998. This approach calls for political leadership. If political leaders, like the president of the Commission or heads of government are strongly committed, they are more powerful than environmental ministers to push for environmental policy integration. Political leaders can use their public authority to support environmental concerns and they can use their legal power to give guidance for sectoral ministries. Mainstreaming creates a “shadow of the hierarchy” upon sectoral ministers.

Mainstreaming is not just a new invention, but it is ongoing policy practice. The pressure on the reform of Common Agricultural Policies in 1999 and earlier did not come from the agricultural community itself but it was mobilised by foreign, finance ministers and economic ministers as well as by the heads of state. Overriding concerns like financing EU enlargement, budget constraints or international trade were mobilised to reform the CAP. In this process the environment is largely acknowledged as another driving force even though not the most powerful one (Grant 1997). Some argue that the environment would benefit from the positive side-effects of policy reform, driven by such superior considerations (Lenschow 1998).

Also the Cardiff and Helsinki Process on Environmental Policy Integration contains some elements of leadership by heads of governments. When sectoral ministers did not deliver sufficient quality for the Vienna Summit in December 1998 the heads of government asked them to continue work and to improve the quality of their strategies.

As early as 1990, the German Chancellor Kohl gave his support and commitment to the German CO<sub>2</sub>-reduction target, which was driving the commitments of the EU on climate change. He supported the then environmental minister, Mr. Töpfer, to write a strategy paper on CO<sub>2</sub> and to install an interministerial working group on CO<sub>2</sub> against the opposition of several ministries (Pehle 1998).

It has also been widely reported that the famous environmental speech of Mrs. Thatcher in 1988 provided for new dynamism in the British environmental debate (Lowe/Ward 1998).

However mainstreaming is far from being a “*panacea*”. The “shadow of the hierarchy” may be easily undermined by sectoral ministers, especially if it is

not seriously and continuously backed. The German Chancellor Kohl for instance supported an interministerial working group on CO<sub>2</sub>-reduction in Germany against the opposition of sectoral ministries. But he could not prevent those ministers from obstructing the work of this group, which did not deliver a joint strategy to achieve the CO<sub>2</sub>-reduction target. When the support of the Chancellor faded away over time, sectoral ministries used their chance (Pehle 1998). Also the final outcome of the Berlin Summit on Agenda 2000 documents a halfhearted reform, where the agricultural interests lost much less they would have, if the Commission proposal would have been approved. There are also doubts about the credibility of the “shadow of the hierarchy”: How can one at the same time press for stronger environmental policy integration and fight for duty free shops providing for an unjustified competitive advantage to air transport.

It seems that political leaders in modern democracies often follow popular cycles. When the environment was popular, as it was end of the eighties, political leaders joined the wave – when it became less popular than during much of the 90ies, the environmental profile of political leaders also declined.

Thus, the risk of mainstreaming is, that it ends up with short-term symbolism undermined by sectoral interests. If taken seriously, however, political leaders can strengthen the negotiation power of environmental ministers.

## 6 Horizontal Cooperation: Let the Environmental Administration Participate - Coalition Building

In its first and second policy papers on environmental policy integration from 1993 and 1997 the Commission suggested a strategy of horizontal cooperation. This strategy consisted of organisational reform and new procedures. The organisational reform strategy was to promote environmental correspondence in each sectoral directorate general and to strengthen also the capacities within DG XI (Environment) to monitor sectoral developments. The second element of the strategy was to strengthen horizontal cooperation, environmental assessment procedures and joint project groups.

Horizontal cooperation may result in “negative coordination” (do not interfere in my backyard) or in “positive coordination” (Scharpf/Mohr 1994). Where synergies can be identified, this means problem solutions, where both sides could win, horizontal cooperation might lead to innovative solutions. However, in the case of distributional conflict, where one side might win and the other one might lose, the outcome of horizontal negotiation depends upon the bargaining power of the partners. It will be some

kind of exchange process and the partner who has little to exchange will lose the bargaining process. This argument shows that horizontal cooperation may deliver progress under certain conditions, but not always.

Horizontal cooperation is one of the strategies favoured by the EEA (see: Gee 1999). Gee in his presentation to the EEB Annual Conference suggested to use the language and the concerns of sectoral policy makers as starting point in order to convince them of potential synergies. He suggested to make them friends rather than enemies or uneducated pupils.

Horizontal cooperation in the EU has been tested in the fields of transport and agriculture. In the transport field joint project groups between DG XI and DG VII on taxation and on the TEN's have been formed (Hey 1998). In the field of taxation potential synergies between fighting congestion and shifting mobility to other modes could be found. The "Green Paper on Fair and Efficient Prices" from 1996 reflects the result of the joint reflections. The later White Paper from 1998, however, has been drafted without joint project work of the two DG's. In the field of infrastructure policy, it seems to be much more difficult to identify synergies. Officials from DG XI often have expressed their frustration about progress. In the field of agriculture, the environment got its marginalised playing field (agro-environment, voluntary cross-compliance) (European Commission 1999). This minimalistic integration reflects the limited negotiation power of DG XI in the process. But at least DG XI got something by horizontal cooperation, which led them to defend the Commission's CAP Reform proposals.

Horizontal cooperation has as a precondition institutional, procedural and organisational reforms. The main elements of those reforms are:

- Environmental ministries (or DG XI) must set up units, which have sufficient resources to monitor, comment and correct respective sectoral activities.
- The system of sectoral advisory committees and the system of comitology must be opened to representatives of environmental concerns.
- Joint project groups should be promoted for issues of major common concern.
- Consultation requests from sectoral ministries should allow for sufficient time to respond adequately.
- Strategic Environmental Assessments of sectoral policy proposals should become ongoing part of administrative culture.
- An internal conciliation mechanism should be found in the case of conflict between environmental and sectoral departments, which gives the environment a fair chance.

## 7 Vertical Environmental Alliances – Disintegrating Sectoral Alliances

The EU is generally characterized as a multilevel political playing field. EU policies have an impact on the regional and local levels and are often negotiated between the regional, the national and the European policy levels. Some elements of supranationality coexist with some elements of intergovernmentalism.

It is the interesting result of a research project for DG XII on successful cases of environmental policy integration (Larrue 1998) that it worked, if the environmental players at all levels could form an alliance empowering each other and sectoral multilevel cooperation was disintegrated. This happened in cases of nature protection. The message of the research was that successful environmental policy integration does not need either centralisation or decentralisation but rather better multilevel alliance building.

Unfortunately, the focus of the research on success stories rather hides the fact, that they are rather the exception than the rule. In most cases one can find powerful and well-coordinated sectoral alliances between the different policy levels and disintegrated environmental ones. Therefore, it is not obvious if the strategy of vertical alliance building can work everywhere.

Also vertical alliance building needs major institutional reforms. Major elements of such reforms are:

- Empowerment of local environmental stakeholders by procedural rights, transparency and early consultation.
- Democratizing public spending and making it publicly more accountable (especially within the Cohesion Policy and Agriculture)
- Earmarking spending via environmental objectives and criteria
- Active promotion of vertical coalition building
- Allowing for freedom for action at lower levels (e.g. case of road freight and air taxation).

## 8 External Coalition Building

External Coalition Building tries to mobilise the wider public or to form coalitions with non-environmental interests. Generally, the function of indicator and reporting systems serve the purpose to create publicity. In the case of wrong trends public opinion may be mobilised for stronger environmental policy integration. The EEA is working with a criteria based sectoral policy assessment approach. Such an assessment provides for an independent overview of progress in environmental policy integration. Also targets and timetables have a public communication value, because they create symbols for issues,

which are less visible (Jänicke/Jörgens 1997). External coalition building may also mobilise private and public interests which might strengthen the environment. In the case of transport for instance, budgetary constraints have reduced the size of motorway construction plans considerable. Also, spatial planning has overlapping objectives with the environmental planning. Telecommunications providers may have a genuine interest in the development of sophisticated road pricing systems. In the case of agriculture, drinking water providers have strong interests in the reduction of fertiliser and pesticide use. In general: there is a wide field of "winning industries" of effective environmental policy integration which are not as strongly organised and involved in the political process as the "losing industries". A more targeted participation of those industries in the political process might help to promote environmental policy integration.

## 9 Conclusions

As this short overview of different policy strategies shows, none of them will deliver effective environmental policy integration as a stand-alone. Only if they are combined after a realistic analysis of what is feasible or not, some political progress can be expected. Some of the strategies are more in the control of environmental policy makers than others. Some strategies can be easily blocked by sectoral policy makers – but there may be constellations where environmental policy makers can find support.

Therefore, environmental policy integration should start with those strategies, where environmental policy makers have some control, such as especially empowerment, horizontal coordination and external coalition building. The approach of the European Commission to go for "self-regulation" only has a chance, if at the same time the momentum of the heads of states and of the President of the Commission is maintained: this means if the concept of mainstreaming finds the strong support of political leaders. Presently, this is less the case, than one might assume from the Helsinki Process. Some of the political leaders still live in the old ages of a trade-off perception between environment and economic modernisation.

Analysing the barriers to environmental policy integration realistically, this approach should not become an alternative to the continuous improvement

of traditional environmental policies. Taking the realistic analysis of Weale (1999), the policy change from an incrementalist, sectoralised, technical and piecemeal approach of European Policy Making to a holistic, integrated and visionary one is revolutionizing the way the EU works. One should not expect too much from revolutions nowadays. Environmental Policy Integration therefore should be rather a supplement than a substitute. Environmental policy integration will not deliver a sustainable future but rather some progress here and there, if conditions are favourable. Therefore, any approach reducing the dynamism of traditional environmental policies in favour of environmental policy integration would weaken and not strengthen the level of protection.

## References

- De Jongh, Paul E. (1998): The Policy Concept Behind the Dutch National Environmental Policy Plans, in: Proceedings of the 1998 Environmental Summer Workshop of the European University Institute on Environmental Policy Integration
- European Commission (1999): Directions towards Sustainable Agriculture, Brussels
- Gee, David (1999): Accounting for Integration: Some Criteria for Progress, documented in: Integration of Environmental Concerns into all Policy Areas - from the Amsterdam Treaty to the Practise in the Union. Report of the EEB Conference, 26th and 27th November, Brussels
- Grant, Wyn (1997): The Common Agricultural Policy. Macmillan. London
- Hey, Christian (1998): Nachhaltige Mobilität in Europa. Institutionen, Akteure, Strategien. Wiesbaden
- Jänicke, Martin/Jörgens, Helge (1997): National Environmental Policy Plans and Long-term Sustainable Development Strategies: Learning from International Experiences; FFU-rep 96-5, Berlin
- Larue, Corinne/Knoepfel, Peter: Environmental Protection, Subsidiarity Principle and Spatial Related Policies, Summary of the Final Report, 1998 documented in: Integration of Environmental Concerns into all Policy Areas - from the Amsterdam Treaty to the Practise in the Union. Report of the EEB Conference, 26th and 27th November, Brussels
- Lenschow, Andrea (1998): The World Trade Dimension of "Greening" the EC's Common Agricultural Policy, EUI Working Papers 98/7; also published in: Golub, Jonathan: Global Competition and EU Environmental Policy, Routledge, London
- Liefferink, Duncan (1997): The Netherlands. In: Andersen, Mikael Skou, Liefferink, Duncan (1997): The Pioneers. Manchester University Press
- Lowe, Philipp; Ward, Stephen (1998): British Environmental Policy and Europe. Routledge. London
- Müller, Edda (1986): Die Innenwelt der Umweltpolitik, Opladen
- Pehle, Heinrich (1998): Ausgegrenzt statt integriert. Das BMU. Nomos. Baden-Baden 1998
- Prittowitz, Volker (1990) Das Katastrophenparadox. Elemente einer Theorie der Umweltpolitik. Opladen
- Scharpf, Fritz W./ Mohr (1994): Efficient Self-Coordination in Policy Networks. A Simulation Study. MPIFG Discussion Paper 1/94, Köln, Max Planck -Institut für Gesellschaftsforschung
- Weale, Albert (1999): A Sceptical Look at Institutional Reform, in: Integration of Environmental Concerns into all Policy Areas - from the Amsterdam Treaty to the Practise in the Union. Report of the EEB Conference, 26th and 27th November, Brussels

## *Locus Standi* and Access to Justice under EC Law – Where to Go after *Greenpeace*\*

Diana L. Torrens

### 1 Introduction

The now well-known case of *Stichting Greenpeace Council v Commission*<sup>1</sup> shows clearly that it is time for environmental groups to be recognized as having *locus standi* under Article 230(4) of the EC Treaty<sup>2</sup> to bring cases before the Court of Justice of the European Communities ('ECJ') when environmental concerns are at stake.

Article 230(4) of the EC Treaty, concerning *locus standi* for non-privileged parties to bring actions under EC law, has traditionally been interpreted quite strictly by the ECJ. A less restrictive approach is called for in the case of environmental groups and in cases generally where an environmental interest is at stake. By not granting standing to Greenpeace to challenge a Commission decision to disburse funding despite an infringement of Directive 85/337,<sup>3</sup> the ECJ lost a valuable opportunity to bring EC law up to date and into line with practice in the Member States.

Article 230(4)<sup>4</sup> deals with the standing of non-privileged parties to bring actions where a party other than a privileged one has been negatively affected by a decision of a Community institution. It is drafted restrictively and has been interpreted quite narrowly by the ECJ. For a non-addressee of a decision to bring an action under Article 230(4), the applicant must be 'directly and individually concerned' by the decision.<sup>6</sup>

Both the CFI and the ECJ were not kind to Greenpeace in the *Greenpeace* case. They refused to widen the test for *locus standi* under Article 230(4). It is submitted that the reasoning of both courts was not only lacking in vision but flawed, both in substance and in result.

The ECJ noted *inter alia* that remedies were available in the national courts and concluded that the Court of First Instance had been correct in its judgment.<sup>7</sup> With respect, this approach is incorrect, simply because the two actions are not related. Whilst the actions brought before the national court and the action brought originally before the Court of First Instance of the European Communities both concerned rights conferred under Directive 85/337, they are different in jurisdictional scope. The action brought before the Court of First Instance was an action for annulment of Commission Decision C(91)440 concerning financial assistance under the European Regional Development Fund for the construction of the two power stations. Whilst the national court could ultimately annul national administrative decisions if authorized to do so under national legislation, it has no jurisdiction, for example, to declare a decision of the Commission invalid or to order the Commission to withdraw funding from a project under any of the Structural Funds.<sup>8</sup> The

action brought before the Court of First Instance was an action for annulment of Commission Decision C(91)440 concerning financial assistance under the European Regional Development Fund for the construction of the two power stations. Whilst the national court could ultimately annul national administrative decisions if authorized to do so under national legislation, it has no jurisdiction, for example, to declare a decision of the Commission invalid or to order the Commission to withdraw funding from a project under any of the Structural Funds.<sup>8</sup> The

\* This article is a summary of an article, *Locus standi* for environmental associations under EC law – *Greenpeace* a missed opportunity for the ECJ, to be published in the Review of European Community and International Environmental Law (RECIEL) 8:3 in November 1999. The views expressed are personal.

<sup>1</sup> Case C-321/95 P *Stichting Greenpeace Council v Commission* [1998] ECR I-1651 (hereinafter variously 'the *Greenpeace* case' and, in relation specifically to the judgment of the Court of Justice of the European Communities, 'the ECJ judgment'). The Opinion of Advocate General Cosmas was delivered on 23 September 1997. The related judgment of the Court of First Instance: Case T-585/93 *Greenpeace and Others v Commission* [1995] ECR II-2205 (hereinafter 'the CFI judgment').

<sup>2</sup> Ex Article 173(4) of the Treaty establishing the European Community ('EC Treaty'). References to Article numbers hereinafter shall refer to Articles of the EC Treaty as amended by the Treaty of Amsterdam including, where necessary, a reference to the article number existing prior to the entry into force of the Treaty of Amsterdam, unless otherwise indicated.

<sup>3</sup> Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, OJ L175, 5.7.85, at 40 (hereinafter 'Directive 85/337'). It has been subsequently amended by Council Directive 97/11/EEC of 3 March 1997 amending Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ L73, 14.3.97, at 5.

<sup>4</sup> Before it became the former Article 173(4), it existed as Article 173(2) but was amended following the Maastricht Treaty and Case C-70/88 *Parliament v Council* [1990] I-2041, which reversed Case 302/87 *Parliament v Council* [1988] ECR 5615 (commonly known as the '*Comitology* decision').

<sup>5</sup> Before it became the former Article 173(4), it existed as Article 173(2) but was amended following the Maastricht Treaty and Case C-70/88 *Parliament v Council* [1990] I-2041, which reversed Case 302/87 *Par-*

*liament v Council* [1988] ECR 5615 (commonly known as the '*Comitology* decision').

<sup>6</sup> Case 25/62 *Plaumann v Commission* [1963] ECR 95; Case 231/82 *Spijker v Commission* [1983] ECR 2559 (hereinafter '*Spijker*'); Case 97/85 *Deutsche Lebensmittelwerke and Others v Commission* [1987] ECR 2265 (hereinafter '*Deutsche Lebensmittelwerke*'); Case C-198/91 *Cook v Commission* [1993] ECR I-2487; Case C-225/91 *Matra v Commission* [1993] ECR I-3203; Case T-2/93 *Air France v Commission* [1994] ECR II-323 (hereinafter '*Air France 1*'); Case T-465/93 *Consorzio Gruppo di Azione Locale „Murgica Messapica, v Commission* [1994] ECR II-361; Case C-209/94 P *Buralux and Others v Council* [1996] ECR I-615, at para. 25.

<sup>7</sup> The same thinking can also be seen in Case 307/81 *Alsuisse v Council and Commission* [1982] ECR 3463, at para. 13; *Spijker*, at para. 11; Joined Cases 239/82 and 275/82 *Allied Corporation v Commission* [1984] ECR 1005, at para. 15; *Deutsche Lebensmittelwerke*, at para. 12.

<sup>8</sup> Only the ECJ has competence to declare void an act of a Community institution: Case 314/85 *Foto-Frost* [1987] ECR 4199.

Court's abdication of its responsibilities raises serious questions about the rule of law within the Community legal order.

The question then becomes: How can environmental groups achieve recognition as having standing under EC law? What can be the basis for standing?

## 2 Amendment of Article 230(4)

The first possibility is almost too obvious, although a major political hurdle stands in the way: amendment of Article 230(4).

The main drive in any effort to amend Article 230(4) for the purposes of environment-related actions would have to aim at bolstering the link between the substance of the case and its admissibility, in other words, emphasis in the drafting must be placed on the *ratione materiae* as opposed to the *ratione personae*.

An amendment could take the form of either an amended Article 230(4) or an amended Article 230(4) combined with a new paragraph next following, which would become a new Article 230(5). One thing is certain, however: the new provision(s) would have to be drafted in such a way that the groups were granted due access to justice while opportunistic actions were prevented. The goal here is not to open the floodgates, it is merely to open the door to those parties and interests that genuinely require and should have legal protection.

An amended Article 230(4) or (5) might read as follows then:

'Any natural or legal person may, under the same conditions, institute proceedings against an act of a Community institution which results or is likely to result in a violation of that person's environmental rights or harm to that person's environmental interests.'

The provision is drafted concisely enough to avoid abuses. An interest is required, only certain types of acts may be reviewed, and actual or probable harm must be shown.<sup>9</sup> At the same time, it is drafted widely enough to afford access for parties with a legitimate interest to protect.

A development like this would be an appropriate corollary to the ever-expanding role of EC law – particularly secondary law – and the increasingly far-reaching and detailed role it plays in the everyday lives of ordinary citizens. Indeed, the case law has already shifted in this direction, recognizing the rights of citizens to obtain redress when their own

<sup>9</sup> See also the discussion in Ludwig Krämer, 'Public Interest Litigation in Environmental Matters Before European Courts', in Hans-W. Micklitz, Norbert Reich (eds.) *Public Interest Litigation Before European Courts* (Baden-Baden, Nomos Verlagsgesellschaft, 1996) 297 at 311 *et seq.*

Member States have failed to implement secondary legislation correctly.<sup>10</sup>

## 3 Progressive Interpretation of Article 230(4)

The second possibility is for the ECJ to become more activist and begin interpreting Article 230(4) in a more teleological manner.

