elni REVIEW

ISSN 1618-2502

No2/2012

ENVIRONMENTAL
LAW NETWORK
INTERNATIONAL

RÉSEAU
INTERNATIONAL
DE DROIT DE
L'ENVIRONNEMENT

INTERNATIONALES
NETZWERK
UMWELTRECHT

elni REVIEW

Nanomaterials as priority substances under the Water Framework Directive
Catherine Ganzleben / Steffen Foss Hansen

The Marine Strategy Framework Directive and its implementation in Spain
Ana Barreira

Hong Kong Convention and EU Ship Recycling Regulation: Can they change bad industrial practices soon?
Thomas Ormond

Water services and why a broad definition under the WFD is needed to ensure the polluter pays principle
Sarolta Tripolszky

Downsizing our Water Footprint
Marga Robesin

The outcome of the UN Conference on Sustainable Development "Rio+20": Some critical comments
Eckard Rehbinder

Greening the Constitution. The principle of sustainable development anchored in the Belgian Constitution
Peter De Smedt / Hendrik Schoukens / Tania Van Laer

Law and innovation in the context of nanomaterials: Barriers to sustainable development?
Julian Schenten / Martin Führ

And further articles

CONTENTS

Editorial 37

Articles within the focus

Nanomaterials as priority substances under the Water Framework Directive 38
Catherine Ganzleben and Steffen Foss Hansen

The legal protection of the marine environment:
The Marine Strategy Framework Directive and its implementation in Spain 46
Ana Barreira

Hong Kong Convention and EU Ship Recycling Regulation: Can they change bad industrial practices soon? 54
Thomas Ormond

Water services and why a broad definition under the WFD is needed to ensure the polluter pays principle 59
Sarolta Tripolszky

Downsizing our Water Footprint 63
Marga Robesin

Articles with focus on other topics

The outcome of the UN Conference on Sustainable Development "Rio+20": Some critical comments 68
Eckard Rehbinder

Greening the Constitution. The principle of sustainable development anchored in the Belgian Constitution 74
Peter De Smedt, Hendrik Schoukens and Tania Van Laer

Law and innovation in the context of nanomaterials: Barriers to sustainable development?
Results of an empirical study 83
Julian Schenten and Martin Führ

A first success in the long run for better access to justice in the EU: The scope of the administrative review procedure provided under Regulation 1367/2006 invalidated by the General Court 92
Anaïs Berthier

Statement

Bank rescues in place of world rescue: Government heads knowingly failed at the Rio+20 summit 97
Almut Gaude (BUND)

Upcoming Events

20 years of Habitats Directive: European Wildlife's Best Hope?

International Conference – Antwerp, 12-13 December 2012 98

Imprint 99

Authors of this issue 99

elni Membership 100

Editorial

Water is a precondition for human, animal and plant life as well as an indispensable resource for the economy. Thus, according to the *European Commission* the protection of water resources, of fresh and salt water ecosystems and of the water we drink and bathe in is therefore one of the cornerstones of environmental protection in Europe. Against this background the present issue of *elni Review* focuses on the legal framework for (the protection of) water in Europe and explains, among other things, how far it can cope with possible threats from emerging technologies and to what extent some of the legislation has been implemented in specific member States of the EU. Moreover, insights are provided into some new political or scientific initiatives to further develop the legal framework for protecting water.

First off, *Catherine Ganzleben* and *Steffen Foss Hansen* examine whether Directive 2000/60/EC ('Water Framework Directive', WFD), which aims to reduce and minimise the concentrations of dangerous chemicals in European waters, and related legal requirements include the right instruments to capture nanomaterials. They also consider whether techniques are available to allow for monitoring nanomaterials in surface waters and review data from modelling exercises that estimate concentrations of nanomaterials in EU waters.

Subsequently, *Ana Barreira* provides an overview of the main elements of the Union's Marine Strategy Framework Directive (MSFD) and analyses how Spain, as an EU country with 8000 km of coastal fringe, is complying with the directive and will review its marine governance framework.

The third article is by *Thomas Ormond* and takes another perspective, evaluating how far international and European legal instruments for the regulation of ship dismantling (potentially) ensure the safe and environmentally sound recycling of European ships in regions like South Asia.

