elni
REVIEW

No 2/2007

ISSN 1618-2502

ENVIRONMENTAL
LAW NETWORK
INTERNATIONAL

RÉSEAU
INTERNATIONAL
DE DROIT DE
L´ENVIRONNEMENT

INTERNATIONALES
NETZWERK
UMWELTRECHT

elni REVIEW

The Aarhus Convention in operation
Ralph Hallo

Aarhus related cases of the Belgian Constitutional Court
Luc Lavrysen

Highest court abolishes EIA-permit
Thomas Alge/Dieter Altenburger

Public Interest Litigation in Environmental Matters
Dora Schaffrin/Michael Mehling

Opening the Doors to Justice - Strengthening Public Access
Irina Zodrow/Cathrin Zengerling

Asia-Pacific Partnership on Clean Development and Climate
Christoph Holtwisch

Waste, Product and By-product in EU Waste Law
Carlos da Silva Campos

CONTENTS

Editorial 1
elni forum on WEEE revison

The Aarhus Convention in operation: EEB Survey Initial Results 2
Ralph Hallo

Presentation of Aarhus-related cases of the Belgian Constitutional Court 5
Prof. Dr. Luc Lavrysen

Highest Austrian court abolishes EIA permit - but EIA appeal proceeding with regard to transport projects appears ineffective 9
Thomas Alge, Dieter Altenburger

Public Interest Litigation in Environmental Matters: A German Perspective 13
Dora Schaffrin and Michael Mehling

Opening the Doors to Justice - The Challenge of Strengthening Public Access 20
Irina Zodrow LL.M and Cathrin Zengerling LL.M.

Asia-Pacific Partnership on Clean Development and Climate: Blockade or Impetus for the International Climate Regime? 23
Christoph Holtwisch

Waste, Product and By-product in EU Waste Law 28
Carlos da Silva Campos

elni Members and Networks: J&E - More than just an NGO 45
Pavel Černý

Imprint 47

Authors of this issue 47

elni Membership 48

Public Interest Litigation in Environmental Matters: A German Perspective

*Dora Schaffrin and Michael Mehling**

1 Introduction

Environmental protection has invariably become one of the central challenges facing modern societies and, by extension, their respective states. Constitutionally endowed with judicial powers, states also have a mandate to guarantee the rights and duties arising from legislation on the environment, including, if necessary, their enforcement. In the process, public interest litigation in environmental matters has acquired growing importance as one important means of achieving this objective. Widespread opposition in civil society to large-scale projects with potentially detrimental consequences for the environment, often followed by lengthy judicial action against operators and licensing authorities, is merely one of the more salient examples of public interest litigation on the environment. Indeed, judicial action frequently provides the only means of resolving such disputes, for instance through an action for rescission of an environmental permit; as a result, environmental law, a relatively young field lacking the degree of statutory elaboration common to other areas of law and involving many broadly worded principles and discretionary clauses to accommodate complex, rapidly changing factual circumstances, has been influenced more strongly than many other issue areas by judicial decisions, prompting some scholars to describe it as based largely on case law.[1]

As with other states, this has also been true with regard to Germany, where the judiciary has been confronted with a rapidly growing – or, as some critics contend, a downright excessive[2] – docket of environmental cases. Given that environmental goods do not typically fall within the ambit of private property, and access to justice has, by contrast, traditionally been geared towards protection of individual rights in Germany, the role of courts in environmental disputes has necessitated innovative approaches. In the process, public interest litigation in environmental matters, which does not seek the enforcement of individual rights, such as property or health, has acquired growing importance as one important means of achieving this objective (public interest litigation *strictu sensu*). Still, conventional litigation aimed at the protection of individual interests, which is clearly dominant in the German judicial system, may also accommodate environmental concerns, and therefore continues to play an important role. By describing the legal framework for public interest litigation, this article seeks to shed light on an important channel of environmental protection in Germany, whose role in countering environmental pollution and other forms of damage to public goods prior to serious and irreversible deterioration has been consistently on the rise. Against this background, the aim of the article is to provide an introduction to German experiences with public interest litigation in environmental matters, both with a view to its success to date and also to more critical aspects.

