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elni NEWS

***elni* Homepage and the *elni* Newsletter**

We hope that you have already had a look at the new *elni* homepage (<http://www.oeko.de/elni>). So far we have offered some information about *elni*, about the Öko-Institut, and we have drawn up an index of the *elni* Newsletter since the first issue appeared in 1991. We are aware that this is not enough to foster communication and information exchange and are trying to make the pages more attractive and up-to-date. We intend to give more short information on actual developments and will keep you informed of English publications of *elni* and the Öko-Institut.

We are also discussing a plan to publish the Newsletter on the Internet. This would help to save a lot of time and costs which could be invested in improving *elni* communication. Another advantage would be that the articles would be available to you sooner. You also would save on costs.

Please let us know what do you think of an electronic *elni* Newsletter. We are also grateful for information on new developments, interesting conferences, new legal publication, etc. for our website.

***elni* Conference**

Unfortunately, we have finally received a negative reply from the EC Commission regarding our application for conference funding. The EC budget for supporting conferences has become very tight, meanwhile the number of applicants has grown considerably. Thus the *elni* conference must be delayed until we have found other sources of financial support.

***New elni* Coordinator**

Betty Gebers left the Öko-Institut at the end of September to work as a lawyer at the German Hanse Office, the representation of Hamburg and the state of Schleswig-Holstein at the EC in Brussels. She led the Coordinating Bureau since 1991. During this period she gave important impetus to *elni*. We would like to recall to you the declaration of the *elni* Annual Conference in 1991 regarding the draft for an EC Regulation on an Environmental Auditing Scheme, a draft proposal for the "Access to Justice" Directive, a press campaign and a study on the Compatibility of the French Nuclear Tests with Art. 34 of the Euratom Treaty. She consistently spread the concepts of

elni and recruited many new *elni* members at conferences, workshops, and meetings in Europe and the United States. Although we very much regret her move, we are pleased that she will remain an active *elni* member and will support *elni* from Brussels.

Her successor is Ralf Jülich of the Environmental Law Division of the Öko-Institut. He will continue developing the network and will intensify information exchange and cooperation with *elni* members.

***elni* Traineeship**

elni offers the opportunity for young lawyers to work for some months in the Environmental Law Division and the *elni* Coordinating Bureau at the Öko-Institut in Darmstadt, Germany, and to gain an insight into the work of the division. In 1998 Matt Hebard, a law student from Oregon University, and Ignacio García Matos, a lawyer from Madrid, spent several weeks at the Öko-Institut working on legal issues. The trainee should be fluent in reading, speaking and writing English. Some knowledge of German would also be helpful. Since the Öko-Institut, which financially supports *elni*, is a non-profit, independent research organisation, we cannot contribute to the trainees' costs of living, except for the excellent dinner at the institute. We also can offer assistance in finding a suitable housing. The trainee would certainly learn more about German culture and improve his/her German language skills.

If you are interested in a traineeship, please contact us and let us know of your special fields of interest.

***elni* Publication on Voluntary Agreements**

The new *elni* publication on Voluntary Agreements has just left the printers'. The book describes the concrete situation in the use of environmental agreements in Belgium, Denmark, France, Germany, Italy, the Netherlands, the United Kingdom, Poland and the United States. On the basis of eight case studies in four countries (Belgium, Germany, the Netherlands and the US), the research investigated and evaluated the success of environmental agreements.

Voluntary Agreements - The Role of Environmental Agreements, edited by *elni*, 544 p., pb., ISBN: 1874 698 627, 60£, Cameron May LTD, London 1998, <http://www.cameronmay.com>

ARTICLES

Access to Justice and the Swedish Environment Code

By Roberth Nordh

1 A General Description

On January 1 1999 a new Environment Code (EC) will come into force in Sweden. The EC is the result of many years of preparatory work. There were many hopes that the EC would be based on a deep analysis of the need for reforms of substantive law. Unfortunately the legislative guidelines lack such discussions and they have been criticized for this. The EC is in all essentials a law-technical product without much substantive news.

This does not mean that the EC is without benefits for the protection of the environment in Sweden. A code that covers the most essential parts of environmental law makes the aims and purposes of the regulation more clear; it makes the legislation easier to find and understand for people in general; and it gives better conditions for a uniform adjudication. The balancing of contrary interests in environmental matters will also be easier to conduct. The foreseeability of environmental decisions will improve.

As has been said, the EC contains few substantive law reforms. The novelty of the EC is more to be seen in a modified view of the direction of the legislation and its realization in practise. The EC is constructed to regulate the central, overlooking goals of environmental law, while the practical work and responsibility for environment protection shall be decentralised. The sections of the EC are to be concretized, filled out and supplemented by governmental and authority ordinances.

The fundamental base of environment protection according to the EC is the consent and supervising functions of the authorities. These functions shall be fulfilled under general and special "consideration rules" laid down in the EC. The rules are vague and admitting many interpretations. There will be great space for the authorities to form the need for measures to protect the environment according to the facts in each special case.

The general consideration rules are with some adjustments gathered from the 15 acts, now in force, that are combined in the EC. There are some minor changes in pointing out the different kinds of interests that are to be considered in environmental decisionmaking, but it is more a question of regrading the relation between different interests than creating

new interests to be considered. Notable is however that the EC clearly points out that Nature in itself is an interest to be protected, independent of the economical effects of a certain activity. As a summing up it can be said that the general consideration rules mean that all shall be done that can lead to the fulfillment of the goals of the EC and that it is up to the person who wants to start an activity that might harm people or the environment to show (prove) that there is no need for special measures of caution.

2 Public Participation

During the last 25 to 30 years, there is hardly any other area of law which has encountered such an increase in Swedish legal regulation as environmental law. Today, environmental law forms a broad belt of acts and ordinances which regulate a variety of matters, stretching from the exploitation of the nation's natural resources to small activities which may cause only individual and local environmental disturbances.

The authorities' need for legal means to apply measures aiming at rectifying environmental problems is comparatively well provided for in Sweden. On the other hand, the possibilities for individuals and for organizations to intervene against environmentally disturbing activities are much more limited.

Of course any one is free to call the attention of the authorities to certain circumstances and request a reaction on the part of the authorities. However, those who are dissatisfied with the reaction on the part of the authorities do not necessarily have the right to have the decision re-examined. Further, the possibility for individuals and organizations to turn to the general courts for assistance is restricted as a result of the extensive decision-making power which has been increasingly given to the authorities. This is related to the issue of the distribution of functions between the administration of justice and the official administration, and the jurisdictional division between general and administrative courts.

It is not until recent years that the Swedish legislator has fully recognised the need for citizens to have access to effective sanction mechanisms and be able to influence decisionmaking, not only when individual interests are concerned but also where public interests need protection. This change in attitude

can partly be explained by decreasing state budget funds. Lack of resources has made it necessary to give priority to activities where there is a special need for state interference. However, the most important factor is certainly that the legislator has adapted a new view of principle on the roles that are to be played by the authorities, on the one hand, and private citizens and their organizations, on the other hand. The starting point is no longer (as it was in the 1960s and 1970s) that state responsibility makes it unnecessary for individual citizens to act. Today it is clear that there must be an interaction and a joint responsibility between public and private institutions. One important principle of the EC is that the public shall have a greater influence on the environmental decisionmaking process.

3 Environmental Impact Assessment (EIA)

Public participation is secured i.a. through provisions on EIA's and other forms of statements that must be taken into consideration by decisionmaking authorities. Thus anyone who intends to start an activity that needs a permit must consult in advance with persons that might be affected. If the adverse effect on the environment of the activity for which consent is sought will be considerable, there will be a special procedure of impact assessment. The applicant must consult with those authorities, municipalities, private citizens and non-governmental organizations that the activity might affect. The consultation must concern the locality of the activity, its extent and the making of an EIA. The application and the EIA must be publicly announced. The result of the consultation procedure and any submissions made must be taken into account by the consent authority in its decisionmaking.

4 Locus Standi

Matters under the EC are to be determined by the government, public authorities, local councils or courts. The government is to determine matters of great national interest. Public authorities and local councils decide matters of consent and are responsible for the supervision of activities that might be harmful to people and the environment. Decisions made by public authorities and local councils may be appealed to the Environment Court. Some consent issues are further to be determined by the Environment Court as first instance.

It is not all clear who has standing under the EC to act as a party for the protection of individual interests. The main principle is that standing requires that one is affected in a certain qualified manner. To discuss what this means in practice one must go into many details of Swedish environmental and procedural law that is of little interest in an international perspective. There is more reason to discuss

the matter of legal standing for the protection of public interests.

Many interests protected by the legal system are commonly called public interests. This is an expression for cases and principles which are embraced by all or a large group of people. The interests which are linked to the legal rules intend to protect society, the public or groups and not to establish rights for the individual citizen. Claims deriving from these rules are normally collective and diffuse.

Public authorities who act as supervisors are of course entitled to start proceedings within their own jurisdiction in order to protect public interests. To fulfill their supervising function they may give orders that they find appropriate, e.g. grant an injunction. If the decision is appealed, the authority will act as a party before the Environment Court.

Matters of consent are frequently determined by a public authority and not a court. Some times there is reason for a review of the consent due to the activity causing harm to a public interest. In such case the authority that has issued the consent can review its decision without an application. If however the consent is issued by a local council or by the Environment Court, there can only be a review on application by one of three named public bodies (Naturvårdsverket, Kammarkollegiet och länsstyrelse). These three institutions also have standing to act as parties, for the protection of public interests, in proceedings where someone has made an application for consent.

In Sweden there have for some time now been significant inadequacies in the capacity of the administrative institutions to respond and protect public interests. The resources of the authorities, both as regards personnel and finance, are limited and are not sufficient to completely satisfy their functions. Further, it is sometimes the case that it is state or municipal operations which are the source of the discharge. One should also not ignore the risk that the personnel of the authority after some years may be affected by the values which dominate those who are subject to control. Lobbying activities, personnel transfers etc. have, in the long term, an influence on how the authorities perform their functions and make it more difficult to combine functions of advice, information and coordination with functions of supervision and intervention.

These, and other reasons, suggest that one ought to revise the fundamental view that the State and municipalities alone should be the primary guardians of common nature conservation issues and view the issue in a broader perspective. The public authorities and the individuals and their organizations both have, for themselves and in joint cooperation, an important function to play if the objectives underlying

ing legal rules are to be realized. It is therefore of importance that those with the energy, courage and will to react are afforded the procedural freedom to ensure that claims which are collective and diffuse are enforced.

In Sweden labour unions, employers' associations and consumer organizations have for several years been able to appeal decisions under the Environmental Protection Act and the Chemical Products Act. The right to appeal has seldom been used. For environmental organizations there has been no right to appeal. This will change with the enforcement of the EC. Environmental organizations will from next year have a right to appeal decisions under the EC in matters of consent, approval or exemption. A requirement for the right to appeal is that the organization according to its statutes has the aim to protect the environment and has been active in Sweden for at least three years and has two thousand members or more. The right to appeal does not require the organization to have acted as a party or in any other way participated in the first instance. On the other hand the right to appeal is limited to decisions that in theory can be appealed by persons who have been parties. The *res judicata* effect against a party has the same effect on organizations that have not been parties.

The demands on organizations to have more than three years practice and at least two thousand members mean that very few organizations will qualify for standing. Today there are probably only two such organizations operating in Sweden. Why it is necessary to restrict the right to appeal in this way is not motivated in the preparatory work, in any other way than by stating that it is "reasonable". Equally reticent is the legislator as to why the standing rule is restricted to final decisions in matters of consent, approval or exemption.

Apart from non-governmental organizations a citizen possessing a sense of responsibility may sometimes have the inclination or need to respond to encroachments of public interests. It may be that an active environmentalist desires to obtain a reduction of a discharge threatening fauna and flora of a lake or the biological diversity of nature. At present there are great obstacles to such citizens obtaining access to appropriate sanction mechanisms. The right to appeal decisions under the EC to protect public interests requires that he can establish an interest over and above the interest that is shared by the public in general. He must have a private interest in the matter.

5 Conclusions

The post-industrial society of today is characterized in several respects by social, industrial, commercial and environmental structures which differ from

those prevalent when the Legislation in many fields was created. It is not only substantive legal rules that must be brought up to date. Equally important is to have modern shaped procedural rules. Unfortunately it cannot be held that the EC supplies the needed modernisation. Procedural rules are still formed without sufficient regard to the fact that the circumstances within environmental law are different to those which apply in many other areas of law. In the environmental field, as well as e.g. in consumer law, the contemporary society has given rise to new forms of needs and claims. For example the right to a good and sustainable environment is a type of claim which derive from rather generally formulated social goals. It is a claim which is common for all citizens or for a large section of the population. Claims of this type can be distinguished from traditional rights as, in practice, they are not susceptible to being individualized or personalized in any simple way. Further, these claims are not suitable to being arranged within current procedural models. It is not possible to satisfy the needs of people and the environment solely by provisions providing private citizens with means of exacting sanctions should they be subject to a violation of their private rights.