Sarolta Tripolszky explains the concept of the term 'water services' in her contribution and outlines the economic and legal consequences of a narrow and broad definition. In this context and with specific reference to a collective complaint started by the NGOs EEB and WWF in 2006 against 11 EU member states to enforce the correct implementation of the WFD, she also describes the development of this legal instrument.

The final article with a focus on water is by *Marga Robesin* and describes current discussions on the question of how to achieve substantial water footprint reduction, focusing in particular on certification and labelling.

A second series of contributions to this issue of the *elni Review* covers a variety of other up-to-date legal issues, including the advancement and legal implementation of the concept of 'sustainable development'. To this end, *Eckard Rehbinder*, who attended the United Nations Conference on Sustainable Development (Rio+20) in Rio de Janeiro in June 2012, shares some critical comments on the summit outcome.

The following contribution by *Peter de Smedt, Hendrik Schoukens* and *Tania Van Laer* examines the anchoring of sustainable development in the Belgian Constitution, discusses the concept's juridical enforceability and subsequently analyses the consequences of this qualification for the application in the jurisprudence.

In a further article *Julian Schenten* and *Martin Führ* present empirical data obtained by several survey methods focusing on companies which manufacture and/or use nanomaterials. They analyse the findings under the perspective of the degree to which REACH (Regulation EC 1907/2006) promotes innovations for sustainability in the field of nanomaterials.

In June 2012 the EU General Court adopted long awaited decisions in two cases in which it interprets for the first time Regulation 1367/2006 ('Aarhus Regulation') – *Anaïs Berthier* examines what real added value these two decisions have with regards to access to justice.

Finally, in a statement by *Almut Gaude* from BUND, the German branch of Friends of the Earth (FoE), the NGO expresses its perspective on the Rio+20 conference outcome.

We hope you enjoy reading the current journal. Contributions for the next issue of the *elni Review* are very welcome and may be sent to the editors by mid-February 2013.

Julian Schenten/Martin Führ

A first success in the long run for better access to justice in the EU: The scope of the administrative review procedure provided under Regulation 1367/2006 invalidated by the General Court

Anaïs Berthier

1 Introduction

The EU General Court adopted two long awaited decisions on 14 June 2012 in cases T-338/08[1] and T-396/09[2] in which it interprets for the first time Regulation 1367/2006 (the Aarhus Regulation) that applies the Aarhus Convention to EU institutions and bodies. The General Court also departs from the case-law of the Court on the possibility for the Courts to examine the validity of an act of European Union law in the light of an international treaty. We support this ruling and will provide arguments that advocate a broadening of the control of legality of EU law.

In both decisions, the General Court held that the regulation was not compatible with the Convention with regard to the types of acts that could be challenged through the administrative procedure provided by the Aarhus Regulation.

Art. 10 of Regulation 1367/2006 allows NGOs to challenge decisions of EU institutions which constitute 'administrative acts'[3]. In case T-338/08, the Non-Governmental Organisation (NGO) applicants made a request to the Commission to review Regulation 149/2008 setting maximum residue levels for certain products[4]. In case T-396/09, the NGOs asked the Commission to review the decision granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC on ambient air quality and cleaner air for Europe[5]. In both cases, the Commission considered the requests inadmissible claiming that the concerned acts were not 'administrative acts' as defined in Art. 2(1)(g) of Regulation 1367/2006 because they were not of 'individual scope'.

The Court annulled both decisions. It therefore broadened the interpretation of the right of access to justice for NGOs in environmental matters. A great move forward one might hope, but the Commission has appealed against both judgments.[6]

We will examine what real added value these decisions have with regards to access to justice. We will demonstrate that even though these decisions allow a broader category of acts, including those adopted through comitology, to be challenged under the administrative review procedure provided by the Aarhus Regulation (section 2), the decisions still do not ensure compliance of EU law with the Aarhus Convention (section 3). In this regard, we will see that the appeal of the Commission focuses on the relationship between international law and EU law and the role of the latter as a 'benchmark' and legal basis to invalidate acts of secondary law (section 4).

