

elni

REVIEW

'New Age' Trade Agreements
and their Possible Contribution to Toxic Trade

Richard Gutierrez

WTO Compatibility of Border Tax Adjustments
as a Means for Promoting Environmental Protection

Rike U. Krämer

Intellectual Property Rights, Genetical Resources
and Traditional Knowledge

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The Legal Nature of the Biodiversity Provisions
adopted by the Andean Community

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Convergence with the Water Framework Directive
in the Context of the European Neighbourhood Policy

Claire Dupont/ Gretta Goldenman

The Phase-Out of Hazardous Substances in Troubled Waters

Stefan Scheuer

Integrated Environmental Permitting

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Editorial

Environmental issues are international issues. Many would agree with this statement when thinking of climate change, biodiversity loss and globalised markets. Environmental impacts in particular do not cease at country borders. For this reason the current issue of *elni Review* (2/2010) focuses on the environmental law of countries outside the EU – especially those considered to be developing or emerging countries. Questions of law arising in those legal spheres are likely to be different in nature, because developments in social and environmental law generally occur more slowly than developments in economic law do.

This issue of *elni Review* (2/2010) contains valuable insights on this subject, based on the following contributions:

First off, *Richard Gutierrez* tackles ‘new age’ trade agreements and their possible contribution to toxic trade in his article, examining the legal provisions under the Japanese economic partnership agreements that gave rise to the concerns over toxic waste trade and dumping. He also discusses the corresponding implications, particularly on the implementation of the Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal by the Southeast Asian countries.

In an article entitled ‘WTO Compatibility of Border Tax Adjustments as a Means for Promoting Environmental Protection’, *Rike U. Krämer* analyses the rationale behind Border Tax Adjustments, its contribution to a level-playing field, and its legality under WTO law.

‘Intellectual Property Rights, Genetical Resources and Traditional Knowledge: An Approach from the Perspective of Megadiverse Countries’ by *Aírton Guilherme Berger Filho* discusses biodiversity as well as biopiracy issues against the background of intellectual property rights and the rights of the native populations and the local communities regarding their territory, their cultural and environmental goods.

Jimena Murillo Chávarro and *Frank Maes* provide details on the Andean Community, its legal instruments and a corresponding decision in their article ‘The Legal Nature of the Biodiversity Provisions adopted by the Andean Community’.

In ‘Convergence with the Water Framework Directive in the Context of the European Neighbourhood Policy’, *Claire Dupont* and *Gretta Goldenman* look at the differences between approximation and convergence processes in the light of EU water legislation, drawing on interesting practical experiences gathered in Moldova and Georgia.

Alongside articles covering environmental law issues of developing and emerging countries, this issue of *elni Review* also deals with three additional issues:

From a broader perspective *Stefan Scheuer* provides a critical analysis of the repercussions of the EU Water

Framework Directive in ‘The Phase-Out of Hazardous Substances in Troubled Waters’.

Furthermore, *Hanna D. Tolsma* looks at the legal instrument of integrated environmental permitting, discussing in the process the integrated approach under the IPPC Directive and recent developments on integrated permitting in the Netherlands.

Finally, we cover recent developments in the law on island protection in China and provide a brief summary of the ELNI-VMR-VVOR congress 2010. The latter addressed the environmental effects of industrial installations the European Directive on Industrial Emissions (IED/current IPPC Directive) and took place in Ghent on 17 September 2010.

Contributions for the next issue of the *elni Review* are very welcome. Please send contributions to the editors by mid-February 2011.

Nicola Below/Martin Führ
October 2010

European Environmental Law Forum Kick-off Symposium:

19th and 20th May 2011
in Leipzig, Germany

“Key Challenges and Developments of European Environmental Law”

The German Helmholtz Centre for Environmental Research (UFZ) is organising a European expert symposium to promote exchange in the field of European environmental jurisprudence.