Today there are great difficulties seeking redress, difficulties connected with economic, psychological, cognitive and social obstacles affecting the individual claimant facing a party who may in several respects be stronger. This problem may be virtually insurmountable as the system of procedural rules is aimed at satisfying traditionally narrow two-party disputes. Yet if claims deriving from encroachments on public interests are ever to be manifested it is necessary that they should be examined judicially or by some other legal instance. Legal systems should be constructed in a manner that guarantee the possibility of effective and just intervention. The overall objective is to enforce and assure the content of the substantive legal rules. It may appear to be a banal truth but it is nevertheless worth stating: A system of sanctions must be founded on the fundamental principle that an act or ordinance is passed with the view that its content shall be observed and that its sanctions are possible to enforce.

The procedural rules, and the actual proceedings, are of fundamental importance to the effectiveness of the substantive law. This also applies to the possibility of compelling enforcement. The procedural system should be structured in accordance with requirements that the decisions are correct in substance and also with the view that the procedure shall act as a behaviour modifier. The litigation procedure should facilitate the resolution of disputes in a manner which does not undercompensate or overcompensate any party while the decision of the

court should discourage actions which violate the law.

All indications show that there is a significant number of public interest violations which never obtain actual recognition. The authorities' financial and staff resources cannot extend to all those cases where intervention is justified. Procedural rules principles present obstacles in the way of those who possess the courage, energy and will to act. There are many reasons which together give rise to lacuna in the legal system and permit the occurrence of unchallenged violations of legal rights.

The EC gives the public an increased access to the environmental decisionmaking process by stipulating a wider obligation for anyone who wants to start an activity that may harm the environment to consult with the public and the authorities in advance and by giving legal standing to environmental organizations in form of a right to appeal. However, in practice there will be few organizations that will be able to use the right to appeal, due to the special requisites for standing. Furthermore, there will be no increased standing for individuals who want to act for the protection of public interests. Standing will still depend on the individual having a greater interest in the matter than people in general. All in all it can therefore be said that the EC will only mean a marginal strengthening of Swedish citizens' access to justice where public interests are concerned.

To improve access to justice in respect of mass claims the Swedish Commission on Group Actions in 1994 proposed that, as a complement to ordinary litigation procedures, a new statute should be introduced concerning group litigation in i.a. environmental law cases. The main content of the proposal, which is under further consideration by the Ministry of Justice, is that

- it should be possible for group actions to be brought by private citizens, certain organizations

(in consumer and environmental cases) and by representatives of the State or a municipality,

- group actions should only be permitted if the action cannot be more effectively or equally well processed in another manner (e.g. in the form of a test case) and if certain other special conditions for a group action exist,
- stringent requirements shall be imposed concerning the suitability of the representative and counsel of the group to conduct the group action,
- a judgment in a group action shall apply for and against (*res judicata*) all members of the group as if they had been parties to the case,
- the members of the group on the plaintiff side should be able to leave the group during the litigation and thereby not be bound by the judgment,
- members of the group shall be informed in an adequate manner of the procedure, their rights to leave the group and also advised about important decisions and other procedural steps in the action,
- a member of the group shall have the right to intervene and thereby become a party to the group action,
- members of the group shall have the right to appeal against the judgment,
- the court shall be active in directing the action, both as regards formal and substantive issues,
- a settlement made by the representative of the group shall be subject to court approval in order to bind members of the group, and
- members of the group shall not be liable to pay litigation costs except in certain circumstances.

A combination of an increased possibility for any person to act on behalf of public interests and a group action procedure of the kind proposed by the Commission on Group Actions would certainly improve the effectiveness of existing substantive legal rules.

Publics Rights of Action under the Spanish Environmental Laws

By Ignacio García Matos

Preface

The legal, political and territorial organisation of Spain is based on the Constitution adopted on 6 December 1978.

According to Article 1 of the Constitution:

1. *Spain constitutes itself into a social and democratic state of law which advocates liberty, justice, equality, and political pluralism as the superior values of its legal order.*
2. *National sovereignty belongs to the Spanish people from whom emanates the powers of the state.*
3. *The political form of the Spanish State is the Parliamentary Monarchy.*

The Constitution also recognises both the indissoluble unity of the Spanish nation and the right of self-government of the nationalities and regions of which it is composed and solidarity among them all.

According to this principle, the Kingdom of Spain is politically divided into 17 autonomous communities of which each has the power to govern itself, in accordance with the scope of competencies assumed in its autonomous status and in the Constitution. The central government has a scope of competencies, the main goal of which is to achieve the general interest of the nation¹.

In relation to the environment, Article 45.1 of the Spanish Constitution recognises the right to enjoy an environment suitable for the development of the individual, as well as the duty to preserve it. Furthermore, Article 45.2 of the Constitution reads:

"The public authorities shall concern themselves with the rational use of all natural resources, for the purpose of protecting and improving the quality of life and protecting and restoring the environment, supporting themselves on an indispensable collective solidarity".

The context in which this article was written, within the Guiding Principles of the Economic and Social Policy (Welfare State Chapter of the Constitution), excludes the possibility to construct a subjective right to a clean environment that may be in the hands of the citizens. It is rather a function that the three powers (executive, legislative and judiciary)

have to carry out as a public duty in order to ensure that the citizens rights to a healthy environment correspond with the rules of the Welfare State Principle.

Within the scope of political life, Article 23.1 of the Constitution recognises:

"Citizens have the right to participate in public affairs, directly or through representatives freely elected in periodic elections by universal suffrage".

Article 29, rules the right of petition;

1. *All Spaniards shall have the right to personal and collective petition, in writing, in the form and with the effects the law shall define.*
2. *Members of the Armed Forces, Institutes, or the Corps subject to military discipline, may exercise this right only individually and in accordance with the provisions of their specific legislation.*

Both articles embody constitutional rights, which can be directly guarded by ordinary courts by the Constitutional Tribunal and must also be observed by all public authorities².

As well as this, Article 105 of the Constitution recognises hearings and the right to information:

"The Law shall regulate: a) The hearing of citizens, directly or through the organisations and associations recognised by the law, in the process of elaborating the administrative decisions which affect them; b) access by citizens to the administrative archives and registers unless it affects the security and defence of the State, the investigations of crimes and the privacy of persons; c) the procedure for administrative actions for guaranteeing when appropriate the hearing of interested persons".

Nevertheless, these rights are ineffective without due enforcement within the legal system³.

1 The legal standing⁴ of citizens before administrative authorities and courts

Taking a glance at the Spanish legal system of justice, it is interesting to note that according to Span-

¹ Domper Ferrando, Javier, "El medio ambiente y la intervención administrativa en las actividades clasificadas", Vol. 1, Planteamientos Constitucionales, Civitas, Madrid, 1992. p.140.

² Garcia Ureta, Agustin, "Marco jurídico del procedimiento de evaluación de impacto ambiental: El contexto comunitario y estatal", Administración de la Comunidad Autónoma de Euskadi. Instituto Vasco de Administración Pública. Bilbao, 1994, p.293.

³ Garcia Ureta, Agustin, "Marco jurídico..." op.cit. at p.293.

⁴ Also "Locus standi".

ish Administrative Law, the person's relation to the administrative act is determinant to found the legal standing of the plaintiff. The most important objective of the Administrative Jurisdiction focuses on the search for illegal nuisances in the rights of citizens. Thus, except in certain cases (as it happens with popular action, see below), citizens cannot commence an action against an administrative act which is alleged to be in violation of the law, unless they have a particular relation to this act.

In the stated context, the Spanish legislation provides the following options to initiate administrative procedures and subsequently, court proceedings in order to protect, preserve or defend the environment⁵:

- a) Subjective right and lawful interest actions
- b) Popular action
- c) Class action
- d) NGO's action
- e) Residents action

The above mentioned actions shall be explained in more detail in the next pages.

1.1 Subjective Rights

The new law that rules the Administrative Jurisdiction, Law 29 of 13 July 1998⁶ (from here on: LJCA), follows the preceding Law of 1956.

Article 19.1 of the LJCA entitles any "natural and legal person that has a subjective right or a lawful interest" to appeal against a concrete administrative act which infringes on his/her rights or his/her interests in any way.

Since it is not necessary to explain the form of the subjective right, we shall focus our attention on the form of the "lawful interest".

A "lawful interest" can be defined as the interest coming from those administrative acts or regulations that cause particular damage in the legal sphere of the plaintiff over and above that suffered by others. According to the Jurisprudence of the Supreme Court, "the difference between a subjective right and a lawful interest, that is today in our Constitution, has in our legal system a sense of increasing citizen's protection. They are not however, different

legal units, but rather a development, enlargement or spilling of the nuclear figure being the subjective right, whose outlines are difficult to specify" (STS 16.7.90 Ref.Ar.6632).

The Supreme Court has summarised the doctrine in relation to lawful interest by stating that this concept can be defined as any lawful and individual situation which focuses on one particular person or group of persons related with the administration. This legal situation must have an inherent administrative legal consistency and logic. The Supreme Court has also stated that there is a lawful interest whenever it is to be presumed that arising from a particular legal situation, a person may obtain an advantage or benefit which is not necessarily material, but can also be moral.

The way to identify the existence of such interest is not only left in the hands of the citizens. Whenever the administration carries out its statutory powers, and by means of such power the rights or interests of any natural or legal person, the administration has the legal obligation to inform those persons that they have the right to act as party⁷, within this administrative procedure and can challenge it before the administrative tribunal.

Before the Court and under the 1956 LJCA, the plaintiff could only apply for an annulment of an administrative act and, in special cases, for the appreciation of an individual legal status. This included an adoption of all necessary legal prescriptions to fulfil the restitution of the said legal status, including a private right of action for damages (action in tort).

Today, the new LJCA entitles in certain cases the plaintiff to apply to the Court to force the administration to perform a statutory duty when the administration has failed to perform it by means of inactivity (failure of duty).

1.2 Popular action

The popular or public action, allows any person to act as a private prosecutor in defence of the law by challenging an administrative act, without being the addressee of this act, whenever he/she claims the act has not complied with environmental law.

By means of this action, the plaintiff can only apply for the annulment of the administrative act. He/she cannot demand the acknowledgement of an individual legal status nor a private right of action for damages, as he/she can with a subjective right.

However, this action has to be expressly established by law. Therefore, the field concerning national and

⁵ The problems concerning the concept of "environment" and therefore, the elements from which such concept is composed, were approached in the Sentence of the Constitutional Court 102/95, of 26 June. With support on the General Theory of Systems, the sentence resumes that the environment cannot be reduced as a mere sum or juxtaposition of natural resources (water, soil, air, etc.) and its physical basis, but that is a complex net of relations of all those involved elements that have themselves a preceding and independent existence. The interaction of these elements give them a transcendent meaning that each element - individually and separately considered - have not.

⁶ In accordance with the final provision n° 3 of this Law, it will come into effect on December 14, 1998, 5 months after its publication.

⁷ Article 34 of the 1992 Law on the Legal System of Public Administrations and Common Administrative Procedures.

natural parks is the most important example of public action within the Spanish environmental legislation.

For example, article 11 of the Law 91 of 28 December 1978, by means of which the National Park of Doñana was declared:

"It shall be public the action to demand, before the administrative bodies as well as before the Courts, the enforcement of the rules protecting the National Park of Doñana".

The same or very similar terms including this provision have been adopted in all nature reserve laws⁸.

Other fields, such as fishing (Fluvial Fish Law of 20 February 1942, Article 58) or the coastal zone (Coasts Law of 28 July 1988, Article 109), also include this kind of action as enforcement of its provisions.

Article 109 of the Law 22/1988, reads:

1. *The action to demand observance of the provisions of this law and those passed for development and implementation thereof, before administrative bodies and the courts shall be public.*
2. *Once the existence of the violation has been verified and provided that the reported action is not the subject of a penalty proceeding already concluded or in process, the administration shall reimburse the complainants for any justifiable costs they may have incurred".*

Paragraph 2 of the above mentioned article is a way to uphold the principle of collective solidarity contained in Article 45.2 of the Constitution, as it stimulates citizens participation in the defence and protection of the environment without incurring additional cost to them.

The original Land Law also demonstrates an important example of public action that could be used in many fields involving land use and environment protection. This Law enclosed specific provisions in this field. Unfortunately, the new Land Law 6/1998 of 13 April does not have any provision concerning environmental protection and thus deprives the citizen of an effective instrument that had previously been in use.

Nevertheless, the Land Laws of many Autonomous Communities, besides the popular action, contain environmental protection provisions; therefore, citizens can still use them in confronting land use problems.

Other environmental laws providing for the popular action require the plaintiff to justify with sufficient

argument the facts alleged to be in violation of the Law or rules used in developing the Law. The plaintiff must also allow the administration to close the file whenever it is proved that there is not enough evidence to keep the case open. These are for example the cases of the Royal Decree 1471/1989 1 of December, on the developing of the Coasts Law, and within the autonomous community legislation, the Law 2/1993 of 5 March, of Wild Animals, Hunting and Fluvial Fishing of Navarra or the Law 7/1995, of 21 April, of Wild Animals, Hunting and Fluvial Fishing of Murcia.