2 On the way to compliance with the Aarhus Convention ...

In both cases, the Court expressly considered that because Art. 10(1) of Regulation 1367/2006 limits the concept of 'acts' that can be challenged by NGOs to 'administrative acts' defined as 'measures of individual scope', it is not compatible with Art. 9(3) of the Convention. Indeed, Art. 9(3) requires the State Parties to ensure that the members of the public may challenge 'acts and omissions by private persons and public authorities'. The Court made use of a teleological reasoning. It referred to the objectives and purpose of the Convention and to the terms of Art. 9(3) of the Convention to hold that *"an internal review procedure which covered only measures of individual scope would be very limited, since acts in the field of the environment are mostly acts of general application. In the light of the objectives and purpose of the Aarhus Convention, such limitation is not justified"*[7]*... "there is no reason to construe the concept of 'acts' in Article 9(3) of the Aarhus Convention as covering only acts of individual scope"*[8]. This was really necessary as the overly restrictive scope of the administrative review procedure was one of the main violations of the Convention by the regulation.

---

1 Case T-338/08, Stichting Natuur en Milieu and PAN Europe v Commission, judgment of 14 June 2012.

2 Case T-396/09, Vereniging Milieudefensie, Stichting Stop Luchtverontreiniging Utrecht v Commission, judgment of 14 June 2012.

3 Administrative acts are defined by Art. 2(1)(g) of the Regulation as *"any measure of individual scope under environmental law, taken by a community institution or body, and having legally binding and external effects"*.

4 Regulation (EC) No 149/2008 of 29 January 2008 amending Regulation (EC) No 396/2005 of the European Parliament and of the Council by establishing Annexes UU, III and IV setting maximum residue levels for products covered by Annex I thereto (OJ 2008 L 58, p.1).

5 Decision C(2009) 2560 final of 9 April 2009 granting the Kingdom of the Netherlands a temporary exemption from the obligations laid down by Directive 2008/50/EC on ambient air quality and cleaner air for Europe (OJ 2008 L 152, p.1).

6 Decisions C(2012)5070 and C(2012)5069 of the Commission of 18 July 2012.

7 Case T-338/08, para 76, case T-396/09, para 65.

8 Case T-338/08, para 77, Case T-396/09, para 66.

This limitation was also in clear contradiction of the findings of the Aarhus Convention Compliance Committee which interprets Art. 9(3) of the Convention as allowing the public to challenge 'all acts and omissions':

> *"The Convention obliges the Parties to ensure access to justice for three generic categories of acts and omissions by public authorities. Leaving aside decisions concerning access to information, the distinction is made between, on the one hand, acts and omissions related to permits for specific activities by a public authority for which public participation is required under article 6 (article 9, paragraph 2) and, on the other hand, all other acts and omissions by private persons and public authorities which contravene national law relating to the environment (article 9, paragraph 3)."*[9]

The Committee further added that:

> *"Article 9, paragraph 3, is applicable to all acts and omissions by private persons and public authorities contravening national law relating to the environment. For all these acts and omissions, each Party must ensure that members of the public "where they meet the criteria, if any, laid down in its national law" have access to administrative or judicial procedures to challenge the acts and omissions concerned."*[10]

The decisions also clarify the link between the Aarhus Regulation and the provisions of the Treaty on the Functioning of the EU on standing.

Art. 263(4) TFEU provides the right to any natural or legal persons to institute proceedings *"against a regulatory act which is of direct concern to them and does not entail implementing measures"* (emphasis added). This provision was added by the Lisbon Treaty to broaden the types of acts that could be challenged before the Courts precisely by dropping the 'individual concern' criteria required by Art. 263(4) TFEU for acts which are not addressed to a person. Regulatory acts are not necessarily of individual scope.

On the contrary, the Treaty enables legal and natural persons to challenge acts that are neither of individual concern nor of individual scope and does not require or allow the institutions to adopt a more restrictive approach in environmental matters. It is therefore difficult to understand the logic in the institutions' approach when adopting the Aarhus Regulation and of the Commission in its appeal to insist in limiting the type of acts to those of individual scope. What actually appears to have motivated the Commission to appeal is the classic 'floodgates' argument, i.e. the fear of potentially having hundreds of requests and legal proceedings against their own decisions – and some might say to protect political decisions or vested interests.[11]

The Court also considered that acts adopted by the Commission in the exercise of its implementing powers (conferred on the Commission by Council Decision 1999/468/EC of June 1999) were not legislative acts and could thus be challenged under the Aarhus Regulation.[12] That is an important clarification as the Commission was arguing that the act in question was a legislative act and was therefore exempt of any types of scrutiny from the public. The Court's decisions therefore subject many more EU Institutions decisions to challenge than before.