2 Public Interest Litigation in environmental matters

Generally speaking, the German legal order distinguishes between two categories of access to justice in environmental matters: litigation geared towards enforcement of an individual right, and public interest proceedings. Unlike the former category, public interest proceedings are not based on provisions which primarily serve the individual interests of a claimant, but rather pursue the promotion of a public good. So far, public interest proceedings have only become admissible in specific fields of law, including environmental law.

With regard to individual rights, access to justice is formally guaranteed under the Constitution, with Article 19 paragraph 4 of the German Basic Law[3] stipulating that, if the rights held by any individual are violated by a public authority, this individual may initiate judicial proceedings. As a consequence, such proceedings traditionally have a much stronger standing in German law than public interest proceedings. While the former cannot be abolished by the statutory legislator without violating the Constitution, the latter are entirely subject to statutory law. Recently, however, public interest proceedings in the area of environmental law have gained currency

* This article is based on a research report written in the context of an advisory project for the Gesellschaft für Technische Zusammenarbeit (GTZ), GTZ-SEPA Programme Office, Beijing, supporting the SEPA legislation department with the elaboration of the legal framework of public interest litigation in China, Project Number: 02.2164.8-001.00.

1 See M. Kloepfer, Umweltrecht, § 8 Annot. 1 (3rd ed., 2004): "Environmental law is, to a considerable degree, based on case law (Das Umweltrecht ist zu einem beträchtlichen … Teil Richterrecht)."

2 See, for instance, H. Sendler, Zum Instanzenzug in der Verwaltungsgerichtsbarkeit, 97 DVBl. 157 (1982), at 164.

3 German Basic Law (Grundgesetz für die Bundesrepublik Deutschland, or GG), 23 May 1949, Federal Gazette (BGBl.) Part I, 1 (1949).

due to a series of impulses from European Community[4] and international law.[5]

Still, there is continuous debate on the legal status of public interest litigation in Germany, and substantial resistance to an ample interpretation of new provisions introducing this marked departure from the traditional doctrine of individual rights proceedings. The following sections will set out the characteristic features of public interest proceedings in public environmental law.

3 Development and legal basis

The objective of public interest proceedings is to ensure the protection of public goods, including, *inter alia,* the environment. As already demonstrated above, the admissibility of altruistic proceedings – in contrast to proceedings based on individual rights – is not anchored in constitutional law. As a result, public interest proceedings in environmental matters were not introduced at the federal level until 2002, and even then, the scope of such proceedings was confined to the enforcement of nature conservation law rather than environmental law in general, and to select decisions of administrative bodies rather than any decision apt to have significant detrimental effects on the environment. Moreover, the ability to initiate public interest proceedings was only conferred upon formally recognised environmental NGOs.

At present, the Federal Nature Protection Act (BNatSchG)[6] and fourteen of the sixteen regional nature conservation statutes of the federate states contain a legal basis for public interest proceedings in environmental matters. The federal provisions apply to proceedings against administrative decisions of federal as well as regional authorities. The provisions contained in the nature conservation act of a federate state apply, in turn, only to proceedings against administrative decisions of an authority of that federal state. When the provisions of a federate state are narrower in scope than the BNatSchG, the BNatSchG takes precedence.[7] Where the provisions of a federal state are broader, they remain in turn applicable to the full extent that they go beyond the federal law. Occasionally, the provisions adopted by the federate states reiterate what is already regulated by the BNatSchG. In this case, when the law of a federate state is silent on the issue of public interest litigation by associations, only the BNatSchG applies. And finally, to the extent that no specific provisions are contained in nature conservation law, the general provisions of the Code of Administrative Judicial Procedure relating to the admissibility of public law proceedings apply.[8]

In federal nature conservation law, the legal basis for public interest proceedings is Section 61 of the BNatSchG. Section 61 of the BNatSchG reads:

“Proceedings Initiated by Associations

(1) An association recognised in accordance with Section 59 or on the basis of respective provisions of the federal states adopted within the framework of Section 60, can without a violation of its rights, initiate proceedings pursuant to the Administrative Courts Code against

1. exemptions from prohibitions and orders for the protection of nature reserves, national parks, and other areas of conservation referred to in Section 33 paragraph 2[9]; and against
2. plan establishment decisions on projects involving an interference with nature and landscape as well as plan approval decisions to the extent to which their adoption requires public participation.

