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SEVERAL COMMITTEES IN THE EUROPEAN PARLIAMENT ARE CURRENTLY DISCUSSING PROBLEMS CONNECTED WITH FRENCH NUCLEAR TESTING IN FRENCH POLINESIA.
FOR MEMBERS' INFORMATION THIS BRIEFING NOTE ON COMPATIBILITY OF THE FRENCH NUCLEAR TESTING IN THE PACIFIC WITH THE EURATOM TREATY IS ATTACHED. IT WAS PREPARED BY THE ÖKO-INSTITUT IN GERMANY FOR GREENPEACE GERMANY.

SUMMARY

Within the framework of a memorandum commissioned by Greenpeace Germany, Hamburg the Öko-Institut e.V. (Institute for Applied Ecology) examined whether the planned underground nuclear tests at Moruroa would violate provisions in the Euratom-Treaty. On that basis the Institute also examined the possibility for legal action before the European Court of Justice.
Our inquiry into the various legal issues surrounding the tests and their compatibility with the Euratom-Treaty has revealed that France would actually act in violation of a number of Treaty obligations arising under the Euratom-Treaty's health and safety provisions. These violations could give rise to legal action by both the Commission and other Member States. We have summarized the results of our inquiry below.

1. Applicability of the Euratom-Treaty

The underground nuclear tests planned by the French government at Moruroa fall within the Euratom-Treaty's territorial and substantive scope of application. According to Art. 198 (1) Euratom-Treaty, the Euratom-Treaty's provisions apply to non-European territories under the jurisdiction of the Member States as well. The military nature of the tests cannot be argued in defence by the government of France, either, as the Euratom-Treaty contains no clause which exempts military uses of nuclear energy from the Treaty's substantive scope. Exceptions exist only with respect to individual provisions of the Treaty.

2. Violations of obligations arising under the Treaty

France's current unilateral action is contrary to requirements under both primary and secondary Euratom law intended to protect the concerned population against hazards due to ionising radiation.

Assent to a particularly dangerous experiment

The planned tests constitute particularly dangerous experiments within the meaning of Art. 34 (1) Euratom-Treaty. Under this provision additional health and safety measures must be taken by France. Since the planned tests' effects are liable to affect a territory which is under the jurisdiction of another Member State (i.e. Pitcairn Island, a colony of the United Kingdom), the government of France requires the assent of the Commission pursuant to Art. 34 (2) Euratom-Treaty. The Commission, for its part, is under an obligation to satisfy itself that additional radiation protection measures planned by France are sufficient to protect the health of the concerned local population. Even if the planned tests' effects were not liable to affect the territory of another Member State, France would have to await the Commission's opinion as to the adequacy of any additional radiation protection measures under Art. 34 (1) Euratom-Treaty before proceeding with any test. To date the French Republic has asked neither for the Commission's assent nor for delivery of a reasoned opinion pursuant to Art. 34 (1) Euratom-

Treaty. The European Commission, however, has not thus far officially demanded that France notify the tests and obtain the Commission's assent. As a consequence, neither the potential environmental effects of the tests nor the additional health and safety measures or compliance with Euratom's radiation dose limits have been subjected to a thorough and careful examination, although various scientific investigations in the past revealed releases of radioactive substances around Moruroa during previous tests.

Access to monitoring facilities and communication requirements
France is also acting in violation of requirements under Art. 35 Euratom-Treaty, since the Commission has thus far been refused access to monitoring facilities necessary pursuant to Art. 35 Euratom-Treaty. Consequently verification of these facilities' adequacy and efficiency has been impossible. In addition, the French Republic has been under an obligation according to Art. 36 Euratom-Treaty to communicate to the Commission data obtained in the course of monitoring radioactivity at Moruroa. To the best of our knowledge no such communication has been made so far to the Commission.