3 ... But a limited progress: Status quo on the right of standing

In neither of the decisions, the Court examines the substance of the cases that is the lawfulness of the decisions for which the review was requested. It only annuls the Commission's decisions about the inadmissibility of the requests made under Art. 10 of Regulation 1367/2006. The decisions do not therefore bring any changes in the case law of the Court or any clarifications on NGOs' right of standing to challenge EU institutions' decisions before the Courts. However, the Court seems – for now – to ensure the status quo on the matter as it states in both cases that the provisions of Art. (ex) 230(4) (new Art. 263(4) TFEU) still need to be complied with.[13] The Court states that *"the conditions laid down in Article 230 EC - and, in particular, the condition that the contested act must be of individual and direct concern to the applicant - apply also to measures of individual scope which are not addressed to the applicant. A measure of individual scope will not necessarily be of individual and direct concern to a non-governmental organisation which meets the conditions laid down in Article 11 of Regulation No 1367/2006."*[14] The risk is therefore that in future the Courts will reassert their case-law on the interpretation of the individual concern criteria adopted in the Plaumann case[15] and still bar all access to the Courts to NGOs.

---

9 Findings and recommendations of the Compliance Committee with regards to compliance by Belgium ACCC/2005/11; ECE/MP.PP/C.1/2006/4/Add.2, 28 July 2006, para. 26.

10 Ibid, ACCC/2005/11; para 28.

11 Minutes of the 2011th meeting of the Commission held on 18 July 2012, PV (2012) 2011 final, page 10.

12 Case T-338/08, para 65.

13 Case T-396/09, para 72: *"Article 12(1) of Regulation No 1367/2006 provides that a non-governmental organisation which has made a request for internal review pursuant to Article 10 of that regulation may institute proceedings before the Court of Justice in accordance with the relevant provisions of the Treaty, hence in accordance with Article 230 EC However, whatever the scope of the measure covered by an internal review as provided for in Article 10 of Regulation No 1367/2006, the conditions for admissibility laid down in Article 230EC must always be satisfied if an action is brought before the Court of the European Union"*.

14 Case T-396/09, para 73.

15 Case 25/62, Plaumann & Co v Commission.

Paradoxically, however, in both cases the Court refers to case C-240/09[16] with regard to EU institutions in stating that "*it is apparent from the case-law of the Court of Justice that obligations arise under Article 9(3) of the Aarhus Convention and that Regulation No 1367/2006 is intended to implement that provision with respect to the institutions of the European Union (see, to that effect, Case C-240/09 Lesoochranarske zoskupenie [2011] ECR I-0000, paragraphs 39 and 41).*"[17] In case C-240/09, the Court considered that Art. 9(3) of the Convention had to be interpreted by national courts and authorities in a way to provide legal standing to environmental NGOs. The reference to this case could thus be interpreted as meaning that the Court considers that NGOs should also have legal standing before the EU courts to challenge decisions of the EU institutions. However, this could only be possible with the adoption of a new interpretation of the conditions provided by Art. 263(4) TFEU.

Yet, if the Courts stick to its recent case law on the interpretation of the 'direct concern' criteria required by Art. 263(4) TFEU, it is very doubtful that NGOs will have standing. In cases T-18/10 and T-262/10, the General Court considered that *"for an individual to be directly concerned by a European Union measure, first, that measure must directly affect the legal situation of that individual and, secondly, there must be no discretion left to the addressees of that measure who are responsible for its implementation, that implementation being purely automatic and resulting from European Union rules alone without the application of other intermediate rules."*[18]

The Court held that *"[f]urthermore, as regards the possible economic consequences of that prohibition [stemming from the contested regulation], it must be borne in mind that, according the case-law, those consequences do not affect the applicants' legal situation, but only their factual situation"*.[19] Having its economic situation affected by a decision is therefore not enough to be directly concerned by a regulatory act and to have legal standing before the Courts.