The first sentence shall not apply where an administrative act referred to therein was issued on the basis of administrative judicial proceedings.

(2) Proceedings pursuant to paragraph 1 are only admissible if the association

1. asserts that the issuance of an administrative act referred to in the first sentence of paragraph 1 is conflicting with provisions of this Act, provisions which are adopted or continue to be applicable on the basis of or within the framework of this Act, or other provisions that must be respected when issuing the administrative act and are at least intended to serve the interests of nature protection and landscape conservation as well;
2. is affected within the field of activities set out in its articles of association, to the extent to which it is covered by the recognition decision; and
3. was entitled to participation in accordance with Section 58 paragraph 1 numbers 2 and 3 or the provisions of the federal states within the

4 See the Proposal for a Directive of the European Parliament and of the Council of 24 October 2003 on access to justice in environmental matters, COM(2003) 624.

5 See, notably, the Århus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 38 I.L.M. 515 (1999).

6 Nature Protection Act (Bundesnaturschutzgesetz, or BNatSchG) of 25 March 2002, Federal Law Gazette (BGBl.) Part I, 1193 (2002).

7 Article 31 of the Basic Law.

8 Code of Administrative Judicial Procedure (Verwaltungsgerichtsordnung, or VwGO) of 21 January 1960, Federal Law Gazette (BGBl.) Part I, 17 (1960).

9 The areas of conservation mentioned in Section 33 paragraph 2 of the BNatSchG are areas designated for the protection of habitats and wild fauna and flora that are registered at the European Community level as well as European areas of conservation for the protection of birds.

framework of Section 60 paragraph 2 numbers 5 to 6 and has, in that context, expressed an opinion on the matter, or, contrary to Section 58 paragraph 1 or to the provisions of the federate states adopted in the framework of Section 60 paragraph 2 was given no opportunity to express its opinion.

(3) If the association had the opportunity to express its opinion during the administrative procedure, the association is precluded with all objections which it failed to raise in the administrative procedure despite the fact that it would have been able to do so on the grounds of the documentation transmitted to it or inspected by it.

(4) If the administrative act was not notified to the association, administrative and judicial proceedings must be initiated within one year from the date on which the association had knowledge or could have had knowledge of the administrative act.

(5) The federal states may admit proceedings initiated by associations also in other cases in which Section 60 paragraph 2 prescribes the participation of the associations. The federate states may adopt further provisions on the procedure."

4 Admissible subject matters and claims

Section 61 paragraph 1 1st sentence, lit. 1 and 2 of the BNatSchG contains an exhaustive list of admissible subject matters. It does not cover all activities with potentially detrimental effects on the environment, however. In particular, not all projects that require an environmental impact assessment may be challenged, even though environmental impact assessments are only required for projects which may have significant detrimental impacts on the environment. Rather, an association may only initiate public interest proceedings against exemptions from prohibitions and orders for the protection of nature conservation areas, national parks and designated areas for the protection of habitats and wild fauna and flora that are registered at the European Community level, as well as for European conservation areas for the protection of birds. Finally, associations may also challenge plan establishment decisions (*Planfeststellungsbeschlüsse*) regarding projects with an impact on nature and landscape, and plan approval decisions (*Plangenehmigungen*), where participation of the general public in their elaboration is stipulated by law.

Exemptions from prohibitions and orders for the protection of nature conservation areas, national parks and designated areas for the protection of habitats and wild fauna and flora that are registered at European Community level, and European conservation areas for the protection of birds[10] are issued on the basis and pursuant to the conditions of Section 62 paragraph 1 of the BNatSchG or corresponding provisions of the federate states.[11] According to Section 62 paragraph 1 of the BNatSchG, an exemption can be granted upon request, provided that the implementation of the nature protection provisions would either entail an unintended hardship, although the exemption would be compatible with the interests of nature protection and landscape conservation, or upon condition that the implementation of the nature protection provisions would have unintended adverse impacts on nature and landscape, or, finally, if imperative reasons related to overriding public interests necessitate the exemption. Exemptions can, for example, be a necessary prerequisite for the approval of the construction of buildings, roads, or wind power plants, when these are located in a protected area. In such cases, associations can only attack the decision on the exemption, not the administrative approval of the project itself.[12] For the construction of industrial facilities, no separate exemption is provided for by law. Here, the interests otherwise taken into account when adopting the decision on the exemption are taken into account when deciding on the approval of the industrial facility. Nevertheless, the decision approving the industrial facility cannot be challenged.[13]

