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ELNI NEWS

Environmental Rights Law, Litigation and Access to Justice

The new *elni* volume edited by Bernard Dyssli and Sven Deimann assembles the papers of the *elni* conference on Citizens Rights and Litigation in Environmental Law in Strasburg. The contributions describe the efforts at the constitutional and institutional level to establish a right to a healthy environment, and the strategies pursued to ensure those rights. Authors of the volume are: Gerrit Betlem, Luuk Boerema, James Cameron, Yves Corriveau, Bernard Dyssli, Carol A Hatton, Ulf Kjellerup, Ludwig Krämer, Sanford Lewis, Marie-José Littmann-Martin, Stefano Nespor, Zurab Nogaideli, Thomas Ormond, Dumitra Popescu, Y.S. Shemshuchenko, Paul L. Stein, Todd True, and Sandra Walker.

elni members can order this book at a special price (25% off the cover price), non-members at a price of £40 post paid UK, £45/$80 post paid EU, £50/$88 post paid rest of the world from Cameron May Ltd, 69-71 Bondway, London SW8 1SQ, Tel: +44 171 582 7567, Fax: +44 171 793 8353. (ISBN 1-874698-11-2, pb 340pp). A leaflet is enclosed in this issue.

Annual Conference in Milano Postponed

This year's annual *elni* conference was supposed to take place in autumn in Milano/Italy. *elni* board member Stefano Nespor and the organisation DOCTER agreed to organise the conference with the topic of environmental impact assessment. The organisers regret very much that the conference has to be postponed. Until now, we have not received a confirmation for the funding of the conference from the EC Commission or from foundations. However, we hope to hold the conference next year - either in spring or in autumn in Milano. Those members and non-members who are interested in delivering papers should get in touch with the *elni* coordinating bureau or with Stefano Nespor, Via Cellini 1, 20129 Milan, Italy, Tel: +39 2545 9934, Fax: +39 255 180 246.

North American Chapter of *elni*?

The establishment of a North American chapter of *elni* was discussed at the last annual conference with some of our members from the United States and Canada. It seems that the discussion might lead to some action. Yves Corriveau of the Quebec Environmental Law Center has shown his interest to establish a North American chapter of *elni*. He is supported by Sven Deimann from the European *elni* coordinating office in Darmstadt, who is doing research in Canada for a year. Interested colleagues from North America are requested to get in touch with Yves Corriveau or Sven Deimann at the Quebec Environmental Law Center, Tel: +1 514 931 91 90, Fax: +1 514 931 19 26.

Press Release on the French Nuclear Tests and Euratom

In July 1995, the elni coordinating bureau issued a press release concerning the French nuclear tests in the South Pacific. *elni* drew attention to the fact that the nuclear tests fall within the scope of the Euratom Treaty and require a notification or a permit of the European Commission according to Art. 34 of the Treaty. The release was taken up by newspapers and news agencies and triggered a big political discussion.

The success was made possible through *elni* members in different EU countries who spread the release at national level. *elni* was also in close contact with members of the European Parliament and Member States officials and provided them with information on possible legal actions that could be taken.

Access to Information

Stichting Natuur en Millieu continues the project on the application of the Access to Information Directive in the Member States of the European Union. Lawyers from all Member States and some associated states have already participated during the past two years in the project. The reports that were prepared allow a comparative view on the practice of access to environmental information in the different countries. The compilation of country reports will be published at the beginning of 1996.

An international workshop on access to information is planned in Madrid on December 18, 1995. For more information contact project coordinator Ralph Hallo at Stichting Natuur en Millieu, Donkerstraat 17, 3500 KB Utrecht, The Netherlands, Tel: +31 30 33 13 28, Fax: +31 30 33 13 11.

Support for the European Environmental Tribunal

The European Environmental Tribunal (EET) is a non-governmental organisation which is seated in Brussels. The organisation plans to put up a Euro-

pean Environmental Tribunal in Brussels, which shall be organised by volunteers from Member States of the European Union (see also *elni* Newsletter 1/95). From 21 to 23 September 1995 the EET hosted a workshop on „Green Access to Justice“. Lawyers from almost all Member States and from Central and Eastern Europe reported on the legal standing in environmental matters in their countries. It became obvious that in many countries legal standing for environmental organisations does only exist to a limited extent or does not exist at all. In some countries, such as Great Britain, the costs are quite deterring. The progress of the draft for an EC Directive on „Access to Justice“, which was prepared by the Öko-Institut in cooperation with FIELD in 1992, was discussed as well (see *elni* newsletter 1/94). It showed that the European Commission had taken up the subject of legal standing for NGOs again. Commissioner Emma Bonino has announced a directive on legal standing of consumer organisations and it seems that GD XI is discussing the issue of legal standing in environmental matters as well.

The participants of the workshop agreed to take up EET’s idea and organise an NGO Environmental Tribunal in Brussels. The Tribunal shall handle selected cases where a breach of environmental law is evident but which cannot be brought to the national court because of a lack of standing. Supporters and volunteers for this project are requested to get in touch with Dörte Fouquet or David Fouquet, 18 B rue Montoyer, 1040 Brussels, Belgium, Tel: +32 2 230 84 84, Fax: +32 2 2310139.

Enforcement of European Environmental Law and Access to Justice

Earthrights is the first environmental law and resources centre in the UK and we are environmental lawyers trying to find ways of making environmental law more accessible for the general public.

We are interested in contacting other environmental lawyers in Europe to compare ways in which European environmental legislation is implemented (or not) and to build on areas of best practice found. We hope to look at some selected case studies, for example, what action can a concerned citizen in your country take if air quality standards are breached or if an Environmental Impact Assessment was required but not carried out? Anyone out there interested in joining us in such a project please contact either one of us:

Peter Roderick, 101 Weavers Way, London, Tel: +44 171 388 33 41, Fax: +44 171 388 28 72, E-mail: proderick@gn.apc.org or

Sibylle Grohs, Rue de Stassart 116, 1050 Brussels, Belgium, Tel: +32 2 502 70 29.

ARTICLES

A Pollution Inventory - The Australian Experience

by Karen Bubna-Litic

Australia is currently in the process of developing a National Pollution Inventory. There is a trend in Australian environmental law and policy towards community right-to-know legislation and an increased role of public participation in decision-making[1]. This paper explores the consultative process that took place within Australia and describes some of the more controversial aspects raised by the process. This may be useful for other jurisdictions currently grappling with their own pollution inventories.

1 The Process

In Feb 1994, a public discussion paper was released by the Environment Protection Agency (EPA). To facilitate discussion of the National Pollution Inventory (NPI), the EPA arranged for one day public workshops to be held in all capital cities during June/July 1994. About 500 people attended these workshops. The discussion paper was mailed to approximately 4000 potential stakeholders and the EPA received a total of 107 written submissions in response to the discussion paper. The EPA were concerned with this low response rate.[2] However, after the Analysis of Public Comment Paper was released in January 1995, due to demand, further public workshops were held in major country centres throughout Australia. The original breakdown of responses was as follows:

- Industry 33%

- Environmental, conservation and community groups 27%
- Government 19%
- Individuals 10%
- Other stakeholders 11%

Most recently, in June 1995, a report has been published detailing a number of possible legislative models which the NPI can take.[3] A final form has not yet been decided upon.

2 Aims, Objectives and Benefits

The aim of the NPI is to encourage industry and government to work towards excellence in performance through public access to information on emission of pollutants and wastes.[4]

The objectives are

- "to provide information to enhance and facilitate policy formulation and decision making for environmental planning and management;
- to satisfy community right to know needs ... about the pollutants and wastes that are being released into the environment, especially those of a toxic or hazardous nature;
- to promote and facilitate waste minimisation and cleaner production programs for industry and government;
- to assist Australia in meeting international obligations;
- to assist in identifying priority contaminants entering the environment."[5]

It was expected that the NPI would deliver benefits to all of the stakeholders. For example, the inventory would give industry the opportunity to recognise inefficiencies of which they were not previously aware. Giving the public access to information would hopefully result in cleaner production by industry, cost savings and reduced pollution.

3 Stakeholder Interests

The major stakeholders, industry groups and conservation groups, rarely agreed on any of the issues put forward in the discussion paper, although both groups agreed to an NPI in principle. They also agreed, with the exception of representatives of small business, that the level of reporting should not be based on an employee threshold nor should it be related to industry category. Rather it should be related to risk to the environment and public health.

Their major points of disagreement related to costs, benefits, the chemical list and whether the system should be voluntary or mandatory. Conservation groups support a 'polluter pays' principle, whereas industry advocates the 'user pays' principle. Industry does not believe that the NPI will be a cost-effective regulatory mechanism.[6] In response to the suggested short list of 50-70 chemicals, conservation groups would favour a significantly expanded list whereas industry opposes a list of more than 50 chemicals. Industry would prefer a voluntary rather than a mandatory system. Its major concern is that of commercial confidentiality, an interest that needs to be balanced with that of the public interest.

4 Particularly Australian Issues

The structure of government power in Australia is divided between the Commonwealth of Australia and the states. Government power is derived from the Federal Constitution which lists the powers that the Commonwealth has to enact legislation. It doesn't have a specific head of power to enact laws to protect the environment. In the past the Commonwealth has been able to use various heads of power to achieve environmental protection, although the use of these heads of power has been challenged in the courts[7].

This raises the issue of whether the NPI can be implemented through Commonwealth legislation or through state legislation or through a combination of both. Conservation groups favour a national Commonwealth based legislative scheme incorporating mandatory reporting. They argue that this scheme would result in consistent standards throughout Australia, and that as environmental damage does not stop at state borders, environmental protection should be legislated at a national level. There is also some evidence that the current federal labour government is more sympathetic to environmental concerns than the liberal opposition, which is in power in some of the Australian states. Industry, on the other hand, opposes Commonwealth legislation, preferring any legislative changes to come through existing state legislation, which they believe would keep costs down. Their preferred option, however, is a voluntary approach whereby they would develop Codes of Practice to incorporate a standard approach.

5 Designing the Inventory:

5.1 What substances should be listed and how?

There is much disagreement amongst stakeholders as to whether Australia should start with a large or a small list of chemicals.

The main arguments for starting with a small list is the high cost of reporting and collating the information, together with evidence from other countries that most of the reporting is of a small number of chemicals[8]. However, a small list of chemicals would not really satisfy the community right-to-know aspect of the inventory, in terms of pollution information. Another problem with a small list of chemicals is that a company may substitute listed chemicals by those not on the list, but which are still hazardous to the community. The public may be misled by thinking that the company has reduced

its toxic emissions when all it has done is used non-listed chemicals.

The Australian chemical list would most likely be drawn from an existing overseas list, modified to fit in with local conditions. Establishing a list from scratch would be more difficult, although both methods would involve identifying selection and evaluation criteria. The consultative process in Australia identified three fundamental criteria to be hazard, risk and community concern. In addition to this, the application of the precautionary principle would mean that the list could not exclude a particular substance simply because it had not been proven to be hazardous. If there was uncertainty about the effect of the impact of the substance, it could still be included on the list. Whichever option is taken, the criteria chosen for selecting substances and varying that selection would need to be included in legislation.

In order for the inventory to achieve its stated aims and objectives, the process of establishing the list must be transparent to interested parties, not only so that they can provide input and comment, but so they can see how decisions are made and to observe how issues raised by particular parties are addressed.

The Australian Conservation Foundation supports the inclusion of a voluntary list, in addition to the mandatory list of substances to report on. They argue that the scope to report on the voluntary list would result in a truer measure of pollution because it would allow those companies, more proactive in environmental protection, to report on sources of pollution that were not necessarily toxic to humans. For example, contaminated storm water and sediment to waterways.

5.2 Reporting

5.2.1 Who must report?

The limited sector approach, as originally used by the US TRI in focusing on secondary manufacturing industry, was not supported by the Australian consultative process. It was seen as being discriminatory and not providing an extensive enough coverage.[9]

At the other end of the spectrum is the blanket approach, which would apply to all industries and government facilities. Arguably, if the main objective of the NPI is to have a comprehensive inventory of emissions, then this is the option that should be adopted. This option would bring in such sectors as mining, agriculture, commercial enterprises, waste treatment facilities and landfills, forestry and all levels of government. The advantage of this blanket approach is its comprehensibility of coverage. Its disadvantage is that unless the reporting mechanisms are tailored specifically for the different sectors, the information in the inventory may be meaningless to the stakeholders. A third option, the multi-sector approach, addresses these concerns by adopting a 'case by case' approach through discussion with industry stakeholders resulting in different regulations and different estimate techniques for different subgroups. This has the advantage of being more sensitive to the needs of the reporter, albeit more confusing for the community. This could be overcome by requiring more explanation to make it meaningful to the community. Another disadvantage of this approach is that it would only cover those facilities specifically listed.

The implementation of the blanket approach could be done most simply through legislation requiring any 'facility' that emitted any of the listed substances to report subject to specific thresholds and exemptions. The limited and multi-sector approaches would require a more complex regulatory framework implemented through subordinate legislation, with different regulations for different subgroups.

5.2.2 Direct/indirect reporting

Regardless of which approach is taken, the next issue is whether there should be direct or indirect reporting. The most effective way is direct reporting which requires the polluting facilities to measure their own emissions. A major concern of direct reporting, especially on small facilities, is the disproportionately high reporting burden placed on them. But to exempt all small facilities ignores the suggestion that they produce total emissions at least equal to those of large facilities.[10] The concern of small facilities could be somewhat overcome by the setting of thresholds and/or exemptions combined with indirect reporting for those facilities that fall below the threshold or are subject to these exemptions. To exclude them from any form of reporting would seriously undermine the value of the NPI.

The setting of thresholds could be based on the amount of chemicals produced, the amount of chemicals emitted or the number of employees. There is an argument that different thresholds should be set depending on the type of industry. This argument has been rejected in the UK which requires a report for all chemicals regulated under UK law. This comprehensive approach has community group support in Australia. Some of the industry respondents opted for a threshold based on the hazard, exposure and risk to the environment posed by each substance. One problem with this approach is that it may ignore the additive and synergistic effects of chemicals. A less complex approach would be the use of thresholds based on the total quantity used or emitted, regardless of its hazardous nature.

The option of having a threshold based on the number of employees was not supported by the consul-

tation process on the basis that small facilities often have little regard for environmental performance and in total, contribute substantial emissions.

However, it is acknowledged that small facilities will face a disproportionate burden in terms of resources and expertise in complying with direct reporting requirements. The possibility of subsidising consultants to work with small enterprises may help relieve this burden. Another way to relieve the burden on small facilities would be to use indirect reporting methods. Diffuse-source pollution, such as agricultural chemicals and urban runoff are of particular concern in Australia and it is argued that if the NPI is to be comprehensive, it should include diffuse source as well as point source pollution. For example, currently, there is no monitoring of the volume of pesticides being used in Australia. Direct monitoring of pesticides has logistical difficulties in that it would place a heavy burden on individual farmers who, at the present time, do not account for their use of chemicals, except for aerial spraying. Indirect reporting could come from suppliers or manufacturers of these pesticides as to the quantities sold to users.

Another issue of concern which may arise is where individual businesses in a certain area may have individual emissions that are unlikely to constitute a serious environmental threat but where their collective emissions do result in a serious threat. The Minister could be given power to declare certain areas to be one of significant environmental risk and if an area has been so declared, then individual firms, who would otherwise not be required to report, would have to do so.

5.2.3 What information should be reported?

This is one of the most controversial aspects of the NPI consultation process because an increased amount of information reported will increase the financial and administrative burden on both the reporting entities and on the government which needs to collate and disseminate the information. On the other hand, the information must be meaningful to the community, otherwise it is a waste of time and effort. A balance, obviously has to be achieved.

To satisfy the community right-to-know objective of the inventory, it has been suggested that the information should allow the public to do the following. To identify how much of each chemical goes into the air, water and ground at a specific site, specific geographic area and nationally. The public should also be able to compare releases from different facilities in different parts of the country, and compare releases among different kinds of facilities, to check that facilities are meeting emission standards and to identify areas with high numbers of releases.[11]

In order to be able to make comparisons across facilities and geographic region, there needs to be a standard structured approach in plain english. Reporting emission information causes particular problems because of the various methods of estimation and the different burdens that are placed on companies depending on the processes that they use. For example, a company may have to estimate the amount of each chemical that has evaporated, spilled, burned, been poured down the drain or incorporated into the final product.

It has also been argued that the frequency of emissions is almost as important as the emissions themselves. For example if a company emitted 4,000kg of benzine into the air, the health risks would vary depending on whether the release was evenly spread over the year or whether it was all released in one week. For the same reason, unforeseen releases should be included in a special category with more frequent reporting.

One of the bases underlying community right-to-know legislation is for the public to be able to use this knowledge combined with their considerable consumer buying power to get companies to use less and consequently release less hazardous chemicals into the environment. To this end, it is very important for the public to be meaningfully informed of, not only what is currently released into the environment but also how these substances are managed by the companies (so the public can gauge the risk of emissions from that company) and how toxic substances are incorporated into their products (so that the consumer can choose whether or not to buy that product). For example, the public may be interested to know the chemicals used as well as emitted from a photo processing company, as well as how the chemicals are managed on that site. If chemicals are transported, it would be useful to know how they are handled in the transportation process. These are strong reasons for incorporating toxic use reporting in the NPI.

An inventory based only on reporting emissions as they are released into the environment and one which ignores reporting when waste is stored or recycled, could be argued to be misleading. The argument of 'double counting' when waste is transferred to a recycling or treatment plant could be overcome by classifying this information separately so that when the waste is transferred, it is not classified as a release into the environment, but rather, as a transfer for recycling or treatment, and only the output of this recycling or treatment would be so reported. The NPI database could then also keep important information on recycling activities. There certainly needs to be provision made for reporting processes which move hazardous chemicals and wastes around, whether it be for recycling purposes, storage purposes or transportation purposes.