Perhaps the strongest jurisprudential support so far for an expanded reading of Article 230(4) may be drawn from *ERTA*<sup>11</sup> and *Les Verts*,<sup>12</sup> in both of which the ECJ refused to allow blind interpretation of Article 230 to produce an unjust result.

Notably, in *Les Verts*, the ECJ referred to the spirit and system of the Treaty and emphasized: that the Community is based on the *rule of law*; and that the EC Treaty has established a '*complete system of legal remedies and procedures* designed to permit the Court of Justice to review the legality of measures adopted by the institutions.' Thus we see that the ECJ is willing to remedy a 'rule of law deficit' in an appropriate case.

Cases such as *Sofrimport*<sup>13</sup> also lend weight to the proposition that the ECJ no longer insists on there being an absolutely closed class for the purposes of Article 230; a 'restricted group' that is 'sufficiently well defined' would now appear to be sufficient. A 'restricted group' that is 'sufficiently well defined' could include, for example, people living near a power plant construction site prior to a decision to commence construction. Moreover, following the reasoning in *Extramet*<sup>14</sup> and *Cordoniu*,<sup>15</sup> the gravity of the impact of the measure on the applicant may serve to distinguish it from all others.

<sup>10</sup> Joined Cases C-6/90 and C-9/90 *Francovich and Others* [1991] ECR 5357 (hereinafter '*Francovich*'); Case C-91/92 *Faccini Dori v Recreb Srl* [1994] I-3325; (hereinafter '*Faccini Dori*') Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029 (hereinafter '*Factortame*'); Case C-392/93 *The Queen v H.M. Treasury, ex parte British Telecommunications* [1996] ECR I-1631 (hereinafter '*British Telecommunications*'); Case G-5/94 *The Queen v MAFF, ex parte Hedley Lomas* [1996] ECR I-2533 (hereinafter '*Hedley Lomas*'); Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 *Dillenkoffer and Others v Federal Republic of Germany* [1996] ECR 4845 (hereinafter '*Dillenkoffer*').

<sup>11</sup> Case 22/70 *Commission v Council* [1971] ECR 263.

<sup>12</sup> Case 294/83 *Les Verts v Parliament* [1986] ECR 1339 (hereinafter '*Les Verts*').

<sup>13</sup> Case C-152/88 *Sofrimport v Commission* [1990] ECR I-2477.

<sup>14</sup> In Case G-358/89 *Extramet Industrie v Council* [1991] ECR I-2501 (hereinafter '*Extramet*'), a regulation was held to be of individual concern to certain traders. Case 11/82 *Piraiki-Patraiki v Commission* [1985] ECR 207, at para. 21, is to the same effect. The text referred to the economic effects of a Commission decision but, if a public interest in the environment has been recognized at Community level in *inter alia* Case C-44/95 *Royal Society for the Protection of Birds* [1996] ECR I-3805, at para. 42, there is no reason why the reasoning in paragraph 21 cannot be read more broadly.

<sup>15</sup> Case G-309/89 *Cordoniu v Council* [1994] ECR I-1853 (hereinafter '*Cordoniu*'). Both *Extramet* and *Cordoniu* stand for the proposition that the gravity of the impact of the measure on the applicant which might serve to distinguish it from all others is a factor to be taken into consideration in determining standing.

Subsidiarily, a 'sufficient interest' test, as opposed to a 'direct and individual concern' test, should be the correct criterion for environmental groups to gain *locus standi* under Article 230(4). This approach has been successfully adopted in a number of the Member States without a flooding of the courts and there is no reason why it cannot be transposed to Community level which, while having its own *sui generis* legal tradition, nonetheless should reflect the state of the law in its various Member States.

#### 4 New Basis for Judicial Review

A third possibility involves the introduction in the case law of a new, independent basis for judicial review of acts of Community institutions.

Cases such as *Metro No. 1* and *Metro No. 2*<sup>16</sup> offer support for the proposition that there should be a link between the right to intervene before a Community institution (or, for that matter, a national administrative agency) and standing to seek judicial review of the institution's acts. It is submitted that this should be so regardless of how the right to intervene is acquired: by regulation, directive, etc.<sup>17</sup>

The determination of whether a right to intervene is conferred – if it is not already clear from, say, the text of a regulation – should be based on a *Factortame*-type test, i.e.: (i) the rule of law infringed must be intended to confer rights on individuals; (ii) the breach must be sufficiently serious; and (iii) there must be a direct causal link between the breach of the obligation and the damage sustained by the injured parties. The test in *Factortame* was formulated for the purposes of State liability when a State failed to fulfill its obligations but there is no reason why the standard should be different for Community institutions.<sup>18</sup> Indeed, the judgment in *Factortame* draws parallels throughout with Community institutions and their liability under the Article 288 (ex

Article 215) scheme.<sup>19</sup> The focus should be on the link between the substance of the Community act in question and the right to have that act be made subject to judicial review. In the absence of specific provisions in the Structural Funds Regulations for enforcement of the Commission's and Member States' obligations, something must be done to remedy the standing deficit thereby created.<sup>20</sup> The case law, at this stage of its evolution, already affords this possibility.

The environmental associations in *Greenpeace* would most likely have had a right to seek judicial review of the Commission's decision under the test given above. With respect to the first criterion, Directive 85/337 confers a right on individuals (to be read in the broad sense of the term) to participate in the environmental impact assessment. The second criterion, that the breach be serious, is certainly fulfilled, since the assessment was not carried out at all. The third criterion is also met, since there was no discretion as to how the Structural Funds were to be used; thus, the decision by the Commission to disburse the funds resulted directly in the project going ahead without the environmental impact assessment being carried out.

It should be noted that this test is not related to Article 230 and in no way contradicts or replaces tests such as the one advocated by Greenpeace in its pleadings in the *Greenpeace* case.<sup>21</sup> Rather, it is an independent basis for standing to seek judicial review, conferred not by the Treaty but by virtue of the principle of the rule of law.

There are also other sources of law which may be put to use, including EC law resulting from international obligations assumed by the Community. One is the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus

<sup>16</sup> Case 26/76 *Metro v Commission* [1977] ECR 1875 (commonly referred to as '*Metro No. 1*'); Case 75/84 [1986] ECR 3021 (commonly referred to as '*Metro No. 2*').

<sup>17</sup> Contrary to what the Court of First Instance in the *Greenpeace* case stated at paragraph 63 of its Order, it is not necessary that there be an obligation for the Community institution to consult the party that involves itself in the process: *Air France 1*, at paras. 44 *et seq.* See also the discussion in A. Arnulf, 'Private applicants and the action for annulment under Article 173 of the EC Treaty', CMLR 32:1 (1995) 7 at 30 *et seq.*; and G. Bellem, 'Being "directly and individually concerned," the *Schutznorm* doctrine and *Francovich* liability' in Hans-W. Micklitz, Norbert Reich (eds.) *Public Interest Litigation Before European Courts* (Baden-Baden, Nomos Verlagsgesellschaft, 1996) 319 at 336 *et seq.* (hereinafter '*Bellem*').

<sup>18</sup> See the discussion in *Bellem* at 337 *et seq.*, in particular concerning the interaction of Community institutions and national public authorities and Community law and national rules. The *Francovich* line of cases (*Francovich*, *Faccini Dori*, *Factortame*, *British Telecommunications*, *Hedley Lomas*, *Dillenkoffer*) imposes no requirement of direct and individual concern but rather focuses on the nature of the obligation breached.

<sup>19</sup> Judgment in *Factortame*, *inter alia* at para. 55:

'... as regards both Community liability under Article 215 [now Article 288] and Member State liability for breaches of Community law, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Member States or the Community institution concerned manifestly and gravely disregarded the limits on its discretion.'

<sup>20</sup> See the discussion in *Bellem*, at 334 *et seq.* Specific provisions for third-party procedural participation are found in other areas: in competition, Regulation 17/62 (Council Regulation (EC) 17/62 of 6 February 1962, 1962 OJ, at 13, at 204) and the Merger Control Regulation (Council Regulation EEC) No. 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L257, 21.9.90, at 13); in consumer law, the 1994 Anti-Dumping Regulation (Council Regulation (EC) No. 328/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community, 1994 Official Community L349, 31.12.94, at 1); in trade marks, the Community Trade Mark Regulation. It is an anomaly that nothing exists in Structural Funds or in the environmental field generally. *Quaere*: is it time for a 'Regulation 17' for the environmental field?

<sup>21</sup> The author supports the test advocated by Greenpeace in its pleadings. See the Opinion of Advocate General Cosmas at para. 29.

Convention).<sup>22</sup> The provisions contemplate *inter alia* access to justice for NGOs. The Aarhus Convention has been signed by the European Community and is thus binding on the Community, including its institutions, pursuant to Article 300(7) (ex Article 228(7)).<sup>23</sup> Article 220 (ex Article 164) obliges the ECJ to ensure that the law of the Treaty is observed. It would thus appear obvious that, even without any Treaty modifications or particularly fanciful interpretations of current provisions, environmental organizations may now successfully bring cases without being blocked on grounds of *locus standi*. *Quaere*: would *Greenpeace* be decided differently if it were brought today? Hopefully, yes.

### 5 Judicial Activism Needed

Lastly, it may be mentioned that the judgment of the Court of Justice in *Greenpeace* contributes to a lack of cohesion in the Community approach to the environment. The judgment runs counter to many different Community pronouncements, starting with the Rio Declaration<sup>24</sup> and the Commission's own Fifth Action Environmental Programme<sup>25</sup>, and continuing on through *Communication from the Commission – Implementing Community Environmental Law*<sup>26</sup>,

*Caring for Our Future*<sup>27</sup> and Council Decision 97/872/EEC.<sup>28</sup> Additionally, the idea of standing for environmental associations under Community law has, in fact, been extensively considered by the Commission. In early 1992, an 'Access to Justice' study<sup>29</sup> was undertaken by the Öko-Institut e.V. (Institute for Applied Ecology), Darmstadt, Germany, in cooperation with the Foundation for International Environmental Law and Development (FIELD), United Kingdom. The objective of the study was to draw up a proposal for an EC Directive on Access to Justice, which would provide legal standing for environmental associations in environmental matters. The fact that the text got as far as draft directive form would indicate that there was considerable support for the idea.

The conclusion then, is that the ECJ missed a valuable opportunity to bring Article 230 into step with the aims currently pursued by the European Communities and with recent developments internal and extraneous to the Communities. The traditional approach of focusing on 'direct and individual concern' has become outdated, in light of recent developments in Treaty law, secondary Community legislation and the general context surrounding Community law. In particular, the Treaty now has explicit provisions providing for environmental protection. If those provisions are not given the proverbial teeth they need to achieve their objective, the environment will suffer, to the direct and individual detriment of all Community citizens.

Community legislation in its various forms has increased dramatically in volume and complexity, and the Commission has limited resources to ensure enforcement. Situations do arise in which it is the Commission which needs to be monitored and, in that context, environmental associations, private players representing a societal interest, have a positive role to play in the enhanced enforcement of environmental rules. This can only be positively complemented by judicial activism, which has an important role to play in the shaping of Community law so that it can address environmental concerns effectively.

<sup>22</sup> UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, signed in Aarhus on 25 June 1998 (hereinafter the 'UN/ECE Convention').

<sup>23</sup> The UN/ECE Convention has in fact not entered into force yet. At present, only Moldova has ratified and 16 ratifications are needed for it to enter into force. However, this does not change the fact that the EC has signed it or the implications of Article 300(7) (ex Article 228(7)). Signature carries with it a presumption of good faith and creates an obligation to refrain from acts calculated to frustrate the objects of the convention, as set out *inter alia* in Article 18 of the Vienna Convention on the Law of Treaties: see Ian Brownlie, *Principles of Public International Law*, 4<sup>th</sup> ed. (Oxford, Clarendon Press, 1990), at 606 *et seq.*

<sup>24</sup> Rio Declaration on Environment and Development, which was adopted by the consensus of more than 170 States and the EC at the United Nations Conference on Environment and Development, 3 to 14 June 1992, reproduced in (1992) 31 ILM 874 and RECIEL 3:1 (1994). Principle 10 of the Rio Declaration states *inter alia*:

'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level [...]. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.'

<sup>25</sup> Fifth Action Programme 'Towards Sustainability', OJ C138, 17.5.93, at 1, which states *inter alia* at p. 82:

'Individuals and public interest groups should have practicable access to the courts in order to ensure that their legitimate interests are protected and that prescribed environmental measures are effectively enforced and illegal practices stopped.'

<sup>26</sup> *Communication from the Commission – Implementing Community Environmental Law* COM(96) 500 final, Brussels, 22 October 1996, CB-CO-96-540-EN-C, at p. 12:

'Better access to courts for non-governmental organizations and individuals would have a number of helpful effects in relation to the implementation of Community environmental law. First, it will make it more likely that, where necessary, individual cases concerning problems of implementation of Community law are resolved in accordance with the requirements of Community law. Second, and probably more important, it will have a general effect of improving practical application and enforcement of Community environmental law, since potentially liable actors will tend to comply with its requirements in order to avoid the greater likelihood of litigation.'

<sup>27</sup> *Caring for our future – Action for Europe's Environment*, published by the Commission through the Office for Official Communications, Luxembourg, 1998.

<sup>28</sup> Council Decision 97/872/EEC of 16 December 1997 on a Community action programme promoting non-governmental organizations primarily active in the field of environmental protection, OJ L354, 31.12.97, at 25, which aims *inter alia* at promoting NGOs in the protection of the environment and providing for financial contributions by the Community towards the activities of NGOs.

<sup>29</sup> The formal report of the study is *Project: Access to Justice*, by Martin Führ, Thomas Ormond, Betty Gebers and Gerhard Roller, 1992, Öko-Institut e.V., Darmstadt, Germany. The Court of First Instance in the *Greenpeace* case was aware of the Report, as evidenced by a reference to it at para. 33 of its judgment.

# Technical Standards in the Area of Conflict of Environmental Protection and Free Single Market

## - A Problem-Oriented Overview\*

*Andreas Furrer and Viola Bölscher*

Technical standardization builds a central foundation of the European single market. It represents one of the deciding references for the assessment of the question of whether a product is single market conforming and thereby tradable within the Single Market. Environmental protection and free trade of goods are also closely related, as this is legally expressed, for example in Article 174 section 2.3 EC Treaty (integration clause)<sup>1</sup>. This raises the issue of the relationship between European standards and environmental protection.

### 1 Introductory Comments

Technical standards will be described according to their most general definition as “technical specifications or another publicly accessible document that is set up in collaboration with all interested parties and with their consensus or general approval, based on the unified results of science, techniques and experience, targeting the largest general benefit and accepted by a qualified body on a national, regional or international level.”<sup>2</sup>

Technical standards will become increasingly important for environmental law and thereby for environmental protection. Environmental protection as an integrative task is a component of all fields of work. Next to the primarily important question of the content of standards, this leads also to the question of the creation of the standards (procedure, composition of the standards creating bodies, rating and representation of environmental interests), the possibilities for examination and objection, as well as the democratic authority of the standard-setting body.

The goal of standardization on the European level is primarily the unification of technical standards for the preservation of free trade. European standard-

setting according to the “New Approach”<sup>3</sup> thus relates also to product standards containing environmentally relevant elements, for instance through the defining of materials or their recycling or disposal capabilities. They therefore also have impact on the level of environmental protection. Unification on one side and the implementation of the highest possible level of environmental protection on the other can represent diverging goals relating to the standard’s content. The question is posed, to what extent the private legally organized standardization organizations are required to take into account the demanding determinations in primary law, and in particular the basic demands of concrete secondary law acts.

The following remarks will examine whether and to what extent environmental interests will (can) be considered in the frame of technical standards, as well as if and how the integration of legal environmental interests is or can be institutionally secured. The introduction will go into the state of European standardization of the European single market and into its close relation to environmental protection (Section 2). Building on that will be the central question of national law-forming scope and legal protection dealing with these standards (Section 3). In conclusion, the results will be acknowledged (Section 4).

### 2 Standardization in the Single Market

#### 2.1 Standardization in General

The term “standardization” will be henceforth understood as “the creation of rules by institutions without governmental authority”<sup>4</sup>, which contain technical specifications “that have been adopted by a recognized standardisation body for repeated or continuous application, with which compliance is not compulsory.”<sup>5</sup> In Germany, the standards ad-

\* This article is a translated, abbreviated version of the article “Technische Normen im Spannungsfeld zwischen Umweltschutz und freiem Binnenmarkt”, published in ZUR 1/1998.

<sup>1</sup> Breier S., Die Bedeutung der umweltrechtlichen Querschnittsklausel des Art. 130r Abs. 2 Satz 2 EWG-Vertrag für die Verwirklichung des europäischen Binnenmarktes, *Natur + Recht* 1992, 174ff.; Epiney A., Umweltrechtliche Querschnittsklausel und freier Warenverkehr: die Einbeziehung umweltpolitischer Belange über die Beschränkung der Grundfreiheit, *NuR* 1996, 497 - 504.

<sup>2</sup> As reads the definition from ISO and ECE/UNO, quoted from: Führ M., Technische Normen in demokratischer Gesellschaft, *ZUR* 1993, 99 - 102, 99.

<sup>3</sup> Compare to Chapt. 2.1.

<sup>4</sup> Ensthaler J., *Zertifizierung, Akkreditierung und Normung für den Europäischen Binnenmarkt*, 1995, 15.

<sup>5</sup> Art. 1 Para. 1 No. 4, Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 204/37; Directive 98/48/EC of the European Parliament and the of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations, OJ 1998 L 217/18. See in details: Breul-

dressed in the first line are those of the DIN-Federation, on the European level they are those set by CEN (comité européen de normalisation), of CENELEC (comité européen de normalisation électrotechnique) and of ETSI (European Telecommunications Institute).<sup>6</sup>

These standards fulfill as their central goal an *order function* in the sense that with them a selection from many possibilities will be made with unified impacts on the basis of systematic and rational criteria and proposed for business compliance. As a result, three distinctive functions will be fulfilled:<sup>7</sup>

1. *Communication and rationalization function:* The goal of these standards is the articulation of generally valid intersections of products. The importance therein lies in the standard numbers defining dimensions, tolerances and formats, but also of the production procedure.
2. *Assurance of quality function:* A growing share of these standards seeks to set standards to maintain quality demands put on the product for the purpose of cooperation between companies. This development becomes more important for modern production systems such as „lean production“, „outsourcing“ or „just in time“.
3. *Security function:* Within the frame of these norms, standards will be fixed that limit the danger potential of specific products.

European standardization orients itself strongly to the concepts and experiences of national standardization. The Commission followed a traditional concept of regulation in the 70s that mainly provided for single regulations and standards in the directives themselves. In the early 80s, the Commission<sup>8</sup> admitted to the failure of this concept:<sup>9</sup> Firstly, the expense of the unification of law in the field of technical standardization held no relation to the targeted results. Secondly, the European Court of Justice (ECJ) showed in its jurisdiction *Dassonville*<sup>10</sup> and *Cassis de Dijon*<sup>11</sup> an alternative route by means of the mutual recognition of products legally produced and marketed in one Member State. Thirdly, they

could fall back upon the long-standing positive experiences from the alternative regulation concept in the low tension directive<sup>12</sup> of 1973. As a result, the “New Approach of Technical Harmonization and Standardization”<sup>13</sup> was agreed upon in 1985<sup>14</sup>. The necessity for European (and international) standardization for the elimination of technical and legal trade barriers was recognized because the differing technical standards of single Member States are obstacles to further growth of international trade and the establishment of the EC single market.