Plan determination decisions are generally required by law for large-scale infrastructural projects, which justify a particularly elaborate procedure set out in Section 73 of the Administrative Process Act.[14] Examples of plan determination decisions within the purview of Section 61 paragraph 1, 1st sentence, lit. 2 of the BNatSchG, that is: decisions with an impact on nature and landscape, include the approval of radioactive waste disposal sites,[15] construction of federal railways,[16] extension and construction of federal water straits,[17] as well as, under certain conditions, the construction and modification of magnetic levitation trains. Other examples are the construction of landfills according to Section 31 of

10 Within the purview of Section 61 paragraph 1, 1st sentence, lit. 1 of the BNatSchG.

11 Section 62 paragraph 1 of the BNatSchG.

12 Upper Administrative Court Berlin, OVG 2 SN 30.98.

13 Upper Administrative Court Frankfurt/Oder, 3 A 37/96.

14 Administrative Process Act (Verwaltungsverfahrensgesetz, or VwVfG) of 25 May 1976, Federal Law Gazette (*BGBl.*) Part I, 1253 (1976).

15 Article 23 paragraph 2a of the Act on Peaceful Utilisation of Nuclear Energy and the Protection against its Risks (Gesetz über die friedliche Verwendung der Kernenergie und den Schutz gegen ihre Gefahren, or AtG) of 23 December 1959, Federal Law Gazette (*BGBl.*) (1959) Part I, pp. 814 *et sqq.*

16 Article 18 of the General Railway Act (Allgemeines Eisenbahngesetz, or AEG) of 27 December 1993, Federal Law Gazette (*BGBl.*) Part I, 2378 (1993).

17 Article 14 of the Federal Water Straits Act (Bundeswasserstraßengesetz, or WaStrG) of 2 April 1968, Federal Law Gazette (*BGBl.*) Part I, 173 (1968).

the Waste Management Act,[18] the extension of water bodies according to Section 31 of the Water Resources Management Act,[19] and the construction or extension of federal highways according to Section 17 of the Federal Highways Act.[20]

Plan approval decisions are normally adopted according to a less elaborate procedure than plan determination decisions and, thus, do not normally require public participation as defined in Section 61 paragraph 1, 1st sentence, number 2 of the BNatSchG.[21] Contrary to the wording of Section 61 of the BNatSchG, moreover, administrative decisions which are not adopted by way of one of the foregoing administrative acts may also be challenged so as to prevent authorities from circumventing judicial control by deliberately using an illegal instrument that is not challengeable under Section 61 of the BNatSchG.

Pursuant to Section 61 of the BNatSchG, only the – preliminary or definitive – *rescission* of one of the administrative decisions set out above can be demanded. On the basis of Section 61 (1), 1st sentence of the BNatSchG, it is not possible to demand that a new administrative decision – let alone a decision with a particular outcome – be adopted. Neither is it admissible to bring an action for restraint against an administrative decision, i.e. to initiate proceedings with the aim of preventing a public authority from issuing an administrative decision.

5 Admissible grounds for action and substantiation of the claim

The mere fact that one of the foregoing administrative decisions is potentially illegal does not suffice as justification to rescind that act. Only the violation of specific provisions can lead to its judicial revocation. Specifically, Section 61 paragraph 2 lit. 1 of the BNatSchG limits the range of potential grounds for substantiation of a claim to violations of

a) the provisions of the BNatSchG itself;

b) provisions which are adopted or continue to be applicable on the basis of or within the framework of the BNatSchG, or

c) other provisions that must be respected when issuing the administrative decision and which are at least also intended to serve the interests of nature protection and landscape conservation.

The admissible grounds for action are, thus, limited to nature protection law, albeit in a wider sense, and do not extend to environmental law in general. Relevant provisions are thus the federal BNatSchG and the nature conservation acts of the federate states. As yet, there has been no comprehensive or uniform case law on which provisions – aside from those contained in the BNatSchG or the nature conservation acts of the federate states – may fulfil the requirement of being "at least also intended to serve the interests of nature protection and landscape conservation."