Another area where the public could be misled is where total emissions decrease but the reason for the decrease is not specified.[12] For example, they could assume that decreases in emissions were due to improved environmental performance rather than by factors such as decreased production levels. This could be somewhat overcome by requiring the reporting entity to explain the reason for a significant change in the NPI substance released or transferred, such as changed production levels, pollution prevention initiatives, redesigning production processes, spills, or paper recalculations. A stricter approach would be for companies to compile a source reduction and recycling report, with the aim of encouraging companies to focus on prevention at the source, rather than end-of-pipe solutions.[13]

5.3 Dissemination of the information

To satisfy the community right-to-know needs, subject to valid confidentiality concerns, the public should have free and easy access to meaningful information.

The question of having meaningful information has been addressed above, and to achieve this there must be some means whereby the public can interpret and make assessments of the risks involved. This would involve a public education program to help the public understand what information they could get and how it could be used by them. Perhaps, for the initial two year period of the NPI, the public's needs could be monitored because as the community becomes aware of what information is available on both the NPI and an accompanying contextual database (if this is the way that Australia will proceed), the more able they will be to articulate their needs and the shortcomings of the existing system. It may be advisable to have some continuous monitoring of community needs, which may change over time. Consequently, the process of dissemination needs to be flexible. Of course, this community right-to-know aspect needs to be balanced against the burden placed on disclosing entities. However, the need for continuous monitoring should not place an additional burden on companies. Implementing the needs of the public may place and additional burden on government agencies.

In terms of ease of access to the information, it seems that the data could be disseminated through a computer database, in CD ROM, by hard copy and through a free telephone support service. The database and CD ROM could be available through public libraries. The information should also be available through a variety of languages.

The database should be able to be searched through a number of fields such as environmental media, substances, company names, address of facility and postcodes so as to enable the user to make comparisons across facilities and across states.[14]

The consultative process favoured free access to the database, with the cost of administration being borne by the government with the possibility of subsidisation through fines and penalties for non-disclosure under the NPI and those imposed under existing pollution control legislation.

5.3.1 Commercial confidentiality

The need to protect the public interest needs to be balanced against reasonable claims to protect commercial confidentiality. Australia has a precedent in its worksafe policy[15] in terms of allowing information to be confidential if

a) the publication of the information could reasonable be expected to prejudice substantially the commercial interest of the applicant; and

b) the prejudice to the applicant outweighs the public interest in the publication of the document.

The more hazardous the substance is, the greater the public interest in having the information disclosed.

5.4 Enforcement

Problems with enforcement arise for two reasons. Firstly, there is the question of the amount of resources available for enforcement purposes. Secondly, there is currently very few sources of independent information detailing who is using toxic substances, against which the NPI disclosures can be examined.

Two areas that enforcement bodies must deal with are non-reporting and false reporting. In addition to fines and penalties for noncompliance, perhaps even a daily penalty for non-compliance, what must be recognised is the particular compliance burden that will be placed on small facilities. Some active support and advice should be available for these facilities.

It has been suggested that compliance take a similar approach to that recently adopted by the Australian Taxation Office.[16]

If a mandatory system is adopted in Australia, in line with other Australian enforcement procedures, heavy penalties are likely to be imposed. They would need to be levied on any person (which would include a corporation) who fails to comply and the penalty imposed could be imposed at a daily rate to encourage prompt reporting. Corporate offences should be based on strict liability. There could be a due diligence defence as there are under other environmental penalty legislation[17].

Australia is also looking at the use of adverse publicity, either in addition to or instead of other penalties. Publically announcing the names of those who do not comply has been found to be a useful com-

pliance measure when the public has easy access to such information, such as through newspapers.

Because government resources for enforcement are often low, there has been a push from community and environment groups to allow third parties to bring their own actions to enforce compliance. There already exists such a section in the Environmental Planning and Assessment Act [18] and this section has certainly not 'opened the floodgates' as has been the argument of opponents of third party rights. Such rights would need to be detailed in legislation as Australian common law generally only gives standing in public interest suits where a 'special interest' can be established.

Another method designed to achieve compliance is to give companies an incentive to report through the use of tax incentives, which could substantially reduce the cost of compliance. The Income Tax Assessment Act could provide deductions for the costs of preparing the NPI report and the cost of preparing cleaner production programs.

6 Conclusion

As Australia embarks on the introduction of a National Pollution Inventory, it is well positioned to learn from the pitfalls of some of its predecessors and to take advantage of some of their successes. Hopefully, it will achieve some of its own successful innovations, especially, in the area of enforcement. The consultative process has been a worthwhile process especially in terms of achieving a consensus from all stakeholders that a National Pollution Inventory is, at least in principle, a worthwhile project. Let us hope that all the stakeholders will reap benefits from the NPI. •

References

1 For example, section 123 Environmental Planning and Assessment Act 1979 (NSW).

2 For example, if the low response rate was indicative of a low demand for the information provided by the NPI, then this would have serious costing, pricing and public resource implications.

3 Minter Ellison "Final Report to the EPA - Development of legislative modelling for the National Pollution Inventory and associated Community Right-to-Know in Australia" June 1995.

4 Commonwealth Environment Protection Agency "National Pollutant Inventory - Public Discussion Paper" Feb 1994.

5 Ibid.

6 Even though, the experience in the US from the industry perspective has been that the savings realised as a result of reduction in waste generation have more than offset the cost of undertaking the inventory.

7 The use of the trade and commerce power was upheld in the Tasmanian Dams case (*Commonwealth v Tasmania* (1983) 158 CLR 1) and the external affairs power in *Richardson v The Forestry Commission* (1988) 164 CLR 261.

8 For example, in the US, in 1992 there was mandatory reporting of 338 chemicals. 60 chemical accounted for 90% of the reports.

9 The original US TRI excluded mining and milling operations, hazardous waste treatment and disposal facilities, municipal incinerators, power plants, sewerage treatment works, and all federal installations.

10 United States General Accounting Office, Toxic Chemicals, Washington DC, 1991, at 28-29.

11 Minter Ellison, op. cit. supra n 3, p.112.

12 In illustration of this, when the EPA announced the TRI results of 1988, there was an incredible reduction from the previous year of 75%. The reason for this was not the drastic improvement in industry performance, but the fact that the EPA had removed four low risk chemicals from the list. After taking this into account, the reduction was only 9%.

13 This was introduced in the USA in 1990 as part of the Pollution Prevention Act.

14 The US TRI allows searching on facility names, the public contact person at the facility, trade secret status, name of substance, environmental mediums, basis of estimates, geographic location of zipcodes.

15 Worksafe Australia's 1990 National Policy on Commercial Confidentiality of Data Relating to Worksafe Substances.

16 This is basically a self assessment scheme with the ATO doing random checks and audits.

17 Section 7 Environmental Offences and Penalty Act 1989 (NSW).

18 See Paul Stein's discussion of s123 in ELNI Newsletter 1/95 at p.10.

Belgian Ecotaxes

by Delphine Misonne

The ecotax is a new financial instrument that has been introduced in Belgium[1] in order to tackle waste issues at source and to promote a more environmentally friendly use of raw materials and energy. The ecotax deals with problems at source, in preventive way, by creating incentives to reorientate consumption patterns and choices of production. Reuse, rather than recycling, is the key of the system. This choice has been made on the basis of various recent international studies and of the experience of some North European countries, such as Sweden, the Netherlands, or Denmark, where economic and fiscal instruments have recently appeared in order to address environmental issues. However, instead of copying an existing scheme, the Belgian system offers a quite innovative approach and is worthy of closer consideration.

The launching of the ecotaxes scheme is an important step in Belgium; it proves that politicians are now aware of the urgency of dealing with sustainable development issues and that they are ready to impose even drastic measures upon all kinds of producers. However, because the law has been drafted and adopted in politically troubled circumstances, it is not flawlessly conceived. The „green parties" have indeed bargained their support for the so-called third institutional reform of the Belgian State in exchange for provisions on ecotaxes being hurriedly inserted in the newly adopted texts. Moreover, the scheme is still at an experimental stage and needs further elaboration. A commission, composed of experts in economics and/or environmental matters, shall therefore at a later stage evaluate the economic and environmental impacts of the taxes and propose any necessary adaptation.

Ecotaxes have been defined as „any tax of a sufficient amount to significantly reduce the use or consumption of environmentally-unfriendly products and/or to reorientate production and consumption patterns towards products that are more acceptable from the point of view of environmental protection and natural resources conservation". The main objective of the law is consequently not to raise new tax revenues but to prompt a modification of the consumer's behaviour and to influence the choices of producers. Actually, would all targets be met, the tax revenue would approach the zero rate. It does not match therefore with the classical meaning of the word tax and has received the name of ecotax.

1 The Scheme

The ecotaxes scheme is articulated around two axes:

- A quite substantial tax is imposed on some products so as to dissuade the consumer from buying them.
- A deposit system is to be organised by the producer for the effective reuse or environmentally-friendly reprocessing of its products. Those products failing under the deposit system shall not be subject to the tax.

The products that are already subjected to the ecotaxes have been chosen according to three criteria:

- the existence and availability of non-taxed substitutes;
- the symbolisation by the product of wasteful behaviour and the pedagogic value of an action being focused on this product;
- the possibility for the producers to implement the law within short deadlines.

Products targetted by the scheme are consequently, at the moment:

- some containers such as beverage containers or industrial products containers (for resins, pesticides, ...),
- papers and cardboards,
- some one-way products such as disposable razors or cameras,
- batteries,
- pesticides and pharmaceutical products.

1.1 Containers

The general philosophy of the scheme regarding beverage containers can be summed up as follows: Reuse is better than recycling, recycling is better than landfilling or incineration. To guarantee the collection and the reuse of empty containers, a deposit system shall have to be put in place by the producer.

Containers entering the deposit system shall be exonerated from the tax if they fulfil three conditions:

- It must be proven that containers are reusable (seven refillings at least) and shall actually be reused, once collected.
- The deposit fee is in accordance with the minimum amount specified in the law.
- A visible distinctive sign is affixed on each container.

Not all containers are subjected to the scheme but only, for now, those that are already reusable. A distinction is thus made between different types of beverages according to the type of material they are packaged in: because beers, sparkling waters, cokes and lemonades can already be bought, for example, in reusable glass bottles, they are targeted by the new tax-deposit alternative. By contrast, beverages such as milk, that are not yet available in Belgium in other containers than cardboard boxes or plastic bottles, shall not be subject to any changes until 1997.

Nevertheless, it is provided for that all PVC containers shall be taxed, without possibilities of exonerations, because of the very specific problems they are assumed to cause to the environment.

Concerning industrial products, all containers of substances such as inks, resins, oils, solvents or pesticides intended to be used for professional purposes shall be submitted to a tax, once being put on the market place, except again if an effective deposit system is put in place.

1.2 Disposable products

The legislator chose to impose a tax on some very well known disposable products: cameras and razors. Because they are made to be used only once and then thrown away, they were deemed by the Belgian legislator to be a symbol of the wasteful use of resources and, for pedagogic reasons, even if the amount of waste they create is not so important, the tax being imposed on them is so high that they are destined to disappear from the market. An exoneration is nevertheless provided for cameras whose components are reused or recycled by 80% at least.

1.3 Batteries

All batteries are subjected to a tax, except if they are used for some professional purposes or if they are part of a deposit system. The objective of the legislator is to keep batteries away from landfills and incinerators; special reprocessing or recycling installations shall be put in place by the producers. So no matter if a battery is labelled as being environmentally-friendly or long-duration; the only way to escape the tax is the deposit system; because even a „green“ battery contains some harmful substances that could leak into the ground or evaporate when consigned to conventional processing methods.

1.4 Pesticides and pharmaceutical products

The purpose of the tax is to raise the awareness of the consumer as regards the potential toxicity of pesticides and pharmaceutical products for humans and the environment, and to prompt the consumer not to use them where it is not necessary. The targeted products are classified in four groups, according to their possible effects on human health and the environment, and to each group a different tax rate is applied. No deposit system can be organised as an alternative but considerable exceptions are nevertheless provided for: Agricultural pesticides are for example exempted from any tax, which constitutes a severe weakness of the system.

1.5 Paper products

Regarding the ecotax on paper products, the objective of the legislator has been to stimulate the use of recycled fibres in the fabrication of paper and to favour the consumption of non chlorine-bleached paper.

A tax shall therefore be imposed on all papers and cardboards that do not contain a minimum percentage of recycled fibres, except for those intended to be transformed into books or that shall be used for wrapping food or medicines. Chlorine-bleached papers shall also be subjected to a tax. Temporary exonerations are provided for in some cases.

Because it has not yet been possible to develop an efficient control procedure to evaluate the exact percentage of recycled fibres a paper product is made of, the scheme has not yet reached the stage of practical implementation.

2 The Reactions

Industry and consumer groups have put up a fierce opposition to the new law. Their complaints focused mainly on the apparently arbitrary choices of products, on discriminations being so created, and consequently on the illegality of the scheme as regards Belgian and European laws.

They promptly went to the Belgian Court of Arbitration on issues of competence of the federal legislator and of breaches of the constitutional principles of equality and non-discrimination[2].

The role of the Belgian Court of Arbitration is twofold:

- It rules on questions of competences, since the federalisation of the Belgian State, so as to ensure that the allocation made between the federal legislator and the regional or community authorities is respected;
- It is the gurardian of the constitutional principles of equality, non-discrimination and freedom of education in Belgium.

The issue of competence was raised because it was disputed that ecotaxes had been elaborated at the federal level and were to be implemented in the whole country, although most environmental issues, and among them the waste policies, were normally to be dealt with by the regional authorities. The question was also whether ecotaxes were to be classified as product norms, a matter for the federal state. The Court decided that the intervention at the federal level was justified because the ecotaxes were to be defined as purely fiscal measures and consequently came under the constitutional jurisdiction of the federal legislator. Moreover, the elaborated scheme would not impede the initiatives of other authorities and would preserve the economic unity of the State.

Because the Court of Arbitration has not been established as a censor of the legislative power, it cannot examine the opportunity of adopting the law itself nor whether there would have been better ways of meeting the pursued goals. On the issues of equality and non-discrimination, its role is consequently limited to controlling whether the adopted measures are not obviously arbitrary or unreasonable.

The court ruled that all the incriminated provisions were in accordance with the fundamental principles of equality and non-discrimination, except for one minor point concerning magazines that were at first arbitrarily exempted from the tax on paper. According to the Court, the heavy tax being imposed on one-way razors is perfectly legal because it is proportionate to the aim pursued by the legislator; the fact that only some beverage containers are targeted for the time being is resonably justified by the criteria of actural reusability; because of their potential or real toxicity, it is not unreasonable to limit the use of pesticides by a high tax rate, etc... One should not be puzzled by these rulings. Because of the above mentioned limited power of the Court, the controversy over the ecological relevance of the taxes cannot be dealt with in this forum. The question of their real efficiency, to be checked by audits and life-cycle assessments is a matter for the political power. However, without doubting the seriousness of the decisions of the Court, it clearly appears that a cancellation of the scheme would have put the whole of the last institutional reform of the Belgian State at risk.

Questions of European law have also been raised before the Court, concerning the alleged non-respect of the constitutional principles of equality and non-discrimination. Four types of issues were submitted to the Court of Arbitration:

A The violation of Articles 30 and/or 95 of the EC Treaty: Are ecotaxes in breach of the European provisions on free movement of goods?

For the Belgian Court of Arbitration, it has been clearly stated by the European Court of Justice that tax impediments falling under the scope of Article 95 cannot be covered at the same time by Article 30 provisions. Because fiscal measures were at issue here, the Court of Arbitration decided that only Article 95 could be applied and ruled that no violation of this article could be established: Ecotaxes on PVC containers have not been introduced to protect Belgian industrial interests.

B The violation of Directive 83/189/EEC laying down a procedure for the provision of information in the field of technical standards and regulations.

According to the Court of Arbitration, ecotaxes do not fall within the scope of the directive, because the marking obligations are not sufficiently clear and constraining to constitute a technical regulation under the meaning of the directive, which was unofficially confirmed at the time by the Commission. In the meantime however, modifications have been made to the directive so that the „technical regulations“ do now include „the technical specifications or other requirements which are linked to fiscal or financial measures affecting the consumption of products“ and the markings shall have to be notified in future (Directive 94/10/EEC).

C The violation of Directive 91/157/EEC on batteries and accumulators containing certain dangerous substances.

According to the plaintiffs, a complete harmonisation of the matter has been organised by the directive and there is therefore no room left for an intervention by the national legislator. Moreover, it was claimed that the consulting obligation laid down in the directive regarding the elaboration of deposit schemes had not been complied with. The Court rejected the argument of harmonisation and ruled that the possible violation of the consulting obligation was irrelevant to the case because it did not lead to any discrimination.

D Preliminary questions to be referred to the Court of Justice on the basis of Article 177 of the Treaty: The Court of Arbitration decided not to refer, holding that no questions of interpretation arose because the answers were clear.

3 Conclusion

The objective of reducing waste production and natural resources exhaustion by a preventive action at source has led the Belgian legislator to develop the ecotaxes scheme. The development of this new kind of economic instrument is an important move

in the direction of sustainable development. The taxes shall raise the awareness of consumers and prompt changes in consumption and production patterns. Producers shall be given incentives to anticipate and adapt investment strategies. However, even if it survived the intervention of the Belgian Court of Arbitration, the scheme has many drawbacks and does not fully convince as to its real positive impact on the environment. A number of details of its implementation have been left unaddressed and the whole scheme is not yet fully operational. •

References

1 Livre 3 de la loi ordinaire du 16 juillet 1993, Moniteur belge/Belgish staatsblad, 20.7.1993.

2 See Moniteur belge/Belgish staatsblad, 21.2.1995 to 7.3.1995.

Proactive Instruments in Business Management[1]

by Martin Führ

If the objective is to be pursued to reduce resource consumption and materials-related environmental impacts to a level that we can term as a sustainable and environmentally compatible economy, then this goal must be implanted into the „innovation motor" of industry. For the necessary restructuring processes concern the very heart of entrepreneurial decision-making: the selection and design of products and the selection and structuring of the manufacturing process. These decision-making processes lie in the hands of the individual companies, but are subject to certain framework conditions that are set by society and are thus alterable; amongst these, economic and juridical determinants are just as relevant as social values.