However, public action is not recognised in most of Spanish environmental laws, such as the 1964 Nuclear Energy Law, the 1992 Law on the Protection of the Atmospheric Environment, the 1973 Law on Mining, the 1985 Law on Water, the 1986 Royal Decree on Environmental Impact Assessment, the 1989 Law on Natural Parks, Wild Fauna and Flora, the 1994 Law on Genetic Modified Organisms, the 1997 Law on Packaging and Packaging Residuals, the 1998 Law on Residuals, etc.

Generally, this type of action is not often used - with the exception of urban areas. The reasons for this behaviour are not only economic, but are also attributed to the inexistence of an important and close relationship between the part of the environment regulated by a specific administrative act and the citizens.

1.3 Class Action

The class action is recognised for groups, entities or collectives without legal personality but legally qualified to defend and promote the interests of the group. Before the court, the group is represented by a previously chosen member of the group who becomes the trustee of the collective legal standing.

As a matter of fact, this is the scope in which the right to a clean environment is more represented, due to the fact that the environment belongs to mankind as a whole.

Article 7.3 of the Judicial Power Organic Law of 1 July 1985, reads:

"Courts and Tribunals will protect the rights and the lawful interest, not only of individuals but also of collectives, avoiding all cases of defenceless. For the defence of those collective interests will be recognised the legal standing of corporations, associations and groups that are either affected or legally qualified for the defence and promotion of the interests of the group".

⁸ Within this context, one can name, for example, the 1980 Law on the Tablas de Daimiel National Park (Article 13), the 1981 Law on Garajonay National Park (Article 17), the 1981 Law on the Caldera del Taburiente National Park (Article 17), the 1981 Law on the Teide National Park (Article 17), the 1981 Law on Timanfaya National Park (Article 17), the 1982 Law on Ordesa y Monte Perdido National Park (Article 17).

⁹ Also article 19.2 of the new LJCA recognizes the legal standing of groups which normally and, in accordance to the article 31.1.c) and d) of the 1992 Law of 26 November on the Legal System of Public Admini-

This group protection is commonly known within the European administrative legal doctrine as "interese diffusi" (diffuse interests). It is important to say that such interest is to specify before the Court. The law entitles only those who have either rights (public subjective rights) or a lawful interest, but not any kind of interest to appear before the court. That is to say, the protected interests are only legal interests that a group, as a whole, may have. According to the Constitutional Court Sentence 93/90, it is required that the interest comes directly or indirectly from a legal rule.

The main difference between groups and NGOs is that the existence of the group is merely accidental and arises from a particular situation that does not require the establishment of a legal entity.

1.4 NGO's action

Associations and other such organisations have legal standing to defend the statutory purposes they were based upon, both during an administrative procedure¹⁰ and before administrative courts¹¹. The legal standing of an NGO as a legal person should neither be identified nor confused with that belonging to the members of such entities, who cannot use the legal standing of the NGO for their own private interests.

In order to act in accordance to the law, not only within the administrative procedure but before the administrative court, it is required that the NGO is legally founded to protect, defend, or preserve in any way the environment as a whole or in part. Usually, there are NGOs especially founded for a certain purpose, like the "Coordinadora de Itoiz", formally founded to prevent the construction of a dam in Navarra. This association successfully challenged the environmental impact assessment before the Administrative Court and claimed for the annulment of that act.

The legislation of many autonomous communities in relation to the protection of animals provides for the participation of NGOs as "collaborating entities" of the authorities to help them accomplish their statutory duties.

Thus we can recall the following laws: the 1992 Law on Animal's Protection from Baleares (Articles 41 and 42), the 1990 Law on Animal's Protection of Castilla-La Mancha (Article 17-19, the 1993 Law on Animal's Protection from Galicia (Article 13), the 1994 Law on Animal's Protection from Baleares

(Article 23), the 1994 Law on Animal's Protection from Navarra (Article 20).

As is true in most EU countries, NGOs are one of the strongest bastions of effective environmental protection, because they not only fight against private and public projects that the citizens individually cannot attack, but at the same time they are increasingly present in the decision of administrative procedures regarding environmental issues.

1.5 Residents action

The Spanish Regulation for Local Administration, Law of 2 April 1985 includes in its Article 25.2.f) environmental protection as a municipal competence. On the other hand, Article 26.1.d) states that those municipalities with a population over 50.000 have the legal duty to establish a public agency of environmental protection.

Moreover, Article 18.1.g) of the same Law, recognises the right of all neighbours to demand from the local authorities the achievement and the establishment of a public utility whenever this is an obligatory municipal competence.

It is important to note that, within the environmental context, local authorities cannot interfere with competencies held by other authorities. Central and autonomous legislation should develop the competencies that local authorities may have in relation to the environment.

The most important regulation within this arena is the Decree 2414 of 30 November 1961 on Irritating, Unhealthy, Harmful and Hazardous Activities¹², which regulates a number of areas in which the local authorities have responsibility concerning licenses for such activities.

According to Article 6 of the Decree, "Mayors are competent to issue licenses or the exercise of the regulated activities, overseeing compliance with these provisions, and exercising sanctioning power as stipulated in these Regulations and without prejudice to the stipulations applicable to the civil governors". Likewise, the "city councils will be authorised to issue regulations in municipal ordinances as regards the location of these activities

strations and Common Administrative Procedures, were present in the previous administrative procedure.

¹⁰ Article 31.2 of the 1992 Law of 26 November on the Legal System of Public Administrations and Common Administrative Procedures.

¹¹ Article 19.1.b) of the 1998 Law of 13 July (LJCA).

¹² Article 3 of the Decree defines those activities in the following terms: Irritating. - Activities that create an inconvenience due to the noise or vibrations they produce or the fumes, gases, odors, clouds, suspended dust, or waste materials they exhaust are classified as "irritating", Unhealthy. - Activities that involve the release or evacuation of products that can be directly or indirectly hazardous to human health are classified as "unhealthy", Harmful. - Activities that may for the reasons stated above cause damage to agricultural property, forests, livestock, or piscicultural property are classified as "harmful", Hazardous. - Activities carried out for the purpose of manufacturing, handling, retailing, or storing products that could cause serious hazards due to explosion, combustion, radiation, or other events having an analogous impact on life or property are considered "hazardous".

and any other supplementary instructions not contrary to the provisions of these regulations".

Thus, the residents of a village can directly demand the protection and defence of the environment from local authorities within the scope of their competencies.

Within this context, the Supreme Court Sentence of 24 April 1989, by means of which the Supreme Court accepted the complaint of a neighbour of the Village of Puigpunyet, who had asked the local authorities to resolve the problems concerning sewage services. This judgement is quite famous within the administrative doctrine. The sentence forced the administration to resolve these problems and further more, to ensure the right of the neighbour to a healthy environment.

1.6 Conclusion

The chances for legal standing that citizens and groups have within the Spanish legal system regarding environmental protection, although reasonable, proof to be ineffective. This is because the courts often study purely whether the administration has fulfilled the provisions contained in the Administrative Procedure Law or not. Therefore they do nothing when the challenged act, although legal from the procedural perspective, is environmentally harmful.

Citizen participation in environmental protection should be supported before the Court by the Public Prosecutor, who has more resources at his hand to protect the environment. This public authority can then act together with those who have a complaint, or alone, to represent people in the defence of the environment as a public good.

Environmental Protection and the New Polish Constitution

By Jerzy Jendroska and Maria Longi

The New Polish Constitution (the "Constitution") was adopted by the National Assembly on April 2, 1997 and passed by national referendum on May 25, 1997.¹ On October 17, 1997, the Constitution came into effect, and is already being proclaimed "one of the greenest" in Europe². A primary reason for this statement is that, in addition to the guarantees of democratic freedoms and assurances that private property and a market economy are pillars of the country's economy, the Constitution contains several provisions related directly to the environment. The general framework of environmental protection law and sustainable development in Poland is found in the Constitution, situated in the midst of fundamental national values.³

A truly modern participatory method was used in developing Poland's new Constitution, providing citizens an opportunity to incorporate issues that were important to them into the Constitution. A 1993 Act regarding the Preparation of the New Constitution stated that if 500,000 citizens submitted a draft proposal for a new constitution, their proposal had to be officially considered and addressed by the

Special Parliamentary Constitutional Commission. Using this law, a public citizens committee known as "Ecology in the Constitution" organized an initiative to incorporate the concept of sustainable development into the Constitution. While this Committee did not manage to collect the required signatures for official consideration, to a large degree, their activities contributed to the consideration and insertion of this topic into the constitution's text. The Constitutional Commission took advantage of the opportunity to introduce a new ecological formula into the constitutional text and approved most of the Committee's proposals, proving the success of these novel participatory procedures.⁴

Arguably, the most important novelty of the Constitution is the direct reference to the concept of "sustainable development", which is made one of the fundamental principles in the Constitution. **Article 5** states:

The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and

¹ Dziennik Ustaw, July 16, 1997, No. 78, item 483 (Pol.).

² International Environmental Law Reporter, Bureau of National Affairs, Washington, D.C., April 16, 1997, at page 394.

³ See The Constitutions of the Republic of Poland and Commentary to the 1997 Constitution of the Republic of Poland, J. Boc (ed.), Wrocław, 1998, at pages 22 to 26.

⁴ See J. Jendroska and J. Jerzmanski, Status of Public Participation Practices in Environmental Decisionmaking in Central and Eastern Europe – Poland Country Report, The Regional Environmental Center of Central and Eastern Europe, September 1995, at page 103. See also M. Mazurkiewicz, Constitutional Regulation of Environmental Protection in Poland, Environmental Protection: Law and Policy, Polish Environmental Law Association, 1997/2, pages 8-10. Mr. Mazurkiewicz was the chairman of the Special Parliamentary Constitutional Commission.

*citizens, ... and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.*⁵ (Emphasis added).

This Article serves to define the nation's role in environmental protection. The language follows one of the newest concepts of environmental development aimed at protecting the environment for today and for future generations, a concept which was introduced on the international level in the document "Agenda 21" at the 1992 UNDEP Conference in Rio de Janeiro.

Undoubtedly, the true significance of Article 5 to environmental protection will be a topic analyzed by many. It is possible to make a few observations, however, at this time. First of all, it is significant that the constitutional legislature decided to use the term "sustainable development" instead of "eco-development," which term had been frequently used earlier in legal acts in Poland. This choice was met with acceptance, especially among lawyers, because the term "eco-development" aroused great resistance as being merely non-legal, journalistic jargon.⁶ The term "sustainable development", on the other hand, is a term which prevails in many international documents and is more universally understood as a credible development concept.

Another concern associated with this term is that, for a majority of economists, the term "sustainable development" is used primarily as an economic term and not an ecological one. In reality, it was not the intention of the constitutional legislature to reflect such an economic understanding. Even so, it is possible that this "economic" interpretation of Article 5 might become a concern and could be challenged in the future. Realizing this concern, steps were taken to more clearly define "sustainable development" through an amendment to Poland's Environmental Protection Act of 1980 (the "EPA"). Although many lawyers did not approve of specifically defining this constitutional term, claiming that it should be left open for judicial interpretation, an amendment to the EPA was introduced into law in August 1997, defining the term "sustainable development" as used in the Constitution as:

socio-economic development with a goal of balancing individual communities' or their citizens' chance to have access to the environment – both today as well as in future generations - in which economic, political and social activi-

*ties are being integrated, with the need for maintaining an ecological balance and sustainability of basic processes of nature.*⁷

The design of **Article 5** also give rise to speculations as to whether the drafters of the Constitution wanted to provide guidance on how to interpret the concept of "environmental protection." One may argue that by connecting "environmental protection" with the principle of "sustainable development" the Constitution requires "environmental protection" to be understood, not with an "end-of-pipe" approach, but with a more comprehensive, "clean-technology" philosophy. Such a preventative approach to environmental protection looks at all aspects of production and product development, requiring a new way of thinking for everyone.

Article 31(3) highlights the prominence of environmental protection, while recognizing that it is not absolute. This Article states:

*Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the national environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.*⁸ (Emphasis added).

On the one hand this Article emphasizes the important role of environmental protection, while on the other hand it clearly shows that any attempts to protect the environment via the force of "necessary" limitations will be balanced relative to other constitutional rights and freedoms. Already, **Article 31** has raised doubts among some lawyers (significantly, citizens' rights ombudsman Adam Zielinski⁹) regarding the possible depletion of civil rights because of environmental protection. How broadly or narrowly the courts interpret what is "necessary" to protect the environment as balanced against other constitutional freedoms and rights remains to be seen.