The Federal Administrative Court has decided that such provisions of the European Community directive on the conservation of natural habitats and of wild fauna and flora[22] which have direct effect may be invoked.[23] Likewise, the Federal Administrative Court has decided that a violation of the obligation of the administration to balance all interests concerned – inter alia the interest of nature protection – amongst and against each other, when adopting a plan determination or a plan approval decision, can be challenged to the extent that such violation consists in the insufficient appreciation of nature protection interests.[24] Affirming its general jurisprudence on the scope of judicial review for decisions involving a balancing assessment, the Federal Administrative Court has held that courts may review whether:

a) a balancing of interests with regard to nature protection interests has taken place at all;

b) whether all relevant nature protection interests were considered in the assessment process;

c) whether the relevance of the nature protection interests was misjudged, as well as whether

d) the balancing of interests was disproportionate to the relevance of nature protection interests.

Consequently, the insufficient appreciation of interests other than nature protection may not be invoked. An exception applies in the case of manifestly frivolous arguments or an abuse of legal powers during the balancing process. In such cases, a comprehensive review extending to interests other than nature protection can be carried out.[25]

18 Closed Cycle and Waste Management Act (Gesetz zur Förderung der Kreislaufwirtschaft und Sicherung der umweltverträgli-chen Beseitigung von Abfällen, or KrW/AbfG) of 27 September 1994, Federal Law Gazette (*BGBl.*) Part I, 2705 (1994).

19 Water Resources Management Act (Gesetz zur Ordnung des Wasserhaushalts, or WHG) of 19 August 2002, Federal Law Gazette (*BGBl.*) Part I, 3245 (2002).

20 Federal Highways Act (Bundesfernstraßengesetz, or BFernStrG) of 20 February 2003, Federal Law Gazette (*BGBl.*) Part I, 286 (2003).

21 Section 74 paragraph 6 of the Administrative Process Act.

22 Directive 92/43/EEC of the Council of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, OJ L 206/7, 22.7.1992.

23 Federal Administrative Court, Case 4 A 28.01, 17 May 2002, 116 Federal Administrative Court Reports (*BVerwGE*) 254 (2002).

24 Federal Administrative Court, Case 4 A 9.97 of 19 May 1998, 107 Federal Administrative Court Reports (*BVerwGE*) 1 (1998); Administrative Court Kassel, Decision of 23 October 2002, 2 Q 1668/02.

25 Federal Administrative Court, Case 4 A 9.97 of 19 May 1998, 107 Federal Administrative Court Reports (*BVerwGE*) 1 (1998).

Other provisions which are "at least also intended to serve the interests of nature protection and landscape conservation" could include certain provisions in the law on ambient air pollution control and water resources management, provisions requiring consideration of the public interest, or the law on environmental impact assessment. By contrast, lacking competence of the public authority that issued the administrative act cannot be invoked.[26]

An association does not, in turn, have to assert that its individual rights (e.g. property rights or procedural rights) have been violated by nature protection provisions.[27] This is the element that distinguishes public interest proceedings from egoist proceedings, which require assertion of a violation of individual rights. Thus, the provisions of Section 61 of the BNatSchG and corresponding provisions of the federate states abrogate the requirement contained in Section 42 (2) of the Code of Administrative Judicial Procedure stipulating that, when the revocation of an administrative decision is sought, the violation of an individual right has to be invoked unless otherwise provided for by law. Similarly, Section 113 (1) of the Code of Administrative Judicial Procedure, which regulates the substantiation of the claim, is modified in that only the 1st part of the 1st sentence applies, according to which the court revokes an administrative act to the extent to which its adoption was illegal. Section 113 (1), 2nd part of the 1st sentence of the Code of Administrative Judicial Procedure does not apply, which makes the revocation of an administrative act conditional on whether the illegality of the act affects the individual rights of the claimant.

However, an association is free to invoke those provisions which it could also invoke in individual rights proceedings, i.e. provisions that confer an individual right upon the association. Separate proceedings are not necessary.