It follows that if the Courts maintain their interpretation of these provisions, and apply it to NGOs, it is more than likely that because NGOs' legal situation will never be affected by a measure adopted by an EU institution on an environmental matter, they will not be considered as directly concerned by any EU institutions' decisions and will therefore not be provided with access to the courts. Yet, the Aarhus Convention Compliance Committee already stated that the EU will violate the Convention if the Courts do not alter their jurisprudence to provide NGOs with access to justice in accordance with Art. 9(3) of the Convention.[20] The next case that will be brought under the Aarhus Regulation should be the opportunity for the Courts to make the necessary change and finally bring EU law in line with the Convention.[21] However, given the contradictory signals the General Court is sending, whether the Courts will do so remains an open question.

4 EU secondary law and the Aarhus Convention: arguments that support the scrutiny in EU's implementation of international Conventions

The decisions are also important because the General Court extends its capacity to control the legality of provisions of EU secondary law devoid of direct effect in the light of an international convention. In both judgments, the General Court relied on the so-called Nakajima case-law[22] to review the legality of Regulation 1367/2006 in the light of the Aarhus Convention even though Art. 9(3) of the Convention has been considered by the Court of Justice as being devoid of direct effect.[23] The General Court held that *"where a regulation is intended to implement an obligation imposed on the European Union institutions under an international treaty, the Courts of the European Union must be able to review the legality of that regulation in the light of the international treaty without first having to determine whether"* the provisions of that treaty are as regards their content unconditional and sufficiently precise.[24] The Court then decided that it was appropriate to assess the validity of Art. 10(1) of Regulation 1367/2006 in the light of Art. 9(3) of the Convention.

The General Court relied on settled case-law in which the Court examines the validity of EU regulations implementing the GATT and WTO international agreements regardless of the lack of direct effect of the contested regulations. In Nakajima, to control the legality of the concerned implementing regulation, the Court stated that *"the new basic regulation [EU*

16 Case C-240/09, Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky, judgment of 8 March 2011.

17 Case T-396/09, para 58 and Case T-338/08, para 58.

18 Case T-18/10, Inuit Tapiriit Kanatami and others v Parliament and Council, para 71, (pending appeal C-583/11) and Case T-262/10, Microban International Ltd v Commission, judgment of 25 October 2011, para 27.

19 Case T-18/10, para 75.

20 Findings and recommendations of the Compliance Committee with regard to communication ACCC/C/200/32 (Part 1) concerning compliance by the European Union, ECE/MP.PP/C.1/2011/4/Add.1.

21 The next case should be Case T-405/10 Justice & Environment v Commission. In this case, the NGO applicant contests the Commission decision to reject their internal review request to annul Decisions 2010/135/EU and 2010/136/EU concerning the placing on the market as food and feed of a genetically modified potato product.

22 C-69/89, Nakajima v Council [1991]ECR I-2069.

23 Case C-240/09, Lesoochranárske zoskupenie, judgment of 8 March 2011.

24 Case T-338/08, ibid, para.54.

regulation applying the GATT], which the applicant has called in question, was adopted in order to comply with the international obligations of the Community, which, as the Court has consistently held, is therefore under an obligation to ensure compliance with the General Agreement and its implementing measures."[25] Exactly the same could be said about the obligation of EU institutions to ensure compliance with any other international agreement as this obligation stems from the Treaty itself (Art. 216(2) TFEU).

There seems to be some contradiction in the case-law as for international agreements other than the WTO ones, *"the Court of the EU may examine the validity of a provision of a regulation in the light of an international treaty only where the nature and the broad logic of the latter do not preclude this and where, in addition, the provisions of that treaty appear, as regards their content, to be unconditional and sufficiently precise (case C-308/06 Intertanko and Others [2008] ECR I-4057, paragraph 45, and joined cases C-120/06P and C-121/06P FIAMM and Others v Council and Commission [2008] ECR I-6513, paragraph 110)."*[26]

According to the Intertanko case-law, because Art. 9(3) of the Aarhus Convention has been declared by the Court of Justice of the EU as devoid of direct effect, the courts would not be able to control the legality of EU law in the light of Art. 9(3) of the Convention. To be able to extend the control of legality to other types of international agreements than the WTO ones such as the Aarhus Convention, the General Court therefore departed from the Court's case-law.