Other than in the case of end-of-pipe pollution control, which is generally restricted to shifting the problems from one medium to another, the reorientation of economic activity as sketched in this contribution cannot be ordered from above, „by decree". The central issue is rather to stimulate the very own interest of the companies to pursue environmental protection activities going beyond their statutory obligations. This contribution presents instruments capable of providing such stimulation. These so-called proactive strategies are discussed on the basis of a broad-based international survey[2] and assessed with regard to their efficacy (1). The conclusions derived from this can partly be implemented by companies of their own accord, but in part also require altered statutory frameworks (2).

The concept of proactive behaviour of a company[3] refers to measures and programmes that contribute to a reduction of environmental impacts without such behaviour being directly mandatory by law.

It must be kept in mind, however, that such entrepreneurial activities do not develop in a void, but are conditioned by the societal and economic framework conditions. Put in general terms, the objective must be to, on the one hand, set sufficiently clear control signals, while, on the other hand, leaving enough leeway for innovative behaviour.

1 Proactive Approaches - An International Comparison

In the following, innovative proactive approaches found in the international debate are presented. From an economic perspective, the conditions of marketing of supplied products and services are a, if not the decisive, driving force behind entrepreneurial action (see 1.1 below). To allow an orientation to environmental criteria, product-related environmental impacts must be inventorized and evaluated (1.2), and environmental information communicated to the entitled social groups (1.3). As a complementing instrument, liability regulations can contribute to the strengthening of proactive approaches.[4]

1.1 Conditions of marketing

As the interface between corporate strategies and social groups, forms of marketing taking environmental requirements into consideration („eco-marketing") play a decisive role. Here it is beyond question that such a strategy must at all times be demonstrable and verifiable by facts; purely placard-style „eco-campaigns" will not lead to sustained success on the extraordinarily sensitive markets for environmentally oriented products. What is rather required is long-term concepts based on generally recognized procedures of determination and assessment of environmental impacts.[5]

A number of approaches for proactive action offer themselves in the context of product marketing and the service industry. Beside the manufacturers and consumers, possible actors here are above all to be found in the trade.

As the examples of the Swiss Migros supermarket chain or of the German Neckermann postal order

company show, trading firms can provide a highly effective contribution to the breakthrough of ecologically innovative products and to the displacement of environmentally damaging products by means of an environmentally oriented product line policy. However, the precondition to this is that the consumer delivers an „appropriate“ response to the proactive action. This in turn presupposes an awareness on the part of the consumer that honours proactive strategies.[6] Here comparative advertising with environmental criteria (point 1.1.1 below) can play a part, and product information by means of eco-labelling (1.1.2), and also extended statutory guarantee periods for consumer durables (1.1.3).

1.1.1 Comparative advertising

Advertising with environmental characteristics can promote the sales of environmentally benign products, and thus offers a heightened incentive to manufacture such products. It is therefore recommendable to permit comparative advertising[7] with environmental characteristics under certain conditions.

However, comparative advertising can only then contribute to the desired goal of establishing an economy that takes materials flows more into account if it is ensured that the advertised products are really more compatible than those of the competitors. The requirement should therefore be enshrined by statute that the statements made must be objectively verifiable and true. Furthermore, the environmentally related advertising must only be allowed to refer to „essential properties“ of the advertised product.

1.1.2 Ecolabelling

Ecolabelling of relatively environmentally benign products can also provide an incentive for proactive behaviour, as the manufacturers expect competitive advantages over other products lacking the label. An important precondition to the success of an ecolabel is the acceptance of the label by the consumer. The quality of the award criteria and the award procedure are therefore of great importance. Both the German and the Canadian award models largely do justice to this aspect.[8] In concrete practice, however, the participation of representatives of consumer and environmental organisations proves difficult. It is regularly a serious problem for these organisations to send representatives to the participatory and decision-making bodies. This gives rise to an imbalance in the representation of interests between industry on the one side, and the consumer and environmental associations on the other. This deficit could at least be partly alleviated by the introduction of legislation making provision for a suitable remuneration for such work. These payments could be drawn from the compulsory contributions paid by industry for the use of the label.

The limits of environmental labelling are encountered in such cases where the hazards proceeding from certain substances would indicate a ban on the substances. In these cases it can be counterproductive to simply award the ecolabel to the products having a comparatively slighter damage potential.

In general, it is an obvious weakness of ecolabelling schemes that they provide little information. The consumer receives no precise statement as to the impact of the product, but merely the general statement that it is „relatively ecofriendly“. For the normal customer, the assessment criteria are practically inaccessible. For certain products, the possibility of enclosing product information in the packaging of the product should therefore be considered. Such information should be drawn up in a clear form and according to uniform criteria, in order to allow the consumers a swift comparison of the environmental impacts.

1.1.3 Legal guarantee periods

As under current conditions it generally lies in the economic interest of market suppliers to reduce the useful life of products in order to be able to sell new goods again, mandatory guarantee periods should be established by law. Within such periods, the manufacturer must remedy any defects that occur at his own cost.

This implies a shifting of risk, with the effect that the person who can determine product design and material selection will indeed take aspects of longevity sufficiently into consideration. An incentive is created to develop and market products that have high quality and are easy to repair. This would ultimately make an instrument available that complements the conventional instrument of mandatory acceptance by the producer of discarded products, and assigns responsibility to its generator and is in conformity with market principles.

The introduction of legal guarantee periods fulfills several objectives at once:

- It provides a substantial contribution to the reduction of materials throughput and to waste prevention.
- It develops an incentive on the part of suppliers to utilize development openings leading towards long-lived products.
- The market opportunities of high-quality products are markedly improved.
- Jobs are created in the service sector; moreover, these are in the (spatial) regions in which the goods are used.

- The instrument is in conformity with market principles, and also need not be in conflict with EC law.

In view of the necessary development work on the one hand and the associated structural change on the other, legal guarantee periods should not come into effect out of the blue, but only after a transitional period of perhaps three or five years. The duration of guarantee periods should be extended gradually.

If the body politic decides to pursue such a course, the suppliers can, already today, take the altered framework conditions into account. They are thus in a position to orient their R&D efforts to this goal. In what manner they satisfy the requirements remains up to the innovation capabilities of the individual companies.

1.2 Inventorization and evaluation of product-related environmental impacts

If a company wishes to orient its decision making to environmental criteria, then the product-related environmental impacts must be inventorized and evaluated. The precondition to this is a system of in-plant environmental accounting (see 1.2.1 below). On the basis of this, environmental performance assessments of plants or sites and environmental life-cycle assessments (LCAs) of products can be drawn up (1.2.2). On the supra-plant level, too, environmental life-cycle assessments of products and „Produktlinienanalyse“ studies can be employed for decision making (1.2.3).

1.2.1 In-plant environmental accounting

In in-plant environmental accounting, we can distinguish between internal inventorization and evaluation on the one hand, and the passing on of information to external persons[9] on the other. In its Corporate Environmental Report (1993, p.16), the Ciba-Geigy AG company stresses the importance of both elements for proactive approaches as follows:

> *„The initial demand for environmental reporting came from the public. But in responding, we have discovered that the information is extremely useful to our own management. We have learned about our successes, our inadequacies and the gaps in our knowledge. It's a good example of the way in which external pressures ultimately prove of benefit both to the environment and to industry.“*

A necessary step is the establishment of an internal environmental reporting system, which should be a component of the environmental management tool kit. On this, once again, Ciba-Geigy:

> *„SEEP (Safety, Energy and Environmental Protection) Reporting has become an important management tool, complementing audits, training and policy-making. It allows us to measure safety, energy conservation and environmental performance at the corporate level as well as the local level. As a result priorities can be established, site specific targets can be set and progress can be measured. We believe that site-specific goals are more effective than a single company-wide target because priorities can be set according to the highest environmental return from a given investment.“*

Only when companies are aware that they have possibilities within their sphere of influence to reduce the input of materials and the releases of damaging substances, can corresponding action be expected from them. The following, mutually reinforcing instruments are to be recommended:

- The legal obligation to submit for every plant or site a report on the usage and release of substances forces the companies to address their materials throughput.
- The legal obligation to examine reduction possibilities for every plant or site from a technical and economic perspective delivers findings that lead to savings concepts for the reduction of raw material inputs and of arisings of residues.

Concerning the drawing up and implementation of reduction plans it should be examined how these can be made to comply with the stipulations of the EC Regulation on environmental management systems.[10]

1.2.2 Environmental life-cycle assessments of products and Produktlinienanalyse studies

Proceeding from the thus acquired information, and supplemented by data from upstream or downstream processes, plant- or site-related environmental LCAs or Produktlinienanalyse[11] studies can be drawn up. These permit an in-plant comparison of products, processes and systems. Moreover, opportunities for optimization can be revealed along product life-cycles.

When developing new products, environmental product LCAs can be employed as a central planning instrument. Comparative assessments of environmental impacts can also be used in decision making in trading firms, such as when restructuring product lines.

Environmental product LCAs and Produktlinienanalyse studies can also be employed beyond the enterprise. A comparison of different product life-cycles can show alternative solutions that are purposeful from a macroeconomic perspective.

Supra-plant LCAs and Produktlinienanalyse studies can also be applied in the debate on any alteration of the legal framework, and are suited to aiding consensus-finding in environmental policy.

1.2.3 Further measures

Already today, corporate environmental information systems have in part been established as the foundation of the assignment of „environmental costs" to individual parts of corporations or productive units of a company. It could be a useful approach to set the internal assignment of these costs within the company at a higher level than the present attribution of external costs is estimated, e.g. in anticipation of future rises in disposal costs. This would create an internal incentive for innovation in anticipation of any expected internalizations of external costs, which would provide the company with a competitive edge over the competitors at a later point.

A further initial step towards the establishment of environmentally oriented product assessment is the standardization of inventorization and evaluation methods. This can be promoted by the creation of the institutional preconditions for product assessment and labelling.

To ensure that environmental impacts can be determined, it is furthermore necessary to establish a duty of manufacturers or importers to disclose the composition of their products. As this is a basic precondition for the determination of environmental impacts, this duty should - with due regard to the methodological work conducted by standards institutes and special-interest associations - be enshrined by law.

1.3 External environmental reporting

Beside the elements discussed in the points above, which are partly purely in-plant, here it is transparence towards the public that is of central importance.

1.3.1 Objectives and relevance

The problem-related forward-looking surveying of data, together with updated, continuous, objective, and understandable reporting, provides the basic preconditions for targeted environmental policy measures. Such information acquisition requires clear precepts and a structured information processing and editing.

If the consumer is to recognise environmental performance and take behavioural decisions on the basis of this recognition, an appropriate informational basis must be given. This must reach the consumer, meaning that it must on the one hand be disseminated by a body in which the consumer has confidence, and must also, on the other hand, insofar as a comparative assessment has been made, be verifiable in a reproducible manner. Only the consumer who considers the information over which he commands to also be reliable will change his behaviour in such a fashion that this provides positive incentives for suppliers with good environmental performances.

The societal dissemination of information must not, however, be restricted to „isolated data". The goal must rather be to create or intensify an awareness of the effects of the behaviour of the actor by means of formulating local, regional and global interconnections and cause-effect chains.

Environmental reporting must, moreover, also offer perspectives. It is therefor important to also - and particularly - report on successes at the local, regional, national or supra-national levels. This must also include the possibility of drawing particular attention to individual companies with exemplary character; just as, conversely, negative examples must be openly named.

1.3.2 Materials-related disclosure requirements

The environmental reporting of companies should be subjected to standardization.[12] One goal that can be pursued by this is to ensure the comparability and expressiveness of the data; furthermore it can thus be achieved that the data of the environmental reports can serve as basic modules for the compilation of environmental audits and LCAs.

For the external communication with the public, it is recommendable to create a duty of declaration in a form similar to the American Toxic Release Inventory (TRI). This has shown positive effects in several respects:

- The companies receive transparence as to the substances released and transferred by them.
- The publicity provides incentives to improve the performance with regard to realization of reduction potentials.
- The data of the TRI can be used for efficiency review of other political measures.

Despite the positive approach, the concept still has weaknesses. The TRI operates with absolute quantities for release and transfer. The assessment encounters difficulties because no connection is made to the size of the plant or site, nor to the produced goods.[13]

It thus appears expedient to demand, as a first step, the compilation of reports with output data according to the model of the Toxic Release Inventory. Subsequently, a duty to compile materials flow inventories could then be introduced.[14] The final outcome of this would be the availability of an expressive „materials flow register".

1.4 Liability law

As an instrument that complements and flanks both regulatory law and other proactive instruments appealing more to the free will of the entrepreneur, liability law fulfills an important function (1.4.1

below), which can be further intensified by insurance company risk management (1.4.2).

1.4.1 Legal framework conditions

The efficacy of liability law, and thus the possibility of internalizing costs so that they are borne by their generators, depends above all upon the probability that claims are presented and that they are enforced. This can be influenced by the design of the legal framework.

We therefore recommend[15] that the rules governing the burden of proof are further improved in favour of the damaged party, that environmental damages are recognised as recoverable damage, and that the standing of environmental associations to sue for the assertion of such damage is introduced.[16]

All in all, however, the effect of liability law must not be overestimated. Liability law always remains a merely flanking instrument. This applies equally to its relationship to preventive requirements ensuing from regulatory law, and to other proactive measures. In entrepreneurial decision making, too, it is to be assumed that liability law is not of prime importance. On the other hand, liability law has a very broad effect, as it potentially affects every company.

1.4.2 Insurance companies and risk management

Under certain conditions, a third-party liability insurance can also create an incentive towards proactive behaviour. One avenue is through rate structuring; a more effective way, however, is through risk management on the part of the insurance companies. Particularly in the case of small and medium-sized enterprises that do not command over an environmental management system, counselling and risk assessment performed by the insurer can contribute to a better estimation of the risks inherent in the enterprises' activities, and to intensified environmental protection efforts. It can be assumed that a rigid environmental liability regime will also increase the demand for insurance, and that the supply of environmental third-party liability policies by the insurers will further rise. State information campaigns on the necessity and possibility of an environmental third-party liability insurance could be helpful for small and medium-sized enterprises. Moreover, the insurers should be involved in the structures of other proactive instruments, in particular manufacturer/user cooperation schemes.

2 Closing Remarks

If we are to assess the opportunities of proactive strategies within the framework of materials flow control, we must proceed from the following basic consideration:

Adopted policies have the task, on the one hand, of creating freedom of movement for innovation; on the other hand, however, they must also ensure that this freedom is actually used in a direction that provides a substantially improved protection of the environment.

If avenues that have been recognized as leading into dead-ends are closed, then this at the same time opens up new paths of development. Those companies that anticipate such developments acquire competitive advantages that are also economically profitable.

Therefore the design of corresponding framework conditions must create incentives for innovation and attach control impulses to these in a manner ensuring that due consideration is given to environmental requirements. Only insofar as this precondition is fulfilled can proactive approaches be successfully implemented. Thus the prevailing economic boundary conditions at the same time define the limits of proactive instruments.

It is also to be noted that the successes of proactive action of individual actors described in this article would not be conceivable without a changed awareness of society as a whole. Accordingly, the instruments should generally be oriented to further pressing ahead with this change of awareness, and this above all requires an active participation of the public. Tendencies directed towards a repression of ecological civil rights are counterproductive here.

We must finally stress the high value of environmental education. This applies to all phases of education, be it in the school or preschool age, in vocational training, in the universities, or in in-house and off-the-job advanced vocational training. All groups of society are called upon to intensify their efforts in this field.

Even if all these changes are realized in the near future, we will still be faced with restructuring on a major scale. We therefore agree with Hans Kindler, Executive Committee Member responsible for environmental protection at Ciba-Geigy, when he answers the question as to what is the greatest long-term challenge for the company in the field of environmental protection as follows:

> *„To define at all levels of our organisation what sustainable development means today and in the future, and to integrate this goal into our business plans."*[17]

The goal of political considerations must be to create „pathways" towards a sustainable economy in such a fashion that they are economically compatible for companies and branches, and thus viable.[18] •

References

[1] This paper presents some of the findings of an international study (the complete summary can be obtained from the author). The study was performed for the Study Commission („Enquête-Kommission") of the German Bundestag „Protection of humanity and the environment" („Schutz des Menschen und der Umwelt") with the cooperation of academic lawyers Betty Gebers and Gerhard Roller (Environmental Law Network International/Öko-Institut e.V., Darmstadt Office) and economist Kilian Bizer, Cologne. I owe thanks to these and all those who have contributed to the successful conclusion of the study by their willingness to give interviews or by passing on material.

[2] See on this in detail: Führ, M./Gebers, B./Roller, G./Bizer, K., Ansätze für proaktive Strategien zur Vermeidung von Umweltbelastungen im internationalen Vergleich (Approaches to proactive strategies for the prevention of envionmental impacts - an international comparison), in: Enquête-Kommission „Schutz des Menschen und der Umwelt" (Ed.), Grundlagen des Stoffstrommanagements (Fundamentals of materials flow management), Bonn 1995 (in preparation).

[3] The scope of the present examination thus does not include the behaviour of public authorities, which can have a thrust pointing in a similar direction, for instance in procurement, construction works et cetera.

[4] Beside this topics the study reflects also other elements of proactive strategies, e.g. the setting of economic framework conditions, Cooperation solutions (which can allow a particularly effective development of proactive strategies), and, finally, environmental management and environmentally oriented business administration, which play a key role in implementing these strategies in company policies.

[5] As regards individual products or product groups, the comparative inventorization of environmental impacts has a central role; see on this II B below.