6 Capacity to act

One argument used against public interest proceedings is a perceived lack of legitimacy of eligible claimants. Eligibility accrues to associations which have been officially recognised either by the Federal Ministry of the Environment, Nature Conservation and Nuclear Safety, or by a competent federal state authority.[28] An association can choose whether to register at federal level or at the level of a Land. The conditions for official recognition laid down in Section 59 of the BNatSchG apply to the recognition on federal level as well as on the level of a federate state, unless a federate state has adopted land-specific provisions. To be eligible for official recognition at the national level, an association must carry out activities that extend beyond the territory of a single federate state. The main purpose of the association, as defined in its Articles of Association, must be to promote, for non-pecuniary purposes and for a longer period of time, the interests of nature protection and landscape conservation.

At the time of such recognition, the association must have existed and been actively pursuing nature protection and landscape management goals for at least three years. It must warrant the capacity to carry out its tasks appropriately, in particular, on the basis of the type and scope of its former activities as well as the composition of its members and its capacity to act. The association must be exempt from corporate income tax on the basis of its non-profit character. Finally, membership associated with full voting rights in the general meeting must be open to anyone who supports the objectives of the association, with the exception of associations that are composed of legal persons only. The federal states can provide for different requirements with regard to the territorial extension and the time of official recognition.[29] Provisions of the federate states have been interpreted extensively by the competent authorities.[30]

In addition, Section 61 (2) lit. 2 of the BNatSchG stipulates that the association must be affected within the scope of activities set forth in its Articles of Association to the extent to which these are covered by the recognition granted.

Beyond that, Section 61 paragraph 2 lit. 3, 1st half of the sentence of the BNatSchG requires associations to have been entitled to participation in the procedure preceding the adoption of the disputed administrative decision. Such entitlements can stem from Section 58 paragraph 1 litt. 2 and 3 or Section 60 paragraph 2 litt. 5 and 6 of the BNatSchG or relevant provisions of the federate states adopted in line with Section 60 paragraph 2, 2nd and 3rd sentences of the BNatSchG. An entitlement to participation in an administrative procedure does not necessarily correspond to a right to initiate proceedings. Not all cases in which an association is entitled to participation in an administrative procedure also allow for the association to initiate proceedings.

Moreover, an association must have filed an opinion during the procedure preceding the adoption of the administrative act challenged on the subject matter

26 Administrative Court of Oldenburg, Decision of 26 October 1999, 1 B 3391/99.

27 Section 61 paragraph 1 1st sentence of the Code of Administrative Judicial Procedure and corresponding provisions of the federate states.

28 Article 61 paragraph 1, 1st part of the 1st sentence of the BNatSchG and corresponding provisions of the Länder.

29 Article 60 paragraphs 1 and 3 of the BNatSchG.

30 For judicial interpretations, see Federal Administrative Court, 101 DVBl. 415 (1986); OVG Hamburg, 1 NVwZ 687 (1982) (judgements rendered on the basis of provisions of a Land).

of the procedure.[31] Failing this, proceedings are inadmissible. An exception applies where the association was not given an opportunity to express its opinion, amounting to a violation of Section 58 paragraph 1 of the BNatSchG or of provisions of the affected federate state adopted in conformity with Section 60 paragraph 2 of the BNatSchG.

Section 61 (3) of the BNatSchG stipulates that, if the association was given the opportunity to express its views during the administrative procedure preceding the adoption of the challenged administrative act, but has failed to put forward a specific objection despite the fact that it would have been able to do so on the grounds of the documentation transmitted to it or inspected by it, it is precluded from invoking this particular objection in judicial proceedings. Without prejudice to the principle that an administrative court inquires the facts of the case *ex officio*, but in line with the obligation of the association to cooperate, it is for the association to put forward the elements which establish that the association was incapable of putting forward objections during the administrative procedure preceding the adoption of the challenged administrative act.