Following similar provisions in the old constitution, the Constitution applies a general duty on "everyone" to protect the environment. **Article 86** states:

⁵ English Translation of The Constitution of the Republic of Poland, Sejm Publishing House, Chancellery of the Sejm, Bureau of Research, August 1997. See also J. Jendroska, Poland: New Constitution, Environmental Liability Journal, Sweet & Maxwell, Volume 5, Issue 6, 1997, cs85, for alternative translations of certain environmental provisions of the Constitution.

⁶ See W. Radecki, Constitutional Basis for Environmental Protection in Poland, Problem Ekologii, 1997/5, page 147, at page 149.

⁷ Environmental Protection Act of 1980, Section 1, Chapter 1, Article 3, Point 3(a), as amended in Dziennik Ustaw 1997, No. 133 item 886 (Pol.). There was also an attempt to implement in this amendment some other constitutional provisions, in particular access to information provisions by establishing PRTR-like registers. Some of these provisions were not implemented at that time, but are included in the Omnibus Environmental legislation referred to infra at note 20. See also J. Jendroska, Doors to Democracy – Poland Country Report, The Regional Environmental Center for Central and Eastern Europe, June 1998, page 309.

⁸ English Translation, supra note 5.

⁹ See Rzeczpospolita, August 31, 1998.

*Everyone shall care for the quality of the environment and shall be responsible for causing its degradation. The principles of such responsibility shall be specified by statute.*¹⁰

It is important to note here that the official English translation referenced in this paper does not provide an exact meaning to the Polish text: the phrase "responsible for its degradation" is more accurately translated as "responsible for degradation cause by himself/herself."

Article 86 is commonly understood as a reference to support the idea of "polluter pays."¹¹ However, if we talk only of "degradation caused by himself/herself" (and therefore "polluters pay"), we would be ignoring the express duty to take "care", which infuses a significantly broader meaning to this Article. The first clause of the first sentence of **Article 86** clearly refers to the need for civic activity on issues regarding environmental protection, and arguably provides constitutional support for the concept of "civil disobedience." An example of how such an argument may develop can be seen in a recent case in Poland, in which environmentalists protested development of a highway through environmentally valuable areas by forming blockades. Should these environmentalists be criminally prosecuted for their actions, it is possible that they could put forth the argument that **Article 86** requires them to care for the environment, thereby justifying their actions. Thus, while the obligation to take care of the environment in the public interest exists, the scope of that obligation is yet to be defined.

In addition to imposing a wide duty of care on "everyone," the Constitution imposes extensive responsibilities on public authorities regarding the scope of environmental protection. **Article 68(4)** states that "Public authorities shall combat epidemic illnesses and prevent the negative health consequences of degradation of the environment."¹² Likewise, **Article 74** is dedicated totally to the concept of environmental protection, and reads as follows:

1. Public authorities shall pursue policies ensuring the ecological security of current and future generations.
2. Protection of the environment shall be the duty of public authorities.
3. Everyone shall have the right to be informed of the quality of the environment and its protection.
4. Public authorities shall support the activities of citizens to protect and improve the quality of the environment.¹³

¹⁰ English Translation, *supra* note 5.

¹¹ See, Mazurkiewicz, *supra* note 4.

¹² English Translation, *supra* note 5.

¹³ *Id.*

As in many constitutions, the drafters of the new Constitution chose to focus on "tasks" of public authorities and not on the "subjective rights" of citizens, at least where environmental protection was concerned.¹⁴ Indeed, there is only one reference to the environment that is stated in terms of subjective rights (**Article 74(3)**, discussed below). This is in contrast to the old constitution that contained two general references to the environment – one referring to the duty of authorities, and the other providing a general "right to the environment." These so-called "rights" of the old constitution, however, were not legal rights enforceable in court, but were used by the government as political tools.¹⁵ The new Constitution's drafters originally intended the document to be legally enforceable, like the United States Constitution, meaning that its provisions would be fully supported by the court system. With this in mind, it was decided that no general subjective rights to the environment would be included, because it was felt that such "rights" would not be legally enforceable: Couching environmental provisions in terms of specific duties and rights would alleviate such problems. Unfortunately, in the development of the Constitution, the force of politics and other factors proved that such a "pure" legal document was not to be. As a result of numerous tradeoffs in the drafting process, certain "social rights" not fully legally defensible in the Polish court system found their way into the Constitution. This being the case, we may now ask ourselves what harm would have been caused by inserting a general right to the environment, as was found in Article 71 of the prior constitution.

Article 74 does provide one very significant regulation regarding the subjective rights of the people, giving everyone the right to information on the state and protection of the environment. Such a right provides us with a guarantee of transparency of public life, which is critical in a democratic state. While the old constitution granted citizens a general right to the environment,¹⁶ albeit a right which was not enforceable, the Constitution now specifically guarantees a legally enforceable right to access to environmental information.

It is necessary to look at **Article 74(3)** in the context of **Article 61**, which talks about the general access

¹⁴ See H. Steiger, B. et al., *The Fundamental Right to a Decent Environment*, Trends in Environmental Policy and Law, M. Bothe (red.), Erich Schmidt Verlag, Berlin 1980, at page 1. This article expounds on the constitutional law theory that distinguishes citizens' "subjective rights" and "objective" state obligations. See also E. Brandl and H. Bungert, *Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad*, *The Harvard Environmental Law Review*, Volume 16, No. 1, 1992, page 1, at Page 17.

¹⁵ See J. Jendroska, *Citizens' Right to Environment*, *Environmental Control and Policy*, A. Tamas and D. Lodner, Peccs, 1988.

¹⁶ *Id.*

to information. **Article 61** gives "citizens" rights to obtain information, but only for activities of "organs of public authority as well as persons discharging public functions."¹⁷ **Article 74**, on the other hand, talks about the rights of "everyone", but of only information on the state and protection of the environment (**Article 74(3)**) is more in line with European Commission Directive 313/90). Therefore, under **Article 61** we will be able to find out about a permit issued for wastewater discharge demands (it will be the result of an act of the public authority), yet information will not be provided by the government regarding the quantity or quality of wastewater a given firm actually introduces into the water (because that is an act of a third party and not of the public authority). Here we find that the application of **Article 74** is more useful because without a doubt, information about how much wastewater is introduced is information about the state and protection of the environment.

It must be pointed out that, in order for "ecological" regulations in the Constitution to work significantly in practice, they must be developed via normal legislation. For example, the term "sustainable development" was defined not long after the Constitution was adopted.¹⁸ Although defining this term was not required by the Constitution, legislators deemed it

useful for implementing the Constitution. The limitations of some of the Constitutional provisions, however, must be established by normal legislation pursuant to **Article 81**. **Article 74** may be asserted only within these limits, as opposed to **Article 61** which is self-implementing, meaning that no further legislative action is required to take advantage of the rights it provides.¹⁹ The way these provisions are used in practice depends very much on the implementing legislation.

It is difficult to determine at this time the true value and significance of the Constitution – as in the case of every other new act of law – and we will only know its true significance with the passing of time. Although many legislative acts need to be developed to fully implement the Constitution, if we simply look at the numerous Constitutional provisions dedicated to environmental protection, the new Polish Constitution appears well-tailored to meet the problems facing us at the turn of the century.

¹⁷ English Translation, *supra* note 5.

¹⁸ *Supra* note 7.

¹⁹ Ordinary legislation meant to implement Article 74(3), as well as to implement the directives from the Aarhus Convention, has been drafted as part of a general environmental "omnibus" act by the Polish Environmental Law Association (which was commissioned by the government under the PHARE Program). This draft will soon be presented as a government bill to parliament. See Cooperation Between Environmental Authorities and Ecological NGOs – A Comparative Review, J. Jendroska (ed.), Polish Environmental Law Association, Wroclaw, 1998, pages 116-117. See also Draft Polish Framework Law to Implement IPPC Directive, Other Legislation, Environment Watch Western Europe, Volume 7, No. 14, July 17, 1998.

Australia and the Recognition of Native Title - Mabo, Wik and Beyond

By Jane Reid

'Native title rights' was the term used by Australia's High Court in *Mabo v State of Queensland (No 2)*¹ to describe the rights and interests of Australia's indigenous peoples to land according to their own traditions and customs. In *Mabo*, and in a number of significant decisions since, the High Court has sought to clarify the nature and scope of native title rights. Those decisions, and subsequent legislative responses, provoked a widespread public debate as interested parties, and in particular pastoral leaseholders and the mining industry, confronted the prospect of sharing rights to land with indigenous peoples who are able to show a continuing connection with their traditional lands or waters.

The rights of Aboriginal and Torres Strait Islander peoples to land is a question which has troubled the Australian nation since the earliest days of its colonisation during the late eighteenth century. Recognition by the common law that indigenous property rights pre-existed and survived sovereignty was not a new concept at the time of British settlement in 1788. Canada and New Zealand are examples of colonies where two systems of land tenure were recognised at the time of colonisation. When Britain declared sovereignty over Australia, Aboriginal and Torres Strait Islanders peoples were made subject to the common law, however 200 years were to pass before the common law recognised native title.

The story of the dispossession of the lands, traditions and cultures of Australia's indigenous peoples is a grim one and not yet fully told. Indigenous peoples were excluded from their traditional lands by force, as a result of government policy and as a consequence of cultural decimation. Regrettably the legal system colluded in practices and policies that resulted in the destruction of many cultures and brought the remainder to the very brink of destruction.

Perhaps the most devastating form of collusion was the legal fiction maintained by the courts that, at the time Australia was colonised, it was *terra nullius*, or a land belonging to no one. This legal fiction developed from the refusal of early settlers to recognise that in indigenous society systems of political and economic organisation existed which were comparable to European systems. The fiction was finally abandoned in 1992 in *Mabo* when the High Court declared that, for reasons of social justice and historical integrity, native title could no longer be denied or removed. The court recognised a form of native title that confers a property right which can only be extinguished by legislation or by alienation

or appropriation of the land by the Crown (i.e. the Australian people) in a manner that is inconsistent with the continuation of traditional title. *Mabo* had finally made it clear that native title had survived the acquisition of sovereignty by the Crown.

The Federal Government responded to the *Mabo* decision by initiating a process of consultation with indigenous organisations, State and Territory governments, pastoralists and other stakeholders to explore its implications and to determine an appropriate legislative response. This process culminated in the enactment of the *Native Title Act (Cth)* 1993 (the NTA) which commenced operation at the beginning of 1994.

The NTA recognised and protected native title and provided that it cannot be extinguished except in accordance with the provisions of the Act. It established processes for allowing development of the land in the future and gave native titleholders a limited right to negotiate, although not a veto, on future acts that will change the use of the land, such as mining. It also provided for the establishment of the National Native Title Tribunal to determine native title claims and compensation for acts which affect native title.

In the course of negotiations over the form of the NTA, indigenous representatives agreed to the validation of land titles granted since 1975 which may have been invalid because they contravened the Racial Discrimination Act 1975 (the RDA). The RDA implements the UN Covenant on the Elimination of All Forms of Racial Discrimination (CERD). In return, the Australian Government agreed that native titleholders would have a right to negotiate in relation to proposals for future dealings with the land. They also agreed to establish a Land Fund and implement a social justice package to address the significant social consequences of dispossession.

One question that was expressly left unresolved by the Court in *Mabo* was whether native title had survived on pastoral leases. Pastoral leases are a unique and limited form of property right which developed in Australia and New Zealand in the nineteenth century as a means of controlling the activities of squatters (settlers who occupied land without formal permission) and protecting the rights of indigenous peoples. Over 40% of the Australian continent is managed by various forms of pastoral lease. A pastoral lease is held over land owned by the Crown. The leaseholder pays rent to the Crown and receives the right to use the land for pastoral purposes such as raising livestock. Pastoral leases are a useful management tool which have allowed state governments to regulate land use.

¹ (1992) 175 CLR 1.

The question of whether native title survived on land covered by pastoral lease was resolved in 1996 in the decision of the Australian High Court in *Wik Peoples v The State of Queensland*² with the court holding that the granting of a pastoral lease did not necessarily extinguish native title. The rights and interests of native titleholders and pastoral leaseholders were not necessarily inconsistent and the two sets of rights could co-exist in the view of the majority of the High Court. In the event of any inconsistency, the rights of leaseholders would prevail.

In what is a distressingly familiar pattern worldwide, the belated recognition of indigenous rights has been followed by determined attempts by State and Federal governments and other interested parties (particularly pastoralists) to further contain those rights. Native titleholders had already made significant compromises in the course of negotiating the content of the NTA in order to achieve certainty for all interested parties. However, following the decision of the High Court in *Wik* in 1996 the new Federal Government, at the urging of pastoralists and the mining industry, proposed amending the NTA in ways which would severely limit the rights of native titleholders. Indeed, many urged its repeal and the complete extinguishment of native title.

Key amendments included a proposal to upgrade pastoral leases into perpetual leases and authorise other activities, such as forestry or tourism on the land. This would effectively convert pastoral leases to freehold and eliminate native title in relation to the land. Other amendments included: specification of the kinds of grants of land that extinguish native title; retrospective validation of grants made by State and Territory Governments since the 1993 Act; the restriction of native title claimants' negotiating rights over land where mining is proposed; a higher registration test in relation to the right to negotiate; speeding up the handling of claims and a sunset clause setting a date by which native title claims must be lodged³.