With this change of course, the standardization got its central position through the European standardization organizations. The goal of this “New Approach” is the acceleration and expansion of law making on the community level for the purpose of harmonization with the simultaneous possibility of a faster reaction to technical developments.<sup>15</sup> The Council placed four foundation principles in the foreground:<sup>16</sup>

- Regarding the harmonization of legal rules, the European legislation limits itself to defining basic demands (security demands and other interests of public welfare);
- The competent bodies draw up standards giving consideration to the state of technology so that the industry is capable of production in compliance with the basic stipulations of the directives;
- Adherence to these technical specifications remains voluntary for the affected companies;
- As long as the production is in accordance with these harmonized standards, a *presumption iuris* exists, that is, the products are to conform with the basic requirements of the directive. To the extent that a product is manufactured in a deviating procedure, this will lead (only) to a reversal of the burden of proof for the adherence.

Since 1985, a total of 20 directives have been issued within the frame of the New Approach, dealing with simple pressure vessels, toy safety, construction and medical products among others.<sup>17</sup> The most important European standardization organizations are, as mentioned at the beginning, CEN, CENELEC and ETSI. EC and EFTA Member States are members

mann G., Normung und Rechtsangleichung in der Europäischen Wirtschaftsgemeinschaft, 1993; Marburger P., Die Regeln der Technik im Recht, 1979, 40ff.

<sup>6</sup> European Commission, Commission Green Paper on the development of European standardization, 1991, OJ 1991 C 20, 1-35, 8.

<sup>7</sup> According to Marburger P., 46f. (Fn. 5), whereas it is noteworthy that single standards can simultaneously fulfill completely different functions. Compare also to the earlier study from Zemlin H., Die überbetrieblichen technischen Normen, 1973, 93ff

<sup>8</sup> See European Commission, Technical Harmonization and Standardization: a New Approach, 1985, COM (85) 19 final 3-8.

<sup>9</sup> Well summarized in: Anselmann N., Technische Vorschriften und Normen in Europa, 1991, 29f.; Farr S., Harmonisation of technical standards in the EC, 1992, 4ff.

<sup>10</sup> ECJ, case 8/74, ECR 1974, 837ff. - Dassonville.

<sup>11</sup> ECJ, case 120/78, ECR 1979, 649ff. - Cassis de Dijon.

<sup>12</sup> Council Regulation from February 19, 1973 on the harmonization of the laws of Member States relating to electrical equipment designed for use in certain voltage limits, Directive 73/23/EEC, OJ 1973 L 77/29.

<sup>13</sup> Council Resolution on a New Approach to technical harmonization and standards, 1985, OJ 1985 C 136/1, 1-9.

<sup>14</sup> See <http://www.newapproach.org>

<sup>15</sup> Falke J. Joerges C., Rechtliche Möglichkeiten und Probleme bei der Verfolgung und Sicherung nationalen und EG-weiter Umweltschutzziele im Rahmen der europäischen Normung, Gutachten ZERP z.H. des Büros für Technikfolgen-Abschätzung des Deutschen Bundestages, Bremen, Juli 1995, 67, 70.

<sup>16</sup> Council, 3-4 (Fn. 13).

<sup>17</sup> See the list on <http://www.newapproach.org/directiveList.asp>

of CEN and CENELEC; ETSI also includes representation by Cyprus, Malta and Turkey. Membership in CEN and CENELEC is organized through states: The respective national standardization organizations are represented. Membership in ETSI is likewise oriented on a state level with the difference that the interested parties within and outside of Europe are included in the standardization process.<sup>18</sup>

European standardization forms a central building block in the creation and maintenance of the European single market, in that the unification and equivalent naming of standardization provides for better exchangeability of goods. Its adherence can be checked more easily and in accordance with the market on the basis of the respective danger potential of adapted systems as will be shown subsequently.

The Commission entrusts the European standardization organizations with the development of European standards within the frame of a formal mandate in the form of civil law contracts. The foundation for these standardization orders shape the previously mentioned directives according to the "New Approach." According to the "New Approach," EN-standards develop an impact of conformity assumption within the scope of the CE marking<sup>19</sup> from the moment of the announcement of the EN standard in the Official Journal.

## 2.2 The CE marking

A manufacturer who wants to sell his product in the single market must label the product with the CE marking to indicate that it has fulfilled all requirements of EU directives. Together with the aforementioned free trade clause, the adherence to EN standards leads to the assumption of adherence to the security demands in the (generally) defined directives. Although the manufacturer is not bound to the particulars determined in the standardization, he accepts responsibility and burden of proof that his deviant behavior meets the level of protection set in the standardization. If a product carries the CE marking, the state fundamentally is allowed neither to prevent nor systematically obstruct<sup>20</sup> its placing on the market or its import. The symbol acts as a sort of "passport" for free trade of goods.

The CE label is thereby in direct correlation with European directives and the related standardization; special national demands are generally irrelevant. This raises the question, under which conditions a manufacturer is permitted to affix this label.

Eight different modules exist, in accordance with which the conformity assessment procedure can take place. The choice of one or more modules is determined by the product's risk potential, production procedures and the scale of production. The more risk assumed, the more intensive the test and control over the examination. The lowest level of testing is the internal check made by the manufacturer (Module A). Module B states that the manufacturer commissions a certification body with the examination. The body examines on the product development level whether the construction pattern corresponds to the requirements. If based on harmonized standards, the correct use will be checked. Modules C - F refer to the production process and differentiate according to the risk potential.

The absence of the CE marking or the non-adherence to relevant standards can affect product liability. Technical standards thereby not only influence the level of environmental protection, but also civil liability in cases of environmentally harmful accidents or work occurrences.

## 3 National Law-Forming Scope, Environmental Legal Protection Level and Legal Protection

It has been made clear in the above remarks that harmonized standards could influence concrete levels of environmental protection. Because both the European Union as well as its Member States pursue environmental legal goals, questions are raised on one side with respect to the implementation of EC stipulations. On the other side, correspondingly, must be examined, to what extent a national law-forming scope remains with the Member States.

### 3.1 Implementation in the Member States

The relationship between community law and national law in the framework of standardization poses questions on two different levels: On one hand it is the known problem of relationships between secondary law and national law. On the other hand, the question of relationships between civil law standards of European standardization organizations and the respective national provenance must be examined. Both of these levels are correlated interdependently because the respective relationships between legal acts and standardizations co-decide their solutions.

- 1) On the Community level, the 20 mentioned directives have come into effect according to the "New Approach." Within their framework 2083 concrete standardization commissions were planned, 515 already ratified and 808 in develop-

<sup>18</sup> European Commission, 19 (Fn. 6).

<sup>19</sup> See the following remarks.

<sup>20</sup> For example through regular, careful and fine-meshed controlling on the borders.

ment by 1996.<sup>21</sup> These 20 directives must be implemented in the 15 Member States. Only through implementation in national law can the concept of the "New Approach" take hold, the CE marking fulfill its intended function in the single market concept<sup>22</sup> and result in the problem of influencing national environmental standards.

- 2) It is stated in the CEN, CENELEC and ETSI statutes that the corresponding standards must be adopted by national standardization organizations.<sup>23</sup> European standardization therefore takes priority over national standardization. A goal of the New Approach is the realization of free trade of goods *without* lessening the existing Member States protection levels,<sup>24</sup> so that such a constellation should not arise, nor have there been any such known situations.<sup>25</sup> Since 1983, Member States and standardization bodies are required to inform the Commission before introducing or tightening national protection levels so that a limited "stand still" time can take effect.<sup>26</sup>

### 3.2 Protection levels and national law-forming scope

All directives according to the New Approach contain two distinctive protection clauses that have the following slightly varying content:

*"Where a Member State or the Commission, considers that the harmonized standards referred to in Article 5 (1) do not entirely meet the essential requirements referred to in Article 3, the Commission or the Member State concerned shall bring the matter before the Standing Committee set up under Directive 83/189/EEC, hereinafter referred to as 'the committee', giving*

*the reasons therefor. The committee shall deliver an opinion without delay. In the light of the committee's opinion, the Commission shall inform the Member States whether or not it is necessary to withdraw those standards from the publications referred to in Article 5 (1)".<sup>27</sup>*

*"Where a Member State finds that vessels bearing the CE marking and used in accordance with their intended purpose might compromise the safety of persons, domestic animals or property, it shall take all appropriate measures to withdraw those products from the market or to prohibit or restrict their being placed on the market.*

*The Member State concerned shall immediately inform the Commission of any such measure, indicating the reasons for its decision, and in particular whether non-conformity is due to:*

*(a) failure to meet the essential requirements referred to in Article 3, where the vessel does not meet the standards referred to in Article 5 (1)*

*(b) incorrect application of the standards referred to in Article 5 (1)*

*(c) shortcomings in the standards referred to in Article 5 (1) themselves.*

*2. The Commission shall enter into consultation with the parties concerned as soon as possible. Where, after such consultation, the Commission finds that any measure as referred to in paragraph 1 is justified, it shall immediately so inform the Member State that took the action and the other Member States. Where the decision referred to in paragraph 1 is attributed to shortcomings in the standards, the Commission, after consulting the parties concerned, shall bring the matter before the Committee within two months if the Member State which has taken the measures intends to maintain them and shall initiate the procedures referred to in Article 6.*

*3. Where a vessel which does not comply bears the CE marking, the competent Member State shall take appropriate action against whomsoever has affixed the mark and shall inform the Commission and the other Member States thereof.*

*4. The Commission shall ensure that the Member States are kept informed of the progress and outcome of this procedure."<sup>28</sup>*

It will be clear from the phrasing that the first protection clause directly addresses the content of stan-

<sup>21</sup> Documentation, Standards programme, CEN, Annual Report 1996, 14.

<sup>22</sup> Clarified in Di Fabio U., Möglichkeiten und Probleme bei der Verfolgung und Sicherung nationaler und EG-weiter Umweltschutzziele im Rahmen der europäischen Normung, Gutachten Institut für Umwelt- und Technikrecht z.H. des Büros für Technikfolgen-Abschätzung des Deutschen Bundestages, Trier, April 1995, 31f.

<sup>23</sup> According to Anselmann N., 75 (Fn. 9).

<sup>24</sup> Vondung P., Bedeutung der Normung und des CE-Zeichens für zu vergebende Aufträge in der EU, DIN-Mitt. 1995, 580 - 584, 581. This was expressly defined by the Council in its fundamental resolution on the "New Conception," in which it insisted that individual state measures of protection be unified, though "already existing and justified protection measures in member states are not [allowed] to be decreased." (Council, 3 (Fn. 13) The report Jörissen J., TA-Projekt "Möglichkeiten und Probleme bei der Verfolgung und Sicherung nationaler und EG-weiter Umweltschutzziele im Rahmen der europäischen Normung", 1996, 27f. refers to different studies that prove that only in singular cases does a reduction in the level of protection occur within the scope of the europeanization of standardization.

<sup>25</sup> Additionally, the Commission published the site of the new EN standard in accordance with the "New Conception" in the OJ (with the consequence that it took effect) only after the standards translated by the standardization organization were inserted into the standardization works of the national standardization organizations.

<sup>26</sup> Art. 9, Council Directive of March 28, 1983 on an information procedure in the field of standards and technical regulations, Directive 83/189/EEC, OJ 1983 L 109/8, now Directive 98/34/EC (Fn. 5)

<sup>27</sup> Art. 6 Directive 90/488/EEC of 17 September on the harmonization of the laws of the Member States relating to simple pressure vessels. This type of protection clause will henceforth be termed Protection Clause I.

<sup>28</sup> Art. 7 Directive 90/488/EEC, relating to simple pressure vessels. This type of protection clause will henceforth be termed Protection Clause II.

dards while the second protection clause deals with its practical application. In our context, three questions stand in the foreground: First, it must be examined whether and to what extent environmental protection is included in these protection clauses (1). Second, the correlation with the functioning of the single market needs to be shown (2). Third is the question, whether and to what extent a judicial examination of law standards defined by civil law can be achieved on the basis of the protection clauses (3).

- 1) In the fundamental decision on the New Approach, the Council determined that the Member States have the responsibility "of ensuring safety on their territory (in the home, at the workplace, etc.) of persons, domestic animals and goods, or the respect of other essential protection requirements in the general interest such as health, consumer or environmental protection etc., with regard to the hazards covered by the directive itself."<sup>29</sup> Consequently environmental protection is also relevant within the scope of the application of the protection clauses.
- 2) Directives according to the "New Approach" contain, like all directives regulating the marketability of products, free trade clauses.<sup>30</sup> The Member States thereby have basically no possibility to take products off the market or to otherwise regulate products when they correspond to the fundamental requirements expressed concretely in the standards.<sup>31</sup> To achieve the sought protection level, different directives of the "New Approach" include the above quoted protection clause I as a settlement. With this, community and nationally competent organs have the possibility to control the protection level of the standards.<sup>32</sup> However as the standardization organizations retain scope for decision-making in the concrete setting of standards despite community stipulations these organizations can absolutely influence the level of environmental protection on partial aspects. To the extent that a Member State feels obligated to keep a high level of environmental protection, it should present its objectives through membership of national standardization organizations in CEN, CENELEC and ETSI. It must strive for this goal on the national level in order to indirectly influence international and European standard setting in the end.

<sup>29</sup> Council, (Fn. 13).

<sup>30</sup> See here, for example Art. 4 Directive 87/404/EEC, relating to simple pressure vessels "Member States shall not impede the placing on the market and the taking into service in their territory of vessels which satisfy the requirements of this Directive."

<sup>31</sup> Falke J. et al., 2 (Fn.15).

<sup>32</sup> To the (often underestimated) legal protection possibilities, see below.

- 3) The EN standards developed within the scope of the "New Approach" have significant influence on the concrete framework ties in the single market.<sup>33</sup> Because the manufacturer of a product profits from considerable legal benefits when he adheres to the relevant standards, the close link between directives of the "New Approach" and its standardization have a large factual impact.

### 3.3 Standardization and legal protection

The stated upgrading of private standardization raises the question of sufficient legal protection. The question of how a disputed standard can procedurally come before the ECJ depends upon the basis of the underlying procedural constellation. Essentially, three procedures can be demonstrated:

- 1) As long as a Member State (or the European Parliament)<sup>34</sup> is not in agreement with a specific EN standard, it can initiate a proceeding supported by the above quoted protection clause I according to Directive 98/34/EC. According to the directives of the "New Approach," these protection clause procedures end with a Commission notification to the involved Member State on whether the standard in question will be deleted from the publication list. The Commission decision stated in the notification is contestable according to Article 230 EC Treaty. The limited conditions for complaint set in Article 230 section 2 have been increasingly expanded by the ECJ in recent years.<sup>35</sup>
- 2) Supported by Directive 98/34/EC, even the Commission can entrust the competent committee with the question of conformity of a specific standard to the directive. Based on the committee's analysis the Commission decides on the inclusion in the list of publications in the Official Journal. A procedure contesting this decision is also possible according to Article 230 EC Treaty. It is also possible that in extraordinary circumstances a manufacturer of a specific product will be awarded legal standing as according to Article 230 section 4 EC Treaty.
- 3) If, however, a Member State prohibits the import and marketing of a concrete product despite its labelling with a CE marking, two distinctive procedures are available.
  - a) On one side, the Member State is required to immediately inform the Commission and to justify its actions as according to the above quoted

<sup>33</sup> Roßnagel, A., Europäische Techniknormen im Lichte des Gemeinschaftsvertragsrechts, DVBl 1996, 1182f.

<sup>34</sup> To the extent that it is even made aware of it.

<sup>35</sup> See here for more detail Rausch R., Die Kontrolle von Tatsachenfeststellungen und -würdigungen durch den Gerichtshof der Europäischen Gemeinschaften, 1994.

protection clause II. A proceeding will be initiated analogous to the first procedure. A negative Commission decision can likewise be appealed to the ECJ.

- b) The manufacturer or importer of the aforesaid product is entitled to domestic legal protection possibilities against the prohibiting administrative act. The decision *Cremonini* cannot, as we see it, be plead against. It is true that in this case the ECJ deprives the national court of the right to initiate a procedure according to (a).<sup>36</sup> This is, however, not the subject of the procedure here. The question of preliminary ruling presented to the ECJ concerns the question of whether or not an EN standard is to be compatible with secondary or primary law stipulations. Although it is probable that the ECJ will then use the parallel proceedings (a) as an opportunity to suspend its own procedure and if necessary to connect it with the Member States instituted proceedings against a decision in accordance with Article 230 EC Treaty, this does not question the possibility of legal protection in a national court.

Hence, the question is to be raised, with which reasons an EN standard may be contested before the ECJ. There are at least three lines of argumentation available:

- Firstly, the question of sufficient protection levels can directly presented to the ECJ. In decision *Meroni*<sup>37</sup>, *Cremonini*<sup>38</sup> and *Angelopharm*<sup>39</sup> benchmarks on the problem of legal protection were defined. The jurisdiction can be summarized to the effect that (1) delegation of law making accompanying tasks to external community institutions is indeed legally permissible, though is subject to strict formal legal requirements that guarantee a scientifically founded decision.<sup>40</sup> The fundamental course of this jurisdiction thus targets (2) the maintenance of a scientifically founded level of protection that may not be questioned through delegation on or put in concrete terms by external community institutions. Insofar as a party entitled to bring an action<sup>41</sup> holds the opinion that a standard, which became part of the CE system through

publication in the OJ, does not correspond to the secondary or primary stipulations, it can submit this to the ECJ for examination on the basis of the above specified legal protection options. The scientific dispute thus shifts away from standardization organizations and the Commission to the ECJ. In such cases the national court, as well as standardization organizations and the Commission would have the obligation to justify the different opinions to the ECJ on the basis of scientific expert opinions.

- Secondly, formal arguments can be held in the field. As long as indications in the scope of European standard setting exist that the European standardization organizations have not given enough consideration to either their own statutory procedures or those procedures agreed upon with the Commission, the integration of such standards into the complete system of the CE marking is questionable under community law aspects. The ECJ attaches much importance<sup>42</sup> to the observance of procedural law stipulations<sup>43</sup> and it is very unlikely that it will diverge from this jurisdiction within the scope of European standardization. Instead it is likely that these demands will be transferred onto standardization organizations.
- Thirdly, the national court must examine to what extent the standard called into question affects constitutionally secured protection rights. Various Member States are constitutionally obligated to maintain the protection of human beings, animals and the environment. Hence, the national court is addressed with the question of whether and to what extent it wishes to abstain from an examination under constitutional law aspects because of the existence of a civil law rule that was integrated into the CE System through publication in the OJ. The court should not derive this question from national constitutionality; as this is primarily a question of community law. Should it, however, come to a preliminary ruling it is unlikely that the ECJ would ignore objections based on national constitutions. One solution could be to recognize national constitutional obligations to protect human beings, animals and the environment also as a common constitutional tradition on the community level and thereby avoid a possible constitutional conflict between Member State and EC institutions.

In summary, it can be stated that

<sup>36</sup> ECJ, case 815/79, ECR 1980, 583ff. - *Cremonini*, no. 11.

<sup>37</sup> ECJ, case 9/56, ECR 1958, 9ff.

<sup>38</sup> ECJ, case 815/79, ECR 1980, 583ff. - *Cremonini*.

<sup>39</sup> ECJ, case C-212/91, Judgment of 25.1.1994 (published in EuZW 1994, 213).

<sup>40</sup> As noted in the literature, the *Cremonini* verdict has been reinterpreted. Fundamentally, two questions are in the foreground: On one side the question whether the system of recognition of a product manufactured in accordance with European standards also is effective when the foundation guideline has not yet been realized in all Member States. (Assumably yes). On the other side is the issue of a product that corresponds to neither European, national nor international standards. This is, however, not the position of the question raised here.

<sup>41</sup> This will be either a Member State or the European Parliament.