[6] National or international environmentally related standards can provide an important contribution to the formation of value attitudes - on the part of both industry and the consumer; see on this the example of the Dutch Nationaal Milieubeleidsplan (NMP) 1989 and the critical assessment in Glasbergen/Dieperink, Milieu en Recht 1989, 298 ff.

[7] Cf. COM(91) 147, OJ C 337 of 21.12.1992, p.137.

[8] Cf. Roller, Der „Blaue Engel" und die „Europäische Blume", EuZW 1992, p.499 (503); Walker, Le label écologique au Canada, in: Jadot/de Sadeleer: Le Label écologique et le droit, Bruxelles 1992, p.19.

[9] See on this also C. below.

[10] See on this Führ, M./Niederstadt, F., European Framework for „Environmental Auditing", ELNI-Newsletter 2/91, p.7-11.

[11] The term „Produktlinienanalyse" refers to a methodology developed at the Öko-Institut in Freiburg/Darmstadt, Germany. It comprises a more comprehensive approach than conventional life-cycle assessments (LCAs), encompassing also safety and social aspects. It would thus best be rendered in English as „comprehensive product assessment", but is to be left in German as a „hallmark" term upon the express wish of its author, Rainer Grießhammer of the Öko-Institut (personal communication, June 1993).

[12] This applies also to the declarations made in the environmental statement pursuant to the EC Regulation on environmental management systems and eco-auditing.

[13] The US state of Massachusetts has supplemented the reporting obligations of the TRI by input data (see on this: Massachusetts Toxics Use Reduction Institute (Rossi/Geiser), Toxic Chemical Management in Massachusetts, Lowell 1993). Since 1991/1992, an annual report must be delivered on the toxic substances used. The companies must submit materials flow inventories. This takes account of the above-mentioned weaknesses of the TRI regime.
In order to have an indicator of success of prevention measures, the Massachusetts Toxics Use Reduction Act has also established the duty to compile a „Byproduct Reduction Index". The index is to make any changes in the relation between the quantity of products and the arising residues transparent. It remains to be seen whether the Byproduct Reduction Index proves to be a suitable indicator of success.

[14] As the final objective must be to not only reduce the usage of toxics, but in fact to reduce the total usage of materials, all materials should be taken up in the scope of these inventories.

[15] The introduction of a lender liability such as has developed in the case law of the USA on contaminated sites (cf. R. Tom, Interpreting the Meaning of Lender Management Participation Under Section 101(20)(A) of CERCLA, 98 The Yale Law Journal, 925 (1985), and Gentry/Vollmann, Environmental Costs: Making Lenders Liable, 1 RECIEL (1992), 422) is currently not recommended. It should, however, be subjected to further examination whether it is expedient to impose disclosure, information and investigation obligations concerning environmental risks upon the financial institutes in connection with their lending practices.

[16] With respect to the improvement of the preventive effect of liability law, the instrument of introducing association lawsuits is particularly suitable. It can raise the efficacy of liability law by increasing the probability that a damaging party is actually held liable in the event of a damage to the environment. Statutory safety mechanisms, in particular the earmarking of compensatory payments for a specific use, can be set up to prevent any feared abuse of such a litigation right.

[17] Corporate Environmental Report 1992, Basel 1993, p.19.

[18] Dyllik, Thomas/Belz, Frank: Ökologie und Wettbewerbsfähigkeit von Unternehmen und Branchen in der Schweiz, Konzeption eines Forschungsprojekts des Schweizerischen Nationalfonds (Ecology and competitiveness of companies and branches in Switzerland, Conception for a research project of the Swiss National Fund), Institut für Wirtschaft und Ökologie an der Hochschule St. Gallen, Switzerland, April 1993, p.6.

Acute Questions of the Conservation of Bielowieza Primeval Forest in Poland

by Konrad Nowacki and Tomasz Tatomir

1 The problem of the conservation of the Bialowieza Forest is very complicated and complex. The protection campaign has been going on for several decades and its intensity has strengthened recently.

The Bialowieza Primeval Forest (Wilderness) has remained the last part of the natural (original) deciduous forests in Europe which once spread from the Atlantic coast to the Ural Mountains. Its age is about ten thousand years now.

The total area of the Primeval Forest amounts to $1475km^2$, divided by the frontier of Poland and Belarus. The Polish part of the Forest extends over a territory of $595km^2$ but the conservation area founded as the Bialowieza National Park is only $47km^2$ large. Outside the Park there are little reserves, altogether $23km^2$. In total, the protected spaces represent not more than 10% of the Forest. On the Belarussian side all the Primeval Forest has been established as conservation territory in the form of the National Park.

In the whole Forest there exists a great diversity of fauna and flora species (ten thousand and five thousand respectively). In 1979 the Bialowieza National Park was declared by UNESCO as a world biosphere reserve. The Park is also registered on the List of World Heritage. In spite of these facts, in the Primeval Forest not covered by the National Park regime wasteful forest management has continued. Since 1918 more than 27 mln m^3 of timber has been carried out of the Forest. Rare species like oaks, ash-trees, hornbeams or spruces have been cut down, even when they were three hundred years old. An extensive exploitation of the Primeval Forest has irreversibly damaged the biological equilibrium. More and more rare plant and animal species are disappearing from this wilderness.

2 At present opponents to the idea of declaring all the Bialowieza Forest a protected territory are: the Ministry of Environmental Protection, Natural Resources and Forestry, a considerable number of foresters, local authorities and the majority of the local population.

Their main argument is that there are no funds to protect such a vast area of ancient woodland and, conversely, the timber economy therein yields enormous profits. They also argue that the wood industry allows local inhabitants to find employment and to subsist. Once the Forest were to become legally protected, this industry, they claim, would be destroyed; people are fearing forced emigration.

The ministry representatives and some foresters argue and warn that without human action the Forest might perish - consumed by insects and plant-eating mammals. All the opponents do not take into consideration the fact that this forest constitutes the last natural wilderness in Europe and should be saved as a historical monument. There should even be introduced a special procedure establishing, in accordance with international conventions, the entire Forest as such a monument and part of world heritage. This is the path that should be chosen by the Ministry of the Environment!

The opponents do not accept arguments that people working up to now as woodcutters, timber transport drivers and foresters could find good jobs as guards or in the administration of the Park, once the wilderness is officially declared a National Park. Local authorities and inhabitants could satisfactorily earn e.g. out of tourist facilities developed in the great Park.

Regarding the above situation and not only the interest of the Polish NGOs in protecting the Bialowieza Primeval Forest, some legal steps and real actions (campaign) should be necessary:

- legal service; consultations, legal opinions, advice for the NGOs;
- preparation (getting ready) of claims, appeals and law suits to the administrative instances and the courts;
- organising meetings and journeys to keep in contact with interested institutions, offices and associations; contacts with the NGOs abroad;
- collecting documents concerning the situation in the Forest; access to government information;
- training for the NGOs representatives and inhabitants;
- educational campaign for the local population and authorities;
- organising the financial (also international) support and reimbursement for involved NGOs, institutes and legal advisers to maintain and continue the campaign.

3 The campaign for the conservation of the Bialowieza Forest was clearly reinforced in September 1994, when Polish NGOs and representatives of some scientific centres in Poland organised a press conference in Warsaw and other cities focused on the above question.

The main Polish NGO involved was and continues to be the "Workshop for All Beings" ("Pracownia na Rzecz Wszystkich Istot") from the Bielsko-Biala which coordinates numerous initiatives and actions for the protection of Bialowieza Forest and nature conservation. It also coordinates the international campaign supporting the Polish actions. Up to now the campaign has been supported by the: League of the Protection of Nature, Polish Society for the Protection of Birds, Polish Environmental Law Association (PELA), Regional Ecological Center in Katowice, Polish Tatra Association, Green Federation from Tychy and Lowicz, Foundation for Ecological Culture from Jelenia Góra and others (not to mention scientific state organisations, councils and institutes).

International NGO support came from Friends of the Earth (Milieudefensie), Netherlands, Reforest the Earth, Earth First!, England, and the Native Forest Network (NFN), also from England, the Sierra Club Legal Defense Fund, USA, Earth Alarm, Pro Regenwald, BUND, NGOs from Germany and also *elni* (Darmstadt), Ökologischer Umweltbund (Leipzig), and B.I.S.O.N., Canada. Not all organisations have been listed here. Polish and international journals have published reports, photos and materials showing the cutting of ancient old trees in the Forest.

A very important, "visual" stage of the campaign was the demonstration in front of the Parliament and in the Old Town on 21 September 1994 in Warsaw.

During the demonstration the ecologists showed huge roots of several hundred years old trees which had recently been cut in the Bialowieza Primeval Forest by the woodcutters.

The next day a group of Parliament deputies officially questioned the Minister of Environmental Protection, Natural Resources and Forestry whether his office and the government provide a conception for the entire (complete) protection of the whole Bialowieza Forest.

On October 14 the Sejm (Parliament) debate took place and during it a representative of the Ministry of Environmental Protection had to explain its negligence.

On the day of the Sejm debate an appeal to the Polish President Lech Walesa as well as a resolution were sent to the signatories of the "Green Lungs of Poland" Agreement. The Presidential Environment Council with its head Prof. S. Kozlowski approved the ecological conception of the total protection of the Bialowieza Forest.

Alas, all these initiatives have not been responded to positively enough by the Government.

On October 18 1994 the General State Forest Directorate presented its management project for the Bialowieza Forest entitled "Promotion Project of the Forest Entity (Complex)".

On November 8 the Ministry of the Environment issued an enacting decision referring to this whole project.

The Ministry decided that the Forest should partially be protected. Cutting of old trees such as oaks, pines, hornbeams should be stopped and allowed only upon the individual decision of the Ministry. Cutting out of the rest of the wood should depend on the zones where the trees are. The Forest is divided into three sectors (zones), which vary according to the protection intensity and the different rules of timber management. In the first one, being in direct connection with the Bialowieza National Park, using heavy forest engines and equipment, is abandoned. Generally, clearings there are only possible upon the consent of the Ministry. In the second sector timber management is limited. It is possible only to reproduce the trees quantity of the naturally devasted forest. The third zone supports in principle the normal forest economy. Cutting out the trees is allowed.

The decision of the Ministry had been critised by almost all Polish ecological organisations involved in the campaign, first of all by the "Workshop for All Beings" which started spectacular actions and elicited mass-media support. December 5 was declared as the "Battle Day" for the Bialowieza Forest. The action found much attention in the world, and among the partially listed foreign organisations.

English, Irish and American organisations which see in the Bialowieza Forest a part of European nature heritage interrogated the Polish embassy in London and the Polish government on the state and future of the Forest. Citizens' signatures on the Declaration of Protection have been collected.

Subsequently, on December 8-9, in Bialowieza village a seminar on the "Protection and biological diversity of the ecosystems in the Bialowieza Forest" took place. The earlier project of Dr. Jedrzejewscy submitted to the Ministry of the Environment to enlarge the National Park regime to all the Primeval Forest was also discussed. This project was approved by many scientists and ecological associations.

The main objective of the discussions was to argue for the idea of the protection of this unique wilderness.

As noted in part 2 of our report, local inhabitants, some few scientists and officials from government plead rather for the further exploitation of the Bialowieza Forest. They are a minority compared to

those who support the National Park Project covering all the area of the Forest.

On January 12-13 1995, a session of state organisations including the State Council for Nature Protection at the Ministry of the Environment (Head - Prof. Dr. R. Olaczek), the Committee for Nature Protection of the Polish Academy of Sciences (Head - Prof. Dr. L. Tomialojc) and the Scientific Council of the Bialowieza National Park (Prof. Dr. J.B. Falinski) took place in Bialowieza.

An outcome of the above meeting together with the representatives of NGOs and of the Ministry of the Environment was a declaration and appeal to the Polish Parliament to protect that part of the Bialowieza Primeval Forest which is on Polish territory, by founding the National Park. Only the Sejm has the legal possibility to do this.

Ecology organisations published materials and information about different conferences, declarations, and actions in this regard in their journals (like "Wild Life", "Green Brigades", "Polish Nature", "Green Ark" and many others). Also letters to the government and the Prime Minister have been reported.

Unfortunately, the Polish Government and especially its Ministry of the Environment have not yet followed these appeals and scientific or citizen protests.

According to reports of ecologists in winter 1994/95 the old trees in the Bialowieza Forest were cleared for timber (possibly even without a permission of the forest administration).

On April 5, the Day of Earth, the campaign to protect the Primeval Forest has been intensified anew in Poland. Therefore the international pressure on the government is necessary, being an important factor in the battle for the protection of the Bialowieza heritage.

4 Following arguments during the campaign have been raised:

- Bialowieza Forest has remained the last so large primeval wilderness in Europe.
- It must be protected, both as a historical monument and as a part of natural world heritage according to the international conventions and treaties.
- The whole Belarussian part of the Forest has already been established as a National Park; in 1979 the Polish and Belarussian Bialowieza Forest was declared a world biosphere reserve.
- The biodiversity in the Forest and the old trees must be saved from damage and cutting.
- Once the legal and actual National Park regime will have covered all the Polish part of the Bialowieza Primeval Forest, the possibility of income from the (controlled) tourism will open up for the population and village inhabitants.
- International financial assistance and some grants from the Polish State for regional development and the new National Park should be given.

Contact addresses for the international campaign: Coordinator "Pracownia na rzecz wszystkich istot", Modrzewskiego 29/3, 43-300 Bielsko-Biala, Tel./Fax: +48 302 94-96. Directly from Bialowieza: Bogumila Jedrzejewska, Tel.: +48 835 12-278, Tel./Fax: +48 835 12-289. In Europe (Denmark): Jesper Petersen, Anna Adhemar: Tel.: +45 35 37 14 23, Fax: +45 31 38 56 16. In Canada: B.I.S.O.N., Grzegorz Kubicki, Tel. +1 604 2 47 84 34. Information and support also possible from: Polish Environmental Law Association, Tomasz Tatomir, Konrad Nowacki, ul. Kuznicza 46/47, 50-138 Wroclaw, Poland, Tel./Fax: +48 71 44 47-47. •

CURRENT AFFAIRS

Compatibility of the French Nuclear Tests with Art. 34 of the Euratom Treaty

by Sven Deimann / Betty Gebers

The President of the French Republic, J. Chirac, has announced his intention to continue underground nuclear testing carried out at Moruroa in the South Pacific which started in September 1995.
This article examines to what extent the course of action set on by the government of France is unlawful in light of the provision of Art. 34 of the Euratom Treaty. The article is partly drawn from a legal memorandum the authors prepared for Greenpeace Germany.[1] The recent decision of the European Commission on the safety of the test series has been taken into consideration.

1 General Applicability of the Euratom Treaty

The announced resumption of underground nuclear testing can only violate provisions of the Euratom Treaty if the planned tests come within the territorial and substantive purview of the Euratom Treaty.

Before a violation of any particular provision of the Euratom Treaty can be discussed, it is hence necessary to examine first whether the Euratom Treaty actually applies to experiments with nuclear weapons.

The Euratom Treaty was signed together with the Treaty establishing the European Economic Community (EEC) in 1957. At the time promoting the use of nuclear energy was deemed to be of such importance that the European Atomic Energy Community (Euratom) was established as a separate community beside the EEC and ECSC.

The EEC, Euratom, and the ECSC since then remained three different communities and separate legal entities. This is made clear even today by Art. 232 of the EC Treaty which, in its paragraph 2, defines the EC Treaty's scope in relation to the Euratom Treaty. According to this provision, the provisions of the EC Treaty „shall not derogate from those of the Treaty establishing the European Atomic Energy Community.“ Provisions in the Euratom Treaty as the more specific law (*lex specialis*) thus take precedence over any provision in the EC Treaty[2].

It follows that recourse has to be had first to the provisions of the Euratom Treaty when determining the scope of this Treaty's provisions with respect to French nuclear tests. Only if the Euratom Treaty makes no express provision in relation to the problem at issue can the EC Treaty be referred to as well.

1.1 Territorial scope of application of the Euratom Treaty

Carrying out nuclear tests at Moruroa would first of all have to fall within the Euratom Treaty's territorial scope of application.

The Moruroa Atoll constitutes a part of the French overseas territory (Territoire d'outre mer) Polynesia and as such a non-European territory under the jurisdiction of the French Republic. According to Art. 198 (1) of the Euratom Treaty the provisions of the Treaty apply to the non-European territories under the jurisdiction of the Member States as well. This rule is laid down without reservations as to a particular or all of the French overseas territories. In particular one can infer neither from the English text („... non-European territories under their jurisdiction.“) nor from the French version („... territoires non européens soumis à leur juridiction“) that only French overseas „départements“ but not overseas territories should fall within the Treaty's territorial scope of application[3]. The provisions of the Euratom Treaty, therefore, apply to territories belonging to French Polynesia, including Moruroa and Fangataufa, as well[4].

Thus Art. 198 Euratom Treaty draws the Euratom Treaty's territorial scope wider than the EC Treaty does for its scope of application. Whilst territories listed in Annex IV to the EC Treaty are merely associated to the EC for purposes of EC law, Art. 198 (1) of the Euratom Treaty brings all non-European territories under the jurisdiction of a Member State within the Euratom Treaty's territorial scope[5].

Hence, although the European Communities and Euratom may share identical institutions, both communities, as separate legal entities[6], are to be differentiated in relation to their territorial scope[7].

1.2 Substantive scope of application of the Euratom Treaty

The planned tests at Moruroa can, however, only constitute a breach of Community law if they fall within the Euratom Treaty's substantive scope of application as well.

When carefully reading the Treaty's provisions, the lack of a provision similar to Arts. 223 and 224 of the EC Treaty either in the preamble to the Euratom Treaty or in the definition of Euratom's tasks in Arts. 1 and 2 or in Arts. 221-225 Euratom Treaty becomes conspicuous. Indeed, the entire Treaty contains no provision that exempts military use of fissile materials in general from the Treaty's substantive scope.