Despite repeated threats by the Government to go to an early election to force its proposals through, minority parties in the Senate were able to effect some modifications to the proposed amendments and the *Native Title Amendment Act* (NTAA) was passed on 7 July 1998.⁴ Indigenous leaders remain, on the whole, deeply unhappy with the changes wrought by the amendment Act and with their exclusion from the final negotiations over the scope of the amendments.

The changes permit permanent extinguishment of native title in relation to some kinds of leases. The right to negotiate has been limited with regard to future acts. The Government will no longer need to

negotiate with native titleholders over the use of public reserves, facilities for services to the public and regulation and management of water and airspace. State and Territory Governments are empowered to replace the right to negotiate, if they choose, with an alternative regime which does not guarantee the same procedural rights. The registration test has become more demanding with some native titleholders needing to prove a traditional connection with the land. A significant exception was made however in regard to those who can show they were locked out of their land or were part of the 'stolen generation' (those forcibly removed from their families as a result of government policy). The proposed sunset clause was abandoned. In summary, the effect of the amendment Act is to substantially reduce the rights of native titleholders to have a say in relation to a range of activities on their traditional lands⁵.

Significantly, the winding back of native title rights has occurred in the context of a formal reconciliation process which was established in 1991 on the recommendation of the Royal Commission into Aboriginal Deaths in Custody. At that time, the Federal Parliament voted unanimously to establish the Council of Aboriginal Reconciliation to promote reconciliation between Australia's indigenous peoples and the wider Australian community. The Parliament stressed that the process was to be based on an appreciation of the unique position of Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia and that it should foster an ongoing commitment to address indigenous disadvantage. It also expressed a desire that reconciliation be achieved by the year 2001, the centenary of Federation.

In retrospect it is possible to see that the early 1990's were a high point in relations between indigenous and non-indigenous Australians. While the reconciliation process continues to enjoy widespread support in the general community, the last few years have also been notable for the acrimonious debate over native title, the refusal of the Government to formally apologise for the forcible removal of indigenous children earlier this century and the rise of a politics of resentment captured so effectively by Pauline Hanson's One Nation Party. It is clear that the process of reconciliation still has considerable ground to cover. Michael Dodson was the Aboriginal Social Justice Commissioner with the Human Rights and Equal Opportunities Commission until 1997 when the Government abolished the position. In 1997 he had this to say:

*If you take our land you take the ground of our culture. If you take our children, you take the future of our culture. If you keep on taking, there will be nothing left.*⁶

² (1996) 187 CLR 1.

³ National Indigenous Working Group on Native Title (NIWG), *Native Title and Reconciliation. An International Brief*. 1997, Canberra, pp 9-11.

⁴ *Native Title Amendment Act* No 97 1998.

⁵ Aboriginal and Torres Strait Islander Commission (ATSIC), *Detailed Analysis of the Native Title Amendment Act 1998*, August 1998.

⁶ National Indigenous Working Group on Native Title (NIWG), *Native Title and Reconciliation. An International Brief*. 1997, Canberra.

CURRENT AFFAIRS

Environment and EU Enlargement

By Peter Dröll

1 New Solutions or New Problems?

At first sight, extending the Union's environmental rules to new Member States looks like one of the often quoted "win-win solutions": The state of the environment and quality of life in the future Member States will improve, export of pollution to current Member States will decrease and, a pleasant side-effect, investments in environmental technology will boom.

This is, however, not the view held by most observers. As so often, environmental protection is a problem, also in an enlarging Union. First, of course, the costs. Cleaning the sins of the past, retrofitting the fittest of industrial plants, closing the outdated and building new ones is a costly business. Various figures are thrown into the debate. A study carried out for the European Commission in 1997 estimates overall costs to be in the range of 120 billion ECU for the 10 associated States of Central and Eastern Europe. Secondly, the Internal Market. The issue is not environmental dumping from the West, as has been the case before 1989, in particular in the waste sector. Unfair competition against companies in the current Member States due to lower environmental standards and hence charges in the future Member States is today's concern. Thirdly, new risks to the environment in the new Member States. Increased transport and mobility, intensive farming with the inherent use of fertilisers and pesticides feature most prominently in this respect. Bio-diversity also seems to be threatened. In fact, some areas which had been reserved for the Tsars had exclusively been used by party cadres and remained taboo for the public, thus leaving natural reserves unknown to the more densely populated west.

2 Procedures and Principles of Enlargement

Any European State may apply to become Member of the Union (Article O of the Treaty on European Union). Once the Council has received an application, it unanimously decides to open negotiations on the basis of a Commission opinion. The conditions of admission, as well as the necessary adjustments to the Treaties and the Community legislation, have to be agreed upon between the existing and the future Member States. This draft accession

Treaty needs to be approved by the European Parliament before the Council acts on it unanimously. Since accession treaties are "constitutional" acts for the Union, they need ratification by existing and future Member States according to international public law and the respective national constitutions.

Turkey applied for Membership in 1987, Cyprus and Malta in 1990¹. The States of Central and Eastern Europe presented their formal application after the Heads of State and Government had clearly indicated at the Copenhagen European Council in June 1993 that membership, rather than association, was a welcome option². This summit also decided the conditions for the fifth enlargement of the European Communities, which is also the second enlargement of the Union:

"Membership requires:

- that the candidate country has achieved stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities;
- the existence of a functioning market economy, as well as the capacity to cope with competitive pressure and market forces within the Union;
- the ability to take on the obligations of membership, including adherence to the aims of political, economic and monetary union."

Based on these so-called "Copenhagen criteria", the Commission presented its opinions in June 1997 and the European Council decided at the December Luxembourg summit to start accession negotiations with Hungary, Poland, Estonia, the Czech Republic, Slovenia and Cyprus while further preparing negotiations with the other States. The decision to open

¹ On Turkey's application the Commission concluded in 1989 that the political and economic situation would not make it useful to open accession negotiations. In 1997, the European Council, while confirming Turkey's "eligibility", concluded that these conditions were not yet fulfilled. Consequently, it suggested to define a strategy in order to prepare Turkey for accession. Malta "frozen" its application in 1992 and re-activated it after the change in government this autumn. Therefore, the present article does not deal with environmental issues in these two countries.

² Hungary (applied for membership on 31.3.1994), Poland (5.4.94), Romania (22.6.95), Slovakia (27.6.95), Latvia (13.10.95), Estonia (24.11.95), Lithuania (8.12.95), Bulgaria (14.12.95), Czech Republic (17.1.96), Slovenia (10.6.96).

negotiations with more States will be taken on the basis of regular reports from the Commission to the European Council on progress made towards accession. The first of these regular reports will be discussed at the European Council of December 1998. The accession conferences with the first six States (legally speaking there is one intergovernmental conference with each future Member State) were opened in March 1998, beginning with the detailed comparison of Community legislation with national legislation ("screening"). This screening will last until summer 1999, but negotiations take already place regarding those parts of the Community legislation already dealt with in the screening. The environmental acquis will be screened in early 1999.

The third "Copenhagen" criterion concerning the obligations of membership means the ability to transpose, apply and enforce the entire Community "acquis", including, of course, environmental legislation. As the Union laid down in its general negotiation position, transition measures may be agreed in the course of negotiations, but only in duly justified cases. They also need to be limited both in scope and duration. Permanent derogations from the acquis are not acceptable to the Union.

3 Status quo

The difficulty of having a clear picture of the state of the environment is a general feature of environmental policy. Assessing the state of the environment in Central and Eastern Europe is even more difficult. The European Environment Agency, with its assessments of the environment in the whole of Europe³, tries to counter this shortage of reliable data. The Regional Environment Centre in Budapest also provides important data. However, the information base is more reliable for some areas than for others and particularly weak for chemicals, biodiversity and urban environment.

According to the Commission opinions on the applications for membership, the overall situation is as follows:

- Bulgaria and Romania are confronted with very severe environmental problems in all key areas (water, air, waste and soil);
- the situation in the Baltic States is comparatively good;
- Slovakia encounters significant problems in particular as regards surface and groundwater pollution, waste management and local air quality;
- Poland faces severe environmental problems with major challenges in waste water and air pollution;

- the situation in the Czech Republic, once one of the most polluted regions in Central Europe, has considerably improved but air pollution is still a major problem;
- Slovenia and Hungary, although without particular sensitive areas, still face major challenges;
- Cyprus does not have severe environmental problems.

This all in all rather problematic situation is aggravated by the fact that the pollution of the different media is closely linked. For instance, acidification due to air pollution increases the mobility of heavy metals in the soil, which in turn accelerates groundwater pollution.

The environmental acquis of the Community, however, does not deal with the cleaning of contaminated sites. Completing this huge task, which includes the cleaning of heavily polluted military sites, is therefore not a precondition for accession to the Union. On the other hand, a number of countries use revenues generated by fines and penalties associated with new environmental requirements to feed funds (e.g. Poland's ECOFUND) which serve to clean-up contaminated sites. Thus, taking over the acquis can also help the policy maker to deal with other environmental issues.

Even without looking at past contamination, the task of meeting the environmental acquis is considerable. The most cost-intensive parts of the Community acquis probably relate to urban wastewater treatment (canalisation and water treatment), large combustion plants and waste. For the overall investment, it is estimated that 40% is required for air pollution abatement, another 40% for water and wastewater treatment and 20% for waste management.

Nuclear safety is a specific issue. 20 Soviet-design reactors are in operation in the Central and Eastern European countries: 6 in Bulgaria, 4 each in Hungary, the Czech Republic and Slovakia and 2 in Lithuania. Not all of these reactors can be upgraded at a reasonable cost. However, the share of nuclear energy is quite high in some countries, for instance 40% of Bulgarian electricity is generated by nuclear plants, in the Czech Republic, where two new reactors are being built, the share is reckoned to rise to 40% in the year 2000. Not surprisingly, demands for early closure of non-upgradable reactors are not easy to implement.

The Community acquis covers radiation protection and safeguards such as monitoring networks and inspectorates. However, there are no encompassing Community safety standards for nuclear power plants. Thus, it is mainly the responsibility of Member States to adhere to international safety standards. Consequently, merely taking over the Community acquis in the nuclear field would not be suf-

³ "Europe's Environment", The Dobris Assessment 1995, The Second Assessment, 1998.

efficient to ensure compliance with state of the art safety standards. The Commission therefore stressed in Agenda 2000⁴ that, in order to protect the life and health of Europe's citizens, the future Member States "should cooperate fully in efforts to bring their levels of nuclear safety up to international standards". In its general negotiation position, taken at the opening of the accession conferences, the Union also declared that "the objective of a high level of nuclear safety and environmental protection" would need to be taken into account in the negotiations.

4 Strategies

The overall pre-accession strategy of the Union combines financial aid with bi-lateral association agreements ("Europe Agreements"). The financial support so far mainly consisted of PHARE. Under the enhanced pre-accession strategy it is proposed to increase the funding under PHARE (to 1,5 billion ECU per year) and to establish further funding for agricultural development (0,5 billion ECU per year) and for structural measures in particular in the transport and environmental spheres ("ISPA", 1 billion ECU per year). The "Europe Agreements" aim to strengthen the existing links between the Union and the associated states and provide for the gradual integration into the Community. They establish a political dialogue at ministerial, parliamentary and senior official level, address all four freedoms (goods, persons, services and capital) and provide for economic, cultural and financial cooperation. So-called "Accession Partnerships" enhance this pre-accession strategy. They define priorities on which preparations for accession should concentrate and set out the financial assistance from the EU available to help tackle these problems.

In view of the particular difficulties in the field of environment, Agenda 2000 concluded that "realistic national long-term strategies for gradual effective alignment should be drawn up and start being implemented in all applicant countries before accession, in particular for tackling water and air pollution. These strategies should identify key priority areas and objectives to be fulfilled by the dates of accession as well as timetables for further full compliance". While not pre-empting any negotiation position of the Union, this is a clear indication that full compliance with the environmental acquis is not necessarily a pre-condition for accession.

Based on this statement, the Commission made practical suggestions for national environmental strategies in a Communication of May 1998⁵. The

Commission distinguishes four challenges to be tackled according to the specific national situation:

- legislative: transposition of EU legislation with priority to product related legislation, framework legislation and procedural aspects;
- institutional: enforcement of legislation with priority on the structures of environmental administration;
- sector specific: air, water, waste and nuclear safety;
- financial challenges.

According to this Communication, the role of the Community is threefold: Financial assistance through PHARE, ISPA, agricultural pre-accession aid and more specific Community programmes, technical and legal assistance in the approximation process (e.g. through a "Guide to the approximation of EU Environmental legislation", issued by the environment department of the Commission in English and the national language of the applicant states) and participation in the implementation activities of the Union (e.g. Environment Agency, Network for the Implementation and Enforcement of Environmental Law - IMPEL).