<sup>42</sup> ECJ, case 138/79, ECR 1980, 3333ff. - *Roquette Frères I*; ECJ, case 68/86, ECR 1988, 855ff. - *Hormones*; ECJ, case C-70/88, ECR 1990-I-2041ff. - *Cernobyl* - Interim judgment EP; ECJ, case C-269/90, ECR 1991-I-5469ff. - *TU München*.

<sup>43</sup> In reference to justification, language translation and publication, belong regulations among others

- 1) an EU Member State can take measures against a standard on two levels:
  - a) On one side - and prior in accordance with the precautionary principle - based on the quoted protection clause it can<sup>44</sup> initiate the procedure described in Directive 98/34/EC<sup>45</sup> targeting to delete the specific standard in question from the list published in the OJ with the consequence that the conformity assumption for the CE label based on this publication no longer be effective.
  - b) On the other side, and on the basis of the above mentioned protection clauses of secondary law Member States can initiate a national measure when a product labeled with the CE marking provides a concrete risk. In this case, information obligations exist with regard to the Commission and the other Member States with the goal suspending the specific standard in accordance with the precautionary principle.
- 2) Member State's court can submit a disputed civil law EN standard within the frame of a preliminary ruling procedure to the ECJ.

#### 4 Summarized Conclusions

In theory, standardization in general and the "New Approach" in particular will be confronted with national and European constitutional questions. These are formed, as indicated above, through the transfer of standard setting tasks to civil law institutions resulting in the privatization of legislation.

In this discussion, the matter in question must be differentiated. In those areas in which technical standardization contains a high contribution of normative valuation - relating to safety standards, environment and health protection -, the demands on the proceedings are indisputably higher. Because standardization in national law initially targeted technical compatibility and safety, the indirect influence on environmental protection levels was tolerated. As early as in the 70s, the problem of normative valuations through technical standards became obvious. Through the "New Approach", consideration of general interests and thereby also environmental interests became explicit tasks of privately set norms. Because of this, the question of legitimation of such a transfer of norm making tasks has gained importance.

European standardization bodies are not compiled pluralistically.<sup>46</sup> The participation of interested par-

ties or the public is not planned, and even if it were, active participation in standard setting would entail an enormous organizational and financial expenditure for the interested parties that environmental organizations would hardly be capable of affording.<sup>47</sup> Thereby exists the danger that the standards will reflect the interests of the participating industry without sufficient consideration given to interests of well-being such as environmental and health protection.<sup>48</sup> The growing amount of norms within the scope of the "New Approach", the dynamic reference in the directives on standards that either do not yet exist or can be altered at any time, as well as the far-reaching actual impact of these standards in the frame of the CE System question those constitutional requirements that are necessary for the transfer of standardization tasks to civil law institutions.

Thus, more important is the existence, use and effectiveness of the above mentioned legal protection possibilities. The more questionable the democratic legitimacy of a standard, the higher the demands on constitutional requirements are set - here in the form of legal protection possibilities. From the ECJ jurisdiction, corresponding demands of community law can be derived for such a procedure, even though the ECJ has not yet concretely expressed its opinion on standardization.

At the same time, the privatization of law implementation raises a few constitutionally relevant questions. The CE marking contains - as shown above - an element of civil law implementation graded depending on the applicable module. The company obliges itself to maintain all relevant European standards by labeling with the CE marking in the simplest form.. Systematic control of foreign products through a Member State's monitoring authority would contradict the Community's CE System and therefore be illegal. Also, there no longer exists a governmental licensing procedure for products imported from the single market. All this is reasonable and comprehensible from the perspective of the creation and maintenance of the single market. The more important, however, is the further development of standard setting procedures on the community level, especially in view of the composition of single committees and taking of legal protection possibilities. Only through this process can the central demands mentioned in the introduction be harmoniously transferred from theory - the implementation

<sup>44</sup> This task must also be addressed by the Commission.

<sup>45</sup> Directive 98/34/EC (Fn. 5).

<sup>46</sup> The opinion of the previous Secretary General of CEN until 2005 does not provide much hope, see Repussard J., Anmerkungen und Gedanken zur Normung in Europa bis zum Jahr 2005: Die Auswirkungen der Globalisierung der Wirtschaft, DIN-Mitt. 1997, 468 - 469: Issues of environmental protection are not addressed.

<sup>47</sup> See Lamb I., *Kooperative Gesetzeskonkretisierung*, 1995, 85f.; Lübbe-Wolf G., *Verfassungsrechtliche Fragen der Normsetzung und Normkonkretisierung im Umweltrecht*, ZG 1991, 248 with a striking example. See also Führ M., *Reform der europäischen Normungsverfahren*, Gutachten Fachhochschule Darmstadt, Fachbereich Sozial- und Kulturwissenschaften, Darmstadt, May 1995, 62ff.

<sup>48</sup> See Lamb I., 67ff., (Fn. 47).

of general interests through the integration of all interested parties - into practical use.

## The Costs to Industry of Environmental Regulation

Gary Haq

### 1 Introduction

During international negotiations for environmental regulations, the industry sector typically raises the issue of the cost of compliance. It is often maintained that the cost of complying with environmental regulations unduly restricts business profitability and competitiveness, reduces economic growth and stifles innovation. Although issues of cost and economic competitiveness do need to be addressed, it is felt by many that strategies and costs presented by industry during such negotiations are often considerably higher than the actual post-regulation costs of implementation or compliance.

The Stockholm Environment Institute (SEI) was funded by the Swedish Ministry of Environment to undertake a study to examine the issue of cost of compliance by considering the arguments and strategies which were presented by industry during the negotiations of different environmental regulations in Europe and North America and at the global level. This paper is based on the results of the study, which was published in April 1999.

### 2 Selection of Case Studies

In order to examine the strategies that have been promoted by industry during the negotiations of specific environmental regulations a number of case studies of environmental regulations were identified. The following criteria were used to select the case studies to be examined in this study:

- clear relation to a statutory environmental regulation;
- clear documentation of the costs estimated by industry prior to the negotiation for that regulation; and
- clear documentation of the costs realised in the implementation phase.

Five case studies of environmental regulations were selected for analysis and provide best illustrative examples:

- 1) UN/ECE Protocols on Acidification and the EC Directive 88/609/EEC on Air Emissions from Large Combustion Plants
- 2) EC Directive 91/441/EEC on Vehicle Emission Standards (Euro I Standards and Catalytic Converter on Cars)
- 3) The European Auto-Oil Programme

- 4) The United States Clean Air Act
- 5) The Montreal Protocol on Substances that Deplete the Ozone Layer

Although there is a limit to the conclusions, which can be drawn from five case studies regarding industry as a whole, the cases do demonstrate the general cost arguments presented in the negotiation of a specific environmental regulation.

### 3 Arguments Presented by Industry during Negotiations

Four arguments are typically raised by industry representatives in responding to the need for new environmental regulations:

- The proposed policy will fail to yield the anticipated environmental benefits; the environmental goal may be valid, but the proposed instrument is economically inefficient because it imposes unnecessary costs.
- The proposed instrument will make particular sections of industry less competitive or disadvantage industry as a whole compared with other countries or regions.
- Employment opportunities will be adversely affected.
- There is a lack of high quality scientific evidence linking cause and effect and hence the action demanded will be unlikely to yield the desired result.
- There is an unresolved conflict between society's desire for higher environmental standards and a company's goal of adding to shareholder value.

Despite the emphasis in these assertions on industry's costs, a broad conclusion to emerge from the study is that comparisons of predicted versus actual costs of implementation oversimplify the positions and strategies adopted by industry during negotiations of environmental regulation compliance. For example, sections of the motor industry resisted the imposition of catalytic converters and proposed alternative technical solutions (lean-burn engines). The potential for job losses was emphasised in several of the cases, but with a very wide range of predicted disbenefits, varying from workforce reductions to extensive plant closures (in oil refineries) up to warnings that „entire industries could fold“ with ensuing „economic chaos“, as in negotiations on the phase-out of chlorofluorohydrocarbons (CFCs). Other arguments hinged upon the lack of scientific

evidence for impacts suggesting that regulation was not required (as in the United States' (US) Clean Air Act negotiations). In summary, although the cost of compliance is often a central theme during regulatory negotiations, it is by no means the only argument employed.

A second conclusion of the study is that the negotiating positions taken by various stakeholders are dynamic and change continually. There is, for example, rarely the simple situation where industry uniformly opposes government. „Industry“ consists of many different stakeholders, each with different positions. Thus, in the negotiations concerning catalytic converters, luxury motor manufacturers were more positive about their introduction than manufacturers of small and lower-priced cars. During the European Auto-Oil Programme the motor industry opposed the oil industry on costs for the introduction of fuel standards, as the development of new engine technologies required the higher quality, low-sulphur fuels which the oil industry were resisting. However, it is common during negotiations that such industries are represented by branch organisations that present a common „industry“ perspective (e.g. CEFIC, CONCAWE, EUROPIA, UKPIA, VNO).

In certain cases government and industry had a similar bargaining position. During the initial European negotiations on the sulphur protocol and large combustion plant directive, the UK and German Governments represented the interests of the power industry, using cost arguments to oppose regulation. Later, the Governments changed their position for a number of reasons including a recognition that costs might be considerably less than the power sector was suggesting. With the Montreal Protocol, sections of industry changed their position dramatically to the point where they strongly supported more stringent regulation on ozone-depleting substances as they developed viable chemical alternatives that could give them a competitive advantage in the field.

#### 4 Comparing Costs and Strategies

Another finding of the study has been that the „costs“ of compliance are hard to compare in a valid and meaningful way. The term „cost“ has many different meanings in everyday language and within technical discussions. This wide usage provides an opportunity for differing interpretations and re-interpretations of the cost of an environmental regulation – a problem that can be mitigated only by adopting rigorous and agreed rules, in advance, for comparative costing exercises. The issues relate to where the boundaries of the activity undertaken are to be drawn, cost estimation and auditing procedures, discount rates, interest and exchange rates,

and their change over time, external costs and the form in which costs are (or have been) presented.

While specific cost data do exist, in none of the five case studies is the pre- and post-regulation cost data directly comparable. It has thus proved difficult to demonstrate simply and unambiguously that estimates made in advance of regulatory abatement compliance were in excess of the eventual "real" cost or that a consistent factor emerges by which the "real" cost was exceeded by the pre-compliance estimates. Nevertheless, the case studies do suggest that industry's actual costs for implementing environmental regulations tend to be lower than their predictions of these costs during the negotiations; in short, that industry may over-estimate the predicted compliance costs and occasionally bases its substantive opposition to the regulations on such cost estimates. However, there is also some evidence that developments which industry could not reasonably predict may have reduced the "real" implementation costs.

In a minority of cases it is possible to make fairly clear comparisons of the costs before and after implementation of a regulation. This is where the strategies and technologies suggested during negotiation were actually implemented. For example, in the case of the installation of flue gas desulphurisation (FGD) units in Germany, industry's claims that the real investment costs would be twice that of the Umweltbundesamt (UBA) estimates were not borne out and in fact the real costs turned out to be very similar to those suggested by UBA. In the case of volatile organic compounds (VOC) emission reductions, it seems clear that the costs proposed by industry in the Netherlands were approximately twice those of the Central Bureau of Statistics. During the Auto-Oil Programme, for example, early estimates of the cost of achieving a 30 ppm sulphur content in petrol were found to be over-estimated by 17 per cent, and for 50 ppm in diesel by 55 per cent. These lower cost predictions were sufficiently large to justify a much greater emphasis on fuel improvements, and influenced the position of the European Parliament. The case study concerning the introduction of catalytic converters for cars also allows some comparison which indicates that the costs proposed by industry were higher than implementation costs.

There appear to be surprisingly few studies into implementation costs and, further, cost comparisons are plagued with a number of inherent difficulties. This is an area where the European Commission could take the initiative to conduct more detailed studies of the actual costs of EU regulation.

In some case studies the before and after compliance costs are not directly comparable as they refer only to unit costs and exclude other important costs such as those relevant to installation. Another prob-

lem centres on manufacturing scale. Initially, the unit cost of production is typically high but, as production increases, costs fall. There are indications from the case studies that the lack of consideration of such economies of scale led to incorrectly high estimates from industry of compliance cost. A further costing problem is that industry may absorb some costs rather than pass them on to customers. This is one reason why the effect of the cost of catalytic converters on car price is difficult to discern.

In other cases comparisons are not simple as:

- the strategy adopted was not the one for which costs were discussed during negotiation;
- the claims made by industry were not specific and vague and cost claims by different stakeholders referred to packages of measures;
- the costs were reduced due to unforeseen or neglected potential to improve current technologies and improve efficiency;
- the potential for industrial innovation was underestimated.

It is clear that the response to an adopted regulation by industry is highly dynamic and that there are many strategies which may be implemented to ensure compliance. Thus, the strategy for which costs are proposed is often not exactly that which is finally implemented. This was clear in the case of sulphur emission reductions in the UK, where the costs proposed referred to installation of FGD but the strategy largely adopted has been one of fuel switching to natural gas, a strategy that was not necessarily chosen specifically to address the sulphur emission problem.

In a number of cases lower costs of implementation were realised through the improvement of existing technologies that were not addressed by industry during the negotiation phase. Germany's UBA initially assessed that the emission control technology required to meet Euro IV standards for cars using advanced catalyst technology would cost a maximum of DM 200-350 in production models. It has subsequently been found that the same standards can now be met even less expensively (for DM 100 or less) by fine-tuning existing technology rather than through major advances in the type of treatment used. The Auto-Oil case study indicated that some of the investment costs in achieving strict motor fuel standards in the Scandinavian refining industry were offset by efficiency gains and other benefits in the refining process. In addition, the greater availability of crude oil supplies, an exogenous factor which perhaps was not envisaged helped to keep down the costs.

One consistent finding is that the potential for innovation in industry is often under-estimated, such

that the costs of compliance are consequently over-estimated. Fast-moving technical innovation typically contributes to rapidly reducing unit costs. Factors such as these are difficult to capture in advance, resulting in a degree of conservatism in industry cost estimates. In a climate of constant technical innovation, it is also difficult to agree which costs or benefits should be fairly ascribed to a regulatory change. These important issues are most clearly demonstrated by events leading to the Montreal Protocol. During the negotiations pessimistic expectations regarding availability of substitutes and alternatives to existing ozone depleting substances (ODS), and the potential for innovation in this area, had a direct impact on the assumptions concerning the costs of phasing out CFCs and other ODS. Based on rather static assumptions, a series of Rand Corporation studies conducted during the first half of the 1980s found relatively limited potentials for reducing CFC use and steeply rising cost curves. The industrial dynamics have subsequently proven these assessments to be far too pessimistic. The example of the Montreal Protocol suggests that costs are easily exaggerated for those sectors of the economy which have a high potential for innovation. Industry may tend not to take into account, or may under-estimate, this innovation potential as there is no certainty that it will deliver the needed solutions. In addition, a number of unforeseen factors can inhibit the realisation of the full potential for innovation in industry. The dynamic evolution of the Montreal Protocol and the rapid phase-out of major ODS have, in large part, resulted from a very remarkable response from industry. Initial resistance to regulation by some industries was relieved through technological innovation, which led to the development of substitutes and alternative technical processes that allowed the phase-out process to proceed much faster than previously anticipated - and at greatly reduced cost. As a consequence, industry played an increasingly constructive role in the Montreal Protocol process. However, it was fortunate in this case that the industry losing the CFC market was identical to the industry which gained the new markets for hydrofluorocarbons (HFC) and hydrochlorofluorocarbons (HCFC) which the Protocol introduced. In political terms this situation can, of course, be much more precarious if the benefits of regulation do not accrue to "loser" industries.

## 5 Conclusion

Regulatory approaches to environmental improvement can impose a burden on companies, and industry often opposes them. However, forward-looking, receptive and innovative industry increasingly recognises that properly designed regulation need not

increase costs and good regulation has often enhanced competitiveness in well-run companies.

Cost comparisons are hampered by the fact that there appear to be surprisingly few studies into implementation costs. Furthermore, cost comparisons are plagued with a number of inherent difficulties as in some case studies:

- the claims made by industry are deliberately vague;
- cost claims by different stakeholders referred to packages of measures;
- costs were reduced due to unforeseen or neglected potential to improve current technologies and improve efficiency; and
- the potential for industrial innovation was underestimated.

In order to properly address the question of costs before and after regulation it would be necessary to undertake a larger study of the issue. In addition, monitoring of cost estimates during the whole regulatory process might be required. The inclusion of independent specialists and analysts during negotiations (such as occurred during the development of the Auto-Oil Programme) can prove effective in arriving at realistic implementation costs, taking into account the different factors that tend to influence costs of compliance.

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## Industrial Self-Control in the European Regulation of Chemicals\*

Martin Führ

*"To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption ..."*

*Principle 8 of the Rio Declaration*

### 1 Introduction

In many quarters you can listen to the "song of songs" of industrial self-control giving the impression that this is considered to be the "high road of German and European environmental policy" (e.g. Fluck/Schmidt 1998). This positive view is based on certain advantages which are expected from an approach based on industrial self-control; these advantages are supposed to be:

- a higher flexibility because they leave room for manoeuvre to those participating, and hence
- cost-efficiency
- a strengthening of motivation
- fast action on the part of industry (VCI 1998a).

Hans-Dietrich Winkhaus, president of VCI, the German chemical industry association, stresses "that voluntary agreements and initiatives are effective

and credible alternatives to growing administrative requirements" (VCI 1998b, 4). It is further argued that "traditional legislation which still adheres to the notion of subordination" causes actors ultimately to develop primarily defensive strategies. By contrast, the argumentation continues "soft" forms of action are better suited for "encouraging a pursuit of public goals based on self-control" (Fluck/Schmidt 1998, 262). There are demands for a paradigmatic shift in environmental policies, toward partnership relations between environmental actors (Pretzer 1998). The approach of command-and-control regulation is firmly rejected and should be replaced by self-control (UNICE 1999).

According to the industry's own views which have been effectively publicised in the media, the discussion is about a radical break with current regulatory principles. Representatives of industrial associations are asking explicitly for an *alternative approach* to the command-and-control regulatory framework.

### 2 Some Basic Criticisms

Proposals for self-control and self-regulation are critically viewed by many.<sup>1</sup> Two main schools of criticism can be distinguished.

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<sup>1</sup> For the discussion in The Netherlands see Gilhuis 1993, Peters 1993 and Evaluatiecommissie 1996; for the perspective of the systems theory see the contributions in Teubner/Farmer/Murphy 1994.

### 2.1 Failure to reach set goals

One criticism is that goals are not being achieved, that "symbolic" politics are being conducted in the sense that activities are ostensibly carried out, while de facto propagated goals are being cut back.

Whether this assessment is correct, depends on the concrete motivational situation and the institutional setting in individual cases (Führ 1996b). At the same time, it is fair to ask what might have been achieved in a different institutional environment and to consider the "costs" that might have been involved. This should include various forms of self-control. Starting from exemplary cases, where goals based on self-control have been achieved, it should be asked what might have been achieved realised by a similar input and under different boundary conditions (e.g. command-and-control framework). Conversely, negative examples are no proof that this approach is failing in principle. Again, it should be asked what alternative concepts of regulation could have been achieved. Taking these various aspects into account, the basic question is: what kinds of incentives exist for a goal-oriented performance, and are they stronger than conflicting motivational impulses?

### 2.2 Self-control as an infringement of basic rights

Another criticism reflecting an entirely different perspective has been raised by those who take the view that an infringement of basic rights (Di Fabio 1997) is involved, when the state gives up its controlling function and burdens private actors with self-control instead.

Underlying this approach is the notion of a strict separation of state and society. The correlative notion of freedom is informed by a narrow liberalistic view. It overlooks that under the rule of law, freedom is always defined by the principles of equality, reciprocity and generalisation. These include obligations relating to the exercise of consideration and care binding upon private citizens, for example, when they engage in activities that affect the social sphere and thus third parties (Führ 1998b). In many cases, the mechanisms of self-control reflect these basic obligations. Freedom and responsibility are inseparable. The emphasis on infringement diverts from the fact that, although it may be that the state formulates the conditions of self-control in an authoritative way, it is basically the individual who, by exercising his or her freedom in a specific way, takes on the responsibility that this involves.