The symposium is divided into two parts. In the first part the key challenges and developments of environmental law will be discussed. There will be presentations on central topics of European environmental law, followed by open debate. In the second part, the situation with regard to the exchange of ideas and information on environmental law amongst experts of this field will be addressed with a view to establishing a European Environmental Law Forum. This forum is to be a common open network and shall encompass regular European conferences.

**Please note that this symposium
is only open to invited experts.**

For more information on the Helmholtz Centre for Environmental Research (UFZ), please visit <http://www.ufz.de/>

Conference Report

ELNI-VMR-VVOR-Congress "Talking about the environmental effects of industrial installations: the European Directive on Industrial Emissions" on 17 September 2010 in Ghent

Nicola Below

1 Introduction

The *elni-VMR-VVOR-congress "Talking about the environmental effects of industrial installations: the European Directive on Industrial Emissions"* took place in Ghent University on the 17th of September 2010. It was jointly organised by the Environmental Law Network International (*elni*), the *Vlaamse Vereniging voor Omgevingsrecht (VVOR)* and *Vereniging voor Milieurecht (VMR)*.

At the congress the new *Industrial Emissions Directive (IED)* was discussed by practitioners, researchers and lawyers. In December 2007, the Commission adopted a proposal for an IED. The proposal recasts seven existing Directives related to industrial emissions into a single legislative instrument. This recast includes in particular the *Integrated Pollution Prevention and Control (IPPC) Directive*, which has been in place for over 10 years. One of the keys of the proposal is to strengthen the dynamic *Best Available Techniques (BAT)* standards. A lot of questions were addressed at the congress, including: *What lessons can be learned from IPPC? Will the IED offer the highest level of protection for the environment and human health? Will the existing legislation be simplified? Will unnecessary administrative costs be cut?*

After the morning coffee the audience assembled in the congress hall to hear the opening speech of Gerhard Roller. He welcomed everyone, gave an introduction and spoke of the further proceedings which were planned to celebrate the anniversary of *elni* after the congress.

The congress was divided into three parts. The first part "Reading" addressed the actual status of the regulation. The second part "Doing" was focused on practical problems relating to the current IPPC-situation. The third part "Dreaming" brought together possible improvements in future developments of the directive.

2 First session "Reading"

Filip François from the European Commission (Belgium) delivered the first presentation, focusing on the current status of IPPC and of the IED from the perspective of the European Commission. First he gave an overview of the core elements of the IPPC Direc-

tive and went on to present the results of the Commission's IPPC review which took place in 2006 - 2007. The Commission then proposed recasting the IPPC and the other six 'sectoral' directives¹ into one single act - the IED - to, on the one hand, simplify the legal text and reduce administrative burdens. On the other hand, the purpose was to strengthen BAT and the role of BAT Reference Documents (BREDS), set new minimum emission limit values (ELV) for LCP, strengthen compliance enforcement and extend the scope and provisions to soil and groundwater protection. Filip Francois then summarised the key elements of the political decision-making process and set out some key issues.

Michel Amand, of the Belgian Presidency of the Council of the EU (Belgium), delivered a presentation on other new developments and the next steps. Key topics covered in the first part were: the permit conditions, their reconsideration and updating, and the inclusion of periodic monitoring and reporting requirements. The second part covered the environmental inspections, the access to information and public participation in the permit procedure. According to the speaker a type of "safety net" is also included via implementation reports and the assessment by the Commission. Amand then spoke about the next steps in the legislative process and the future tasks of the Commission.

Christian Schaible of the European Environment Bureau (Belgium) addressed new aspects arising from the IED with a focus on their relevance for NGOs. The two core elements of his speech were the strength of the BREFs and BAT-based permitting as well as public participation and transparency. According to Schaible, there is no generation or active dissemination of valuable information on BAT-based permitting when there is no comitology decision, with the exception of remediation measures on site closures.