As outlined in Agenda 2000, the Commission urges that all new investments should comply with the *acquis*. This simple but far-reaching principle - it implies that construction and operation licences go well beyond the requirements under national legislation - is applied to investments co-financed by the Union. As regards domestic investments, the Union has no leverage to impose this concept which, in the short term, increases investment costs. It still remains to be seen how effective this principle will prove, in particular how compliance of new investments with the *acquis* will be ensured in practice.

The Commission concludes that substantive additional work will be necessary to achieve full compliance with the *acquis* and that quick implementation will be difficult due to scarce financial and other resources.

The Council endorsed the thrust of this Communication and stressed the compliance of all new investments with the *acquis*. The Council also underlined that, in the context of intensified sectoral activities, valuable resources in the candidate States, for instance biodiversity, would need to be safeguarded.

To date, all of the future Member States have adopted environmental strategies, at least in the framework of their national programmes for the adoption of the *acquis*. While some of the environmental strategies have already proved useful and led to a remarkable progress in alignment, implementation is rather slow in the majority of the future Member States. Applying and enforcing newly adopted environmental requirements will present particular

⁴ COM(97) 2000 of 16.7.1997.

⁵ COM(98) 294 of 20.5.1998 regarding the 10 associated countries; a specific document on Cyprus will follow.

difficulties - difficulties not unknown to the current Member States - ranging from simple fact finding to the continuous monitoring of emissions and the provision of necessary administrative resources.

5 Conclusion

The future Member States are not to be envied for the tasks that lie ahead in the field of environmental protection. At least in the short term, considerable legislative and practical efforts are required and huge investments necessary. Difficult choices are to be made.

At this stage, however, it is too early to speculate about the adjustment time needed by the different states and possible transition arrangements. The evaluation of likely requests for transition periods will certainly need to take into account the environmental effects, the impact on the internal market and the determination in progressing towards compliance with the *acquis*.

Another aspect concerns "sustainable development" in an enlarging Union. The Amsterdam Treaty has given new emphasis to this concept. The Cardiff Summit of June 1998 invited in particular the Transport, Energy and Agricultural Councils to give effect to environmental integration and sustainable development in their respective policy areas. Added to this, the Council conclusions of September 1998 on

accession strategies for the environment explicitly refer to intensified sectoral activities and the need to safeguard valuable resources in the future Member States. Possible requests for transitional arrangements in policy areas other than environment could therefore be justified with "sustainability" considerations. Free traders would certainly fear a new set of hidden barriers to trade and the Union would need to exclude such risks. But there might be cases where the integration of environmental considerations in particular policy areas could justify requests for transitional periods. If such transitional arrangements were agreed, the Union's legislation would also need to be undertaken, as during the last accession regarding some stricter rules in particular on chemicals. This would provide new possibilities to enhance the Union's efforts in achieving sustainable development, one of the objectives in the ongoing reform of the agricultural and structural policies.

Finally, enlargement will also lead to an enlarged environment policy. Due to regular exchanges both at ministerial and at administrative levels, the Union's environmental policy gains effectiveness already today. A good example is climate change, where the ten associated States of Central and Eastern Europe have adopted, in the framework of the Kyoto protocol, legally binding emission reduction targets similar to those of the EU.

The Impact of the Aarhus Convention on Non-Governmental Organizations (NGOs)

By *Grazyna Krzywkowska*

"All we seek is recognition
That we have a role to play
And that the whole world will not cave in
If citizens can have their say"

(from the Battle Hymn of the NGOs performed at the NGOs session of Aarhus Conference on June 24, 1998)

"The Aarhus Convention can start to create a new culture based on transparency, open debate from the start of policy-making and accepting citizens as responsible guardians of democratically agreed rules,"
John Hontelez, Secretary General of the European Environment Bureau

The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters [hereafter referred to as the Aarhus Convention] submitted by the Economic Commission for Europe Committee on Environmental Policy through the Ad Hoc Preparatory Working Group of Senior Officials at the Fourth Ministerial Conference "Environment for Europe," was signed in Denmark on June 25, 1998.

The Aarhus Convention's aim is to increase the ability of the public to be fully involved in environmental matters. Its objectives are to allow easy access to information, make government decision-making processes transparent and give the public and NGOs an ability equal to that of government and business to use the court system in the event of a breach of environmental law. The Convention will hopefully improve government-NGO relations. The Aarhus Conference underlined a need for support and cooperation between governments, the business sector and NGOs. Nevertheless, during the NGO session, "Strengthening Participatory Democracy for Sustainable Development," at the Conference, the NGOs expressed concern that their role in the dialogue among sectors was limited merely to making comments. Substantial provisions of the Convention are to establish the rights to request and receive environmental information from the authorities upon a request (Art. 4), to demand updating and a proper flow of such information, an adequate emergency information notification (Art. 5), access to public participation in decision-making in environmental related matters (Art. 6-8) and access to justice in such respect (Art. 9).

Bosnia and Herzegovina, Slovakia, Hungary, the Russian Federation and Germany did not sign the Convention. German Environment Minister Angelika Merkel, while discussing the German delegation's refusal to sign the Convention with NGOs at the Aarhus Conference, said that the final decision on the signature had not been reached and more consultations would be needed to reach an agreement between the federal government and the states.¹ On the other hand, Minister Merkel emphasized that German authorities were concerned about what might happen if the public exercised rights to access to information and public participation, referring to the former problems with citizen activism in this area. In contrast to Germany, the Russian Federation declared a strong intention to sign the Convention in the near future and the Former Yugoslav Republic of Macedonia submitted a declaration instead of signing, because of procedural reasons. Hungary and Slovakia did not sign the Convention because of ongoing elections. The US and Canada which are members of United Nations Economic Commission for Europe, were not even involved in negotiating the Convention.

Altogether 36 countries, and the European Union Commission signed the Aarhus Convention and the implementation procedure has already started. This poses numerous questions about the impact of the Convention on non-governmental organizations, since the Convention is unfortunately not free from

¹ See, <http://www.mem.dk/aarhus-conference/NGO/groups.htm>

flaws,² though it is a great step ahead in the international fields of public access to information, decision-making and access to justice in environmental matters.

Unfortunately, the provisions for public participation in environmental decision making apply to the hot issue of the release of genetically modified organisms (GMOs) into the environment only to "the extent feasible and appropriate" decided by the Parties' national laws. The use and release of the GMOs has not been adequately addressed by the Convention despite urging to make them subject to the public participation procedure of Art. 6³ by the delegations of Norway, Denmark, Poland and the Russian Federation, along with the Regional Environmental Center for Central and Eastern Europe and GLOBE. NGOs heavily criticized the way GMOs issues were handled in the final version of the Aarhus Convention and indicated a probable connection between such wording of the Aarhus Convention and business influence on some delegations. The business sector sought to influence Aarhus delegations because GMOs are already a flourishing business that is going to become even more profitable in the future. According to Peter Roderick, legal advisor to Friends of the Earth, the Convention's major failure was not guaranteeing the right of the public to participate in this respect.⁴

ECOs, a coalition of over 200 European NGOs, criticized several governments for diluting some important provisions and then refusing to sign the Convention. The ECOs pointed out weaknesses of the Convention and ambiguities in the text. NGO representatives were also concerned about the issue of pollution emission registers (PRTRs), a requirement that business report the release of toxic chemicals. Unfortunately, the Convention provides for access to the information held only by public authorities, not by business entities. The Aarhus Convention does not fully address the problem with access to information where there is no obligation to pass the information from business sector to the public authorities.⁵ The limitations on access to business held and voluntarily released information has been explored as outrageous by the ECOs.⁶ The NGOs em-

phasized the lack of specific provisions on human health issues in the Convention as well.⁷

A great sign for positive future impact of the Convention on NGOs is the fact that the whole Aarhus Convention is based on the right to an environment adequate for health and well-being. This right can be claimed by the NGOs included in the definition of "the public". Aarhus Convention's Article 4 (1) states that the environmental information shall be made available to the public upon request. According to the Aarhus Convention the broad definition of "the public" of Art. 2 (4) of the Aarhus Convention encompasses associations, organizations or groups of natural or legal persons in accordance not only with the national legislation but also with *practice*. Furthermore, non-governmental organizations promoting environmental protection are specifically mentioned in the definition of "public concerned" (Art. 2 (5) of the Aarhus Convention), as deemed to have an interest in the environmental decision-making.

In addition, the Aarhus Convention provided an inclusive definition of environmental information that empowers the NGOs to claim access to virtually any information not excluded from public domain by specific legal exemptions stated in Art. 4 (3) and (4) of the Convention.⁸ According to the Convention, such exemptions have to be interpreted in a restrictive way and after the balance of public interest in disclosure against exemptions. The remainder of the information otherwise subject to Art. 4 (3) or (4) can be disclosed if it can be separated without prejudice to confidentiality of refused information.

According to the Aarhus Convention, the public and NGO's comments should be taken into account when an environmental decision is taken. The Aarhus Convention calls on its Parties to ensure establishment of relevant systems of collection, dissemination, easy access to and transparency of environmental information and legislation, including emergency information. The Convention obliges the Parties to provide for early and "adequate, timely and effective"⁹ public participation in environmental matters of the 'public concerned.' Public participation is also assured in preparation of environmental plans, policies and programs, together with executive regulations and legislation.

The Convention allows for an optional procedure of review of the Convention compliance which is stipulated in Art. 15.¹⁰ It is a very controversial provision.

² Speaking at the press conference on 24 June 1998 in Aarhus, Jeremy Wates, coordinator of the ECOs delegation on the Working Group drafting the Convention, told the press: "Even though we were part of the official negotiations, many parts of it remain weak due to the lack of political will among many governments. We cannot regard it as a model, only as a first step".

³ See Article 6 in the Annex to this article.

⁴ <http://www.mem.dk/aarhus-conference/NGO/criticis.htm>

⁵ See Article 5 (b) of the Aarhus Convention.

⁶ <http://www.mem.dk/aarhus-conference/NGO/criticis.htm>

⁷ See draft general comments on Aarhus Convention prepared during evening working group meeting and amendments made by discussion group on June 22, 1998.

⁸ See Aarhus Convention Art. 4 (3) and (4) in the Annex to this article.

⁹ See Aarhus Convention Art. 6 (2).

¹⁰ Art. 15 of Aarhus Convention: Review of Compliance

The Meeting of the Parties shall establish, on a consensus basis, op-

Such a procedure is not only optional, but also has to be reached on a consensual basis, which will be a major difficulty to overcome during the First Meeting of the Parties. Public involvement in this procedure shall be assured. It is in the NGOs interests to include the strongest possible compliance procedure wording and strong with strong public input.

The Aarhus Convention is an important legal binding instrument that assures public and NGO rights of access to information, public participation and access to justice in environmental matters. In this way it serves as a pillar and a guardian of better environmental protection and democracy.

It will have a positive impact on the following:¹¹

- the right to an environment adequate for health and well-being;
- a broad definition of public authorities, the public (including non-governmental organizations, associations and other groups, formed not only according to national law but also to national practice), the public concerned, and environmental information (encompassing human related-health information);
- the application of public interest in a disclosure test against all exemptions to access to information;
- ensuring early and efficient public participation in environmental decision-making along with the right to have comments considered.

The weak points of Aarhus Convention, which may have a negative impact on NGO involvement, are:

- deferring an obligation to establish pollutant release and transfer registers (PRTRs) to a non-specified future time;
- a failure to recognize the need for wide dissemination of environmental information through the Internet;
- a weak compliance procedure, with a non-specified level of public participation;
- weak provisions on information voluntarily released by the business sector;
- an absence of provisions on public participation in decision-making in the area of genetically modified organisms (GMOs);
- a failure to deal with the problem of timely provision of information when the authorities that are legally obliged to provide it do not possess it.

tional arrangements of a non-confrontational, non-judicial and consultative nature for reviewing compliance with the provisions of this Convention. These arrangements shall allow for appropriate public involvement and may include the option of considering communications from members of the public on matters related to this Convention.

¹¹ Compare draft general comments on Aarhus Convention prepared during evening working group meeting and amendments made by discussion group on June 22, 1998.

Annex

Aarhus Convention Art. 4 (3) and (4)

3. A request for environmental information may be refused if:
 - a) The public authority to which the request is addressed does not hold the environmental information requested;
 - b) The request is manifestly unreasonable or formulated in too general a manner; or
 - c) The request concerns material in the course of completion or concerns internal communications of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure.
4. A request for environmental information may be refused if the disclosure would adversely affect:
 - a) The confidentiality of the proceedings of public authorities, where such confidentiality is provided for under national law;
 - b) International relations, national defense or public security;
 - c) The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an inquiry of a criminal or disciplinary nature;
 - d) The confidentiality of commercial and industrial information, where such confidentiality is protected by law in order to protect a legitimate economic interest. Within this framework, information on emissions which is relevant for the protection of the environment shall be disclosed;
 - e) Intellectual property rights;
 - f) The confidentiality of personal data and/or files relating to a natural person where that person has not consented to the disclosure of the information to the public, where such confidentiality is provided for in national law;
 - g) The interests of a third party which has supplied the information requested without that party being under or capable of being put under a legal obligation to do so, and where that party does not consent to the release of the material; or
 - h) The environment to which the information relates, such as the breeding sites of rare species.