Responsibility is part of human nature, it is a fundamental anthropological category. Anyone adopting a particular social role, at the same time accepts the resultant responsibility. The fact that the law has formulated this responsibility in a binding form may

- if the criteria of basic rights are dogmatically applied - be interpreted as an infringement because the exercise of freedom would have been formulated in substantive terms. But if there is an inner relation with the activity under review, such an infringement can be considered constitutional throughout, even expedient in some cases.

A withdrawal of the state, according to the same critics, would pose the risk that the fulfilment of the state's tasks tends to become incomplete. A state that withdraws from dealing with practical matters and problems is no longer in a position to judge whether decisions made on the basis of self-control are adequate in terms of the state's responsibility for the common good. To raise the issue of the state's warranty in this context, state these critics, creates the likelihood of operating with "widespread political euphemisms" (*weitverbreitete Polit-Euphemismen*, Di Fabio 1997, referring to Forsthooff 1973, 76).

### 2.3 Lack of democratic legitimation

All critical statements hold in common that it is problematic when control over definitions (of what?) lies no longer with the democratically legitimated actors but to a significant extent with the polluters themselves. Another issue raised concerns the rule-of-law character of the power exercised under the regime of self-control and the possibilities of obtaining legal protection.

## 3 Framework and Pre-Conditions

Against this background, a framework of orientation should be developed comprising the arguments presented in the debate. For this purpose, three questions should be addressed first:

1. Do constellations exist in which "industrial self-control" demonstrates specific advantages?
2. Which conditions are crucial for success?
3. Are there any exclusionary criteria?

### 3.1 Fields of application

Industrial self-control is appropriate where the issue is not the limitation of undesirable behaviour, but an active participation of actors in social tasks. In this constellation, the state ceases to act like a policeman who gives a stop signal and orders people to go no further. The issue, therefore, is not the classical prevention of danger which is achieved by refraining from a potentially dangerous activity, but more broader-based tasks of guidance and control (Grimm 1994, 626 ff.), calling for the creativity and imagination as well as the specific knowledge and skills of actors. Or, as William Jefferson Clinton, President of the United States of America, put it when presenting his programme on environmental excellence and

leadership, "Project XL": self-control "is built on the simple premise that in many cases companies know their business a whole lot better than the government does" (quoted in: Steinzor 1998, 111). Whenever this seems to be the case elements of industrial self-control are at stake.

### 3.2 Conditions of success

In a second step, we have to scrutinise the premises of successful self-control. A decisive aspect is the motivational inclination of actors. Essential is the concrete institutional context. It will not be sufficient to judge from an abstract perspective; for otherwise measures for the saving of water and the reduction of waste would have been introduced by many companies much earlier, or on a much greater scale. This has not generally happened, although it would have been called for in light of economic rationality. Such processes (raising awareness, identifying actors, designing appropriate action) require an institutional framework including communication patterns within organizations as well as motivational aspects of individuals resulting from external impulses. To create such processes or to utilize existing frameworks is a crucial condition for successful self-control. Appropriate institutional framework conditions are therefore required, both within and outside the actors.

### 3.3 Limits on self-control

Self-control is not appropriate where the self-motivation of actors clearly points in a different direction. Here, a – markedly – modified legal framework is indispensable. Under these changed conditions, it will then be possible to reflect again on the framework and pre-conditions of self-regulation concepts.

## 4 The Development to Date

The development to date has to be considered in the perspective of the outlined criteria. Self control has to be seen in the context of the legal framework.

### 4.1 Fields of application

It is not a new phenomenon that the state, in fulfilling its tasks, depends on the active participation of societal forces. Hence, it is hardly surprising that in many domains the state cannot rely solely on subordinate-type regulation based on the command-and-control pattern. Rather, co-operative approaches, which usually incorporate elements of self-control, are now being increasingly applied.

This even prompted the Federal Constitutional Court to rule that the plant-related regulatory framework of the Federal Immissions Control Act (*Bundes-Immissionsschutzgesetz*) is characterised by the principle of cooperation under the law in

force which grants the companies "freedom of choice" (*Wahlfreiheiten*) on a large scale. This ruling is surprising; not only with respect to the wording of the law, but also and especially because plant-related legislation is a much favoured object of the demands by industrial associations for an extension of self-control. It should be noted that the ruling made by the Federal Constitutional Court fails to address the existing legal situation (Bothe 1998). The ruling is to be understood as an indication of the mixed-instruments character (Gawel 1991) also of the plant-related legislation (Führ 1998c).<sup>2</sup> Accordingly, legislation, especially environmental legislation, has for some time been characterised by mixed forms of subordinative and co-operative elements (Koch 1998). As a result, a considerable number of areas have developed involving "freedom of choice", in which self-responsibility and self-control are being practised.

A co-operative approach can also be found in the – relatively recent – legal field of chemicals regulation. The notification procedure can probably be regarded as a particularly obvious expression of self-control. Because it involves the testing of substances by the industry and it is up to industry to undertake the first risk assessment.

In light of this, it appears misguided to demand a paradigmatic shift to co-operative solutions. A fundamental change already happened. For the time being, mixed forms continue to be predominant. Whether self-control approaches actually constitute – as some comments indicate – a fundamental alternative to the command-and-control system, depends on whether they are able to provide institutional safeguards for a sufficiently strong motivation.

### 4.2 Institutional conditions

Institutional forms of self-control are diverse (Schmidt-Preuß 1997). Here, the focus will be on important elements of internal structure as well as on the external institutional framework.

#### 4.2.1 Internal structure

Looking at the internal structure of companies the key elements of self-control are found in the "management system". It reflects the organisational side of the substantive obligations of environmental legislation which include a basic commitment to effective self-control (Feldhaus 1991, 929; Koch 1998, 263). The scope for action by companies is extensive in this respect. The state has generally

<sup>2</sup> It seems that to jurists who espouse a monistic-liberalist concept of freedom and a corresponding "Einseitigkeitsdenken" (non-mutual, one-sided way of thinking) (Haverkate 1992) – oriented to an outdated notion of a strict separation between state and society (Rupp 1987) – the discovery of structures of reciprocity comes as a complete surprise making them turn immediately to the other extreme.

refrained from setting standards; and when this occurred at all, interventions have been very restrained, for example:

- appointment of competent persons for the various regulatory frameworks,
- obligation to notify basic elements of the management system to the competent authorities,
- a framework for voluntary participation in the Community environmental management system, the EMAS regulation.<sup>3</sup>

If the management system is to work effectively, a specific management culture is required which ensures internal transparency and openness. Experienced management consultants have pointed out that the introduction of the environmental management system frequently touches a sore spot because it means that the established pattern of leadership is also put to the test. Some companies turn out more bureaucratic and ossified than public bureaucracies. The mere fact that an environmental management system has been formally introduced is no proof of its successful operation - even with an EMAS or ISO certification.

This is especially true of the area of substance and product development. Although industry emphasises the crucial importance of this area as a key to innovation, this does not alter the fact that there are problems of internal co-ordination. There are quite a number of management interfaces. And each interface is a potential obstacle. These problems also occur in the EMAS-framework: product planning is one of the topics for consideration in connection with the management system. The regulation explicitly mentions the selection of raw materials (annex I C. no. 3), design, packaging, transport, use and disposal (no. 7) as well as a customer advisory service (D. no. 10). The responsibility for product development and the environmental impact of its subsequent application thus lies with the environmental management system. Whereas, apart from this, the regulation deals mainly with the site and its production plants so that there is a danger that almost all emphasis is laid on the impact of the production plant, in accordance with the well-established tradition of plant-related environmental law. This tendency is also reflected in the manuals and guides which have been published to support EMAS implementation by companies. Although the aspect of product development is generally mentioned, methodological and organisational specifications are lacking.<sup>4</sup> This shortcoming is continued in the pub-

lished environmental statements. And even their critical review and evaluation on the basis of comparative "rankings" (Peter/Küppers 1997) does not take into account this deficit (on this, Führ 1998a).

A more comprehensive approach is pursued by the "guide on product stewardship" (Leitfaden Produktverantwortung) as part of the "Responsible Care" initiative of the chemical industry (VCI 1996). Its aim is to make all product-related aspects pertaining to environment, safety and health a concern of the management system. Even more advanced is the concept of "Product Sustainability Assessments" (PROSA), which was developed for the strategic product development of Hoechst AG (Öko-Institut 1997). PROSA is designed to enable a classification of products according to regionally differentiated indicators of sustainability. But implementation has proved to be problematic. Ultimately, other criteria seem to be decisive, particularly in product development (e.g. pressures of success in the research and development sections in the sense of short-term marketing successes).

If the problems of internal co-ordination remain unsolved, there is a danger that environmental protection in industry will continue to be considered primarily a technical task - technical in terms of plant technology - sidelining other aspects, especially those relating to product development. In surveys dating back to the 80s which included interviewing persons responsible for environmental protection in industry (BP-Enquête 1986, Ullmann 1982),<sup>5</sup> participation in the development of new products ranked last on the list of priorities. Contributory factors are training profile and background of professional experience, on the one hand, and an orientation toward a specific culture associated with various task areas, on the other. The thinking and working styles of the development section and the section responsible for environmental protection, for instance, may differ considerably. This leads to an aggravation of already existing problems of co-ordination.

Even if efforts made by management succeed in overcoming these obstacles, there is still no guarantee that a fundamental re-orientation will take place in product development, as envisaged by Principle 8 of the Rio Declaration - not least due to the fact that the internal structure largely responds to external demands and therefore reflects, or must reflect the external institutional framework. As long as environmental aspects play only a marginal role in the success criteria applied in evaluating research and development sections, nothing much will change in relation to the problems described.

<sup>3</sup> Environmental Management and Audit Scheme, EC Regulation 1836/93; on this, Führ 1992, 1994 and 1996a.

<sup>4</sup> As, for example, in the "TÜV-Umwelt-Management-Berater" (Myska 1996) or in Both/Gebbers/Peter 1996. More details are given by Becker/Nissen in: Aljiah/Heuvels 1996, chap. 6.2.3. Completely out of consideration is this topic in Brennecke/Krug/Winkler 1998.

<sup>5</sup> The results of Theissen (1990) are pointing in a similar direction.

In this context, reference is often made to the intrinsic factors of motivation, for example with respect to the ethical responsibility of management. These do play a certain role, but will hardly prove sufficiently important to take the place of those motivational impulses that are the result of external institutions (Lübbe-Wolff 1998, Gawel 1999). But to conclude from this that external institutions will be sufficient, is also falling short of designing optimal incentives. Up to now, we know little about how to recognise the potentials of combining motivational and external impulses.

#### 4.2.2 External framework

Self-control is not something that is unknown in chemicals legislation.<sup>6</sup> Regarding the provision of toxicological tests, the notification procedure for new substances relies to a significant degree on the self-control of notifiers and the laboratories engaged by them. But how about problematic test results? What are potential incentives to pursue the matter further? Clearly, at an advanced stage of substance development, strong impulses can be expected to point in the opposite direction. Following the disclosure of practices employed in the testing of pharmaceuticals, serious doubts have arisen concerning the validity of toxicological analyses, which cannot be easily dismissed.

Even more problematic is the area of existing substances<sup>7</sup>, as is well known. The incentive for the producer to press on with tests of substances which might eventually lead to marketing restrictions, must be considered quite limited. This merely applies to cases, for example, where a marketable substitute is already available. It might be worth considering in this connection whether a reversal of the current approach should be favoured for some groups of substances with an anticipated risk potential. According to my memory the science section of FAZ, a German national daily, for example, proposed a form of sunset-legislation: for certain groups of chemical that pose a potential risk the indication as "existing-substance" (EINECS) shall be limited to a certain period of time. From then on, distribution should be permissible only, if – comparable to the case of new substances – toxicological analyses are available. It should then be left to the calculations of producers whether they are willing to provide the necessary analyses, or whether they opt for alternative solutions. This model combines the factors "time" as well as the burden of testing with the relatively well

established framework for new substances. It will clearly provide a strong incentive for this specific form of self-control.

In the domain of chemicals policy, a considerable number of voluntary agreements have been published.<sup>8</sup> Experiences with such declarations are mixed. One pledge, for example, made by the paint industry to limit the use of solvents could not be kept. The pledge concerning batteries also failed and had to be replaced by appropriate legislation (Gebers 1998). Whether voluntary agreements are able to provide the necessary institutional framework is highly questionable. An economic analysis (Bizer 1998) based on the empirical evidence of eight case studies shows that agreements are cost-effective only under restrictive conditions hardly ever observed, and that flexibility of non-binding agreements often results in failing the environmental objectives altogether. These findings suggest that voluntary agreements should be applied as additional instruments rather than alternatives, either where small and homogeneous groups can be motivated to adhere to voluntary standards or where government agencies carry "big sticks", i.e. threats of regulatory standards (see also Holm 1999).

As for the question of self-control, the issue is not about an "all-or-nothing" decision. Self-control, too, requires a legal framework (e.g. the "green point" and the packaging regulation and legal framework for the self-commitment concerning the end of life vehicles); such a framework is a crucial factor in the success of any self-regulatory approach.

The art of regulation consists in providing a tailor-made legal framework adapted to a given context and the related motivational factors. This is a challenging task; but if the concern is to find the right solutions, an attempt would surely be worthwhile.

In the context of external institutional framework other actors and the impulses resulting from their behaviour of other actors are also important. Especially consumers should be mentioned as they are able to influence product development by demand. A precondition would be, though, that the composition of products is reasonably transparent and that alternatives are available.<sup>9</sup>

## 5 Conclusion

The demands for a paradigmatic shift appear to be based on a fundamental misunderstanding. There seems to be a widespread assumption that the mere

<sup>6</sup> There is no need to explain once more the legal framework of EC legislation concerning chemicals. It is clear by now that considerable differences exist between the so-called existing and new substances.

<sup>7</sup> On the work of the "Beratergremium für umweltrelevante Altstoffe" (BUA) of the "Gesellschaft Deutscher Chemiker" (advisory body of the association of German chemists on environmentally relevant existing substances), see Öko-Institut e.V. 1989, annex I.

<sup>8</sup> The VCI (1998) points out that the chemical industry, with more than 30 such pledges, is leading in Germany in this respect.

<sup>9</sup> In this, an important role is played by trade. It is easily overlooked that a controlling function is exercised not only by the marketing of finished products, but also by the intermediate trade with chemicals. The possibilities of this group of actors are to be analyzed.

fact of a control by public authorities has the effect that the responsibility for the impacts on the environment caused by industry is placed on the shoulders of the authorities. It should have become clear by now that this notion cannot be reconciled with the law in force. The substantive demands of environmental law include already the obligation to exercise self-control; it is not sufficient to regard merely the binding regulations laid down by the authorities. This is illustrated in the field of product liability, where courts have pointed out (as the German Federal Court of Justice 1987 in the "Honda"-case) quite explicitly that an approval by the authorities does not diminish the basic responsibility of producers. Hence, self-control already plays a central role in the law in force. The existing law has incorporated this paradigm to a high extent.

In the field of environmental policy and law, there is almost no situation, where we do **not** find a constellation of "shared responsibility" – the headline of the Fifth Environmental Action Programme of the European Communities. When human health and the long-term protection of the environment is at stake, the state authorities are never completely out of the picture. And without any doubt, the person or company causing or contributing to an environmental threat have the duty to contribute to the solution of the problem as well. The question is always one of how to share the burden, how to design an institutional setting that is responsive to the individual situation, to the risks that might arise from it, to the possibilities of behaviour for actors and to their specific motivational inclinations.

Let us come back to the simple phrase Bill Clinton formulated: "in many cases companies know their business a whole lot better than the government does". The crucial questions are: What is THEIR business? To what extent is it congruent to the tasks of the government? And: What is it that companies know, what sort of knowledge are they willing – and able – to gather? Without external "signposts" and legally binding conditions little will come from companies.

Internal institutional arrangements, such as environmental management systems under the EMAS regulation, are essential, but by no means sufficient. An additional external institutional framework is necessary to establish a "level playing field" for all competitors. Let me put this straight: Arguing in favour of self-control while at the same time rejecting an additional external institutional framework, basically means to drop environmental goals for a myopic industrial deregulation policy.

Instead it is necessary to interlock elements of self-control and a legally binding framework. The entrepreneurs in particular need support in the form of standards set by the state, if they are to compete

successfully. I was not surprised, therefore, by a finding that is diametrically opposed to the frequently published statements of industrial associations. It is not surprising, therefore, that the "working group of independent entrepreneurs" (Arbeitsgemeinschaft Selbständiger Unternehmer) contradicted the frequently issued statements of industrial associations by conducting a survey of 800 executive staff employed by companies considered pioneers of environmental management. Asked whether they wished to see some degree of deregulation, none of the interviewees demanded a substantial reduction of environmental standards (FAZ 1997).

## References

- Alijah, Renate/Heuvels, Klaus 1996: Betriebliches Umweltmanagement, Augsburg
- Becker, Andreas/Nissen, Ulrich 1996: Produktplanung, in: Alijah/Heuvels 1996, Kap. 6.2.3
- Bizer, Kilian 1998: Voluntary agreements: cost-effective or just flexible to fail?, sofia-Discussion papers on Institutional Analysis 98-3, Darmstadt (forthcoming in: Environmental Economics and Policy Studies)
- Bothe, Michael 1998: Zulässigkeit landesrechtlicher Abfallabgaben, NJW 51, 2333 - 2335
- Brennecke, Volker M./Krug, Sebastian/Winkler, Claudia M. 1998: Effektives Umweltmanagement, Berlin
- Bundesgerichtshof (BGH, Federal Court of Justice) 1987: Judgment of 9.12.1986 - VI ZR 65/86 - BGHZ 99, 167 - 181 = NJW 1987, 1009 - 1012 ("Honda" judgment)
- Deutsche BP 1986: Umwelt-Enquete, in: Bundesverband Junger Unternehmer, Handbuch des Umweltschutzes, Kap. III - 1.1
- Di Fabio, Udo 1997: Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, in: VVDStRL 56, 235 - 282
- Eijlander, Ph./Gilhuis, P.C./Peters, J.A.F. 1993: Overheid en zelfregulering, Zwolle (Tjeenk Willink)
- Evaluatiecommissie Wet Milieubeheer 1996: Vergunnen met beleid - Advies over de milieuvergunning in bedrijf (Advies nr. 11), Den Haag 1996
- Frankfurter Allgemeine Zeitung (FAZ) of 10.12.1997, p.20
- Feldhaus, Gerhard 1991: Umweltschutzsichernde Betriebsorganisation, NVwZ 10, 927 - 935
- Forsthoff, Ernst, Lehrbuch des Verwaltungsrechts, Erster Band, Allg. Teil, 10. Aufl. 1973
- Fleck, Ludwig 1983: Entstehung und Entwicklung einer wissenschaftlichen Tatsache. (Hrsg. Schäfer, Lothar und Schnelle, Thomas), Frankfurt am Main
- Fluck, Jürgen/Schmitt, Thomas: Selbstverpflichtungen und Umweltvereinbarungen - rechtlich gangbarer Königsweg deutscher und europäischer Vereinbarungen, VerwArch 98, 220 - 263
- Führ, Martin 1992: European Framework for "Environmental Auditing", Milieu & Recht 1992, 459 - 466
- Führ, Martin 1994: Eigenüberwachung und Public Scrutiny - Vom Betriebsbeauftragten zum Umweltmanagementsystem, in: Koch, H.-J./Lechelt, R.: Zwanzig Jahre Bundes-Immissionsschutzgesetz, Baden-Baden, 99 - 116
- Führ, Martin 1996a: Eigen-Verantwortung oder Öko-Staat? - Sicherung der Selbstverantwortung in Unternehmen in: Roßnagel, Alexander/Neuser, Uwe (Hrsg.): Reformperspektiven im Umweltrecht, Baden-Baden, 211 - 253
- Führ, Martin 1996b: Ordnungsrahmen für "nachhaltige Unternehmen": Zuckerstangen oder Karotten?, in: Schlacke, Sabine (Hrsg.): Neue Konzepte im Umweltrecht - Beschleunigung durch Modernisierung, Effektivierung, Vereinfachung?, Berlin 1996, 187 - 214
- Führ, Martin 1998a: Mehr Transparenz und Wettbewerb im Umweltschutz - Der "Leitfaden zum Ranking der Umwelterklärungen", Blick durch die Wirtschaft vom 28.1.98, Frankfurt am Main (FAZ), 5