¹ IPPC Directive 2008/1/EC, Large Combustion Plants (LCP) Directive 2001/80/EC, Waste Incineration Directive 2000/76/EC, Directive on the limitation of emissions of volatile organic compounds (VOC) from solvents 1999/13/EC, Directives related to the titanium dioxide industry 78/176, 82/883 and 92/112.

Marga Robesin of The Netherlands Society for Nature and Environment (Stichting Natuur en Milieu) concentrated her presentation on the relation between IED and the National Emission Ceilings Directive² (NEC). She compared the instruments of the IPPC and NEC and gave two practical examples in which installations were in line with the IPPC Directive, but would influence national emission ceilings. Robesin argued that the IED needs to be much clearer with regard to the relation to other European Directives, e.g. the NEC.

The subsequent discussion was hosted by Martin Führ of the University of Applied Sciences Darmstadt (Germany).

3 Second session "Doing"

The second session of the congress was opened by Willem Henk Streekstra, who discussed fair implementation of the IED from the viewpoint of the Confederation of the Netherlands Industry and Employers (VNO-NCW). He addressed the requirements of enhancing the level playing field via fair implementation, the role of Competent Authorities (CA) and the need for discussion about the link to other European policies. He went on to discuss the comparability of the quality of BREFs and alternatives for BAT, for example, the NO_x emission trading system in the Netherlands.

Yolanda Waas from the DCMR Environmental Protection Agency in Rijnmond (The Netherlands) discussed interpretation, application and review issues of IPPC from the perspective of a CA in the Netherlands. She set out the background of the permit tradition in her department and the simplification of BREFs. She also raised concerns about derogation possibilities and expressed the need for proper criteria for transparency to promote innovation.

Ari Ekroos from the University of Helsinki gave a presentation on IED implementation in Finland. He summarised the foreseeable IED implementation measures in Finland and discussed BAT conclusions and emission limit values against the background of different industrial sectors and different stages of BREF developments, as well as derogation possibilities. All in all, he concluded that the IED provides a reliable system of inspections, but that CAs might need more resources.

The definition of the term "Best Available Techniques" was scrutinised by Lesley James, an expert from Friends of the Earth in Derbyshire, Great Britain. Firstly, she defined the term theoretically and showed the relation between BREFs and BAT. She went on to point out practical problems relating to the methodology of practically defining BATs. With reference to the Aberthaw Power Station case³ in Wales she illus-

trated interpretation issues, going on to question the cost-benefit analysis which cannot currently assess the environmental benefits in a suitable manner. She also queried the derogation process and requirements.

Delphine Misonne from the CEDRE of the Facultés Universitaires Saint-Louis in Brussels, Belgium, spoke about whether IPPC/IED provides for a European safety net in terms of location-based emission limit values (ELV). She reasoned that there will be tensions between flexibility through, for example, derogation and a true level playing field with equal conditions for every installation in Europe. She reasoned that derogation possibilities must be kept tight to establish a safety net.

Chris Backes from the University of Maastricht (The Netherlands) compared ELV with environmental quality standards (EQS) and began by elucidating their relation with and within the IPPC Directive. He went on to argue for a strengthening of the EQS.

Jerzy Jendroska from the Opole University and the Centrum Prawa Ekologicznego (Poland) showed first impressions of the links to the Aarhus Convention⁴ and raised questions about potential compatibility problems. He questioned diverse provisions and their wordings in the light of the three pillars of the Aarhus Convention and recommended that the IED should be interpreted in the light of the Convention when transposed by Member States.

Volker Mauerhofer from the University of Vienna (Austria) presented an analysis of the past and ongoing procedures at the European courts. Most of the cases related to the IPPC Directive itself were based on non-transposition claims, preliminary rulings or on reporting issues.

The following discussion was hosted by Luc Lavrysen.