Article 6 of the Aarhus Convention: Public Participation in Decisions on Specific Activities

Each Party:

- a) Shall apply the provisions of this article with respect to decisions on whether to permit proposed activities listed in annex I;
- b) Shall, in accordance with its national law, also apply the provisions of this article to decisions on proposed activities not listed in annex I which may have a significant effect on the environment. To this end, Parties shall determine whether such a proposed activity is subject to these provisions; and

- c) May decide, on a case-by-case basis if so provided under national law, not to apply the provisions of this article to proposed activities serving national defense purposes, if that Party deems that such application would have an adverse effect on these purposes.
2. The public concerned shall be informed, either by public notice or individually as appropriate, early in an environmental decision-making procedure, and in an adequate, timely and effective manner, inter alia, of:
- a) The proposed activity and the application on which a decision will be taken;
 - b) The nature of possible decisions or the draft decision;
 - c) The public authority responsible for making the decision;
 - d) The envisaged procedure, including, as and when this information can be provided:
 - i) The commencement of the procedure;
 - ii) The opportunities for the public to participate;
 - iii) The time and venue of any envisaged public hearing;
 - iv) An indication of the public authority from which relevant information can be obtained and where the relevant information has been deposited for examination by the public;
 - v) An indication of the relevant public authority or any other official body to which comments or questions can be submitted and of the time schedule for transmittal of comments or questions; and
 - (vi) An indication of what environmental information relevant to the proposed activity is available; and
- e) The fact that the activity is subject to a national or transboundary environmental impact assessment procedure.
3. The public participation procedures shall include reasonable time-frames for the different phases, allowing sufficient time for informing the public in accordance with paragraph 2 above and for the public to prepare and participate effectively during the environmental decision-making.
4. Each Party shall provide for early public participation, when all options are open and effective public participation can take place.
5. Each Party should, where appropriate, encourage prospective applicants to identify the public concerned, to enter into discussions, and to provide information regarding the objectives of their application before applying for a permit.
6. Each Party shall require the competent public authorities to give the public concerned access for examination, upon request where so required under national law, free of charge and as soon as it becomes available, to all information relevant to the decision-making referred to in this article that is available at the time of the public participation procedure, without prejudice to the right of Parties to refuse to disclose certain information in accordance with article 4, paragraphs 3 and 4. The relevant information shall include at least, and without prejudice to the provisions of article 4:
- a) A description of the site and the physical and technical characteristics of the proposed activity, including an estimate of the expected residues and emissions;
 - b) A description of the significant effects of the proposed activity on the environment;
 - c) A description of the measures envisaged to prevent and/or reduce the effects, including emissions;
 - d) A non-technical summary of the above;
 - e) An outline of the main alternatives studied by the applicant; and
 - f) In accordance with national legislation, the main reports and advice issued to the public authority at the time when the public concerned shall be informed in accordance with paragraph 2 above.
7. Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.
8. Each Party shall ensure that in the decision due account is taken of the outcome of the public participation.
9. Each Party shall ensure that, when the decision has been taken by the public authority, the public is promptly informed of the decision in accordance with the appropriate procedures. Each Party shall make accessible to the public the text of the decision along with the reasons and considerations on which the decision is based.
10. Each Party shall ensure that, when a public authority reconsiders or updates the operating conditions for an activity referred to in paragraph 1, the provisions of paragraphs 2 to 9 of this article are applied *mutatis mutandis*, and where appropriate.
- 11. Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment.**

Harmonization of the European Waste Management Law The Debate at the 2nd European Waste Forum in Madrid

By Gerhard Roller

The second conference of the European Waste Forum took place in Madrid on 15 and 16 October 1998 under the heading of "Towards a new concept of integrated waste management". Among other issues, the conference debated in its segment on "juridical instruments" the proposal of a working group for codification of European Community (EC) waste management law. The discussion proceeded on the basis of a working document entitled "First draft of European Regulation - Codification on Waste" that had been prepared by B. Dewulf and J.P. Hannequart in cooperation with a number of experts on European law.¹ Most of the participants in the debate took a sceptical view of the prospects for success of such an enterprise. The following analysis is based on the presentation given by G. Roller to the conference.

1 Fundamental Considerations Concerning a Unified Body of Waste Management Law

Over the past 25 years, an extensive body of environmental regulation has been created in both the EC and in most of its Member States. However, nowhere is there a unified Environmental Code, neither in individual Member States nor in EC law. Moves to change this situation and create a unified codification of environmental law have gained impetus recently. Thus in Germany, for instance, an expert commission has recently submitted the draft of a General Part of an Environmental Code.² In France, too, there have been moves towards a codification of environmental law³. It needs to be noted, however, that the enactment of such comprehensive codification is already an exceedingly difficult and lengthy process at the national level.

The Member States do have Waste Management Acts that at least regulate the core areas of waste management law.⁴ European Community waste man-

agement law, by contrast, is broken down into a great number of different Directives, these also reflecting the development over time of the process of European integration. A collation of these regulations into a uniform statute is to be welcomed from a doctrinal perspective, and would certainly be of benefit to the application of the law. Whether such an enterprise is worthwhile in view of limited (financial and human) resources is another matter. This shall be one of the points considered below.

Before discussing the details of the codification proposal, one fundamental point needs to be stressed. In its Resolution of 24 February 1997 on a Community strategy for waste management (OJ No. C 76, p. 1), the Council of the European Union has expressly confirmed that an integrated Community waste management policy is necessary in the interests of environmental protection, whereby a high level of environmental protection is to be the prime criterion (Preamble, 5 and 6). In terms of environmental protection there is thus no doubt as to the necessity of pursuing a coordinated waste management policy at the EC level, rather than leaving this to the Member States or merely reacting on a case-by-case basis with individual decisions.⁵

It must further be stressed that, contrary to widespread opinion, the call for 'deregulation' that is frequently raised with regard to environmental regulations is misplaced - whereby very different things can be understood by 'deregulation'. Rather, to enforce waste management law the competent authorities of the Member States need clear enforcement imperatives, in order to safeguard the protection of human health and the environment and, where required, to enforce this necessary protection against conflicting economic interests. This requires a clear, enforceable and consistent legal framework.

The present Working Document draws together the existing Community provisions concerning waste management in the form of a Regulation. This is therefore an 'additive' approach, in the sense that the existing provisions are collated, without change, within a uniform codification. The collation of existing provisions in a uniform document neither closes

¹ The members of the working group were: M. Campins, B. Deltour, M. Führ, P. Giampietro, G. Konstantinopoulos, C. Huglo, R. Lindbauer, K. Marttinen, I. Rose, Y. Scannel.

² Cf. on this: *Kloepfer/Durner*, Der Umweltgesetzbuch-Entwurf der Sachverständigenkommission (UGB-KomE), in: Deutsches Verwaltungsblatt Heft 18 (1997), S. 1081. On the preparatory academic drafts cf. *Rehbinde*, Argumente für die Kodifikation des deutschen Umweltrechts, Umwelt- und Planungsrecht, Heft 10 (1995), S. 361.

³ *Vigouroux*, Die Kodifikation des Umweltrechts in Frankreich, in: Die Öffentliche Verwaltung, Heft 18 (1995), S. 754.

⁴ Although the details are then regulated through a great number of statutory regulations, ordinances and guidelines.

⁵ Cf. on this e.g. the hearing of the Environment Committee of the European Parliament "Improving European Waste Management" of 26 November 1997.

existing gaps nor does it set new priorities; it thus remains far removed from the goal of an integrated waste management concept. Such a project is only worthwhile if substantive modifications and improvements are also made, that is to say if it takes a modifying and integrative approach beyond a purely additive approach. This need not entail a fundamental reorientation, for the EC waste management law in force already pursues the correct principles and objectives. Nonetheless, without a substantive refinement of the law, the gain offered by such an enterprise appears to me to be too slight to justify the effort involved. Indeed, this is why the working group pursues a 3-stage concept, codification in the sense described above being followed by an "interprétation harmonisée" in a second stage and finally by a "révision du droit" in a third stage. It must however be critically noted concerning this three-stage approach that, in view of the delicate consultation processes at the EC level - which will not become easier through the pending enlargement of the Community - and the completely divergent interests of the various actors in the waste policy domain, every further development of the applicable law is an exceedingly difficult undertaking. There is a danger that even the first step, the intended codification, triggers a debate on everything that has been achieved in the past, with a scarcely foreseeable dynamism, at the end of which environmental considerations may well lose out. It would thus appear to be more expedient to continue for the present with the approach of tackling specific issues, if albeit with the intention of a later codification. Codification would then be the final outcome, not the beginning of the process.

There is a further basic disadvantage that can attach to unification. One objective of codification efforts in environmental law in the Member States is to establish integrative environmental protection structures in order to overcome sectoral perspectives and to move towards a holistic approach. It lies in the nature of a project focused on only one sector of environmental law, namely waste management law, that it cannot pursue such an objective. There is thus a danger that the sectoral approach is further cemented. It must be asked whether the time is not now ripe to gradually convert waste management law into a more comprehensive substance or materials law oriented less to the outdated categories dictated by the concept of 'waste', and more to the potential of substances or materials to cause harm.

1.1 Legal form

Concerning the legal form of the instrument, the choice of the form of a Regulation is certain to encounter resistance among the Member States. In my opinion, this change in legal form - from Directive to Regulation - does not lead to any considerable dif-

ference in practice. For one thing, the provisions in the waste sector are mostly very detailed - limit values for waste incineration facilities, packaging quotas etc. - so that despite the legal form of Directive no implementational leeway is left insofar to the Member States in any case. A further point is that the widely known case law of the European Court of Justice (ECJ) has effectively led to a considerable approximation of the legal consequences of the two types of instruments. Finally, regulations also need, where they are not formulated in sufficiently concrete terms, national implementing acts for their application, as shown by the example of the Eco-Audit Regulation (EMAS).

1.2 Enabling clause

As a fundamental point, EC environmental law should follow the principle of minimum harmonization. More far-reaching measures adopted at the Member State level should thus remain permissible. Enabling clauses should therefore be included in legal instruments, particularly in instruments based on Article 100a of the EC Treaty. Distortions of competition resulting from this need to be tolerated to a certain degree in order to create incentives for an improvement of the level of environmental protection in other Member States.

2 Substantive Development of the Law already in Force

2.1 Landfill and co-incineration

There are many points of departure for a further development of the European Community waste management law already in force. Foremost among these is landfill, which is soon to be regulated by an EC Directive.

Co-incineration is a further area that is, in my view, in need of regulation. Wastes - including highly toxic wastes - are burnt today throughout Europe in cement works and other industrial facilities. Standards vary widely across Europe. It is in my opinion urgently necessary to stipulate uniform emissions standards and technical requirements in this area, one motivation for this being to reduce waste movements within the Community.

2.2 Demarcation between disposal and recovery

The case law of the ECJ has clarified the concept of 'waste'. Today, the legal debate has shifted and is now concerned with the demarcation between disposal and recovery. In Germany, the concept of recovery is interpreted very broadly, also including placement in underground repositories for the purpose of stabilization. This is rightly rejected by the European Commission with reference to Annex IIA D 1 of Directive 75/442/EEC. Concerning incineration

of wastes, there is also a difference of opinion between German practice and the European Commission, but with an opposite thrust: Under German law, incineration is only accepted as recovery under certain conditions. It is not enough that merely some other fuel is substituted. Rather certain minimum requirements are placed upon the waste in terms of its fuel quality and calorific value. The Commission, which views any form of substitutive burning as recovery, does not accept these restrictions, and upon the instigation of the Belgian cement industry - has already initiated infringement proceedings against Germany. This construction of the law - while certainly acceptable in terms of the wording of the Directive - fails to give adequate consideration to environmental concerns.

As this example shows, these debates are by no means merely juridical niceties, but decisions with considerable practical impacts: If waste is classified as destined for recovery, then a whole array of monitoring and licensing duties can be dispensed with, recovery having priority over disposal as a matter of principle and therefore being privileged in many respects in order to initiate a private-sector recovery market. This principle, while sensible in itself, is problematic in cases where recovery itself leads to considerable environmental impacts and these activities are exempted from regulatory control. There is thus a need for uniform recovery standards. Blanket priority for recovery would appear to be a dubious principle. German waste management law provides for a restriction of this priority insofar as that recovery loses its priority if it is more environmentally damaging than disposal.

2.3 Prevention principle

A further critical point of the law currently in force is the absence of instruments for implementation of the prevention principle.