1.2.1 The definition of Euratom's tasks in Arts. 1 and 2 Euratom Treaty

At first glance, however, Euratom does not appear to be concerned at all with military uses of nuclear energy. For Art. 1 of the Euratom Treaty merely defines as the task of Euratom to contribute to a raising of living-standards in the Member States by creating the preconditions necessary for setting up and developing nuclear industries. In a like manner, Art. 2, which elaborates on the general task given to the Community in Art. 1, contains no explicit reference whatsoever as to whether military uses of nuclear energy are to remain outside the ambit of the Treaty or not. In this regard, the provisions defining Euratom's tasks and purposes and the language used to describe them remains vague and open-ended.

When examining the provisions more closely, however, one finds numerous exceptions which modify the substantie scope of individual chapters in relation to the defence interests of Member States and corresponding uses of nuclear energy[8] which make it quite plain that military uses of nuclear energy were not to be totally excluded from the Treaty's remit.

Thus, Art. 24 (1) of the Euratom Treaty, in particular, provides for the confidentiality and secrecy of certain information obtained by the Commission in the course of carrying out the Community's research programme. Where such information could compromise security and defence interests of a Member State, the Commission can refuse third party access to such information and keep a lid on it[9]. This provision would have been unnecessary and, indeed, would not make any sense, had the framers of the Treaty intended to exclude military uses of nuclear energy a priori from the Treaty's substantive scope of application

Furthermore, if the Treaty's definition of Euratom's tasks were to be read in such a way that military uses of nuclear energy fall outside the Treaty's ambit, one would expect to find inserted into the Euratom Treaty a provision similar to Art. 223 (1) (a) of the EC Treaty[10]. By virtue of such a provision the Member States could have been expressly authorised to withhold certain information or patents related to nuclear energy from the Commission. Arts. 24 and 25 of the Euratom Treaty, however, expressly deny the Euratom Member States the power to withhold such information.

Finally Art. 2 e) of the Euratom Treaty[11] indicates that the framers of the Treaty were aware of the possibilities for military uses of nuclear energy and, as a result, wished to ensure that appropriate measures could be taken against illicit military uses of fissile materials.

1.2.2 The exception made in Art. 84 (3) of the Euratom Treaty

A general exemption of military uses from the ambit of the Euratom Treaty could, if at all, only be read into Art. 84 (3) of the Euratom Treaty. This provision states that the Euratom Treaty's provisions regarding safeguards against the diversion of fissile materials to unintended purposes (Arts. 77-83) „may not extend to materials intended to meet defence requirements which are in the course of being specially processed for this purpose or which, after being so processed, are, in accordance with an operational plan, placed or stored in a military establishment.“

It is to be noted in this context that Art. 84 (3) of the Euratom Treaty exclusively concerns the substantive scope of application of Chapter VII[12]. The provision's systematic position at the end of Chapter VII clearly indicates its limited scope. It can, therefore, only regulate the application of Chapter VII to military uses of nuclear energy but not how or to what extent the entire Treaty extends to military uses of nuclear energy[13]. In view of the limited scope of Art. 84 (3) Euratom Treaty the general applicability of any other provision in the Treaty, therefore, remains unaffected[14].

1.2.3 Comprehensive supply with nuclear fuels pursuant to Art. 52 Euratom Treaty

That military uses of nuclear energy have not been exempted from the Treaty's scope in general is furthermore borne out by Art. 52 Euratom Treaty. For paragraph one of this provision which guarantees every Member State equal access to ores and fissile materials is said to preclude any kind of policy on the part of Euratom's nuclear supply agency which would discriminate against a Member State on grounds of this Member State carrying out a military nuclear programme as well[15].

1.2.4 Definition of substantive scope of application in Art. 197 Euratom Treaty

Hence the sole criterion for determining the Treaty's scope of application must be the definition of what constitutes „special fissile materials“ or „ores.“ Where these substances are the object of human activity anywhere within the Treaty's territorial scope of application, it applies in substance as well[16].

Since the Treaty unequivocally lists Plutonium 239, which is required for building a nuclear explosive device, as one of the special fissile substances in Art. 197, the nuclear tests at Moruroa fall within the Treaty's substantive scope as well.

2 Violation of Art. 34 Euratom Treaty

If the tests fall within the Treaty's general scope of application the question arises whether they require the assent of the Commission pursuant to Art. 34 (2) of the Treaty. Art. 34 concerns „particularly dangerous experiments“ that a Member State wishes to carry out. Before proceeding with such an experiment, the provision requires the Member State first to notify the Commission and to obtain an opinion from the Commission as to the adequacy of obligatory additional health protection measures. The notification must, therefore, contain information about obligatory additional health protection measures.

If the experiments are „liable“ to have effects on a territory which is under the jurisdiction of another Member State, they require the assent of the Commission pursuant to Art. 34 (2) of the Treaty as well.

2.1 The substantive scope of Art. 34 Euratom Treaty

In this regard cognisance should be taken of the *ratio legis* informing the provisions laid down in Chapter III on health protection in the Euratom Treaty. According to the European Court of Justice, the *ratio legis* of Art. 37, a provision that requires notification of radioactive discharges and is comparable to Art. 34, consists, on a purposive method of interpretation, in allowing for the prevention of radioactive contamination hazards[17]. This purpose, in the Court's view, commands an interpretation guided by the provision's *effet utile*, if otherwise it could not be attained[18].

When construing Art. 34 Euratom Treaty in keeping with the provision's purpose and *effet utile,* one has, however, to take into account the fact that a coherent radiation protection concept which exempts particular sources of radiation is impossible. For the effects of ionising radiation can hardly be differentiated according to the different causes and sources of radiation[19]. For this reason there can only be a single and uniform legal concept for radiation protection which would have to fail its objective and be deprived of its practical effect[20] if one were to leave aside a priori particular radiation sources.

On this view, an interpretation of Art. 34 Euratom Treaty which were to exclude from the provision's ambit sufficient protection against the dangers of ionising radiation due to a military use of nuclear energy would have to defeat the provision's purpose. For this purpose can only be identical to the one informing Art. 37 Euratom Treaty, namely to confer sufficient powers on the Commission prior to a particular hazard in order to be able to take precautionary measures against a possible radioactive contamination of the population or the environment which, in the case of Art. 34, is due to a „particularly dangerous experiment.“[21]

Hence, the planned underground nuclear tests at Moruroa fall in principle within the substantive scope of Art. 34 Euratom Treaty as well - notwithstanding the military nature of the 'experiments.'

This result is confirmed again by reference to the Treaty's legislative history. Thus, the French Secretary of State for Foreign Affairs at the time when the Treaty was being ratified, M. Maurice Faure, unequivocally stated on 21 June 1957 before the French National Assembly's Family, Population and Public Health Committee that the provisions of Art. 34 apply to both civilian and military „particularly dangerous experiments.“ Accordingly the Committee's report on Bill no. 4676 authorizing the President of the French Republic to ratify the Euratom Treaty concluded:

> *Les dispositions de l'article 34 s'appliquent à toutes les expériences particulièrement dangereuses, civiles ou militaires.*[22]

In total accordance with this view of the law, France did in fact notify its atmospheric military nuclear tests in the Sahara in the early 1960s[23] and complied with the procedure laid down in Art. 34 of the Euratom Treaty[24].

2.2 Particularly dangerous experiment

It should be self-evident that exploding an atomic device even at a depth of 1000 m below the lagoon's coral rock constitutes a „particularly dangerous experiment.“[25]

The results of previous scientific investigations into the environmental effects of nuclear tests at Moruroa do permit the conclusion that due to fissures in the rock previous tests have resulted in a release of radionuclei into the Pacific Ocean[26]. Samples of plankton taken by Greenpeace outside the 12-mile-exclusion zone contained caesium 134[27]. Scientists believe that the rock has become fragile as a result of the previous tests' detonations[28]. Consequently it is to be feared that the environmental risk will substantially increase if testing is to resume. All re-

search groups who worked around the atoll were given only a few days to take samples and measurements. As a result the real extent of a possible contamination due to underground nuclear testing is difficult to estimate. It is safe to assume, however, that health hazards exist as a result of the ocean's contamination with radionuclei. Fish frequenting the waters around the test sites can pick up contaminated algae and plankton. This way a food chain accumulation of radionuclei can occur causing an internal exposure to radiation to the population living in the region of Moruroa, especially on neighbouring islands. It has to be added that the World Health Organisation assumes that no nuclear test is without health risk. From this evidence one has to conclude that the French nuclear tests are to be considered as particularly dangerous in general and specifically in this particula r case.

However, the European Commission evidently felt that in order to apply Art. 34 it itself bore the burden of proof for the dangerousness of the tests. As France did not provide any information on the dangerousness of the tests, the Commission was consequently unable to prove such dangerousness. It thus did not enforce the requirements of Art. 34 prior to the start of the test series. This is a construction that is hard to follow, for the purpose of Art. 34 is precisely to permit the Commission to determine whether hazards to health proceed from the tests or not. The application of the „particularly dangerous experiment“ criterion can therefore always only proceed from the potential of the test to have harmful effects, as the information necessary for any conclusive assessment is then to be acquired via the procedure pursuant to Art. 34.

It must moreover be noted that the practice of the Commission to assume, when in doubt, that nuclear tests are not dangerous, fails to do justice to the precautionary principle. The affected citizens in the South Pacific are thus exposed to unnecessary risks. The Commission, in its function as the guardian of the Treaties, would therefore have had a duty to insist, in the interests of the protection of its citizens, upon a notification or assent pursuant to Art. 34.

Finally, on October 25 - well after two tests had already been carried out without notification or assent - the European Commission decided not to apply Art. 34 of the Euratom Treaty in this case. The President of the Commission Santer and Environmental Commissioner Ritt Bjerregaard announced that they do not consider the testing of nuclear bombs a particularly dangerous experiment[29], because there will be no health dangers for workers or the population. It appears that France has submitted data or information concerning the tests and their possible radiological effects which allow this conclusion. Some members of the European Parliament, such as the liberal de Vries, strongly critized this decision. The Commission had obviously not had the opportunity to inspect the testing area and the quality of the information provided by France was considered questionable.[30].

At this point it can not be concluded whether sufficient information has actually been made available to the Commission. Given the context with health protection that Art. 34 (1) Euratom Treaty establishes it would appear that the Commission may only take into account considerations related to protecting the health of the affected population. Since Art. 2 (b) Euratom Treaty specifies in relation to Euratom's tasks that the Community is to ensure the application of uniform safety standards to protect the health of workers and of the general public, one would expect these uniform safety standards, adopted under Art. 31 Euratom Treaty, to provide the Commission with an appropriate substantive standard for its decision under Art. 34 (2) Euratom Treaty. When applying the Euratom basic standards it has to be kept in mind, that health dangers can not only result from direct external exposure of the population. Considering the geographical situation of the testing side, it seems rather unlikely that the Euratom basic standards for the protection of the population will be exceeded through direct external exposition to radiation resulting from the nuclear tests.

In order to evaluate the Commission’s decision it would be interesting to know whether the Commission has indeed restricted its view to direct external exposition or whether there has been information on other means of radioactive exposition. This concerns in our view especially reliable information on the accumulation in the food chain and the subsequent internal exposition.

A further question would be whether the commission has taken into account the probability of accidents. In the event of an accident an uncontrolled release of radioactive substances into the atmosphere is to be feared that could lead to contamination of the entire South Pacific region. Factual proof for this assumption was furnished by an accident which occurred in the summer of 1979. The atomic device remained stuck at a depth of 400m and could not be lowered to the planned depth of 1000m. Nevertheless the device was exploded and the ensuing shock waves engulfed the entire Tuamoto archipelago over a length of 1500km[31].

In case the latter points had not been taken into account or the information delivered by France was not sufficient the decision of the Commission not to apply Art. 34 will have to be considered an infringement of EC law.

2.3 Effects on a territory of another Member State

The „particularly dangerous experiments“ conducted by France could have effects on a territory which is under the jurisdiction of another Member State. For the British colony Pitcairn Island lies only 800 to 1000km to the south-east of Moruroa[32]. Pitcairn Island is the last remaining British colony in the Pacific and is administered by the British High Commissioner in New Zealand[33].

It is arguable, however, that the factual requirement of possible effects on a territory under the jurisdiction of another Member State can only be met if that territory also falls within the Euratom Treaty's territorial scope.

According to Art. 198 (3) (c), the Euratom Treaty does not apply to „those overseas countries and territories having special relations with the United Kingdom of Great Britain and Northern Ireland which are not listed in Annex IV to the Treaty establishing the European Economic Community.“ In other words, the Treaty does apply to territories which are listed in Annex IV.

Pitcairn Island is listed in Annex IV[34]. Consequently Pitcairn Island lies within the Treaty's territorial scope.

As Chernobyl has made abundantly clear, the effects of a nuclear accident cannot be limited to a few hundred kilometres. The accident of July 1979, the effects of which could still be felt some 1500km away from Moruroa, equally demonstrates that Pitcairn Island at a distance of 800 to 1000km is indeed liable to be affected by the tests' adverse effects.

As a consequence, all the factual requirements spelled out in Art. 34 (1) and (2) Euratom Treaty would appear to be met by the intended French nuclear tests at Moruroa. If the nuclear tests are particularly dangerous experiments, the French Republic required the assent of the Commission of the European Communities before it could proceed with the planned nuclear tests at Moruroa.

3 Legal action before the European Court of Justice

3.1 Infringement proceedings

In respect of any of the Treaty violations outlined above, any other Member State could commence infringement proceedings against France pursuant to Art. 142 Euratom Treaty. Before proceedings can be brought before the European Court of Justice, however, the Commission has to deliver a reasoned opinion. If, within three months after the matter has come before it, the Commission has not delivered a reasoned opinion nor given its assent to the tests under Art. 34 (2) Euratom Treaty, an infringement suit can be filed with the Court. Should the Court find France in violation of her obligations under the Treaty, France would be required to cease any violation so found by the Court and to act in future in conformity with her obligations under the Treaty.

If an action alleging a violation of Art. 34 Euratom Treaty is pending before the European Court of Justice, the applicant Member State could further ask the Court to grant an interim order restraining France from carrying out any tests until judgment has been delivered in the main action.

In a like manner, the Commission could also bring infringement proceedings against France. No time limit has to expire before this action could be brought directly before the Court but the Commission first has to follow an administrative preliminary procedure pursuant to Art. 141 (2) and (3) Euratom Treaty.

3.2 Action against the Commission for failure to act ?

Any Member State could bring an action against the Commission under Art. 148 Euratom Treaty for failure to act by alleging that the Commission has failed to exercise its supervisory powers under Art. 34 Euratom Treaty. Such an action, however, would normally require that the complainant Member State, prior to bringing suit in the European Court of Justice, has officially asked the Commission to require France to notify the tests and obtain the Commission's assent. As the Commission has already decided not to apply Art 34 this requirement seems obsolete. The complainant Member State can in our view bring an action for failure to act before the Court without asking the Commission again to notify the tests.

Under the same conditions the European Parliament could also bring an action against the Commission for failure to act.

3.3 Annulment actions

The decision of the Commission to consider the tests as being not particularly dangerous could also be subject to an annulment action if one considers this decision a formal act. Any Member State as a so-called „privileged applicant“ could challenge this decision in the European Court of Justice and bring an action for its annulment under Art. 146 (1) Euratom Treaty. Such an action could be based on the argument that the Commission has taken its decision even though additional health protection measures announced by France are insufficient to protect the concerned population's health or the information which has been the basis for decision has been insufficient.

3.4 Legal action by individuals

Private persons can bring actions for annulment under Art. 146 (4) Euratom Treaty. These actions, however, can only be brought if they are directed

against reviewable - that is legally binding - acts adopted by an institution of the Community. It needs to be examined whether the decision of the Commission not to apply Art 34. meets this requirement. Moreover, a private applicant also has to demonstrate that he or she is directly and individually concerned by the act although it is not addressed to him or her. It appears that these requirements are met in relation to applicants residing in the territories affected by the tests, i.e. French Polynesia and Pitcairn Island. The grounds for review of the Commission decision under Art. 146 Euratom Treaty would depend on the reasons the Commission would have to give to justify its decision.

In addition individuals can also bring an action for failure to act against the Commission. This is possible where the Commission fails to perform its tasks under Art. 34 (2) Euratom Treaty by unlawfully refraining from examining the effects of the tests on the health and safety of the concerned local population.

4 Conclusion

The examination shows that the action taken by the European Commission concerning Art 34. of the Euratom treaty can be discussed quite controversially. In particular it needs to be questioned whether the Commission has to have proof that an experiment is actually particularly dangerous before applying Art 34. In order to minimize the risk to the population Art. 34 should be applied in all cases where tests are potentially dangerous. It is then up to the Member State that wishes to carry out the experiment to give evidence on the safety of the experiment according to Art. 34.

It is still not clear whether the European Commission based its decision concerning Art. 34 on sufficient information This is especially important for the inclusion of data on internal exposition through food chain accumulation and exposition of the population in case of a breakage of the atoll.

Member States and affected individuals which are not satisfied with the decision of the European Commission could bring an annulment or an infringement action before the European Court of Justice. •

References

[1] Deimann/Gebers; Compatibility of the French Nuclear Tests in the Pacific with the Euratom Treaty, Darmstadt, August 1995.

[2] E.-U. Petersmann, in: H. von der Groeben/J. Thiesing/C.-D. Ehlermann, Kommentar zum EWG-Vertrag, vol. IV, 4th. ed. Baden-Baden 1991, Art. 232 para. 19; see also B. Beutler/R. Bieber/J. Pipkorn/J. Streil, Die Europäische Union. Rechtsordnung und Politik, 4th ed. Baden-Baden 1993, p.44.