That is why the General Court further added quoting the Nakajima case that *"[h]owever where the Community has intended to implement a particular obligation assumed under an international agreement, or where the measure makes an express renvoi to particular provisions of that agreement, it is for the Court to review the legality of the measure in question in the light of the rules laid down in that agreement."*[27]

The General Court notes that the Aarhus Regulation was adopted to meet the EU's international obligations under Art. 9(3) of the Aarhus Convention and mentions the provisions of the regulation that make an explicit renvoi to the Convention.

The General Court also stresses the fact that in Nakajima as in the Aarhus cases discussed, the applicants were not relying on the direct effect of the provisions of the international treaties at stake but were questioning the validity of the regulations indirectly, in accordance with Art. 241 EC, in the light of the international treaties, the GATT and the Aarhus Convention respectively.

In its decision to appeal, the Commission contests the use of the Nakajima case-law by the General Court. It argues that *"[t]he Nakajima case-law has never been applied by the Court outside the field of WTO agreements and the Commission should seek to avoid its extension to provisions of international agreements such as Article 9(3) of the Aarhus Convention which ... have no direct effect because they are not unconditional and sufficiently precise and, therefore cannot be invoked by individuals before the courts."* The Commission considers that *"[i]f the General Court's ruling on this point is allowed to stand, it will create an unfortunate precedent for many other agreements concluded by the Union."*[28] The President of the Commission is concerned that the decisions *"could give rise to a drastic reduction in the discretionary powers of the legislator when transposing international obligations into EU law."*[29]

The fact that the Court is able to examine the validity of a provision of a regulation in the light of an international Treaty is perceived by the Commission as 'unfortunate'. Yet, having courts of law checking the validity of public authorities' decisions is not an option but the duty of the Courts in a democratic system and a State of law. Art. 263(1) TFEU provides that the Court of Justice of the EU shall review the legality of acts of EU institutions and bodies. Institutions should thus not be able to choose which acts the Court should be able to review, in distinguishing acts the institutions adopted on their own initiative from acts that implement a norm higher in the hierarchy of norms such as international Treaties.

It is also unclear why the Court could examine the legality of secondary laws that implement the GATT and WTO agreements, even the ones which are devoid of direct effect, and not the ones that transpose other international conventions. The Commission seems to want to impose an artificial dichotomy between commercial matters on the one hand, which it accepts would be important enough to allow the Courts to examine the legality of the EU institutions' decisions implementing the relevant agreements, and other matters such as environmental ones, which it appears to consider should be entirely and utterly governed by the institutions without the checks and balances of judicial review.

25 Case C-69/89, ibid, para. 31.

26 Case T-338/08, Ibid, para. 53. This case law has been confirmed in Case C-366/10, Air Transport Association of America and other, judgment of 21 December 2011.

27 Case, T-338/08, para 54.

28 Commission decision (2012)5070 final and (2012)5069 final, paragraphs 5.

29 Minutes of the 2011th meeting of the Commission held on 18 July 2012, PV (2012) 2011 final, page 11.

In any case, nothing prevents the Court from extending the Nakajima case-law to other international agreements. On the contrary, secondary EU legislation implementing WTO agreements and legislation implementing environmental agreements should be treated on an equal footing. There is no legal justification to distinguish between different types of international agreements depending on their subject matters and scopes. Commercial matters do not prevail over environmental ones. Indeed, if there are conditions to invoke provisions of international agreements before Courts and for them to apply them directly, Art. 216(2) TFEU provides that the international treaties are binding for the institutions without applying any differentiation by treaty type. As the agreements are binding, it is only logical that Courts should be able to examine the validity of regulations that transpose them into EU law once they are adopted, no matter what field of the Treaty.