2.4 Proximity principle

The fact that wastes fall under the principle of the free movement of goods means that these can be transported at will. This is a point that the Council has noted with concern. It needs to be expressly established in European Community law that disposal should take place as close as possible to the point of generation, unless disposal at a different location has environmental benefits. The proximity principle is already established as a basic principle (of rectification at source) in Article 130r para 2 of the EC Treaty. For waste policy, however, this needs an appropriate concretization.

2.5 Liability

It needs to be remembered that there is still no Community-wide regulation of the liability of producers and holders of waste, although the Commission already submitted proposals for corresponding Directives in 1989 and 1991. Nor has it yet been possible to integrate these proposals within a general environmental liability, although the European Parliament already called upon the Commission in 1996 to submit a corresponding proposal.

3 Conclusion and Outlook

The project of a codification of waste management law can provide a stimulus for examining existing deficits. However, this is only then worthwhile if a substantive development of the law is actually intended. A mere collation of existing provisions within one document does not suffice. In my opinion, the opposite path should rather be taken: First further development towards a comprehensive substance and product law; uniform codification can stand at the end of this path.

NEW REGULATIONS

New Legal Framework for the Remediation of Contaminated Sites in Germany The Federal Soil Protection Act

By Betty Gebers

Introduction

In Germany 190,000 sites are suspected to be contaminated with dangerous substances. The problem is especially pressing in the eastern part of Germany where approximately half of the problematic sites are located. Here no private liability entities can be made liable as most damage was caused by the state-owned companies of the former German Democratic Republic.

Traditionally, the remediation of contaminated sites in the Western Federal Republic¹ was not specifically regulated. A combination of the applicable provisions of the traditional "police law", the Waste Management Act, the Water Protection Act and the general liability laws served as a legal basis for all clean-up activities. The somewhat antiquated police laws generally allow public authorities to become active when a specific situation imposes a threat to "public security and public order"; For example, if a site was contaminated or suspected to be contaminated in a way that could lead to adverse effects on the environment or human health. Over the years distinct enforcement practices developed in the different German states (Bundesländer). This diversity was notably evident with regard to standards of assessing potentially harmful effects and in the extent of remediation requirements.

The legal basis for soil remediation was already considered to be insufficient in the 1980s. In 1985 a soil protection plan was proposed by the federal government²; in 1993 a first draft was prepared. This highly-critiqued draft did not pass the legislative process. A new draft was decided by the cabinet on 14.1.1997 and the abiding law was passed on 17.3.1998. The law only partly went into force on 25.3.1998; only those provisions are in force that give the government the competence to pass the necessary sublaws. The Soil Protection Act will enter into force on 1.3.1999. The sublaws are already under preparation. The intention of the sublaws is to

harmonise the assessment standards of contaminated sites in Germany. The main regulative content of the law follows:

1 Objective

The Soil Protection Law formulates as an objective "to sustain or restore the functioning of the soil". To achieve this the act calls for a prevention of the harmful deterioration of the soil and the remediation of the soil and old contaminated sites as well as water pollution resulting from decomposition. The Art. 1 provision also stresses the need for preventive measures against adverse soil impacts.

2 Definitions

The law contains definitions of contaminated sites in Art. 2 para. 5. These are

- suspended waste treatment facilities or other sites where waste had been treated or stored
- or
- sites of former industrial installations where dangerous substances have been handled and which cause a harmful deterioration of the soil or human dangers.

The law also contains a definition of restoration in Art. 2 para. 7.

Restorations are:

- measures to eliminate or minimise the harmful substances (decontamination)
- measures that hinder or minimise a spread of harmful substances without eliminating them (protection/sealing measures)
- measures that aim at the reduction and or minimisation of harmful deterioration of the soil with regard to its physical, chemical or biological character.

So-called "Suspected Sites" (Altlastenverdachtsflächen) are those sites where a contamination can only be assessed after further examination.

- preventive measures.

¹ According to the Unification Treaty most laws of the Federal Republic continue to be applicable in the unified republic.

² BT-Drs. 10/2977.

3 Responsibility for Remediation

The liability provisions are based on the principles that were formerly applied under police law, but they reach further under regarding some aspects.

The person or entity that has caused the deterioration of the soil is responsible for its restoration under Art. 4 para. 3 as stated by police-law. The responsible person must have caused the damage through an activity or through unlawful non action. In case of more than one responsible person the persons have to each cover an equivalent of the part they contributed to the damage. In cases where the authorities have chosen to make one person liable for the damage, this person may seek compensation from the others.

The owner or the possessor of the site is according to Art. 4 para. 3 also responsible for restoration. The former owner of a property may also be liable. His liability is limited to those cases when he sold his property after 1.3.1999 and when he had known or should have known of the contamination. This provision is new in comparison to the former law.

The new Soil Protection Act identifies a variety of potentially liable persons. However, in their decision the authorities have to consider the individual contribution to the environmental threat. As a consequence the authorities will only approach an owner if the person or entity that has caused the damage cannot be traced or has insufficient financial resources.

In addition, the Act contains a new specific provision for companies freed from liability due to bankruptcy. It stresses the - already under other laws existing - possibility to make the representatives of an undercapitalised company liable.

The effort to be taken is determined mainly by water and health protection requirements. The standards of the Water Protection Act apply to water. The extent of measures to protect human health will depend on the intended or existing use of the site. A regulation which will contain limit values and harmonise the existing distinct practices of the German States is in preparation.

4 Exemptions

Some specific rules were applied in the early nineties in the East German States to attract investors to potentially contaminated sites. The Unification Treaty contains in Art. 9 a provision that, under certain conditions, releases the buyer of a property from a liability for the clean-up of the site. Liability is in these cases restricted to the time after the 1 July 1990, given agreement from the responsible authorities. The buyers of properties had to apply by 28.3.1993 in order to benefit from the clause. In practice, a limitation of liability was also negotiated with

investors during the privatisation process. However, the effect of these exemptions on the matter regulated by the soil protection act is limited.

5 Inspection of Potentially Contaminated Sites

A practical problem has been the inspection of sites and the investigation of possible damages:

- when contamination of the site seems probable;
- when a contamination has been found, but the extent is not clear.

According to Art. 9 para. 1 of the Soil Protection Act, the responsible authorities are obliged to take appropriate measures to examine the nature and extent of contamination or harmful deterioration of the soil. An investigation is necessary when certain so-called "inspection values" have been exceeded. The authorities will instruct the owner to carry out the inspection and ask to contract an expert. In cases where the owner is not cooperative, it would be possible for authorities to inspect and investigate the sites without the consent of the owner and invoice him the costs.

6 Clean-Up Planning

Art. 13 and Art. 14 contain provisions for a clean-up plan. A clean-up plan must be worked out by the liable person or entity in cases of severe contamination. The plan contains a summary of the assessment and evaluation of possible harms to the environment, information about current and future uses of the property, a description of the objective of the clean-up measures, and a description of the envisaged measures accompanied by a time table. The government is empowered to pass regulation with specific requirements.

Art. 14 regulates the right of the administration to formulate a clean-up plan of its own or complete a plan, provided that the liable person did not adequately present the requested clean-up plan.

Planning of clean-up measures by the administration are found mainly in cases where public properties are restored for further use. The so-called "recycling" of land is an objective in many communities.

7 Prevention Measures

The Law contains also provisions on the prevention of adverse soil effects.

Art. 7 contains a general obligation for everyone who is influencing the soil by his activities to prevent harmful effects. This obligation is specified for agricultural land-use under Art. 17 para. 2, which contains the essentials of good practices in agricultural land-use.

A general obligation has also been included regarding current dangers. Owners and possessors are

obliged to take measures to defend their property from harmful deterioration of the soil (Art. 4 para. 2).

A further provision seems to be a reaction to the high proportion of land that is already covered with asphalt and concrete in Germany. The provision aims to regulate the so-called "de-sealing" (Entsiegelung), the removal of cover material and the

eventual restoration of the soil. Some doubts might be justified whether this provision will prove to be effective, because it only covers the possibility of depaving properties permanently out of use and in conflict with paving provisions of land-use plans.

BOOK REVIEW

James Cameron & Agata Fijalkowski (Eds.) Trade and the Environment - Bridging the Gap

Cameron May, London, 1998, 190 pp., pb., ISBN: 1 874698 17 1, £40.00/\$65.00,

<http://www.cameronmay.com>

Once more *J. Cameron* has given his attention to the interesting issue of how to reconcile controversial aspects of trade liberalisation and environmental protection. "Trade and the Environment: Bridging the Gap" is a collection of valuable expert findings and commentaries ensuing from an international conference on ways and means of the implementation of Multilateral Environmental Agreements (MEA) in the Hague in 1997. The central theme of all contributions is related to the question of how MEA can be implemented more effectively and which trade measures can contribute to the implementation process.

In its introductory chapters, *J. Cameron* and *J. Martinez* discuss recent developments in consensus building and dispute settlement regimes particularly under the GATT/WTO regime. Focusing on expected results from the recent trade-environment dispute - the shrimp-turtle case of Thailand, Malaysia, India, and Pakistan against the US, which was decided by the Appellate Body under the GATT/WTO a few month ago - *Cameron* concludes that the further integration of environmental law and policy into the decision making process of the WTO is essential. In his contribution *C. Osakwe* demands that less time should be spent on the debate about GATT/WTO consistency of trade measures in MEA instead of more efforts to be undertaken in creatively designing the ideal combination of coercive trade measures and positive measures for individual MEAs.

The influence of trade-related measures to the implementation of three important MEA - the Montreal Protocol, the Basel Convention and CITES - are discussed by *R. Vossenaar* and *V. Jha*. They conclude that both trade measures and so-called "posi-

tive measures" such as the transfer of technology and capacity-building have increased participation in MEAs. However, a package of different instruments, containing positive and trade measures but also compliance, control and enforcement measures may be needed in order to achieve effective implementation of MEA.

This finding is backed up by *B. Ivars*. She emphasises the necessity to harmonise environmental and trade commitments so that the effectiveness of MEA is not undermined. *S. Charnovitz* examined 31 cases of bilateral, plurilateral or multilateral treaties in which design trade measures played some role, showing that the use of trade measures in MEA is similar to that in economic and health treaties.

Two other authors, *J. Adams* and *K. Kummer*, also focus on the Basel Convention, which particularly combines trade and environmental interests and may therefore be a milestone in "bridging the gap" between both. However, as pointed out by *J. Adams*, this does not mean that the convention is a good example of effective implementation because it has other drawbacks such as ambiguous wording. *D. Brack* names three components that need to be examined when considering the value of trade measures in any MEA. These are feasibility, fairness and the interrelationship with the multilateral trading system under the GATT/WTO regime. *K. v. Moltke* addresses the broad context of a consistency of sustainable development and commodity markets.

"Trade and the Environment" is not a comprehensive analysis of the relationship between international trade and the environment. However, this cannot be expected from a collection of various conference contributions. Instead, the collection illuminates many viewpoints of an important aspect of international environmental policy. It will thus promote the growing discussion on how to reconcile trade and environmental issues and, going beyond, how to use trade measures as a means for an effective implementation of MEA. The current debate on the defining and organising of "emissions trading"

under the Kyoto Protocol shows the extreme relevance of this problem.

Ralf Jülich

News in Brief

The ACEA Agreement

On 6 October 1998 the EU Environment Ministers approved the European car makers' (ACEA) agreement to reduce the average of CO₂ emissions of new passenger cars from 180 gr/km to 140 gr/km by 2008, which means a fuel consumption of 6 l per 100 km. In 2003 the achieved preliminary reduction will be examined and further reduction potentials to reach an emission standard of 120 gr/kg by 2012 will be discussed. In case that the agreement lags behind its target, the EU Commission will propose legal measures.

The commitment does not impose a target on the individual manufactures, but only an overall average target for all ACEA members. Individual members are free to apply more stringent as well as less stringent levels of CO₂ emissions, provided the average target is met. No sanctions are foreseen for a non-fulfilment of the agreement.

Originally, the EU Environment Ministers had called for stricter conditions (5 l/100km by 2005 or by 2010 at the latest) within the Community's climate strategy. Only the Netherlands and Denmark still had reservations on this matter before the text of the agreement was unanimously adopted by Ministers.

IMPRINT

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

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

The *elni* Newsletter is prepared with the financial and organisational support of the Öko-Institut e.V., a non-profit private research institute. The address of the main office is: Öko-Institut e.V., P.O. Box 62 26, 79038 Freiburg, Germany, Tel.: +49 (0)761 45 295-0, Fax: +49 (0)761 475437, <http://www.oeko.de>

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TASKS AND ACTIVITIES

What is elni?

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

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

Why is elni Necessary?

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

How are elni's Objectives Achieved?

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

1 Studies of the Environmental Law Network International

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

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

2 elni Newsletter

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

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

3 Annual Conference

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

4 Coordinating Bureau

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

elni's Board

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

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

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

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

Stefano Nespore, lawyer, editor of the "Rivista Giuridica dell'Ambiente", Milano, Italy

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