These procedural restrictions aim at maintaining the division of powers between the administrative and judicial branches without encroaching upon the powers of the administration, and at the same time are meant to protect the beneficiaries of the challenges act against unexpected objections, thereby promoting legal certainty.[32]

7 Other requirements

Under the general provisions of the Code of Administrative Judicial Procedure, administrative or judicial proceedings need to filed one month after the notification of the administrative decision.[33] In exceptional cases, administrative or judicial proceedings may be initiated up to one year from the date on which the association had knowledge or could have had knowledge of the administrative act, if the administrative act was not notified to the association.[34]

According to Section 61 paragraph 1, 2nd sentence of the BNatSchG, an administrative decision may not be challenged whenever it was issued in the course of judicial proceedings as opposed to adoption by the administration. This is necessary to prevent that conflicting judgments are rendered and thus provides legal security. Other admissibility requirements flow from Section 61 paragraph 1, 1st sentence of the BNatSchG in connection with the provisions of the VwGO. They differ depending on the type of proceedings. In particular, the prior termination of administrative proceedings may be required as a prerequisite for initiating judicial proceedings.[35]

8 Progress towards Public Interest Litigation? The new Environmental Litigation Act

A new Act on Supplementary Provisions for Environmental Litigation pursuant to Council Directive 2003/35/EC (URbG)[36] entered into force on 15 December 2006.[37] It applies, in particular,[38] to proceedings against non-final administrative decisions authorising projects that require an environmental impact assessment or industrial facilities that require an authorisation according to the IPPC Directive, on the condition that these proceedings were introduced or would have had to be introduced after 25 June 2005.[39]

The Environmental Litigation Act supplements the general provisions on access to justice contained in the Code of Administrative Judicial Procedure and the federal and federate states' nature conservation laws. Its main purpose is to enhance the capacity to act already set out in existing legislation. Nevertheless, it also introduces some new elements of public interest proceedings.

First, under certain conditions, it allows associations that have been officially recognised by the Federal Environment Agency to invoke the violation of environmental protection provisions relevant for the authorisation of a project or facility to which the act applies, without requiring that these provisions confer a subjective right upon the claimant association.[40] In this regard, the new Environmental Litigation Law joins the federal and federate nature protection acts in allowing a derogation from Article 42 paragraph 2 of the Code of Administrative Judicial Procedure, which requires that claimants invoke an impairment of their rights. Unlike the federal and federate state nature conservation laws, however, the Environmental Litigation Act adheres to the requirement that only provisions which confer subjective rights can be invoked. And it does not introduce the legal fiction that recognised associations are deemed to have rights capable of being impaired.[41]

31 Article 61 paragraph 2 lit. 3, 2nd half of the sentence.

32 Compare Federal Records of Parliament (BT-Drs.) 14/6378, at 62.

33 Articles 70 (administrative proceedings) and 74 (judicial proceedings) of the Code of Administrative Judicial Procedure.

34 Article 61 paragraph 4 of the BNatSchG.

35 Article 68 paragraph 1 of the Code of Administrative Judicial Procedure.

36 Gesetz über ergänzende Vorschriften zu Rechtsbehelfen in Umweltangelegenheiten nach der EG-Richtlinie 2003/35/EG (Umwelt-Rechtsbehelfsgesetz, or URbG), Federal Law Gazette (BGBl.) Part I, 2816 (2006).

37 Article 6 of the UrbG.

38 For an exhaustive description of the scope of application and *ratione materiae*, see Article 1 of the URbG.

39 Article 5 of the URbG.

40 Article 2 of the Environmental Litigation A.

41 Such is the case in Articles 10a of the EIA Directive and 15a of the IPPC Directive.

Accordingly, it does not introduce public interest proceedings in a strict sense, but rather exemplifies proceedings by representation.

Second, contrary to Article 46 of the Administrative Judicial Procedure Code as interpreted by the Federal Administrative Court, a claimant can invoke the violation of specified provisions on environmental impact assessment procedures, even if the violation had no effect on the substance of the administrative decision taken.[42] In some ways, this can again be seen as a step towards public interest proceedings, as the respective provision is not even restricted to recognised associations, if one follows the Federal Administrative Court that procedural provisions only serve an auxiliary function, but do not themselves confer individual rights.

Whether the entry into force of the Environmental Litigation Act also means that a claimant can no longer rely on the direct applicability of Articles 10a of the EIA Directive and 15a of the IPPC Directive is questionable. This would require an adequate implementation of the aforementioned Articles. Whether the Environmental Litigation Act meets this requirement is disputed and has not yet been authoritatively resolved by the European Court of Justice.