Compliance with radiation protection norms
So far France has not conclusively shown whether basic norms are being complied with which have been laid down in directive 80/836/Euratom to protect the public against health hazards due to ionising radiation. The results of random testing during previous tests have shown that radionuclei were released into the Pacific Ocean. A violation of dose limits set in directive 80/836/Euratom, therefore, cannot be ruled out since radioactive substances can accumulate in fish and other living organisms and can thus lead to a contamination of the concerned human population through food chain contamination (internal exposure to radiation). No forecasts and calculations as to exposure to radiation during future tests have been submitted by France thus far. Moreover it is not entirely inconceivable that dose limits laid down in Art. 12 of directive 80/836/Euratom will be exceeded around the archipelago during future tests, especially in the event of accidents.

Information of the public
In the event of an accident uncontrolled releases of radioactive materials may occur. For this reason France is under an obligation, in accordance with directive 89/618/Euratom, to keep the concerned local population informed of any health protection and other precautionary measure that individuals should take in the event of a radiological emergency. To date France has not complied with requirements under this directive either.

3. Legal action before the European Court of Justice

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

If an action alleging a violation of Art. 34 Euratom-Treaty is pending before the European Court of Justice, the applicant Member State could further ask the Court to grant an interim order restraining France from carrying out any tests until judgment has been delivered in the main action.
In a like manner, the Commission could also bring infringement proceedings against France. No time limit has to expire before this action could be brought directly before the Court but the Commission first has to follow an administrative preliminary procedure pursuant to Art. 141 (2) and (3) Euratom-Treaty.

Action for failure to act
Any Member State could also bring an action against the Commission under Art. 148 Euratom-Treaty for failure to act by alleging that the Commission has failed to exercise its supervisory powers under Art. 34 Euratom-Treaty. Such an action, however, requires that the complainant Member State, prior to bringing suit in the European Court of Justice, has officially asked the Commission to require France to notify the tests and obtain the Commission's assent. If the Commission fails to respond to such a demand and refuses to take any position at all within two months of the matter coming before it, the complainant Member State can bring an action for failure to act before the Court.
Under the same conditions the European Parliament could also bring an action against the Commission for failure to act.

Annulment actions
Should the Commission decide to give its assent to the planned tests at Moruroa, any Member State as a so-called "privileged applicant" could challenge this decision in the European Court of Justice and bring an action for its annulment under Art. 146 (1) Euratom-Treaty. Such an action could be based on the argument that the Commission gave its assent even though additional health protection measures announced by France are insufficient to protect the concerned population's health.

Interim relief
Once an action is pending before the European Court of Justice, any party to the suit can lodge an application for an interlocutory order granting interim relief. As has already been noted above, in connection with an action for infringement of Art. 34 Euratom-Treaty - not to be confounded with actions for failure to act or for annulment - the test series could be brought to a halt. By virtue of an interlocutory order of the European Court of Justice, France could be ordered to cease any tests or, depending on whether proceedings can be brought in time, to postpone the announced resumption of tests until judgment has been delivered in the main action.

Legal action by individuals
Private persons can bring actions for annulment under Art. 146 (4) Euratom-Treaty. These actions, however, can only be brought if they are directed against reviewable - that is legally binding - acts adopted by an institution of the Community. Moreover, a private applicant also has to demonstrate that he or she is directly and individually concerned by the act although it is not addressed to him or her. Should the Commission resolve to give its assent to the proposed tests under Art. 34 (2) Euratom-Treaty, it would appear that these requirements are met in relation to applicants residing in the territories affected by the tests, i.e. French Polynesia and Pitcairn Island. The grounds for review of the Commission decision under Art. 146 Euratom-Treaty would depend on the reasons the Commission would have to give to justify its decision.

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

Introduction

The President of the French Republic, J. Chirac, has announced his intention to have a further eight underground nuclear tests carried out at Moruroa in the South-Pacific starting in September later this year. His decision has led to world-wide protests. Thus far, however, the protests have not focused on the legal aspects of the issue and, in particular, it has remained unclear whether France would actually be in violation of her obligations under European law if she went ahead with the announced new tests. In particular the question arises whether France as a member of the European Atomic Energy Community (Euratom) is required

- to notify the Commission of the tests or even seek the Commission's assent and- to ensure compliance with any provision adopted on the basis of the Euratom-Treaty to protect against the dangers of ionising radiation.