[3] See also J. Errera/E. Symon/J. Van der Meulen/L. Vernaeve, Euratom. Analyse et Commentaires du Traité, Brussels 1958, p.273:

„Les territoires non-européens soumis actuellement à la juridiction des Etats membres sont les suivants:

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Les Territoires d'outre-mer français suivants: ... Etablissements français de l'Océanie, ..."

[4] This seems to be the view taken by J. Grundwald, Tschernobyl et les communautés européennes: aspects juridiques, (1987) Revue du Marché commun 396 at 407, note 52 as well, even if he leaves the decisive question of whether French nuclear tests at Moruroa require the Commission's assent under Art. 34 (2) of the Euratom Treaty open for no apparent reason. - It is to be noted that already under international law any treaty signed and ratified by the French Republic applies to all the territories that are under French jurisdiction unless the treaty makes express provision to the contrary, as does, for example, the EC Treaty in Art. 227, see J. Ziller, Les „DOM-TOM". Départements - Régions d'outre-mer. Territoires et collectivitiés territoriales d'outre-mer, Paris 1991, p.39.

[5] M. Schroder, in: H. von der Groeben/J. Thiesing/C.-D. Ehlermann (eds.), Kommentar zum EWG-Vertrag, vol. IV, 4th ed. Baden-Baden 1991, Art. 227 para. 64.

[6] Cf. Arts. 210 of the EC Treaty and 184 of the Euratom Treaty.

[7] B. Beutler/R. Bieber/J. Pipkorn/J. Streil (supra note 2), p.41.

[8] See, e.g., Arts. 24 f., 84 (3), 194, and 223 Euratom Treaty.

[9] Accordingly, the European Parliament was refused access by the Commission to certain documents related to the safety of British nuclear installations at Sellafield, see Leigh Hancher, 1992 and Accountability Gaps: the Transnuklear Scandal: A Case Study in European Regulation, 53 (1990) M.L.Rev. 669 at 674.

[10] The provision reads as follows:
„The provisions of this Treaty shall not preclude the application of the following rules:
(a) No Member State shall be obliged to supply information the disclosure of which it considers contrary to the essential interests of its security; ... ."
For clarity's sake it should be noted again that such a provision was not inserted into the Euratom Treaty in 1957 and has not been added to the Treaty by any of the Treaties amending the original Treaties since then.

[11] The provision reads:
„In order to perform its task, the Community shall, as provided in this Treaty:
(c) make certain, by appropriate supervision, that nuclear materials are not
diverted to purposes other than those for which they are intended; ... ."

[12] Nor does the ECJ's ruling in Case 1/78, [1978] 2151 command a different view. While the Court states in para. 12 of the ruling in an obiter dictum that materials and facilities used for military purposes remain outside the Treaty's remit, one cannot conclude from this explicit reference only to Art. 84 (3) Euratom Treaty that, in the opinion of the European Court of Justice, military uses of nuclear energy have generelly been exempted from the Treaty's remit. For the context in which the Court makes this observation makes it clear that it refers solely to the applicability of Chapter VII of the Treaty. The ECJ ruling under Art. 103 Euratom Treaty concerned the signing and ratification of a convention by Euratom Member States that was intended to be part of a series of international agreements to implement Art. III of the Non-Proliferation Treaty. The purpose of the particular convention at issue in the ECJ's ruling consisted in providing protection against dangers arising from unintended uses of fissile materials reserved for civilian uses. The proposed convention's purpose, therefore, corresponded to the purposes of Chapter VII of the Euratom Treaty. For this reason one can safely assume that the comparison between the Treaty's and the Convention's scope of application was restricted to the safeguards system in Chapter VII. Furthermore the Court explicitly refers to Art. 84 (3) which, however, on its face, only concerns the safeguards provisions in Chapter VII.

[13] This interpretation of Art. 84 (3) Euratom Treaty finds further support in the English text. The English version of the Treaty makes clear that only „safeguards" may not extend to materials „which are in the course of being specially processed for this purpose."

[14] In passing it should also be observed that Arts. 77 ff. Euratom Treaty would appear to apply to any fissile material following explosion of the nuclear device. For after the explosion and the destruction of the actual bomb these materials can no longer be said to be „specially processed" to meet defence purposes or to be „placed or stored in a military establishment." See above, note 16 on the applicability of Art. 77 Euratom Treaty once fissile materials are no longer stored in military facilities.

[15] J. Errera et al. (supra note 4), p.119.

[16] See also Errera et al. (supra note 4), p.271 on Art. 197 as defining the Treaty's substantive scope of application.

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[17] Case 187/87, judgment of 22 September 1988, Saarland et al. ./. Minister for Industry, Post and Telecommunication and Tourism, ECR [1988] 5013, para. 12.

[18] ECR [1988] 5013, para. 19.

[19] See J. Grunwald, Neuere Entwicklungen des Euratom-Rechts, 1 (1990) Europäische Zeitschrift für Wirtschaftsrecht 209f.

[20] Ibid.

[21] See also Case 187/87, [1988] E.C.R. 5013, para. 12 and the submission of Advocate-General Sir Gordon Slynn at 5034.

[22] S. Neri/H. Sperl, Traité instituant la communauté européene de l'énergie atomique (EURATOM). Travaux préparatoires. Déclarations interpretatives des six Gouvernements. Documents parlementaires, Cour de Justice des Communautés Européennes, Luxembourg 1962, p.122.

[23] France exploded its first nuclear device in February 1960. This explosion was meant to test the first French atomic bomb, Darryl A. Howlett (supra note 16), p.62.

[24] See Euratom, Dritter Gesamtbereicht über die Tätigkeit der Gemeinschaft, 1960, p.101ff.; Vierter Gesamtbereicht, 1961, p.113.

[25] Cf. on the long-term environmental effects of atomospheric nuclear tests D. Tsourikov/G. Chabryzk, Nuclear Weapons Testing and the Environment, ed. by the European Parliament (Directorate General for Research - Scientific and Technological Options Assessment), 2nd ed. Luxembourg 1995; for the scientifc results of the Cousteau and other inquiries into the environmental effects of underground nuclear testing at Moruroa see Le Monde of 21 June 1995, p.20 („Trois missions n'ont pas permis de faire toute la lumière sur les conséquences des expériences“). The Cousteau mission especially noted the risk of radionuclei re-emerging into the sea as a result of the lagoon's limestone accelerated decaying and deep cuts found in the rock underneath the atoll.

[26] See, inter alia, Cousteau Foundation, Scientific Mission of the Calypso at the Moruroa Site of Nuclear T, November 1988; H.R. Atkinson, Report of a New Zealand, Australia, Papua-New Guinea Scientific Mission to Moruroa Atoll, New Zealand 1984.

[27] N. Buske, Radioactivity in Plankton outside the 12-mile exclusion zone of the French nuclear test site, Report of the 1990 Scientific Mission of the Rainbow Warrior, Amsterdam 1990.

[28] Cf. Greenpeace International Environmental Aspects of Weapons Testing at Moruroa-Atoll, Southpacific, August 1995.

[29] See Frankfurter Allgemeine Zeitung of 1 August 1995, p.2 („Sind Atomtests besonders gefährlich?“).

[30] Frankfurter Allgemeine Zeitung of 25. 10.1995 -

[31] See „die tageszeitung“ of 12 July 1995, p.7 and A.C. McEwan, Environmental Effects of Underground Nuclear Explosions, in: J. Goldblat/D. Cox (eds.), Nuclear Weapons Tests: Prohibition or Limitation? Oxford 1988, p.75 and 88f.

[32] Pitcairn Island's permanent population of around 60 inhabitants is mostly descended from Fletcher Christian and his fellow mutineers from H.M.S. Bounty and their Tahitian women, see Encyclopaedia Britannica, Micropaedia, vol. 9, p.474 and S. Winchester, Outposts, London 1985, p.279ff.

[33] See supra note 34.

[34] BGBl. 1972, II, p.1157.

The Discussion about a Legally Binding Biotechnology Safety Protocol

by Guardial Nijar / Beatrix Tappeser

At the Third Session of the Commission on Sustainable Development, held in New York on 14-28 April 1995, the US made a concerted and sustained effort to exclude from the final text provisions which sought primarily to give a balanced approach to the introduction of genetically-engineered organisms and which cautioned against the unbridled and uncontrolled unleashing of the biotechnology industry especially on the Third World.

The US asked for the deletion from the draft of

- any reference to the lack of an internationally agreed framework for regulating the safe handling and transfer of biotechnology;
- any reference to the application of the "precautionary approach" in dealing with genetically engineered organisms;
- any reference to concerns that without proper regulation, the release of such organisms might take place in developing countries without due consideration for the environment in these countries;
- any reference to the knowledge, innovations and practices of indigenous and local communities;
- any reference to feasible and up-to-date standards for intellectual property rights related to biotechnology.

The US was particularly insistent that there be no reference to the "precautionary approach" in two paragraphs of the text. Mr. Pringle, the American Ambassador, said that by the inclusion of this term, the CSD was prejudging the work of the expert panel set up by the 1st meeting of the Conference of the Parties (COP) of the Biodiversity Convention to prepare a background document to enable the 2nd meeting of the COP to reach a decision on the need for and modalities of a biotechnology safety protocol.

Many delegates and NGOs noted that the US' arguments for excising the term from the text were simply unacceptable. The term has acquired a clear and distinct meaning. Indeed it appears in the legislations of several Northern countries. The UK and Germany apply this precautionary principle against potential risks which are not, or not yet, identifiable because of the current state of scientific knowledge.

More importantly the Biodiversity Convention stresses the importance of preventative measures. It recognises that information and knowledge regarding biological diversity is generally lacking. That is why it states the urgent need to develop scientific, technical and institutional capacities to plan and implement measures to deal with the loss of this diversity. In the meantime, the Convention explicitly states, lack of scientifc certainty cannot be used to avoid undertaking preventative measures. It states that the precautionary principle shall be applied.

The first Conference of the Parties to which the American Ambassador referred set up an expert panel on biotechnology safety which prepared a report at a meeting in Cairo. This report was discussed at a conference of the open ended working group on biotechnology safety which took place at the end of July in Madrid. Based on the report this working group should give a recommendation to the second Conference of the Parties which shall take place in Djakarta, Indonesia, in November 1995. At the beginning of the Madrid meeting it was quite open in which direction the delegates would move. Especially the USA, Australia, New Zealand and Germany opposed the recommendation for a legally binding protocol arguing that it would hinder the industry but not bring any additional safety. The states of Africa and the Nordic countries were very much in favour of a protocol, some countries were in between: open to a protocol or to voluntary guidelines.

The NGOs present in Madrid worked hard. They presented recent findings which underlined the urgent need for a stringent regulation and discussed with lots of delegates the different topics. Especially the argument that each country should be given the possibility of developing by its own legislation was given no value and credibility. In the context of intellectual property rights or the GATT negotiations the industrialized countries argued always in favour of an international and legally binding character of the agreements. Freedom of choice and different national legislations were seen as counterproductive. At the end of the meeting there was an overwhelming majority for a binding protocol on biotechnology safety.

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RECENT COURT DECISIONS

The Case of López Ostra v. Spain
Judgment of the European Court of Human Rights of 9 December 1994

by Adriana Fabra Aguilar

On 9 December 1994, the European Court of Human Rights („the Court") issued a judgment that has become a landmark in the history of its jurisprudence. In *López Ostra v. Spain* (41/1993/436/515), the Court has found for the first time ever that environmental degradation results in the violation of a substantive right recognised in the Convention for the Protection of Human Rights and Fundamental Freedoms („the Convention"). This judgment is qualitatively different from other recent Court decisions also sensitive to environmental concerns, which have acknowledged that certain rights - namely the right to property - could be limited by a greater social interest in favour of environmental protection.

In the *López Ostra case*, the plaintiff alleged violation of Articles 3 (prohibition of a degrading treatment) and 8 (right to respect for private and family life) of the Convention as a result of the operation of a waste treatment plant next to her home. The European Commission of Human Rights („the Commission") found the case admissible under the invocation of both articles, but the Court found that nuisances from the plant amounted to a breach of only the right to privacy and did not constitute „inhuman and degrading treatment".

1 Background to the Case

In the Spanish town of Lorca (Murcia), a private company built a plant for the treatment of liquid and solid waste from tanneries with the aid of the government, which gave municipal land and a State subsidy for its construction. The plant began to operate in July 1988 without the licence required for activities classified as causing nuisance and being unhealthy, noxious and dangerous, and without having followed the procedure with the municipal authorities for obtaining such a licence.

Since its start, the plant's operation released fumes, pestilential smells and contamination which caused health problems and nuisance to the town inhabitants. As a result, people living near the plant had to be evacuated during the summer months of 1988, and in September of the same year, following many complaints and health and environmental reports, the town council ordered cessation of one of the plant's most polluting operations.

Mrs. López Ostra, who lived only twelve metres away from the plant, was suffering, herself and her children, health problems as a result of the plant's pollutants, and general distress from the fumes, noise and foul and irritating smell. She tried to find a solution to the contamination problem with the municipal authority, but having not succeeded in this, she filed a complaint with Murcia's *Audiencia Territorial*. She sought protection of her fundamental rights to privacy, to physical and psychological

integrity, to safety, and to freedom of movement and to determine one's residence, among other rights. She held the municipal authorities responsible on account of their passive attitude to the nuisance and risks caused by the waste treatment plant and requested temporary or permanent cessation of the plant's activities. Despite Crown Counsel having endorsed her application, in January 1989 the *Audiencia Territorial* ruled that although the plant's operation caused nuisance, it did not constitute a serious risk to the health of the families living in its vicinity; it „just“ impaired their quality of life, though not enough to infringe the fundamental rights claimed.

A few days after this judgment, the plaintiff filed an appeal with the Supreme Court, which was equally unsuccessful. The Supreme Court dismissed the appeal and found that no privacy had been violated because no public official had entered the applicant's home, and that she was free to move elsewhere. Exhausting her domestic remedies, she lodged an appeal *(recurso de amparo)* with the Constitutional Court. She alleged violation of constitutional rights to physical integrity, to private life and to choose freely a place of residence. In February 1990, the Constitutional court ruled that the appeal was inadmissible on procedural and substantive grounds. The Court found no violation of fundamental rights as a result of pollution.

Concurrently, two of Mrs. López Ostra's sisters-in-law, who lived in the same building as her, brought administrative and criminal proceedings against the company operating the waste treatment plant. Administrative proceedings were brought in 1989 alleging that the plant was operating without a licence required by law; criminal proceedings were filed in 1991 because of alleged environmental health offence, according to the Spanish Criminal Code. In both proceedings, judges decided to close the plant, but the court orders were stayed because of appeals. In the criminal case, the judge finally confirmed his order in 1993 and the plant was temporarily closed. The administrative proceedings are still pending in the Supreme Court.

2 Proceedings before the Commission and the Court

After the negative ruling of the Constitutional Court, Mrs. López Ostra applied to the Commission in May 1990. She complained of the Lorca municipal authorities' inactivity in respect of the nuisance caused by the waste treatment plant. As stated above, she alleged violation of Articles 8.1 and 3 of the Convention. In July 1992 the Commission declared the application (16798/90) admissible, but found violation of only the right to respect of one's private life.

In the final submissions to the Court, the applicant alleged again violation of Articles 8 and 3. The government presented preliminary objections, alleging failure to exhaust domestic remedies by the applicant, and that the applicant was not a victim. Both objections were dismissed by the Court. In regard to the first objection, the Court found that the applicant's choice to file a complaint for human rights violations, and not of an administrative nature, was appropriate in relation to the infringement of which she had complained, and that she was under no obligation to bring other proceedings which were slower. In regard to Mrs. López Ostra not being a victim, the Government of Spain alleged that due to the rehousing of the applicant and her family in 1992 away from the plant, and the plant's temporary closure in October 1993, all nuisances were brought to an end. The Court maintained that the fact that the applicant and her family had lived for years only twelve metres away from a source of smells, noise and fumes could make her a victim of human rights violations.

3 Article 3

According to Article 3 of the Convention, „no one shall be subjected to torture or to inhuman or degrading treatment or punishment.“ Mrs. López Ostra alleged that physical and psychological distress suffered by her, and most particularly by her daughter who presented a clinical picture of nausea, vomiting, allergic reactions, anorexia, etc., could reasonably be regarded as amounting to degrading treatment prohibited by the Convention.

Both the Commission and the Court found there is no breach of Article 3, „although the conditions in which the applicant and her family lived for a number of years were certainly very difficult.“ The Court does not justify its decision regarding Article 3, but its ruling is not inconsistent with preceding case law. As pointed out by Richard Desgagné in a recent Article, the Commission and the Court have found in other cases that „inhuman treatment is also degrading and that [t]he notion of inhuman treatment covers at least such treatment as deliberately causes severe suffering, mental or physical, which in the particular situation, is unjustifiable“ *(Greek case)*.

In *López Ostra v. Spain*, although the Court finds that the polluting effects of the plant's operations do not amount to the required „minimum level of severity“ *(Tyrer v. United Kingdom*[1]*)*, the Commission seems to have broadened, at least in the admissibility stage, the applicability of Article 3 to disturbing treatment resulting from negative environmental conditions[2].

4 Article 8

As stated above, the Court has found for the first time that environmental nuisance amounts to a breach of Article 8. Article 8 reads, in its first part,

„[e]veryone has the right to respect of his private life, his home and his correspondence."

The Court noted the results of medical reports and expert opinions which indicated that hydrogen sulphide emissions from the plant could endanger the health of those living nearby and that there could be a causal link between those emissions and Mrs. López Ostra's ailments. Following from that, the Court considered,

„...severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their private and family life adversely, without, however, seriously endangering their health."