- Führ, Martin 1998b: Das Gebot gegenseitiger Rücksichtnahme - Renaissance eines Rechtsprinzips?, sofia-Diskussionsbeiträge zur Institutionenanalyse 98-1, Darmstadt
- Führ, Martin 1998c: Widerspruchsfreies Recht im uniformen Bundestaat? - Zum Sonderabfallabgaben-Urteil des Bundesverfassungsgerichts, Kritische Justiz 31, S. 503- 518
- Gawel, Erik 1991: Umweltpolitik durch gemischten Instrumenteneinsatz - Allokative Effekte instrumentell diversifizierter Lenkungsstrategien für Umweltgüter, Berlin
- Gawel, Erik 1999: Sind Probleme intrinsischer Motivation für die Umweltpolitik relevant?, Beitrag für die Tagung des Ausschusses für Umwelt- und Ressourcenökonomie im Verein für Socialpolitik am 23./24. April in Innsbruck, Bielefeld 1999
- Gebers, Betty, et al. 1998: The Role of Environmental Agreements, London (Cameron May)
- Gilhuis, P.C. 1993: Zelfregulering en het milieu, in: Eijlander/Gilhuis/Peters 1993, 71 - 86
- Grimm, Dieter 1994: Wandel der Staatsaufgaben und die Zukunft der Verfassung, in: ders. (Hrsg.): Staatsaufgaben, Baden-Baden (Nomos), 613 - 646
- Haverkate, Görg 1992: Verfassungslehre - Verfassung als Gegenseitigkeitsordnung, München (Beck)
- Holm, Jesper 1999: Modernisation and Flexible Environmental Regulation, Preprints der Forschungsgruppe Rationale Umweltpolitik - Rationales Umweltrecht, Nr. 11/99, Bielefeld
- Koch, Hans-Joachim 1988: Anlagenüberwachung im Umweltrecht - Zum Verhältnis von staatlicher Überwachung und Eigenkontrolle, UBA-Berichte 2/98, Berlin (Schmidt)
- Kuhn, Thomas S. 1970: The Structure of Scientific Revolutions, Chicago
- Lübbe-Wolff, Gertrude 1998: Recht und Moral im Umweltschutz, Preprints der Forschungsgruppe Rationale Umweltpolitik - Rationales Umweltrecht Nr.1/98, Bielefeld
- Myska, Martin 1996: Der TÜV-Umweltmanagement-Berater, Köln
- Öko-Institut e.V. 1989: Stellungnahme zur Novellierung des Chemikaliengesetzes (BT-Ds 11/4550), Freiburg/Darmstadt
- Öko-Institut e.V. 1997: Sustainable Hoechst - From guiding principle to industrial tool, Freiburg/Darmstadt/Berlin
- Peter, Brigitte/Küppers, Peter 1997: Der Weg zur besten Umwelterklärung. Methoden - Tips - Beispiele, Eschborn (RKW-Verlag)
- Peters, J.A.F. 1993: Instrumenten van het milieubeleid: andere accenten, in: Eijlander/Gilhuis/Peters 1993, 87 - 100
- Pretzer, Wolfgang 1998: Thesen zur künftigen Entwicklung aus der Sicht der chemischen Industrie - Beitrag zu "Hessen im Dialog 1998": Neue Wege in der Umweltpolitik, Frankfurt (Hoechst)
- Rupp, Hans Heinrich 1987: Die Unterscheidung von Staat und Gesellschaft, HStR, Band I, § 28, Heidelberg (Müller)
- Schmidt-Preuß, Matthias 1997: Verwaltung und Verwaltungsrecht zwischen gesellschaftlicher Selbstregulierung und staatlicher Steuerung, in: VVDStRL 56, 160 - 227
- Steinzor, Rena I. 1998: Reinventing Environmental Regulation: The Dangerous Journey from Command to Self-Control, Harvard Environmental Law Review 22, 103 - 202
- Teubner, Gunther/Farmer, Lindsay/Murphy, Declan 1994: Environmental Law an Ecological Responsibility - The Concept and Practice of Ecological Self-Organization
- Theissen, Antje 1990: Betriebliche Umweltschutzbeauftragte - Determinanten ihres Wirkungsgrades, Deutscher Universitätsverlag
- Ullmann, Arie A. 1982: Industrie und Umweltschutz, Frankfurt am Main
- UNICE (Union des Confédérations de l'Industrie et des Employeurs d'Europe) 1999: Opinion on Integrated Product Policy, Brussels
- Verband der Chemischen Industrie e.V. (VCI) 1996, Leitfaden Produktverantwortung, Frankfurt am Main
- Verband der Chemischen Industrie e.V. (VCI) 1998a, Chemie im Dialog zum Thema Umwelt- und Verbraucherschutz: Wirksamer Umweltschutz durch Selbstverpflichtung, Frankfurt am Main
- Verband der Chemischen Industrie e.V. (VCI) 1998b, Responsible Care - The chemical industry's data on safety, health and environmental protection, Frankfurt am Main

## Environmental Law in the New South Africa: Developments since 1994

*Michael Kidd*

1994 was a crucial watershed in the evolution of law in South Africa. The main reason for this is that 1994 was the year in which South Africa adopted for the first time a Constitution allowing for the universal franchise and which contained a Bill of Fundamental Rights.<sup>1</sup> Also in 1994, the country elected its first fully democratic government, which embarked on a process of addressing the inequities left by the legacy of years of apartheid rule. Both of these have had an important impact on the development of environmental law.

### 1 The Constitution and Environmental Law

The most noteworthy aspect of the 1996 Constitution as far as the environment is concerned is the environmental right in the Bill of Rights (Chapter 2). Section 24 of the Constitution provides:

Everyone has the right

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

The Bill of Rights applies to all law and binds all organs of state, and binds a natural or juristic person 'if, and to the extent that, it is applicable, taking

<sup>1</sup> The Constitution of the Republic of South Africa, Act 108 of 1996, which replaced the interim Constitution, Act 200 of 1994. See also the article "Environmental Protection in the New South African Bill of Rights by Cheryl Loots" in: elni Newsletter, no. 1/97, p.2-5.

into account the nature of the right and the nature of any duty imposed by the right'.<sup>2</sup>

Whilst there has not been much judicial consideration of the right since its coming into effect, it has been used in order to activate the liberal standing clause in the Constitution. Section 38 provides:

Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

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

This is significant from an environmental perspective since, before 1994, people wishing to litigate in the interests of the environment (which would be regarded as the public interest) fell foul of the restrictive standing requirements which required a sufficient, personal and direct interest in the matter.

The position now is that a litigant who alleges an infringement of or threat to the section 24 right (the environmental right) and who is acting in the public interest would have *locus standi* in terms of the Constitution. The protection of environmental rights in the Constitution has also been bolstered by the new National Environmental Management Act 107 of 1998.

## 2 The National Environmental Management Act 107 of 1998

The most important 'framework-type' environmental legislation currently operative is the Environment Conservation Act 73 of 1989. This Act largely relies on administrative rule-making for its efficacy. In May 1995 an environmental policy development process was initiated in South Africa with the aim of integrating environmental management (in contrast to the existing fragmented approach) and providing for sustainable development. After a painstaking policy-making process, involving widespread public participation, the eventual outcome was the National Environmental Management Act (NEMA), passed in late November 1998.

The Act, which came into operation in January 1999, is designed to replace the majority of the Environment Conservation Act of 1989.

The overall objective of the Act is to 'provide for co-operative environmental governance (co-operative governance being one of the cornerstones of the Constitution) by establishing principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state; and to provide for matters connected therewith'.<sup>3</sup> Since the Constitution provides for many environmental matters to be of concurrent national and provincial legislative and administrative competence, the primary objective of NEMA is an important one.

Chapter 1 of the Act contains the National Environmental Management Principles, which apply to the actions of all organs of state that may significantly affect the environment; serve as a framework within which environmental planning is to be carried out; and guide the interpretation, administration and implementation of both NEMA and any other law concerned with the protection or management of the environment.<sup>4</sup> The principles themselves derive largely from the principles included in the White Paper which was the outcome of the policy-development process mentioned above, but, in addition, contain a number of principles which appear to be based on the Rio Principles. The basic principles are that 'environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably'<sup>5</sup> and that 'development must be socially, environmentally and economically sustainable'.<sup>6</sup> The rest of the principles (eighteen of them) range from the polluter-pays principle and the precautionary principle to principles of empowerment and access to information.

These principles are potentially of great importance in that they serve to operate (in theory at least) as an 'environmental bill of rights', as one writer described a similar list of principles in a draft incarnation of the 1989 Environment Conservation Act.<sup>7</sup> Not only will these principles be useful to those state authorities whose task it is to manage the environment but, especially in those instances where the state fails in its responsibilities, also to the general

<sup>2</sup> Section 8.

<sup>3</sup> Long Title of the Act.

<sup>4</sup> Section 2.

<sup>5</sup> Section 2(2).

<sup>6</sup> Section 2(3).

<sup>7</sup> Jan Glazewski 'The environment, human rights and a new South African Constitution' (1991) 7 SAJHR 167 at 180

public, who are given significant rights of environmental law enforcement by this Act.

Procedures for Co-operative Governance are covered in Chapter 3 of NEMA. The Act envisages specified government departments (both national and provincial) drawing up either or both of 'environmental implementation plans' and/or 'environmental management plans'. Implementation plans are to be drawn up by those departments whose actions 'may affect the environment' whilst management plans must be prepared by those departments which exercise functions involving the management of the environment. Some departments, like the (national) Department of Environmental Affairs and Tourism (DEAT), fall into both categories and have to prepare both types of plans, the content of which are set out in the Act. These plans are submitted to the Committee for Environmental Co-ordination (CEC - created by s 7 of NEMA), which then scrutinises the plans and makes appropriate recommendations - either to adopt the plan or to specify changes where there are shortcomings.<sup>8</sup> Once adopted, every organ of state must exercise its functions in terms of its plan.<sup>9</sup> The Minister of Environmental Affairs and Tourism is given various powers to ensure that there is compliance with the plans, and there is also provision in Chapter 4 of the Act for detailed conciliation procedures should a dispute arise between government departments.

Given the structure of government, it is important that there be co-ordination of environmental activities, but it remains to be seen how NEMA's planned system will operate in practice. Under the 1989 Act, there was a very similar body to the CEC (which went by the same name) which, by all accounts, failed to operate effectively. The CEC now has a critical role to play in the co-ordination of the various plans, so the failure of its predecessor to operate effectively is of some concern. Another concern is that the relatively weak status of DEAT within the governmental hierarchy may make it difficult for the Minister to co-ordinate the procedures for co-operative governance as they ought to be. The major concerns about this aspect of NEMA are based on historical experience and it may well be that the implementation of the Act will reveal that they were premature. That, however, remains to be seen.

Chapter 5 of NEMA deals with integrated environmental management. An important aspect of this part of the Act is the issue of environmental impact assessment (EIA). The details of the legislation in respect of impact assessment will be supplied by way of delegated legislation which the Minister is

empowered to make. Until such time as these powers are exercised, the EIA regulations made under the 1989 Act will remain in force.

There has been a great deal of interest in the provisions contained in Chapter 7: Compliance, Enforcement and Protection. Several of these provisions are innovations the like of which have not been seen in many other countries, if at all. Section 28 deals with the duty of care and remediation of environmental damage, an issue which has never been covered entirely satisfactorily before in South Africa. The basic requirement is that 'every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorised by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment. The Director-General of DEAT (or other competent official) may direct any person who fails to take the required measures to take specified measures. If the directive is not complied with, the relevant authority may itself take the necessary steps and recover the resultant costs from:

- any person who is or was responsible for, or who directly or indirectly contributed to, the pollution or degradation or the potential pollution or degradation;
- the owner of the land at the time when the pollution or degradation or the potential for pollution or degradation occurred, or that owner's successor in title;
- the person in control of the land or any person who has or had the right to use the land at the time when-
  - (i) the activity or the process is or was performed or undertaken;
  - (ii) the situation came about; or
 any person who negligently failed to prevent-
  - (i) the activity or the process being performed or undertaken; or
  - (ii) the situation from coming about,

provided that any such person failed to take the measures required of him in terms of the basic duty set out above.

There is some doubt as to whether this section will operate retrospectively since the provision refers to a person who 'has caused' pollution or degradation to the environment, but it is unlikely that a court will decide that it is retrospective. Nevertheless, legislative provision of a duty of care to prevent and remediate damage to the environment is to be welcomed, since a general duty of care was seen as a signifi-

<sup>8</sup> Section 15.

<sup>9</sup> Section 16.

cant exclusion from the environmental right in the Constitution.

The first part of Chapter 7 also provides for the right of workers to refuse to do environmentally hazardous work,<sup>10</sup> and the control of emergency incidents.<sup>11</sup>

The second part of Chapter 7 provides for 'information, enforcement and compliance'. Section 31 provides for the right of access to environmental information and the protection of whistleblowers. The right of access to environmental information can be exercised by 'every person' against the state, and by the state against 'any person', where such information is of relevance to environmental protection. A major concern about this section is that it is applicable only until such time that an Act under section 32(2) of the Constitution is promulgated. Section 32 of the Constitution provides for access to information 'held by the state and any information that is held by another person and that is required for the exercise or protection of any rights'. Subsection 2 provides that 'national legislation must be enacted to give effect to this right'. There is currently a Bill (the Open Democracy Bill) under consideration which is designed to meet the duty imposed by section 32(2), but it applies only to information held by the state, not by individuals. Once the Open Democracy Act comes into effect, section 31 of NEMA will fall away, with the result that the portions dealing with information held by persons other than the state will also fall away. It is hoped that this problem will be addressed.

The impact of the Constitution on the standing (*locus standi*) of environmental litigants has been discussed above. This Constitutional right is augmented by section 32 of NEMA which provides that any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of NEMA or any other statutory provision concerned with the protection of the environment or the use of natural resources-

- (a) in that person's or group of persons' own interest;
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;
- (d) in the public interest; and
- (e) in the interest of protecting the environment.

<sup>10</sup> Section 29.

<sup>11</sup> Section 30.

Moreover, the section also provides for the power of a court not to award costs against a person who loses his or her case if the court is of the opinion that the person in question acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought.

The costs clause is certainly something of an innovation but the section itself is important in that it makes it somewhat easier for environmental litigants to approach court than if they had to rely on section 24 in the Constitution. Reliance on the constitutional right requires the litigant to show a threat to his or her 'health or well-being' whereas using section 32 of NEMA allows anyone to approach the court in order to address a breach or threatened breach of any legislation protecting the environment.

NEMA goes further in providing rights of enforcement to the citizen in section 33, which provides for any person, in the public interest or in the interest of the protection of the environment, to institute and conduct a private prosecution for any breach of legislation where the duty is concerned with the protection of the environment and where breach of the duty is an offence. It is unlikely, in my opinion, that this section will be used too frequently by private individuals, but it may be of great usefulness to institutions (both state and private) which are concerned with environmental management and protection of environmental quality. At present, any prosecution for a breach of an environmental statute must be prosecuted by the Department of Justice and the NEMA provision now allows for 'in-house' prosecutions with all the advantages that this brings.

NEMA also provides for various issues relating to criminal proceedings in section 34. Provision is made for summary inquiry into and judgment for loss or damage incurred as a result of committing an offence, including the cost of rehabilitation of the environment or prevention of harm to the environment. This is an important provision since this type of loss would be difficult to claim under the common law of delict (tort). In addition to the civil liability aspect, NEMA also allows for the court to inquire into the monetary value of any advantage gained or likely to be gained as a result of committing one of a group of offences listed in the Act, and award damages or compensation or a fine equal to the amount so assessed. It is not usual in South Africa for an order of costs of prosecution to be made against a convicted person, but NEMA provides for this as well - the court may order the payment of reasonable costs incurred by the public prosecutor and the organ of state concerned in the investigation and prosecution of the offence.

Liability for corporate offences is also addressed in this section. The Act provides for a type of vicarious liability which makes the employer liable for certain specified acts (which would be offences) committed by a manager, agent or employee, where the employer was negligent in failing to prevent the act in question. Another form of vicarious liability is imposed on a director of a firm where the firm commits an offence listed in the relevant Schedule to the Act, provided that the offence in question resulted in the failure of the director to take 'all reasonable steps' that were necessary under the circumstances to prevent the commission of the offence.

Obviously any provisions which make it easier to bring to book environmental offenders are to be welcomed, provided they do not make unacceptable inroads into individuals' civil liberties. It will be interesting to see how these provisions relating to criminal proceedings are approached by the courts, especially since the vicarious liability provisions contain reverse onus provisions, which have received little or no support from the courts since the beginning of the 1994 Constitutional era.

Chapter 8 of NEMA reflects international trends away from directive-based approaches to regulation to a more co-regulatory system by providing for environmental management cooperation agreements.<sup>12</sup> These agreements, which can be entered into between officials at national, provincial and local levels on the one hand and any person or community on the other may contain:

- an undertaking by the person or community concerned to improve on the standards laid down by law for the protection of the environment which are applicable to the subject matter of the agreement;
- a set of measurable targets for fulfilling this undertaking, including dates for the achievement of such targets;
- provision for periodic monitoring and reporting of performance against such targets; independent verification of reports; regular independent monitoring and inspections; verifiable indicators of compliance with any targets, norms and standards laid down in the agreement as well as any obligations laid down by law; and
- the measures to be taken in the event of non-compliance with commitments in the agreement, including where appropriate penalties for non-compliance and the provision of incentives to the person or community.

Given the likelihood that there will not be sufficient resources for South Africa to operate an effective directive-based environmental law enforcement

regime, this provision is welcomed. There is certainly much foreign experience that can be followed as far as co-regulation is concerned.

Overall, NEMA is a very interesting new addition to South Africa's statute book. There is great potential in the Act for the state to ensure co-ordination in environmental management and also for the general public to become involved in enforcement where necessary. It is still far too early to predict exactly what kind of impact it will have on environmental law in South Africa. What does seem certain, though, is that the courts will become involved in providing more certainty as to how several of the provisions in NEMA will operate in practice.

### 3 Other New Legislation

There has been much legislative activity in the sphere of environmental management since the new government came into power in 1994. An underlying motivation behind much of this legislation has been a policy of eliminating inequalities in the operation of the repealed legislation. A case in point is the water law, for many years regulated by the Water Act 54 of 1956. South Africa's water law operated on a riparian rights system which served largely to exclude the black majority from equitable access to water. Thousands of people had to rely on communal water supplies and lack of adequate sanitation and access to fresh water was responsible for many infant fatalities. The new water law, contained in the National Water Act 36 of 1998, now provides for more equitable access to water. The Act provides for a 'Reserve' from which basic human needs and the water needs of the environment itself will be provided. Allocations of rights to water will be made only once the Reserve's requirements have been satisfied. This is clearly a radical departure from the previous system and recognition of the environment's water needs is an innovative idea.

Other new environmental legislation which also has improved equity as an important objective are the Marine Living Resources Act 18 of 1998 and the National Forests Act 84 of 1998. Currently underway are policy development initiatives in integrated pollution control and waste management and coastal zone management. New Acts in both areas are anticipated in the future.