As a general principle of international law of treaties, codified by Art. 27 of the 1969 Vienna Convention on the Law of Treaties, a State may not invoke its internal law as justification for failure to perform a treaty. The Aarhus Convention Compliance Committee relied on the Vienna Convention and stated that *"[a]n independent judiciary must operate within the boundaries of law, but in international law the judicial branch is also perceived as a part of the state. In this regard, within the given powers, all branches of government should make an effort to bring about compliance with an international agreement. Should legislation be the primary means for bringing about compliance, the legislature would have to consider amending or adopting new laws to that extent. In parallel, however, the judiciary might have to carefully analyse its standards in the context of a Party's international obligation, and apply them accordingly."*[30]

The requirements, imposed by EU law through the case law of the EU courts, that have to be fulfilled for international treaties to be directly applicable or for the Courts to be able to examine the validity of the law transposing them, cannot therefore be used as an excuse by the Commission not to apply the international agreements the EU ratifies, among them the Aarhus Convention.

Moreover, the fact that a provision is devoid of direct effect does not imply its non-existence. Such a provision is enshrined in an international agreement that is an integral part of EU law binding the institutions. It thus needs to be implemented and complied with. Neither does it imply unlimited discretion of the institutions in the way they transpose and implement this provision, as the Commission seems to believe.[31] Yet, the way Art. 9(3) of the Aarhus Convention has been implemented by Regulation 1367/2006 is clearly far too restrictive as it only allows NGOs to contest a very limited category of acts. This is not what the Aarhus Convention requires.

Also, contrary to other Multilateral Environment Agreements, the Aarhus Convention provides procedural rights to individuals in environmental matters. These rights, irrespective of whether they are enshrined in sufficiently precise and unconditional provisions, have to be transposed in national laws, among them EU law, in a way to enable the beneficiaries of these rights to exercise them in accordance with the objective of the Aarhus Convention and its purpose. Limiting the type of acts subject to administrative and judicial review to acts of individual scope cannot be considered as proper access to justice for the purpose of the Aarhus Convention.

5 Conclusion

The compliance of the EU with its international obligations under the Aarhus Convention now depends on the decisions of the Court of Justice in these two cases. These decisions will also give rise to the final findings of the Aarhus Convention Compliance Committee following the communication made by the NGO ClientEarth about the non-compliance of the EU with the access to justice provisions of the Convention. The Committee has already stated that if the EU courts do not provide legal standing to NGOs the EU will violate the Convention; it is very likely that if the Court was to overhaul the rulings in cases T-338/08 and T-396/09 the Committee would find that the EU now violates the Convention for not allowing NGOs to contest the right categories of acts. Not only would the EU be in violation of the Aarhus Convention for lack of standing but also for imposing too restrictive a scope of access to justice. This says a lot about the degree of scrutiny the EU institutions are ready to put themselves under.

It is also interesting to observe that contrary to general belief, it is not only the former Eastern bloc countries that have difficulties with adopting procedural environmental rights and lag behind when it comes to implementing the international Conventions they ratify. Western states, including the EU itself, are also reluctant and even sometimes bluntly opposed to adopting the required measures. It will take a few more years to finally know whether access to justice will be provided at EU level and whether the Union will eventually become truly democratic.

[30] Findings and recommendations of the Aarhus Convention Compliance Committee, ECE/MP.PP/C.1/2006/4/Add.2 of 28 July 2006 paras 41 and 42.

[31] Decisions C(2012)5069 and (2012)5070, paragraphs 6.

Imprint

Editors: Regine Barth, Nicola Below, Claudia Fricke, Martin Führ, Gerhard Roller, Julian Schenten, Silvia Schütte

Editors in charge of the current issue:
Martin Führ and Julian Schenten

Editor in charge of the forthcoming issue:
Gerhard Roller (gerhroller@aol.com)

The Editors would like to thank **Vanessa Cook** (Öko-Institut) for proofreading the *elni Review*.

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.

The *elni Review* is published with financial and organisational support from Öko-Institut e.V., and the Universities of Applied Sciences in Darmstadt and Bingen.

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

Authors of this issue

Ana Barreira, Director of Instituto Internacional de Derecho y Medio Ambiente (IIDMA), LL.M on Environmental Law (London University 1993) and on International Legal Studies (New York University, 1996). Member of the IUCN Commission on Environmental Law,
ana.barreira@iidma.org.