As part of this legal memorandum the Öko-Institut e.V. (Institute for Applied Ecology) has examined to what extent the course of action set on by the government of France would be unlawful in light of the provisions contained in the Euratom-Treaty and whether possibilities exist to stop the planned nuclear tests by bringing judicial proceedings before the European Court of Justice.
The focus of our inquiry is on the requirements and obligations laid down in Arts. 30 ff. Euratom-Treaty.

I. COMPATIBILITY OF THE TESTS WITH OBLIGATIONS UNDER EURATOM'S PRIMARY LAW

The announced resumption of underground nuclear testing can, however, only violate provisions of the Euratom-Treaty - or of secondary legislation (directives) adopted under the authority of the Euratom-Treaty - if the planned tests come within the territorial and substantive purview of the Euratom-Treaty. Before a violation of any particular provision of the Euratom-Treaty can be discussed, it is hence necessary to examine first whether the Euratom-Treaty actually applies to experiments with nuclear weapons.

1. General applicability of the Euratom-Treaty

The Euratom-Treaty was signed together with the Treaty establishing the European Economic Community (EEC) in 1957. At the time promoting the use of nuclear energy was deemed to be of such importance that the European Atomic Energy Community was established as a separate community beside the EEC. Together with the European Coal and Steel Community which had already been founded in 1951, the "European Communities" thus came into being with a common Parliament (initially called the Assembly), a common Court of Justice and a common Economic and Social Committee. In 1965 the hitherto separate commissions and councils for the EEC, Euratom, and the ECSC were merged into a single Commission and Council as well[1].

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[1] For a brief overview of the development of the Treaties and efforts to reform them cf. Gebers/Fritsche/Sailer, Revision of the European Treaties in the Energy Sector, Luxembourg 1995, p. 9 ff.

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

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

1.1 Territorial scope of application of the Euratom-Treaty

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

The Moruroa Atoll constitutes a part of the French overseas territory (Territoire d'outre mer) Polynesia and as such a non-European territory under the jurisdiction of the French Republic. According to Art. 198 (1) of the Euratom-Treaty the provisions of the Treaty apply to the non-European territories under the jurisdiction of the member states as well. This rule is laid down without reservations as to a particular or all of the French overseas territories. In particular one can infer neither from the English text ("... non-European territories under their jurisdiction.") nor from the French version ("... territoires non européens soumis à leur juridiction."[3]) that only French overseas "départements" but not overseas territories should fall within the Treaty's territorial scope of application[4]. The provisions of the Euratom-Treaty, therefore, apply to territories belonging to French Polynesia, including Moruroa and Fangataufa, as well[5].

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

[3] Bundesgesetzblatt 1957, II, p. 1118 [Law Gazette of the Federal Republic of Germany, part II (containing international treaties) 1957].

[4] See also J. Errera/E. Symon/J. Van der Meulen/L. Vernaeve, Euratom. Analyse et Commentaires du Traité, Brussels 1958, p. 273:
"Les territoires non-européens soumis actuellement à la juridiction des Etats membres sont les suivants:
Les Territoires d'outre-mer français suivants: ... Etablissements français de l'Océanie, ..."

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

Thus Art. 198 Euratom-Treaty draws the Euratom-Treaty's territorial scope larger than the EC-Treaty does for its scope of application. Whilst territories listed in Annex IV to the EC-Treaty are merely associated to the EC for purposes of EC-law, Art. 198 (1) of the Euratom-Treaty brings all non-European territories under the jurisdiction of a member state within the Euratom-Treaty's territorial scope[6]. Consequently the distinction between French overseas "départements" and overseas territories is relevant only for purposes of EC-law and defining its territorial scope in accordance with Art. 227 EC-Treaty. In contrast, the distinction is irrelevant for purposes of determining whether provisions of the Euratom-Treaty apply.