9 Outlook

The restrictive concept of legal protection and its usual reliance on a violation of subjective rights has prompted influential observers to describe Germany as a laggard when it comes to environmental litigation in Europe.[43]

Even with the entry into force of the new Environmental Litigation Act, this assessment is unlikely to see dramatic change, given the largely reticent stance it adopts on the admissibility of public interest proceedings. Of course, only experience and actual practice will reveal whether, in applying this law, the stance long held by German courts is finally eroding. Given the many developments at the international and European Community level, it can only be hoped that Germany will follow suit and eventually open its judicial system for more forceful pursuit of those environmental interests which otherwise lack an adequate spokesperson. Arguments cited against wider access to justice in environmental matters, such as the threat of straining judicial dockets, are not borne out by experiences in other states.[44] From that perspective, existing rules on public interest litigation in Germany are but a first step in what will hopefully prove to be a longer and more comprehensive trend.

42 Article 4 of the Environmental Litigation Law.

43 Rat von Sachverständigen für Umweltfragen (SRU), Umweltgutachten 2002: Für eine neue Vorreiterrolle, Federal Records of Parliament (BT-Drs.) 14/8792 of 15 April 2002, Annot. 155.

44 L. Krämer, The Citizen in the Environment: Access to Justice, 7 Resource Management Journal 1 (1999) at 11.

Öko-Institut e.V.
Institut für angewandte Ökologie
Institute for Applied Ecology

The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.
The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.
The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

The Environmental Law Division of the Öko-Institut:
The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

Contact

Freiburg Head Office:
P.O. Box 50 02 40
D-79028 Freiburg
Phone +49 (0)761-4 52 95-0
Fax +49 (0)761-4 52 95 88

Darmstadt Office:
Rheinstrasse 95
D-64295 Darmstadt
Phone +49 (0)6151-81 91-0
Fax +49 (0)6151-81 91 33

Berlin Office:
Novalisstrasse 10
D-10115 Berlin
Phone +49(0)30-280 486 80
Fax +49(0)30-280 486 88
www.oeko.de

I·E·S·A·R
Institute for Environmental Studies and Applied Research

The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

Main areas of research:

- **European environmental policy**
  - Research on implementation of European law
  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

Contact

Prof. Dr. jur. Gerhard Roller
University of Applied Sciences
Berlinstrasse 109
D-55411 Bingen/Germany
Phone +49(0)6721-409-363
Fax +49(0)6721-409-110
roller@fh-bingen.de

www.fh-bingen.de

sofia

The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.
The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.
The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of *homo oeconomicus institutionalis*, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

- Product policy/REACh
- Land use strategies
- Role of standardization bodies
- Biodiversity and nature conversation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

sofia is working on behalf of the

- VolkswagenStiftung
- German Federal Ministry of Education and Research
- Hessian Ministry of Economics
- German Institute for Standardization (DIN)
- German Federal Environmental Agency (UBA)
- German Federal Agency for Nature Conservation (BfN)
- Federal Ministry of Consumer Protection, Food and Agriculture

Contact

Darmstadt Office
Prof. Dr. Martin Führ – sofia
University of Applied Sciences
Haardtring 100
D-64295 Darmstadt/Germany
Phone +49(0)6151-16-8734/35/31
Fax +49(0)6151-16-8925
fuehr@sofia-darmstadt.de
www.h-da.de

Göttingen Office
Prof. Dr. Kilian Bizer – sofia
University of Göttingen
Platz der Göttinger Sieben 3
D-37073 Göttingen/Germany
Phone +49(0)551-39-4602
Fax +49(0)551-39-19558
bizer@sofia-darmstadt.de

www.sofia-research.com

Öko-Institut e.V.
Institut für angewandte Ökologie
Institute for Applied Ecology

I·E·S·A·R
Institute for Environmental Studies and Applied Research
FH Bingen

sofia

elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

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

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focussing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researches, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements - The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment - European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann / Dyssli (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/ Küppers (eds.), P. Lang, 1993
- Licensing Procedures for Industria Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilmowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/ Roller (eds.), P. Lang, 1991.

Elni Website: elni.org

On the elni website www.elni.org one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.

elni, c/o Institute for Environmental Studies and Applied Research
FH Bingen, Berliner Straße 109, 55411 Bingen/Germany

www.elni.org