### 4 Conclusion

The entire legal system in South Africa has been profoundly affected by the new Constitutional jurisprudence, and environmental law is no exception. There have been several very important developments in environmental law since 1994, as outlined above. Most of these developments have been so recent, however, that it is quite difficult at this stage to anticipate exactly how they will be implemented or

<sup>12</sup> Section 35.

what impact they will have. There are important challenges for the state, both in respect of the crucial need for economic development and the commitment to sustainability as reflected both in the

Constitution and the National Environmental Management Act. These are interesting times for an environmental lawyer in South Africa.

## CURRENT AFFAIRS

### Moldova Conference on Public Participation, Part I Conference of Environmental Citizens' Organisations

*Jeremy Wates*

#### Introduction

More than 100 NGO representatives from 33 countries attended a pan-European conference on public participation, held in the Moldovan capital Chisinau on 17-18 April 1999. The ECO (environmental citizens' organisations) conference reviewed progress towards implementing the Aarhus Convention<sup>1</sup>, discussed follow-up work on the Convention and formulated a set of demands to the governments who were due to meet there at the First Meeting of Signatories to the Aarhus Convention on 19-21 April. (See report on the Signatories' meeting following this article.)

This short report covers the following areas:

- key points from the ECO Declaration from the meeting;
- implementation progress across the region;
- measures to strengthen the implementation process;
- future working structures for the ECO campaign on the Convention;
- dialogue with other key players in the implementation process;
- impact in the host country;
- miscellaneous (organisational issues, further information sources).

The full conference proceedings will be published in due course, and circulated to all participants and others requesting copies (see Further Information below).

#### 'The Chisinau Declaration'<sup>2</sup>

One of the main outcomes of the conference was an ECO Declaration addressed to the Meeting of Signatories and setting out the key priorities of the ECOs

with respect to the implementation and further development of the Convention.

The 'Chisinau Declaration' calls for early ratification and implementation of the Convention and urges governments to comply with both the legal requirements and the spirit of the Convention. It reminds governments that the Convention is a starting point and recommends that its principles be extended into other areas such as health, safety and consumer protection.

Several of the 'hot' topics on the agenda of the official process are addressed in the Declaration, as well as some issues not yet explicitly on the official agenda. Among its demands on governments are:

- development of a legally binding instrument requiring governments to establish and maintain **pollutant release and transfer registers**, as a proven tool for reducing pollution;
- full rights of public participation in decision-making on **genetically modified organisms**, as a minimum to the extent required for decision-making on the types of activities listed in Annex I of the Convention;
- an effective, independent and transparent **non-compliance mechanism** for the Convention, to which the public may submit complaints and in which the public may participate - failing which, consideration will be given to setting up an ECO-instigated tribunal;
- strengthening of the provisions of the Convention providing for public participation in policies, programmes, plans and legislation through the addition of a Protocol requiring use of **Strategic Environmental Assessment** in such decision-making, fully incorporating public participation requirements;
- strategies to improve the extent and quality of **electronic access** to information through systems such as the Internet and Geographic Information Systems, underpinned by legally enforceable rights of electronic access;

<sup>1</sup> UN ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/CEP/43)

<sup>2</sup> For the full text of the Declaration, see 'Further Information' below.

- the removal of barriers to **access to justice** in environmental matters, including through development of 'best practice' guidelines, provision of resources to support legal cases taken by ECOs and training of legal professionals;
- prioritisation of **human health** issues in the implementation process, with full consideration being given to the outcome of the forthcoming London Ministerial conference on environment and health;
- ratification of the Convention by the **European Union** by the end of 2000, full application of its provisions to EU institutions and within the EU enlargement process, and allocation of EU funding through PHARE and TACIS to capacity building in support of implementation;
- application of the Convention's principles in other **international instruments and institutions** such as the World Trade Organisation, the European Bank for Reconstruction and Development, the European Investment Bank and throughout the UN itself;
- commitment to start developing a **global convention**, modelled on the Århus Convention, to be signed at the Earth Summit in 2002.

The Declaration proposes that, in addition to the three Task Forces proposed in the UN ECE's draft workplan (PRTRs, GMOs, compliance arrangements), the governments establish three other Task Forces dealing with access to justice, electronic access to environmental information and public participation in policies, programmes, plans and legislation.

The Declaration was presented to government delegates at the Meeting of Signatories.

### Progress to Date in the Implementation Process

Presentations were given on the progress towards ratification and implementation of the Convention in each of the main sub-regions (NIS, CEE, Western), followed by discussion. Among the salient points were the following:

- **Ratification** has different significance in different countries, according to whether or not the specific changes to national legislation needed to bring it into line with the Convention must be carried out before ratification may proceed. Even where ratification does not imply that any progress has been made to revise national laws, it can help towards meeting the target of 16 ratifications which is required for the Convention to enter into force.
- The implementation process in **NIS countries** is being supported by the TACIS Environmental Awareness-Raising Programme, which has held open parliamentary meetings or open public hearings on the Convention in a number of countries.

It is not envisaged that NIS signatories will have big problems with the ratification process (implementation may be more difficult).

- The REC has a major project involving a network of experts monitoring the progress towards ratification and implementation in **CEE countries** and the level of correlation between existing legislation in those countries and the provisions of the Convention. Roundtables involving governmental and NGO representatives are being held, and good practices for involving NGOs in the implementation process are being promoted. Many CEE countries do not have explicit plans for ratification, but most have activity moving in this direction.
- In **Western Europe**, governments tend to assume that they are already in compliance, whether or not this is actually the case. Although there are big differences in legislation and culture between Western European countries, levels of activity around the Convention are generally quite low. There is quite limited NGO involvement in the implementation process in countries where new legislation needs to be introduced; more NGO involvement where the legislation is well established.
- **Non-signatory countries** and countries falling outside the above three sub-regions should not be ignored.
- Careful attention needs to be given to the **translation** into national languages, as there is scope for different interpretations of certain provisions or phrases.
- **Legislation and culture** are different but connected: although new legislation does not immediately change culture (the culture of secrecy among officials or the culture of apathy and non-participation by the public), in the longer term it can bring about changes in culture which in turn can lead to further strengthening of the legislation.

### Measures to Strengthen the Implementation Process

Part of the conference was devoted to discussion of steps which can be taken to expedite the implementation process. Some of the resulting recommendations related to **official implementation procedures** at national level, for example:

- Environment ministries should establish **multi-stakeholder working groups**, especially involving ECOs and also other involved ministries, to oversee and guide the ratification/implementation process. Such committees should use e-mail conferences.

- Close attention should be given to the relevant **parliamentary processes**.
- Even when good legislation has been adopted, it is a further step to ensure that it is **applied and enforced** effectively.
- Exchange of information on **best practices** with respect to implementation procedures can be useful. Some good examples mentioned were Czech Republic where the secretariat for the official national implementation process is run by an ECO, and Denmark where the Environment Ministry will hold a multi-stakeholder conference during the summer to discuss its implementation plans. Generally, open processes came about as a result of ECOs asking for meetings with officials.

Other ideas related more to ECO activities to make information more accessible. It was noted that the Convention itself averages 63 words per sentence and is written in very legalistic language not easily understood by lay people or even campaigners. A number of ideas were discussed:

A **model leaflet** introducing the Convention to the general public, available in English, French and Russian, was presented by the Bulgarian organisation Borrowed Nature. By citing everyday examples of cases where a person needs information or wants to participate in a decision-making process, the leaflet attempts to make the very legalistic language of the Convention meaningful in the context of ordinary life. A background paper prepared by the European Environmental Bureau in the form of an **introductory guide** to the Convention provided a slightly more technical analysis, aimed at ECOs.

A proposal for a **guidance manual** on the Convention, to be produced by and for ECOs as a lobbying tool, was discussed and considered to be potentially extremely useful for ECOs actively working on the issue. This would contain guidance not only on how the content of the Convention should be interpreted when governments or parliaments are discussing how to adapt their laws to fit with the Convention (e.g. pointing out weak provisions where national measures should go further than the Convention), but also the procedures involved and how ECOs might become involved in them so as to influence the outcome. The proposed manual, to be developed with the support of the US Environmental Law Institute, would be translated into several languages and presented at sub-regional seminars. Funds are currently being sought for this project.

It was agreed that the campaign newsletter '**Participate**' should be developed into more of a campaign tool. It should not simply be for internal communication purposes.

Use of **electronic information tools** should be developed. Governments should do more to provide

access to information technology, create public access points, build capacity of NGOs and the public and open up university/academic networks for use by NGOs. NGOs should lobby for these goals, and can play an important role in presenting technical information in a form which is accessible and comprehensible to lay people, e.g. maps and other graphics. Plans for follow-up work included pilot projects (IHEAL, PRTR, etc), monitoring best practices and mechanisms of dissemination (national roundtables). A new listserv and a website will be established by Green Spider for those working on electronic issues. The Website is up and running but more use can be made of it, e.g. for national activities (either directly or through linkages with national websites).

**Building of coalitions** among NGOs is also a very powerful way of enhancing the role of civil society in the implementation process. The pre-requisites for such coalitions to work effectively were discussed. Goals such as those in the Århus Convention, which imply broad social change, are often not the primary goals of NGOs but are necessary to help them achieve their primary goals. They are therefore usually pursued most effectively by a large range of organisations working within loose coalitions.

**Funding** is important, especially in Eastern Europe where outside support has been crucial for the activities which have been undertaken to date.

Other more general comments were made to the effect that the time has come to look positively at the Convention text and how it can be used to bring about significant progress; that the e-mail network of those working on the Convention should be expanded; that local ECOs need more support than national ones; and that it is important for ECOs to keep their position as the main civil society representatives in the implementation process (as opposed to commercial or industrial interests).

### Future Working Structures

On behalf of the Public Participation Campaigns Committee (PPCC), the Secretary-General of the European Environmental Bureau John Hontelez described how the PPCC had evolved under the auspices of the Pan-European ECO Forum and had operated over the past few years as the organisational body behind the ECO activities on the Århus Convention: raising the necessary funds, deciding on the composition of the ECO delegation and generally overseeing the activities of the campaign coordinator.

The PPCC felt that the structure had been generally successful but was proposing that it (the PPCC) should be expanded to improve the degree of regional representation and breadth of expertise. This proposal, which received the broad support of the

meeting, involved a new 10-person committee with representatives from two European federations and from national ECOs from the following regions: two NIS, two CEE, two Western Europe, one North America, one Israel - see Annex I for list of members. In the ensuing discussion, some additional suggestions were made.

- The idea of ECOs in each country establishing a national focal point on the Convention was considered useful, provided that there was broad agreement among the most involved ECOs as to where the focal point should be.
- Another idea was for each country to establish national consortia of ECOs working together on the implementation process.
- It was recognised that specialised ECO working groups would be needed to follow some of the main themes emerging in the implementation process. Priority themes mentioned were PRTRs, GMOs, compliance arrangements (the three topics for which Task Forces had been proposed in the UN ECE's draft workplan), and also access to justice, electronic access to environmental information and public participation in policies, programmes, plans and legislation.

### Multi-Sectoral Dialogue

The conference concluded with a panel session involving representatives of several of the key sectors or bodies involved in the implementation process. Representatives of the UN ECE, governments, parliaments, the media, local authorities, ECOs and the REC gave their perspectives on the Convention and their respective roles in and plans for the implementation process.

### Miscellaneous

Moldova proved a good choice of location for the conference, both for the participants and for promotion of the Convention on the domestic front. The fact that it took place in Moldova undoubtedly had a positive influence on the level of priority given to implementing the Århus Convention in that country, at both governmental and non-governmental levels. About a fortnight before the ECO conference and the Meeting of Signatories, Moldova earned the distinction of becoming the first country to ratify the Convention. Furthermore, important progress was made in the passage through parliament of draft access to information legislation during the weeks before the conference.

Moldovan ECOs were represented on the Conference Committee by Pro Natura, Biotica and the Ecological Movement of Moldova. These and other Moldovan ECOs participated actively in the preparations for the conference and played a prominent role

in the conference itself. The conference was opened by the President of Moldova, Petru Lucinschi, and the Moldovan media gave extensive coverage to both meetings (the ECO conference and the Meeting of Signatories), with several interviews on TV and radio and in the print media.

The conference was organised by an international Conference Committee with representatives from two European networks and from national NGOs from 9 countries. Svetlana Arionescu of the Moldovan NGO Counterpart Centre for Social Enterprise and Research was employed to organise all the Moldovan logistics of the event, with the support of a local organising committee. Mara Silina of FoE Europe was in charge of financial and administrative aspects and Jeremy Wates of the European Environmental Bureau chaired the Conference Committee and had the main responsibility for developing the programme.

The ECO conference was fully financed by the Danish Environmental Protection Agency.

*The full text of the Declaration and other information from the conference can be downloaded from <http://www.participate.org/Moldova>, and is also available from Mara Silina, FoE Europe, 29 rue Blanche, B-1060 Brussels, Belgium, ph +32-2-542-0184, fax +32-2-537-5596, e-mail: [mara.silina@foeeurope.org](mailto:mara.silina@foeeurope.org).*

*Other enquiries relating to the Convention implementation process can be sent to the campaign coordinator, Jeremy Wates, at [jwates@foeeire.iol.ie](mailto:jwates@foeeire.iol.ie), ph/fax +353-27-51333.*

## ANNEX I

### Members of the Public Participation Campaigns Committee

John Hontelez, European Environmental Bureau (subsequently elected as Chair)

Mara Silina, Friends of the Earth Europe

Anna Onisimova, Mama 86, Ukraine

Olga Ponizova, Eco-Accord, Russia

Kliment Mindjov, Borrowed Nature, Bulgaria

Linas Vainius, CEE Bankwatch, Lithuania

Fe Sanchis Moreno, TERRA Environmental Policy Centre, Spain

Mary Taylor, Friends of the Earth, UK

Brian Rohan, Environmental Law Institute, USA

Ishai Menuchin, Shatil, Israel

N.B. The members of the PPCC are on the committee as representatives of their organisations, not in a personal capacity.

## Moldova Conference on Public Participation, Part II

### First Meeting of Signatories to the Aarhus Convention

Jeremy Wates

#### Background

At its meeting in September 1998, the UN ECE's Committee on Environmental Policy decided that a Meeting of Signatories to the recently adopted Aarhus Convention<sup>1</sup> should be held in early 1999 with the aims of:

- preparing a concrete workplan on the Convention;
- providing support and assistance in the ratification and implementation process pending the Convention's entry into force;
- raising political and public awareness of the Convention.

The government of Moldova offered to host the meeting, with financial support provided by Italy and Austria. Non-signatory countries were also invited and able to participate on an equal basis with signatories. As during the Convention drafting process, NGOs were invited and given ample opportunity to participate. Apart from the delegation of the ECO coalition (see Annex I), delegations from other bodies which have been active in the implementation process, such as REC, GLOBE Europe, CLRAE, ABA/CEELI and the TACIS Environmental Awareness Programme, took part (*for list of acronyms, see end of document*).

The conference took place on 19-21 April 1999 in the Moldovian capital of Chisinau. At the beginning of the meeting, Willem Kakebeke (NL), who had chaired the negotiations over the draft Convention, was appointed Chair, and the Moldovan Environment Minister Arcadie Capcelea as Vice-Chair.

#### Information Exchange on Progress towards Implementation

A significant part of the meeting was devoted to exchange of information on what countries or international organisations have been doing to implement the Convention since the Aarhus Conference. As well as the information on national and EU Commission (including TACIS) activities, there were reports from UNEP (including Infoterra activities), WHO (regarding relevant aspects of the forthcoming London conference on Environment and Health), REC and CLRAE on their activities. Information on

this is to be incorporated in the report of the Secretariat so is not expanded on in detail here.

In the course of this information exchange, about 20 countries indicated that they intend to ratify the Convention before the end of the year 2000. About half of these, mainly from Eastern Europe, said they would ratify before the end of 1999.<sup>2</sup> The NGOs pointed out that in order to meet the CEP's target of entry into force in the year 2000, at least 16 countries would need to ratify by the end of September 2000 (given the specification in Art 20 of a 90-day period between the 16th ratification and entry into force), and that countries committing themselves to ratify by the end of 2000 would not necessarily be contributing to meeting the CEP target. Notwithstanding this qualification, these projections compare positively with the ratification performance in relation to several other Conventions.

#### Decisions on Future Work

The main outcome of the Meeting of Signatories was agreement on a workplan to support implementation of the Convention.<sup>3</sup> Part of this workplan is aimed at promoting the entry into force of the Convention and preparing for the First Meeting of Parties. This included the setting up of three Task Forces addressing some of the issues where the Convention and/or Ministerial Resolution had indicated that further work was needed, namely:

i) **Compliance arrangements** (Conv Art 15, Min Res recital 12): this Task Force will be led by the UK, with financial support being offered by the Netherlands, Italy and Germany. It will probably meet once a few months before the 2nd MoS and once a few months after. The UK is to produce an initial draft for discussion at the first meeting. It was proposed that countries should provide experts with a background in human rights instruments.

ii) **Pollutant release and transfer registers** (Art 5.9, Art 10.2i): this Task Force will be led and initially

<sup>2</sup> It is worth pointing out here that ratification has different significance in different countries, with respect to the implementation process. In some countries, it may precede any required revision of national laws to bring them into compliance with the Convention; whereas in others, mainly in Western Europe, it can only occur in conjunction with or following the process of revising national laws to bring them into line with the Convention.

<sup>3</sup> In fact, this workplan is supposed to be approved by the CEP at its next meeting (during week 20-24.9.99) but will presumably be used as the basis for action in the meantime.

<sup>1</sup> UN ECE Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (ECE/CEP/43).

financed by Czech Republic, with further financial support offered by Italy and possibly the REC. France argued against the need for such a Task Force, and Germany was in favour of restricting its mandate to exchange of information on experience with applying Art 5.9. i.e. thereby excluding consideration of 'an appropriate instrument'. Despite these objections, the Task Force was established and it was agreed that even if exchange of information was the first step, the Task Force should also be able to give guidance on future actions by formulating draft recommendations. One of the concerns expressed was to avoid duplication with ongoing international work in this area, and it was therefore agreed that the Secretariat should formally invite OECD and UNEP to participate, and to consider what other bodies to invite. Following a UK proposal, it was agreed to invite participation of the private sector. This prompted the ECOs to remind the meeting that the private sector included those who would be regulated by PRTR provisions, but the Chair asserted that as stakeholders they should be able to be involved.

iii) **Genetically modified organisms** (Art 6.11, Min Res recital 15): this Task Force will be led by Austria. In the discussion, Denmark reported on the breakdown of the global negotiations towards a biosafety protocol, pointing out that the public participation provisions in the draft were not the cause of the breakdown. France and Germany both opposed the setting up of a Task Force. France wanted the issue to be addressed through circulation of comments to be discussed at the 2nd MoS, whereas Germany was against embarking at this stage on an exercise which it considered 'might involve considerable amendments to the Convention'. A German compromise proposal to the effect that up to the 2nd MoS the Task Force should focus on exchange of experience on applying the GMO-related provisions of the Convention was accepted.

It was accepted that the ECO coalition would be represented in each of the Task Forces. Furthermore, it was understood that apart from the countries listed above, other countries would have an opportunity to join these Task Forces within a limited time period.

ECO proposals to establish three further Task Forces addressing i) **public participation in policies, programmes, plans and legislation**, ii) **access to justice** and iii) **electronic access** to information were not successful. However, it was decided to invite the NGOs to present a paper at the 2nd MoS on public participation in policies, programmes, plans and legislation. It was also decided to give the Bureau of the MoS a mandate to consider whether a Task Force on access to justice should be established, taking into account availability of funding

and subject to approval by the CEP. Some countries (Germany, UK, France) preferred the question of a Task Force on access to justice to be left for consideration at the 2nd MoS but did not insist. Others (Belgium, Austria) supported the swifter approach but suggested that the matter could be addressed by the Task Force on compliance arrangements - a proposal which the UK, as lead country, considered to be too ambitious.