This statement, together with the Court's final appreciation of the psychological distress suffered by the applicant, indicates that the concept of private life - as explained by Desgagné - encompasses not only health and physical well-being, but a certain *quality of life (Powell and Rayner*; *S. v. France).*[3]

To determine whether the waste treatment plant's operations violated the right to respect of one's private life, the Court applied a proportionality test, stating it needed to strike „a fair balance [...] between the competing interests of the individual and of the community as a whole." A similar test has been applied by the Court in regard to the right to property (First Protocol) in cases where the public interest to protect the environment had to be balanced with the right to peaceful enjoyment of one's possessions. In significant case law since 1990, the Court has legitimised restrictions for environmental reasons on the use of private property *(Oerlemans v. The Netherlands; Skärby case; Fredin case; Pine Valley Developments Ltd. and others v. Ireland).*[4]

In regard to the right to privacy, the proportionality test has been applied restrictively. Second paragraph of Article 8 establishes possible restrictions to the right „as is in accordance with the law and is necessary in a democratic society in the interests of [...] the economic well-being of the country ...". According to it, a measure „necessary in a democratic society" implies a „pressing social need"[5]. Until the *López Ostra* judgment, the Court had found that restrictions to the right to privacy resulting from activities with negative effects on the environment were justified under the notion of „interests of the economic well-being of the country." Thus, it considered that the existence of large international airports *(Powell and Rayner)*, the establishment of a nuclear power station *(S. v. France)* and the construction of a hydroelectric plant *(G. and E. v. Norway)* did not constitute violations of Article 8[6].

Not differently from other cases, in *López Ostra v. Spain*, the Court afforded to the State a certain margin of appreciation in the balance between public and private interests. As noted by Desgagné, „the development of international law may someday create a common European standard of protection, but the Commission and the Court are not likely to interfere with national policies that involve important economic choices."

In its judgment, the Court finds that public authorities were responsible for the plant's emissions despite not being its operators, as the municipality had subsidised the enterprise and had a duty to act according to local regulations. Reviewing the Spanish authorities' actions in regard to Mrs. López Ostra's complaints, the Court further resolves that the national authorities did not take the measures necessary for protecting the applicant's right to respect for her home and for her private and family life, and even resisted judicial decisions to that effect.

5 The Judgment's Enforcement and Further Legal Actions

One of the unique features of the European human rights system is the possibility for the Court to order just economic compensation to the party injured by a human rights violation. Responding to Mrs. López Ostra's claim for compensation for damage and reimbursement of costs and expenses, the Court awarded an amount of 4,000,000 pesetas for damages (a sixth of the award claimed by the applicant) and about 1,500,000 pesetas for costs and expenses (over half of the amount claimed by the applicant). The applicant's lawyer has informed that compensation to her client has been thoroughly paid.

Although Mrs. López Ostra's case has been resolved by the European Court, in Spain there are pending legal actions against the waste treatment plant's operating company. Mrs. López Ostra's sisters-in-law filed an administrative action *(recurso contencioso-administrativo)* which has not been resolved yet by the highest judicial instance and, actually, has experienced a new turn since the European Court's judgment was delivered in December 1994. The plaintiffs' lawyer has alleged in these pleadings that Spanish authorities have not complied with the European Court's judgment. He informs that in July 1994, notwithstanding numerous reports declaring the unhealthy and polluting effects of the plant's operations, local authorities granted a licence to the waste treatment plant. The plaintiffs allege that authorisation of the plant's operations is contrary to Articles 53 and 54 of the Convention, which establish the obligation by State parties to conform to the Court's ruling. •

References

1 *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser.A) (1978), para1.

2 Richard Desgagné, „Integrating Environmental Values into the European Convention on Human Rights, 89 A.J.I.L. 263 (1995), p.270".

3 *S. v. France*, App. No. 13728/88 reprinted in 3 RUDH 236 (1991); *Powell and Rayner v. United Kingdom*, 172 Eur.Ct.H.R. (ser.A) (1990).

4 *Oerlemans v. The Netherlands*, 219 Eur.Ct.H.R. (ser.A) (1991); *Skärby case*, 180 Eur.Ct.H.R. (ser.A) (1990); *Fredin case*, 192 Eur.Ct.H.R. (ser.A) (1991); *Pine Valley Developments Ltd. and Others v. Ireland*, in: European Human Rights Reports, 319 (1991).

5 Powell and Rayner (see supra note 3), para.41

6 Richard Desgagné, (see supra note 2), p.277.

The Federal Administrative Court Upholds the Right of German Cities to Tax One-Way Non-Reusable Packaging

by Sven Deimann

On 19 August 1994 the German Federal Administrative Court in Berlin handed down a landmark decision that upheld the right of German local councils to tax certain types of one-way, non-reusable beverage or other (food) containers[1]. At issue was a municipal ordinance adopted by the City of Kassel[2] in the State of Hesse (central Germany) which was hotly contested by small take-away outlets and fast-food restaurants. In this article both the Kassel ordinance and the decision of the Federal Administrative Court will be briefly outlined.

1 The Facts: The Kassel "Ordinance for the levying of a Packaging Tax"

The action centred on the validity of the Kassel ordinance which had gone into effect on 1 July 1992 and which sought to levy a tax on certain types of one-way, non-reusable packaging and containers. Thus § 1 (1) declared that, subject to the provisions of the Ordinance, the City of Kassel levied a tax on non-reusable packaging and silverware, provided that food and beverages were sold in them for on the spot local consumption[3]. § 1 (2) of the Ordinance defines as non-reusable packaging all one-way cans, bottles or any other beverage container and any form of one-way silverware. The tax was set in § 4 of the Ordinance at DM0.40 for every one-way bottle, cup or any other container and at DM0.50 for every piece of one-way (plastic) silverware. An exemption was to be granted pursuant to § 3 of the Ordinance where one-way, non-reusable packaging would be collected or taken back and safely disposed of outside the public waste disposal system by individuals otherwise subject to the tax.

2 The Issues: Tax or Regulation?

The applicants in the original action before the Administrative Court of Appeal of the State of Hesse[4] operated fast-food restaurants and vending machines for warm and soft drinks using one-way non-reusable cups[5]. In accordance with section 47 of the Administrative Courts Act they brought an application before the Hesse Administrative Court of Appeal to have the ordinance set aside as null and void on the grounds that Kassel City Council lacked jurisdiction to impose a levy on packaging by way of a municipal ordinance. Thus the applicants argued that even if Kassel City Council had jurisdiction to levy local consumption taxes under Art. 105 (2a) of the Basic Law[6] (Germany's constitution) and the relevant legislation of the State of Hesse, it lacked jurisdiction to adopt what in reality was not a mere "local consumption tax" but a fully-fledged regulatory scheme that sought to enter the field of waste minimization and prevention.

The latter subject matter, however, had been allocated to the Federation by virtue of Art. 74 (24) of the Basic Law which provides for federal concurrent legislative power over "waste disposal"[7]. The Federation had made exhaustive use of its concurrent jurisdiction under the provision by adopting the Federal Waste Prevention and Disposal Act, 1986 and in particular section 14 of the said Act which confers powers on the Federal Government to issue regulations for waste prevention. In accordance with Art. 72 (2) of the Basic Law[8], the Länder (States/Provinces) were thus, in the applicants' submission, pre-empted from exercising legislative jurisdiction over waste disposal and prevention and, furthermore, could not delegate any rule-making power over these matters by way of (fiscal) legislation to their local councils.

The question in constitutional law, therefore, was whether the States' exclusive power to levy local consumption taxes under Art. 105 (2a) of the Basic Law was sufficient to support State legislation that empowered municipalities to introduce levies whose exclusive purpose was not only to raise revenue but also to enter a substantive policy field

that comes within the purview of a head of concurrent Federal legislative power.

The Hesse Administrative Court of Appeal referred the action to the Federal Administrative Court under section 47 (5) (1) (i) of the Administrative Courts Act to have this particular question of constitutional law decided. Section 47 (5) (1) (i) of the Administrative Courts Act allows the State Administrative Courts of Appeal to refer a matter to the Federal Administrative Court where points of federal law are at issue that have not been authoritatively settled by the Federal courts of appeal.

3 The Federal Administrative Court's Ruling: A Tax with a Regulatory Purpose

After ruling briefly on the admissibility of the referral which neither the applicant nor the respondent City Council in the original action had disputed, the Federal Administrative Court answered the question put to it by the Hesse Administrative Court of Appeal in the affirmative: Art. 105 (2a) of the Basic Law could indeed support State legislation that empowered local councils to introduce local consumption taxes the purpose of which was chiefly to influence consumer behaviour and not only to raise revenue[9].

In holding the Kassel Ordinance and the State legislation intra vires the State's legislative powers under Art. 105 (2a) of the Basic Law, the Federal Administrative Court first turned to the question whether the levy introduced by the Kassel municipal Ordinance constituted a "tax" as the term was commonly understood for purposes of constitutional law. In this regard the Federal Administrative Court held that the only instance where the properties or characteristics of a "tax" could not be said to be present was where the taxing provision was worded in such a manner as to preclude the "taxed" human behaviour or activity from occurring in the first place. In other words: where it was patent that on the face of the provision there was no intention on the part of the "taxing" body to raise any revenue at all.

Conversely, where there was evidence that the introduction of a levy met with a corresponding expectation of substantial revenue, it was immaterial whether the chief purpose consisted in raising revenue or in achieving extra-fiscal objectives, e.g. influencing economic activity. In this respect the Court noted that any definition of what constitutes a "tax" as a matter of constitutional law would have to take cognizance of the necessity in modern industrial societies to use taxes as a regulatory instrument central to active governmental economic and social policy.

In the case before the Court, the Federal Administrative Court rejected arguments made by counsel for applicants that the levy to be introduced under the Kassel Ordinance did not disclose any real intent to raise revenue. On the contrary, the Court accepted evidence tendered by counsel for the respondent city council which showed that the projected annual revenue to be raised through the tax would exceed returns from the municipal dogs tax (DM0.8-0.9m).

In order for the Ordinance to be intra vires it was not sufficient, however, that the levy to be introduced constituted a tax as a matter of constitutional law. According to Art. 105 (2a) of the Basic Law, the State (legislative) taxing power extends only to local consumption or excise taxes. Hence, the Ordinance, and the legislation under which it was adopted, could only be said to be intra vires if it was found to operate exclusively in relation to local consumption, i.e. consumption taking place within the limits of the taxing municipality.

Relying on an earlier judgment by the Federal Constitutional Court[10], the Federal Administrative Court found this to be the case in the action before it. § 1 (1) of the Ordinance expressly restricts the application of the tax to packaging for foodstuffs intended for local, on the spot consumption[11].

The Federal Administrative Court did think it necessary, however, to restrict the operation of the Ordinance in relation to vending machines. Where these sold soft drinks or other beverages in solid containers that were fit for transporting the contents and, by implication, consumption both of the contents and its packaging beyond the city limits, the tax could not apply as it would cease to be a merely "local" consumption tax or excise coming within the purview of Art. 105 (2a) of the Basic Law.

Finally, returning to the question of whether the State of Hesse lacked legislative jurisdiction under Art. 70ff. of the Basic Law to confer powers on Kassel City Council for the introduction of a local tax the principal purpose of which was a regulatory one - namely waste prevention -, the Federal Administrative Court relied on the Federal Constitutional Court's jurisprudence with respect to taxes with mere regulatory "side-effects". For the latter type of taxes the Federal Constitutional Court had held that no specific legislative head of power had to be relied upon by the enacting jurisdiction as along as one of the heads of powers to tax under Art. 105 of the Basic Law was available[12]. For taxes, in the opinion of the Federal Constitutional Court, constitute no direct regulation of a substantive subject matter allocated either to the Federal parliament or the States in Art. 70ff. of the Basic Law but are merely incidental in their effects on the substantive subject matters listed in Art. 71 and 74f[13].

The Federal Administrative Court held this reasoning to be applicable in the present action as well, where a tax was at issue whose regulatory effects on a substantive subject matter - notably waste preven-

tion as part of "waste disposal" (Art. 74 (24)) - could not be described as mere "side-effects". The Court noted, however, the difficulty of ascertaining whether the regulatory effects of a tax constituted merely "side-effects" or indeed the main purpose of the taxing scheme. Therefore, save an abuse of power as evidenced by a lack of any projected revenue, the taxing powers in Art. 105 of the Basic Law could be relied upon even where the chief purpose of a tax was an extra-fiscal one.

4 Conclusion

This decision of the Federal Administrative Court constitutes a landmark ruling on the extent of the local councils' power in Germany to run local waste minimization policies by way of introducing levies. While local councils in Germany by no means enjoy carte blanche to run their own local environmental policy (despite a constitutional guarantee in Art. 28 (2) of the Basic Law to manage the affairs of the local community autonomously)[14], this decision has preserved scope for local initiative in the face of a good deal of inertia or, indeed, inflexibility at the Federal (legislative) level when it comes to waste minimization and prevention.

While some observers have expressed doubts whether, in the light of the plain language of Art. 74 (24) Basic Law - "waste disposal" -, the Federation can claim any concurrent legislative power in relation to waste prevention in the first place[15], received jurisprudential teaching in the Federal Republic has it that the Federation can actually legislate with respect to waste prevention as well[16]. And, indeed, as the applicants in this case argued, the Federation has made use of its powers and enacted the Federal Waste Prevention and Disposal Act which confers powers on the Federal Government to issue regulations for waste minimization and prevention[17].

The problem with the Packaging Ordinance adopted under § 14 of the Federal Waste Prevention and Disposal Act, however, is that it narrowly focuses on waste recycling by offering industry to operate a private waste collection and recycling scheme - the by now for environmentalists infamous DSD-"Green Dot" system[18]. Under the terms of the Packaging Ordinance, the operation of the DSD scheme prevents provisions from becoming operational which would force retailers and, in the last resort, manufacturers to take packaging wastes back, thus providing in effect a powerful incentive to avoid packaging in the first place (were it not for the mentioned escape clause).

The present Federal Administrative Court decision avoids ruling on whether Art. 74 (24) of the Basic Law comprises federal concurrent legislative jurisdiction with respect to waste prevention as well and, if so, whether the Federation has made exhaustive use of its powers, thus pre-empting the States from passing any additional legislation[19]. By holding the Kassel tax scheme intra vires merely by virtue of the taxing powers in Art. 105 of the Basic Law, the Court in effect offers municipalities a limited lever to tilt the balance back a little, at least at the local level, in favour of a clear waste prevention policy. By way of taxing packaging, local councils in Germany can now provide the necessary incentive to avoid one-way, non-reusable packaging. •

References

1 The decision is reported with a case comment by D. Schofeld/S. Göcke in 5 (1994) Zeitschrift für Umweltrecht 311 (Journal for Environmental Law).

2 The Ordinance is reprinted in: [1992] Neue Zeitschrift für Verwaltungsrecht 961 (New Journal for Administrative Law).

3 Ibid.

4 Pursuant to section 47 (1) of the Administrative Courts Act the State Administrative Courts of Appeal exercise original jurisdiction over actions brought to challenge the validity of State regulations or any other provision of law below the status of a State Act of Parliament (which includes municipal ordinances).

5 The facts are reported in part at 5 (1994) Zeitschrift für Umweltrecht 311 as well.

6 Art. 105 (2a) of the Basic Law reads as follows according to the "Official Translation" published by the Press and Information Office of the Federal Government:

> "The Länder shall have power to legislate on local excise taxes as long and in so far as they are not identical with taxes imposed by federal legislation."
>
> Most of the Länder (States) have delegated the exercise of this power to the municipalities under their respective Municipal Levies Acts, some States, however, - e.g. North Rhine-Westfalia - require the municipalities to seek ministerial approval prior to the introduction of a levy, see § 2 (3) of the Municipal Levies Act (North Rhine-Westf.) [NRWKAG]. In Hesse the relevant provision of the Municipal Levies Act does not require the municipalities to obtain such approval prior to the imposition of a new local tax, see § 8 Municipal Levies Act (Hesse) [HessKAG].

7 Art. 74 (24) Basic Law for the Federal Republic of Germany, supra note 6, p. 47.

8 Under this provision the Länder may exercise legislative jurisdiction over matters falling within the Federation's concurrent legislative powers only "as long as and to the extent that the Federation does not exercise its legislative powers"; see Basic Law (supra note 5), p. 44.

9 BVerwG [Federal Administrative Court] 5 (1994) Zeitschrift für Umweltrecht 311 at 312.

10 BVerfGE 16, 306/327 [Judgments of the Federal Constitutional Court, vol 16, p. 306 at 327] (holding State legislation, and municipal ordinance adopted pursuant to it, purporting to tax sale of ice-cream irrespective of whether it was intended for on the spot or external consumption beyond the municipal limits ultra vires State legislative power). - The reader will appreciate the considerable ingenuity which legislators and local councils in Germany can deploy at times in areas other than the environment in order to vex local populations with ever new tax schemes.

11 The Federal Administrative Court judgment thus holds it admissible that municipal tax ordinances require fast-food outlets (or any other form of retailing for that matter) to register whether a transaction was made for on the spot local consumption or to take away. Technically, however, this imposes no additional burden on the concerned businesses as they are already required to record sales for on the spot and "take away"-consumption under the Federal Turn-over Tax Act which carries different rates for the respective transactions. See BVerwG supra, note 8, at 314.

12 BVerfGE 14, 76/99 (holding North Rhine-Westfalia's amusement tax on slot machines intra vires despite Federal legislation to regulate operation of amusement businesses).

13 BVerfGE 31, 8/23 (affirming previous ruling and upholding State tax legislation which impinges on areas of Federal concurrent legislative jurisdiction; States' legislative authority to levy certain types of taxes comprises power to influence "somehow" [irgendwie] activities permitted under Federal legislation and to pursue a limited educational effect - notably combating game addiction - as a secondary purpose apart from raising revenue).

↗

[14] See, e.g., BVerwGE 90, 359 [Judgments of the Federal Administrative Court, vol. 90, p. 359] (striking down Munich City Council's Ordinance to ban certain one-way products and require retailers to take back certain waste products as unconstitutional interference with constitutionally guaranteed right to operate a business (Art. 12 of the Basic law) in the absence of State legislation authorizing such ordinances).