4 Third session "Dreaming"

Liesbet van den Abeele from VITO in Mol, Belgium, began the third session by addressing the new status for BREFs and BAT-associated emission levels (BAT AEL). She showed the importance of BREFs from a technical point of view and presented a new methodology for determining BAT-AELs. The methodology presented could increase objectivity and transparency and provide a level of consensus on BAT-AELs, and thereby ELVs.

Marian Peeters from the University of Maastricht in the Netherlands showed alternatives to the environmental permits and their impacts. She focused in particular on the pros and cons of integrated permitting versus market-based approaches from a theoretical and a practical point of view. In every case enforce-

² NEC Directive 2001/18/EC.

³ Elni Review 2/2009 p. 86 et seq.

⁴ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, on 25 June 2008.

ment monitoring is crucial to allow for a proper working instrument.

Isabelle Larmuseau from Ghent University (Belgium) gave a presentation on the introduction of the sustainability criterion as a permit condition or criterion in IED. With reference to the example of palm oil-fired power plants in the Netherlands and Belgium/Flanders she showed different interpretation possibilities. She concluded that Sustainability Impact Assessment now tends to be just a policy tool for 'better regulation' and 'good governance'. In the future, this impact assessment could be included as an annex to environmental permit demands.

Martin Führ of the Society for Institutional Analysis (sofia) at the University of Applied Sciences Darmstadt in Germany showed potential synergy effects between the IED and REACH. His presentation focused on substances under the registration regime and their relation to sector-specific environmental legislation. He showed regulatory options as well as specific links and interfaces between REACH and sectoral laws such as IED and the Water Framework Directive. He concluded that it would be necessary to close the gaps between IED and REACH experts, ensure appropriate implementation, establish linking clauses between the laws, and provide guidance to achieve the aims set out by the laws.

Filip François of the European Commission then gave general reflections on the issues discussed at the conference. All in all, he appreciated the points addressed on this day. Moreover, the Commission will take care of appropriate implementation of the Directive and develop it further.

The last discussion was chaired by Eckard Rehbinder from the University of Frankfurt am Main in Germany. Gerhard Roller gave some closing remarks and invited the audience to the elni anniversary party which took place in the evening.

Environmental Law and Policy at the Turn to the 21st Century

Umweltrecht und -politik an der Wende zum 21. Jahrhundert



Gedenkschrift / Liber amicorum Betty Gebers

*Thomas Ormond/Martin Führ/
Regine Barth (eds.)*

The present environmental law in Europe has been essentially produced in the last 20 years, and current environmental policy is still based on the courses set in this time. One of the actors in this process was the environmental lawyer Betty Gebers, until her premature death in September 2004. Her life achievements but also the current status in the many fields where she was active are examined in this book. The combination of retrospective and present-day analysis forms also the basis of an outlook how environmental law and policy in Europe could further develop in the next decades of this century.

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We invite authors to submit manuscripts to the Editors as files by email using an IBM-compatible word processing system.

The *elni Review* is the double-blind peer reviewed journal of the Environmental Law Network International. It is distributed twice a year at the following prices: commercial users (consultants, law firms, government administrations): €52; private users, students, libraries: €30. Non-members can order single issues at a fee of €20 incl. packaging. The Environmental Law Network International also welcomes an exchange of articles as a way of payment.

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The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.

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elni membership

If you want to join the Environmental Law Network International, please use the membership form on our website: <http://www.elni.org> or send this form to the **elni Coordinating Bureau**, c/o IESAR, FH Bingen, Berlinstr. 109, 55411 Bingen, Germany, fax: +49-6721-409 110, mail: Roller@fh-bingen.de.

The membership fee is €52 per year for commercial users (consultants, law firms, government administration) and €21 per year for private users and libraries. The fee includes the bi-annual elni Review. Reduced membership fees will be considered on request.

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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.

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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

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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 conservation
- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
- Self responsibility

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- Federal Ministry of Consumer Protection, Food and Agriculture

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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, focusing 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 researchers, 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.
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- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
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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.