Although many countries clearly considered the issue of electronic access to be important and referred to the ways in which they were using electronic media to facilitate public access, it was argued that the issue of electronic access should initially be addressed in June at the London Ministerial conference on environment and health (although the issue which is on the agenda of the London conference is primarily that of improving *practices* through cooperation between electronic providers and users of environment and health information, rather than that of expanding legal *rights* to electronic access).

The workplan charges the Secretariat with the task of drafting **rules of procedure** for the Meetings of Parties. A draft will be discussed at the 2nd MoS.

Other parts of the workplan include:

- production of an **implementation guide** to assist governments with the implementation process: this will be financed by the Danish EPA, coordinated by the REC and published under the auspices of the UN ECE;
- an **international workshop on good practices**, focussed on public participation at the local level: this will take place in the UK towards the end of the year and will be financed by the UK government;
- expansion and further development of the **Convention website**, to include a regularly updated **inventory of activities and funding schemes** relevant to the Convention and a **list of contact persons** working on the Convention, including national focal points where they exist, and **linkages to other related websites**;
- **translation** of the Convention into national languages: in addition to the official English, French and Russian versions, the UN ECE has produced a Spanish version partly with a view to publicising the Convention outside the ECE region (in this case, Latin America).

Several countries supported the identification of national focal points for the Convention, and it was suggested that INFOTERRA focal points could play this role in some cases. It was noted that both governmental and NGO contact points could be useful.

Additional proposals put forward by the NGOs included a **layperson's explanatory guide** to the Convention, to be produced by the UN ECE Secre-

tariat, and consideration of a **permanent funding mechanism** to support the participation of NGOs in the implementation process. The former proposal was welcomed by the Chair. The meeting was also informed of the NGO proposal for an **NGO advocacy manual** on the Convention, produced by and for NGOs.

The decision to establish an **Advisory Board** to promote the Convention, referred to in the workplan, drew some comments. France strongly opposed the concept of such a Board, to which the UN ECE responded that new structures were needed to supplement the traditional governmental structures, and the Chair added that experts would be giving their time free of charge. France then expressed surprise at the composition of the Board when a list of members was read out by the UN ECE and asked whether it had been invited to provide a candidate, to which the answer was negative. Moldova also commented on the composition, and specifically the number of NGO-type members in the Board, pointing out the lack of Eastern European governmental representation. The UN ECE in turn pointed out that members served on the Board in a personal capacity but conceded that there was geographical imbalance and expressed willingness to consider adding an NIS government candidate in the future.

There was some discussion as to whether a **Second Meeting of Signatories** would be needed. A few countries argued that it was better to go for rapid entry into force (whereupon the Meeting of Parties would become the body responsible for the Convention) and that organising a 2nd MoS would take attention and resources away from other more important activities. Most others maintained that even with a relatively swift entry into force, a 2nd MoS would be required to keep up the momentum. In the event, the latter group prevailed and it was agreed to make provision for a 2nd MoS in about one year's time, i.e. Spring 2000, with the possibility of cancelling this plan in the event of a sufficiently large number of early ratifications. The CEP meeting in September, to which the Meeting of Signatories will report, was seen as providing an opportunity to review this proposal in the light of progress achieved by then.

### Financial Support

The Chair invited potential donor countries to give indications of whether they would be providing financial support for activities promoting the implementation of the Convention.

### Linkages with Other Conventions

A memo from the Secretariat of the ECE Convention on the Transboundary Effects of Industrial Accidents proposing closer co-operation between the

two Convention processes led to general support for such co-operation not only with this Convention but also with other Conventions. It was agreed to recommend an international workshop on the impact of the Aarhus Convention on other Conventions.

### List of Acronyms

ABA/CEELI:	American Bar Association's Central and Eastern European Law Initiative
CEE:	Central and Eastern Europe(an)
CEP:	Committee on Environmental Policy (of the UN ECE)
CLRAE:	Congress of Local and Regional Authorities of Europe (under auspices of Council of Europe)
ECE:	Economic Commission for Europe
ECO:	Environmental Citizens' Organisation
GLOBE:	Global Legislators' Organisation for a Balanced Environment
GMO:	Genetically modified organism
MoS:	Meeting of Signatories
PRTR:	Pollutant release and transfer register
TACIS:	Technical Assistance for Countries of Independent States
TF:	Task Force
UN ECE:	United Nations Economic Commission for Europe
UNEP:	United Nations Environment Programme
WHO:	World Health Organisation

### ANNEX I

#### Members of ECO delegation at 1st Meeting of Signatories

Jeremy Wates, European Environmental Bureau, Ireland  
 Olga Razbash, Regional Public Centre for Human Rights and Environmental Defence, Russia  
 Sándor Fülöp, Environmental Management and Law Association, Hungary  
 Mary Taylor, Friends of the Earth, UK  
 Vladimir Garaba, Ecological Movement of Moldova  
 Fe Sanchis Moreno, TERRA Environmental Policy Centre, Spain  
 Anna Onisimova, Mama-86, Ukraine

#### Advisers

Brian Rohan, Environmental Law Institute, USA  
 John Bonine, Environmental Law Alliance Worldwide, USA  
 Mara Silina, Friends of the Earth Europe, Belgium  
 Kliment Mindjov, Borrowed Nature, Bulgaria  
 Michael Stanley-Jones, International Campaign for Responsible Technology, USA

Petru Cocirta, Ave Natura, Moldova

Svitlana Kravchenko, Eco-Pravo, Ukraine

**NEWS IN BRIEF****Winning the Daisetsuzan National Park Case**

As stated in the 2/97 elni Newspaper, the Hokkaido prefecture government planned the construction of the Shihoro Plateau Road in the Daisetsuzan National Park. 21 plaintiffs brought a suit against the Hokkaido prefecture government to protect the last remaining wilderness in Japan on August 26, 1996, because it was illegal to expend public expenditure on the construction of this road. It was obvious that this road construction would destroy the ecosystem and the species in the park. The plaintiffs insisted that the road plan violated the mandates of the Biological Diversity Convention (BDC). Article 8 and the spirit of BDC mandates the government, including prefecture government, not to destroy ecosystems and the species diversity, and to conserve these 'in so far as possible'.

Although the governor appealed that this construction would be helpful to the regional economy, the plaintiffs insisted that this road is unnecessary, because there is another road and the new road would shorten the travelling hour by only 11 minutes.

As a result of the controversy, an NGO, the Pika Fun Club, was established in order to list pika as a natural monument. There is a big habitat of pika, a living fossil of the glacial period in the proposed area of this road. Now the Pika Fun Club is one of the biggest NGOs in Japan with over 2,000 members.

The suit and the citizens' movement pressured the Hokkaido prefecture to stop the road construction.

It is obvious that the construction of this road violates the obligation of BDC and it is clearly against public opinion. For one year the prefecture conducted investigations on the economic and environmental impact and found out that the economic impact would be little meanwhile the environmental impact would be serious. On March 17 1999 the governor announced to discontinue the road construction. After checking that the Hokkaido prefecture government would not expend any public expenditure to construct this road in an oral pleading, the plaintiffs withdrew this lawsuit.

In Japan, a strong bureaucratism exists and citizens have few rights to participate in administrative decisions. The statutes to protect the few remaining wildernesses in Japan are incomplete. Only a few persons who are "injured in fact" can bring administrative suits against the government under the Administrative Procedure Act (APA). NGOs cannot file a suit to protect the environment under APA. In the Daisetsuzan National Park case, people living in that area made use of the taxpayers provision under the Local Autonomy Act (LAA) to protect the park. Although the case was withdrawn before the court, this case constitutes a landmark in nature conservation movements in Japan.

*Further information: Morihiro Ichikawa, Sapporo, Japan, email: moichi@ibm.net*

**Zakynthos National Marine Park**

MEDASSET, the Mediterranean Association to Save the Sea Turtles, first filed an official complaint to the European Commission (EC) against the Greek Government in 1993 (P.4667/94), for the non-implementation of national and international laws and the recommendations of the Convention on the Conservation of European Wildlife and Natural Habitats (Bern), concerning the protection of loggerhead turtles in the island of Zakynthos, one of the most important habitats in the Mediterranean, where a national marine park is to be set up.

The complaint was renewed each year until 1997, when the DG XI stated that they had examined all the information received and considered that progress had been made in this case by the Greek Authorities. Therefore, formal initiatives against the Greek Government in the framework of an infringement procedure (Article 169 of the Treaty) had been suspended.

Immediately MEDASSET made a complaint to the EC Ombudsman regarding the lack of action by DG XI, and at last some action was declared necessary following an EC on the spot assessment. After 13 years of struggle by the Bern Secretariat, prevarication by the Greek Government, and Bern Convention decisions; a report on the legal situation with Recommendations, prepared by an IUCN legal expert in 1996, is the EC now considering whether to take the Greek Government to the European Court of Justice. Meanwhile roads are being widened parallel to nesting beaches, road lighting is being installed in open view of the beaches, more illegal buildings are erected on nesting beaches, and tourist trade operators on the nesting beaches take no account of the needs of the remaining sea turtles which are an endangered species around the world.

More information can be obtained from Lily Venizelos, Medasset, 1c Licavitou St., 10672 Athens, Greece. Email: medasset@hol.gr

## IMPRINT

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

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## 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.

### *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 nine 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,
- Voluntary Agreements - The Role of Environmental Agreements

#### *2 elni Newsletter*

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

jects, legal cases and developments in environmental law. *elni* therefore encourages its members to submit such articles to be published in the Newsletter in 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, director of 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**, professor of law, Bingen University of Applied Sciences, Bingen, Germany

**Nicolas de Sadeleer**, lawyer and academic for the Centre d'étude du droit de l'environnement (CEDRE) at the facultés universitaires Saint-Louis, Brussels, Belgium

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**elniPUBLICATIONS**

*elni (Ed.): Voluntary Agreements: The Role of Environmental Agreements*  
Cameron May Ltd., London, 1998, 544pp,  
ISBN 1874-698-627, pb., £60

*elni (Ed.): Environmental Impact Assessment  
European and Comparative; Law and  
Practical Experience*  
Cameron May Ltd. London 1997, 284pp, ISBN  
1 874698 074, pb. £40 post paid UK, £45 post  
paid EU, £50 post paid other countries.

*Sven Deimann / Bernard Dyssli (Eds.):  
Environmental Rights : Law, Litigation and  
Access to Justice*  
Cameron May Ltd. London 1995, 340pp, ISBN  
1-874698-11-2, pb. £40 post paid UK, £45  
post paid EU, £50 post paid other countries.

*Betty Gebers / Jerzy Jendroska (Eds.):  
Environmental Control of Products and  
Substances:  
Legal Concepts in Europe and the United  
States*  
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York, Paris 1994, Vol. 6, 179pp., ISBN 3-631-  
47672-8, pb. DM65,00

*Thomas Gehring: Dynamic International  
Regimes:  
Institutions for International Environmen-  
tal 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

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ment?*

*Current Legal Situation and Practical Ex-  
perience in Europe*

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York, Paris, 1993, Vol. 4, 241pp., ISBN 3-631-  
45863-0, pb. DM74,00

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York, Paris 1993, Vol. 3, 166pp., ISBN 3-631-  
45580-1, pb. DM59,00

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York, Paris 1992, Vol. 2, 196pp., ISBN 3-631-  
45172-5, pb. DM59,00

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ticipation and Litigation Rights of Envi-  
ronmental  
Associations in Europe  
Current Legal Situation and Practical Ex-  
perience*

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

## *INDEX OF elni ISSUES 1996-1998\**

### **Court Decisions**

ECJ Decides on Standing in Environmental Matters, Deimann, Sven, p.39-42 (1/98)

Disposing of Politically Dangerous Experiments: The President of the Court of First Instance Dismisses Application for Interim Relief against Commission's Non-Application of Article 34, Deiman, Sven, p.48-52 (1/96)

### **Deregulation**

Industrial Permitting Procedures and International Competition, Gebers, Betty, p.4-8 (2/96)

The Year of Living Dangerously: The U.S. Congress and the Environment in 1995, Wetstone, Gregory S., Buccino, Sharon p.29-33 (1/96)

### **Energy Climate**

Monitoring and Verification under the Kyoto Protocol, Jülich, Ralf/Herold, Anke, p.4-10 (1/98)

European Commission: 15% Reduction of Greenhouse Gas Emissions in Europe Is Possible, Jülich, Ralf, p.13-15 (2/97)

### **Environmental Impact Assessment**

EC Study to Develop and Implement a Strategy for EIA/SEA Research in the European Union, Haq, Gary, p.35-36 (1/98)

Implementing EC Directive 97/11/EC in the UK, Hamblin, Paul, p.18-20 (2/97)

The "Space" of EIA Law in Developing Countries: The Case of Suriname, De Mulder, Jan, p.9-15 (1/97)

EIA in the Netherlands: A Comparative Assessment, Wood, Christopher, p. 15-19 (1/97)

The Convention on Environmental Impact Assessment, Schrage, Wiek, p.21-26 (1/97)

Strategic Environmental Impact Assessment 1977-1995, Hey, Christian, p.9-16 (2/96)

EIA and EE in CEE and CIS: Convergence or Evolution? Stec, Stephen, p.17-21 (2/96)

Strategic Environmental Assessment: The Need for European Action Hamblin, Paul, p.30-31 (2/96)

### **Environmental Management**

Revision of the EMAS Regulation, Gebers, Betty, p.15-18 (2/97)

ISO 14001: An Uncommon Perspective: Policy Questions for Proponents of the Proposed ISO Standards on Corporate Environmental Management, Benchmark Environmental Consulting, p.33-38 (1/96)

### **Environmental Policy Tools**

US EPA's Environmental Protection Agency's 33/50 Program, Lewis, Sanford/Clish, Heather/Kieffer, Karen p.11-17 (1/98)

Voluntary Agreement on the Recycling of Old Cars in Germany, Gebers, Betty, p.57 (1/96)

Environmental Objectives instead of Last-Minute Environmental Protection, Bunke, Dirk/ Eberle, Ulrike/Grießhammer, Rainer/Kupetz, Renée, p.11-14 (1/96)

### **European Community Law**

Harmonization of the European Waste Management Law, Roller, Gerhard, p.24-26 (2/98)

Environment and EU Enlargement Dröll, Peter, p.16-19 (2/98)

EU Commission Proposes Directive on the Limitation of Nitrogen Oxide Emissions from Aircraft, Jülich, Ralf, p.36 (1/98)

EC Study to Develop and Implement a Strategy for EIA/SEA Research in the European Union, Haq, Gary, p.35-36 (1/98)

The "Seveso II" Directive and the Major Accident Hazards Bureau, Mitchison, Neil/Kirchsteiger, Christian, p.28-31 (1/98)

WTO Panel on EC Measures Concerning Meat and Meat Products (Hormones), Deimann, Sven, p.1-12 (2/97)

Revision of the EMAS Regulation, Gebers, Betty, p.15-18 (2/97)

Report on the Implementation of the 1991 Nitrates Directive, Gebers, Betty, p.23 (2/97)

European Commission: 15% Reduction of Greenhouse Gas Emissions in Europe Is Possible, Jülich, Ralf, p.13-15 (2/97)

Implementing EC Directive 97/11/EC in the UK, Hamblin, Paul, p.18-20 (2/97)

The Environmental Results of the Amsterdam EU Summit, Hallo, Ralph, p.27-28 (1/97)

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\* See the complete index of elni issues from 1991-1998 at <http://www.oeko.de/elni>.

## **International Law**

- Growth Hormones - Take Two, Deimann, Sven, p.43-49 (1/98)
- Draft for a Protocol on Water and Health, Gebers, Betty, p.37 (1/98)
- Trans-national Investments: The Multilateral Agreement on Investment (MAI), Hebard, Matthew, p.32-34 (1/98)
- Monitoring and Verification under the Kyoto Protocol, Jülich, Ralf/Herold, Anke, p.4-10 (1/98)
- The Bled Declaration (NGO Declaration on the proposed UN ECE Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making), p.20-23 (2/97)
- WTO Panel on EC Measures Concerning Meat and Meat Products (Hormones), Deimann, Sven, p.1-12 (2/97)
- The Public Participation Convention - Progress Report on the Negotiation, Wates, Jeremy, p.29-32 (1/97)
- Towards an ECE Convention on Access to Environmental Information and Public Participation in Environmental Decisionmaking, Wates, Jeremy, p.15-21 (1/96)
- Illegal Italian Driftnet Fishing, Goldman, Patti, p.47 (1/96)

## **Legal Standing**

- Publics Rights of Action under the Spanish Environmental Laws, Matos, Ignacio, p.6-10 (2/98)
- Access to Justice and the Swedish Environment Code, Nordh, Roberth, p.2-5 (2/98)

## **National Law**

- New Legal Framework for the Remediation of Contaminated Sites in Germany, Gebers, Betty, p.27-29 (2/98)
- Australia and the Recognition of Native Title - Mabo, Wik and Beyond, Reid, Jane, p.14-16 (2/98)
- Environmental Protection and the New Polish Constitution, Jendroska, Jerzy & Longi, Maria, p.10-13 (2/98)
- Publics Rights of Action under the Spanish Environmental Laws, Matos, Ignacio, p. 6-10 (2/98)
- Access to Justice - and the Swedish Environment Code, Nordh, Roberth, p.2-5 (2/98)
- New Legislation on Industrial Safety in Russia, Gebers, Betty, p.38 (1/98)
- Public Participation in the Legislation of the Russian Federation, Stec, Stephen, p.18-27 (1/98)
- Implementing EC Directive 97/11/EC in the UK Hamblin, Paul, p.18-20 (2/97)
- Report on the Implementation of the 1991 Nitrates Directive, Gebers, Betty, p.23 (2/97)
- EIA in the Netherlands: A Comparative Assessment, Wood, Christopher, p. 15-19 (1/97)

Environmental Protection in the New South African Bill of Rights, Loots, Cheryl, p.2-5 (1/97)

Aspects législatifs et réglementaires de l'environnement au Maroc, Maarouf, Rahhal, p.5-8 (1/97)

## **NGO Activities/Non-Profit Organisations**

- The Impact of the Aarhus (Arhus) Convention on Non-Governmental Organisations, Krzywkowska, Grazyna, p.20-23 (2/98)
- ECJ Decides on Standing in Environmental Matters, Deimann, Sven, p.39-42 (1/98)
- To Protect the Last Remaining Wilderness in Japan, Ichikawa, Morihiro, p.24 (2/97)
- The Bled Declaration (NGO Declaration on the proposed UN ECE Convention on Access to Environmental Information and Public Participation in Environmental Decision-Making) p.20-23 (2/97)
- The Public Participation Convention - Progress Report on the Negotiation, Wates, Jeremy, p.29-32 (1/97)

## **Participation/Information**

- The Impact of the Aarhus (Arhus) Convention on Non-Governmental Organisations, Krzywkowska, Grazyna, p.20-23 (2/98)
- United Kingdom will Enact a Freedom of Information Bill, p. 51 (1/98)
- Recommendations for the Revision of Directive on Access to Information, p.50 (1/98)
- ECJ on German Implementation of Access to Information Directive, Gebers, Betty, p.49 (1/98)
- Public Participation in the Legislation of the Russian Federation, Stec, Stephen, p.18-27 (1/98)
- The Public Participation Convention - Progress Report on the Negotiation, Wates, Jeremy, p.29-32 (1/97)
- Freedom of Access to Information on the Environment, Hallo, Ralph, p.22-29 (1/96)
- Towards an ECE Convention on Access to Environmental Information and Public Participation in Environmental Decisionmaking, Wates, Jeremy, p.15-21 (1/96)

## **Standardization**

- European Standardization Procedures: A Model for Reform, Führ, Martin, p.22-27 (2/96)
- Report on ISO 14001 and Developing Countries, Howard, Eric, p.31 (2/96)
- ISO 14001: An Uncommon Perspective: Policy Questions for Proponents of the Proposed ISO standards on Corporate Environmental Management, Benchmark Environmental Consulting, p.33-38 (1/96)