Anaïs Berthier, staff attorney at ClientEarth, an organisation of activist lawyers committed to securing a healthy planet. More info: http://www.clientearth.org,
info@clientearth.org.

Peter De Smedt, Lawyer at Ghent based Environmental law firm LDR, research collaborator at the Centre for Environmental and Energy Law of Ghent University More, Member of the Flemish High Council for Environmental Enforcement on behalf of the Flemish Council for the Environment and Nature. More info: http://www.ldr.be/,
peter.desmedt@ldr.be.

Martin Führ, Professor of public law, legal theory and comparative law, Society for Institutional Analysis (sofia), Darmstadt University of Applied Sciences, Germany, www.sofia-research.com,
fuehr@sofia-darmstadt.de.

Catherine Ganzleben, PhD, Senior Policy Advisor, Milieu. More info: www.milieu.be,
catherine.ganzleben@milieu.be.

Almut Gaude, Bund für Umwelt und Naturschutz Deutschland (BUND) (Friends of the Earth Germany),
almut.gaude@bund.net.

Steffen Foss Hansen, PhD, Senior Researcher in Risk assessment and regulation at DTU Environment, Technical University of Denmark,
sfha@env.dtu.dk.

Thomas Ormond, Dr. iur., legal officer with the regional environmental administration (Regierungspräsidium Darmstadt) in Frankfurt am Main; from 2004-2008 seconded national expert for waste shipment matters with the EU Commission (DG Environment),
thomas.ormond@rpda.hessen.de.

Eckard Rehbinder, Professor emeritus of economic law, environmental law and comparative law, Research Centre for Environmental Law, Goethe University Frankfurt/Germany,
rehbinder@jur.uni-frankfurt.de.

Marga Robesin, lawyer at Stichting Natuur en Milieu (Dutch Society for Nature and Environment, www.natuurenmilieu.nl) in Utrecht (The Netherlands) and PhD candidate at ACELS (Amsterdam Centre for Environmental Law and Sustainability), University of Amsterdam,
m.a.robesin@uva.nl.

Julian Schenten, Lawyer with media and information technology speciality, Research assistant at the Society for Institutional Analysis (sofia), Darmstadt University of Applied Sciences, Germany,
schenten@sofia-darmstadt.de.

Hendrik Schoukens, PhD-assistent at Ghent University and Lawyer at the Ghent based environmental law firm LDR. More info http://www.ldr.be/,
hendrik.schoukens@ugent.be.

Sarolta Tripolszky, Biodiversity, Water and Soil policy officer at the European Environmental Bureau (EEB),
saroltapolszky@yahoo.co.uk.

Tania Van Laer, practising lawyer at LDR lawyers (www.ldr.be) - a law firm based in Ghent - and researcher at the Centre for Environmental & Energy Law at the University of Ghent,
tania.vanlaer@ldr.be.

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.

Please transfer the amount to our account at **Nassauische Sparkasse** – Account no.**: 146 060 611, BLZ 510 500 15,** IBAN: DE50 5105 0015 0146 0606 11; SWIFT NASSDE55.

"Yes, I hereby wish to join the Environmental Law Network International."

Name:_____

Organisation:_____

Profession:_____

Street:_____

City:_____

Country:_____

Email:_____

Date:_____

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 17 71
D-79017 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:
Schicklerstraße 5-7
D-10179 Berlin
Phone +49(0)30-40 50 85-0
Fax +49(0)30-40 50 85-388

www.oeko.de

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

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 develop-ing 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 Na-ture 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

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. 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

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. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review 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).

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

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.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

elni Board of Directors

- Martin Führ - Society for Institutional Analysis (sofia), Darmstadt, Germany;
- Jerzy Jendroska - Centrum Prawa Ekologicznego (CPE), Wroclaw, Poland;
- Isabelle Larmuseau - Vlaamse Vereniging voor Omgevingsrecht (VVOR), Ghent, Belgium;
- Marga Robesin - Stichting Natuur en Milieu, Utrecht, The Netherlands;
- Gerhard Roller - Institute for Environmental Studies and Applied Research (I.E.S.A.R.), Bingen, Germany.

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

www.elni.org