[15] Bothe, Rechtliche Spielräume für die Abfallpolitik der Länder nach Inkrafttreten des Bundesgesetzes über die Vermeidung und Entsorgung von Abfällen [Scope for Individual Länder Waste Policy Following the Coming into Force of the Federal Waste Prevention and Disposal Act], [1987] Neue Zeitschrift für Verwaltungsrecht 938.

[16] H.-H. Lindemann/K.-P. Breiholdt/A. Wiebe, Abfallsatzung, in: G. Lübbe-Wolff (Hg.), Umweltschutz durch kommunales Satzungsrecht, Berlin: Erich Schmidt 1993, Rn. 218 [H.H. Lindemann, et.al, Waste Ordinance, in: G. Lübbe-Wolff (ed.), Environmental Protection through Municipal Ordinances/By-Laws, para. 218] and BayVerfGH, DVBl. 1990, 692 [Bavarian Constitutional Court, [1990] German Administrative Law Review 692] (holding waste prevention provisions in Federal Waste Prevention and Disposal Act intra vires the Federal Parliament's power to legislate in relation to economic activity - Art. 74 (11) Basic Law -, while legislation - and hence referenda - in relation to waste minimization and prevention in other areas - e.g. schools, public administration, etc - remain within the States' exclusive shpere of competence).

[17] See § 14 (2) (iii) Waste Prevention and Disposal Act.

[18] Cf. § 6 (3) of the Packaging Ordinance (§ 6 III VerpakkungsVO).

[19] Cf. D. Schefold/St. Göcke, Case Comment, 5 (1994) Zeitschrift für Umweltrecht 316 at 317.

NEW REGULATIONS

The Proposed Swedish Environmental Code

The proposed Swedish Environmental Code has been withdrawn and sent back to a newly constituted Commission to work on it some more. This was primarily due to the national elections which resulted in a change of governing parties.

It is expected that a similar proposal will come in the middle of 1996, with perhaps the incorporation of rules concerning water. It may, and should, also come about that the various relevant European Community Directives will be implemented by incorporation into a new Environmental Code.

"GROUP ACTIONS" - Proposed Swedish legislation for a type of class action.

A Swedish legislative drafting commission has recently issued its proposal for a change in the Swedish Procedural Code to allow for "Group Actions." This would be analogous to the class action known in Anglo-American law, but not identical.

The objective of the Commission was to determine if there is a need to improve access to justice for group claims and propose new rules concerning group actions, or "Grupptalan" in Swedish. This would particularly apply to consumer and environmental law, and gender discrimination in compensation levels in employment. The reasons given as motivating such a change in the procedural law was that at present there are unreasonable obstacles, such as when the individual injury is too small and/or where there is unjust (unlawful) profit for industry.

If the proposal is adopted this will have an especially significant relevance to environmental litigation where injuries are often diffuse to the extent that no single injured party has a sufficient economic damage to warrant the costs of litigation.

An interesting aspect of the proposal is the possibility of "risk agreements" where the plaintiff would not be obligated to pay the legal representation costs of their lawyer if the case was lost, and if the case was won the compensation of the lawyer could be based upon a percentage of the monetary award in the case. •

Charles Phillips

Draft on Strategic Environmental Impact Assessment

The European Commission is working on a draft directive concerning a strategic environmental impact assessment. A first internal draft was circulated in spring 1995. With this proposal the European Commission aims to extend the obligation of the Member States to perform environmental impact assessments to plans and programmes.

The concept of environmental impact assessment in the European Community as laid down in Directive 85/337/EEC[1] has so far been only project related. All projects listed in Annex I of the directive have to be made subject to an environmental impact assessment prior to granting a permit. Projects listed in Annex II of Directive 85/337/EEC are subject to an assessment if their characteristics so require.

It is one of the weaknesses of Directive 85/337/EEC that it does not cover planning decisions which are usually taken before a concrete project is developed. The range for seeking alternatives at the stage of a project specific permitting procedure might have already been narrowed to an extent where real alternatives do not exist any more. The European Commission illustrates this with the example of a land use planning decision which can already de-

termine whether a certain installation can be established at a defined place.

The first internal draft on strategic environmental impact assessment provided for an environmental impact assessment for all strategic planning decisions concerning agriculture and forestry, industry, energy, transportation, tourism, water, and waste management. The obligation also applies to all other strategic planning decisions as well as changes of existing plans. For all plans and programmes all environmental impacts, including impacts on climate change, have to be assessed.

This principally positive approach is watered down by some rules on possible exemptions. An exemption is suggested for the case that a Member State comes to the conclusion that an environmental impact assessment would not make sense in the specific case. Plans that are subject to a legislative process and that are passed as laws could also be exempted according to this draft.

As a result of several discussion rounds with representatives of the Member States and of different lobbying groups the first draft has already been modified. A second draft which circulated in summer 1995 brought some changes: The European Commission took agriculture, industry and tourism out of the scope of the proposal. Transportation planning shall now only be subject to an environmental impact assessment to a limited scale. Instead, planning strategies in the field of mining, telecommunication networks and the enlargement of harbours have been drawn under the scope of the proposal. Plans that might result in binding legislation are no more subject to an exemption clause. The possibility to exempt a planning decision if no significant impact on the environment is to be expected has been expanded. This will eventually lead to a widely differing implementation in the Member States. The draft has been discussed until now between different general directorates of the Commission. An official draft has not yet been presented and it remains unclear whether the Member States will finally confirm the approach of a strategic environmental impact assessment. •

Betty Gebers

Reference

[1] 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 No. L 75 of 5.7.1985, p.40.

NEWS IN BRIEF

Protection of Tropical Forests

On 5.9.1995 the European Commission presented a revised proposal for a regulation of the Council concerning measures to protect tropical forests (COM(95) 405 fin). The proposal mostly contains provisions for the objectives and the conditions of a financial aid programme which the European Union will put up for the protection of tropical forests. The whole budget between 1995 and 1999 will amount to 250 million ECU. Specific goals are, among others, the preservation of tropical forests and their biodiversity, the support of sustainable forestry, the development of labelling systems for tropical timber which come from sustainable forestry, capacity building of local population and of local institutions that engage themselves in issues of forest preservation and the development of national plans on the sustainable use of tropical forests.

Apart from the financial commitment the proposal contains some policy orientated provisions. For example, the Community plans to develop a tool which will prevent other policies of the Community to be harmful to the preservation of tropical forests. In this revised proposal the Commission partly took up suggestions made by the Parliament in the first reading of the proposal. The Commission rejected proposals concerning restrictions on the import of tropical timber to the European Union and the establishment of a certification system.

European Environment Agency

The European Commission has directed a communication towards the Council and the Parliament concerning the work of the European Environment Agency (COM(95) 325 fin.). The Agency works on the legal grounds of Regulation EEC/1210/90 of 7 May 1990 (OJ L 120/5) on the establishment of the European Environment Agency and the European Environment and Observation Network. The European Environment Agency is supposed to mainly collect and provide information on the present and foreseeable state of the environment. It does not have any enforcement competences. However, Art. 20 of Regulation EEC/1210/90 says that after two years of the entry into force of the directive the Council shall, after consulting the European Parliament, decide on new tasks for the Agency, such as associating in the monitoring of the implementation of the Community environmental legislation.

The Agency took up its work in Copenhagen with some delay in the middle of 1994. The Agency has since then put up a first work programme for the

years 1994-1999. The work has so far been concentrated on the establishment of a European network for the collection of environmental data (EIONET).

The European Commission believes that the agency needs two more years to get EIONET working. In its communication the Commission suggests to postpone the decision on further tasks until 30 October 1997. The Member States shall put up sufficient national networks which can deliver information to the European Environmental Agency. It is also suggested - where it is necessary - to come to bilateral agreements with organisations in third countries. It shall also be possible for third countries to participate in the work of the Agency. The Council of Environmental Ministers already agreed at the October meeting to postpone the decision on further tasks until 1997.

Report on the Application of the European Law in the Member States

The European Commission has presented its 12th Annual Report on the Control of the Application of Community law (OJ C 254, p.1). One chapter deals with the application of European environmental law in the Member States. The report shows that most problems still arise from the transposition and implementation of Council Directive 85/337/EEC of June 1985 on environmental impact assessment. The commission has put forward infringement procedures against Spain, Italy, Germany and Great Britain. Belgium has already been prosecuted by the European Court of Justice. Additionally, a number of citizens have filed complaints with the Commission because they were unsatisfied with the practice in Greece, France and Portugal. Problems mainly arise in three areas:

- the general exemption from the EIA for all projects covered by Annex II of the directive (Spain and Italy),
- transitional regulations that allow for permits without prior environmental impact assessment even after this was mandatory according to EC law,
- insufficient participation and information of the public.

Other directives have not been applicated satisfactorily either. The EC Commission proposes some measures in order to improve the application of European environmental law: According to these suggestions the Commission and the administration of the Member States should come to a closer cooperation. In order to achieve a faster application there should also be a closer cooperation among the administrations of the Member States. The Commission also considers to propose measures to improve direct access to the courts in environmental matters.

Enforcement Network IMPEL

In 1992 an informal enforcement network between the Member States of the European Union was established. The network, also known as „Chester network“ aims at the improvement and harmonisation of the enforcement of European environmental law. Participants are representatives from administrations with practical enforcement experience who exchange views and develop common positions. The network has now been named IMPEL, „Implementation and Enforcement of Environmental Law“. The IMPEL network focuses on issues concerning industrial installations. Several working groups have been established so far, among them a group which deals with technical aspects of permitting industrial installations, a group working on legal aspects of permitting procedures as well as a group discussing questions of inspections.

The European Commission is now considering to give IMPEL official status and is examining different ways to do so.

Report on Habitats Directive

The WWF European Policy Office has prepared a report on the Transposition of the Habitats Directive into national law. The paper offers an overview of the current situation in the Member States. The paper „Spotlight on the Habitats Directive“ can be ordered from: WWF European Policy Office, Tel.:+32 2 347 3612, Fax: +32 2 347 4366.

Montreal Protocol Meeting in Vienna

From 28 November to 7 December the Conference of the Parties of the Montreal Protocol will meet in Vienna. The Conference will discuss the following issues:

- time limits for further sales restrictions on HCFC and methyl bromide,
- negotiations on the obligations of so-called developing countries,
- the multilateral fund on technology transfer,
- trade with substances harmful to the ozone layer,
- exemptions and „essential uses“.

At its meeting on 6.10.1995 the Council of Environmental Ministers of the EU defined goals for its meeting in Vienna: The consumption of HCFC shall be stabilised and reduced step by step until 2015. The use of methyl bromide in agriculture shall be reduced by 25% until 1998 and by 59% until 2005.

An NGO forum will take place from 28.11.-29.11.1995. The forum is coordinated by the Öko Büro Vienna, Tel: +43 1 212 7616 0, Fax: +43 1 212 7616 20

Conference on the Protection of the Alps

Every year over 120 million tourists spend their holidays in the Alps. 10 000 km of national and international highways and more than 16 000 regional motorways not only cut through the unique landscape but also cause a lot of other environmental problems. The „European Conference on the Protection of the Alps" which was held from 17-19 November 1995 discussed concepts for a fundamental change in tourism and transportation in the region. The conference worked out recommendations for protocols to the convention on the protection of the Alps, which shall be decided upon by the Conference of the Parties to the Convention. For more information and results of the conference please contact DNR (Deutscher Naturschutzring), Am Michaelshof 8-10, 53177 Bonn, Germany, Tel: +49 228 3590 05, Fax: +49 228 3590 96

Environmental Codes of Conduct of Transnational Corporations

In principle, international firms and international industry very often accept that there is a relationship between their business and local and global environmental concerns. Dozens of industry associations have published environmental charters and codes of conduct for their membership. Benchmark Environmental consultants researched environmental codes of conduct from industry associations and conducted an analysis on their contents for the United Nations Centre for Trade and Development in Geneva. The report examines 25 industry associations with regard to the following activities: environmentally sound production and consumption patterns, risk and hazard management, full cost accounting. The report „Industry and Agenda 21: An analysis of international industry associations of environmental codes of conduct against the recommendation of Agenda 21" can be ordered by cheque/money order from Benchmark Environmental Consulting, 49 Dartmouth Street, Portland, ME 04101, USA, Tel: +1 207 775 9078, Fax: +1 207 772 3539 at a price of $50 per copy plus shipping and handling ($5 in the USA, $8 outside the USA).

TASKS AND ACTIVITIES

What is elni?

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

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

Why is elni necessary?

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

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

For the legislator or executive authorities, and those advising or aiming to influence them, a knowledge and understanding of different systems of environmental regulation of different states, countries or continents and of the effectiveness of their practical implementation allows comparisons of the different systems and enables the legislator or authority to learn from wide and diverse experiences when faced with the task of developing and improving environmental legislation and its practical application.

How are elni's objectives achieved?

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

1 Studies of the Environmental Law Network International

elni publishes a series of books entitled "Studies of 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 seven volumes to date:

- Participation and Litigation Rights of Environmental Associations in Europe,
- Civil Liability for Waste,

- Licensing procedures for Industrial Plants and the Influence of EC Directives,
- Environmentally Sound Waste Management,
- Dynamic International Regimes,
- Environmental Control of Products and Substances,
- Environmental Rights - Law, Litigation and Access to Justice.

2 elni Newsletter

The elni coordinating bureau in Darmstadt, Germany, produces and sends to each member the elni Newsletter twic a year containing member's reports on projects, legal cases and developments in environmental law. elni therefore encourages its members to submit such articles to be published in the Newsletter, in English, in order to allow the exchange and sharing of experiences with other members.

3 Annual Conference

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

4 Coordinating Bureau

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

elni's BOARD

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

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

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

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

Stefano Nespor, lawyer, editor of the "Rivista Guiridica dell'Ambiente", Milano, Italy

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

Marga Robesin, staff lawyer with the Stichting Natuur en Milieu, Utrecht, the Netherlands

Gerhard Roller, staff lawyer with the ÖKO-Institut, Darmstadt, Germany

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

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

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elni PUBLICATIONS

Martin Führ / Gerhard Roller (Eds.)

Participation and Litigation Rights of Environmental Associations in Europe Current Legal Situation and Practical Experience

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

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

Peter v. Wilmowsky / Gerhard Roller

Civil Liability Waste A Legal Analysis of the Proposed EC Directive

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

In recent years there has been an increase in the use of new strategies in environmental law which aim at supplementing command and control regulation with economic incentives in order to reduce pollution. Such incentives also aim to incorporate improved civil law remedies. Against this background the Commission of the European Communities has proposed a directive on civil liability for damage caused by waste which is carefully examined by this study. Although the Commission's proposal dates from 1991 the key issues of the proposal are still highly relevant in current political discussions on environmental civil liability. The importance of the issue has been highlighted by the recently adopted "Greenpaper on Civil Liability". The authors of this study scrutinise the provisions of this proposed EC directive and develop policy recommendations on the key issues of waste liability law. The main chapters deal with the question of who should be subject to strict liability, requirements in relation to causation, legal remedies which should be available in case of damage to the environment, and the question of compulsory environmental insurance.

Betty Gebers / Marga Robensin (Eds.)

Licensing Procedures for Industrial Plants and the Influence of EC Directives

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

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

With contributions from Rik de Baere, Belgium, Bernardo Delogu, Belgium, Agnes Dósa, Hungary, Gelika Harakopou, Greece, Mariëtte Glim, the Netherlands, Ralph Hallo, the Netherlands, Jutta Jahns-Böhm, Germany, José Januario, Portugal, Jerzy Jendroska, Poland, Alain Lebrun, Belgium, Marga Robesin, the Netherlands, Martin Führ, Germany, Stefano Nespor, Italy, Frank Niederstadt, Germany, Konrad Nowacki, Poland, Eckard Rehbinder, Germany, Gerard C. Rowe, Australia, and Maurice Sheridan, Great Britain.

Andrea Sander / Peter Küppers (Eds.)

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

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

The book assembles the revised papers presented to an international working conference on international waste policy convened by the Environmental Law Network International in May 1991 in Germany. The focus is on EC, national and regional

waste management law, and implementation and pratice in 15 countries of Europe. This is supplemented by analyses of relevant organisations and rich statistical material; thus volume 4 in the *elni* publication series offers a unique comparative overview. The pan-European perspective showed a serious risk of "eco-dumping", i.e. the export of waste to countries with lower disposal standards. Therefore "global domestic policy" must become the guiding principle of national and international regulation and one of the main tasks of environmental organisations.

The book contains contributions of Leandro Barozzi, Italy, Kevin Bradley, Belgium, Josepa Bru Bistuer, Spain, Daniel Crade, France, Agnes Dósa, Hungary, Leo Frühschütz, Germany, Lis Husmer, Denmark, Jutta Jahns-Böhm, Germany, Konrad Keller, Germany, Ernst Klatte, Belgium, Blake Lee-Harwood, Great Britain, Michael Mehnert, Germany, Maite Menen, Spain, Björn Ohlsson, Sweden, Nelly Paleologou, Greece, Jim Puckett, Belgium, Wojciech Radecki, Poland, Vladimir Rimmel, Czechoslovakia, Klaus Rudischhauser, Brussels (EC Commission), Arkady S. Soroka, Ukraine, Henk Venner, the Netherlands, and Volrad Wollny, Germany.

Thomas Gehring

Dynamic International Regimes Institutions for International Environmental Governance

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

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

Betty Gebers / Jerzy Jendroska (Eds.)

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

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

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

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

With contributions from Michail Brinchuk, Russia, Betty Gebers, Germany, Jerzy Jendroska, Poland, Sanford Lewis, USA, Irina Krasnova, Russia, Eva Kruzikova, Czech Republic, Luc Lavrysen, Belgium, Dumitra Popescu, Romania, Eckard Rehbinder, Germany, Marga Robesin, the Netherlands, Jerzy Sommer, Poland, H.A.G. Temmink, the Netherlands, Halina Ward, Great Britain, and Gerd Winter, Germany.