Moreover, because of Art. 232 (2) of the EC-Treaty, Art. 227 EC-Treaty does not derogate from what Art. 198 (1) of the Euratom-Treaty defines as that treaty's territorial scope. Hence, although the European Communities and Euratom may share identical institutions, both communities, as separate legal entities[7], are to be differentiated in relation to their territorial scope[8].

Contrary to some agency news releases[9], it is hence equally irrelevant to determining the Euratom-Treaty's territorial scope whether a particular overseas territory has been administratively or constitutionally incorporated into a member state in such a manner as to make it part of the "European Union". Art. 198 (1) Euratom-Treaty does not provide for such a distinction.

Moruroa thus comes within the territorial purview of the Euratom-Treaty as defined in its Art. 198 (1).

1.2 Substantive scope of application of the Euratom-Treaty

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

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

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

At first glance, however, Euratom does not appear to be concerned at all with military uses of nuclear energy. For Art. 1 of the Euratom-Treaty merely defines as the task of Euratom to contribute to a raising of living-standards in the member states by creating the preconditions necessary for setting up and developing nuclear industries. In a like manner, Art. 2, which elaborates on the general task given to the Community in Art. 1, contains no explicit reference whatsoever as to whether military uses of nuclear

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

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

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

[9] See especially AFP of 20 July 1995 (DEU110) quoting unnamed French diplomats in Brussels.

energy are to remain outside the ambit of the Treaty or not. In this regard, the provisions defining Euratom's tasks and purposes and the language used to describe them remains vague and open-ended. When examining the provisions more closely, however, their silence as to an exclusion of military uses of nuclear energy from the Treaty's scope of application turns out to speak volumes.

For numerous exceptions which modify the substantive scope of individual chapters in relation to the defence interests of member states and corresponding uses of nuclear energy[10] make it quite plain that military uses of nuclear energy were not to be totally excluded from the Treaty's remit.

Thus, Art. 24 (1) of the Euratom-Treaty, in particular, provides for the confidentiality and secrecy of certain information obtained by the Commission in the course of carrying out the Community's research programme. Where such information could compromise security and defense interests of a member state, the Commission can refuse third party access to such information and keep a lid on it[11]. This provision - as any other provision related to military uses of nuclear energy - would have been unnecessary and, indeed, would not make any sense, had the framers of the Treaty intended to exclude military uses of nuclear energy a priori from the Treaty's substantive scope of application by confining Euratom's tasks according to Art. 1 and 2 of the Treaty to civilian nuclear programmes.

Furthermore, if the Treaty's definition of Euratom's tasks were to be read in such a way that military uses of nuclear energy fall outside the Treaty's ambit, one would expect to find inserted into the Euratom-Treaty a provision similar to Art. 223 (1) (a) of the EC-Treaty[12]. By virtue of such a provision the Member States could have been expressly authorized to withhold certain information or patents related to nuclear energy from the Commission. Arts. 24 and 25 of the Euratom-Treaty, however, expressly deny the Euratom-Member States the power to withhold such information. Under the Euratom Treaty a Member State cannot refuse to communicate to the Commission knowledge and patents related to nuclear energy on the grounds that such communication would threaten to compromise security interests[13]. It is exactly for this reason that the Euratom-Treaty empowers the Commission to ensure the confidentiality of certain information and patents under Arts. 24 and 25 of the Euratom-Treaty.

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

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

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

[13] See J. Errera/E. Symon/J. Van der Meulen/L. Vernaeve (supra note 4), p. 65:
"Le Traité refuse aux Etats membres le droit de se soustraire à cette obligation de communication, pour des raisons de défense, mais, tout naturellement, l'article 25 assortit la communication, à la demande des Etats membres, de mesures de sûreté appropriées."

The special provisions dealing with military uses of nuclear energy thus make clear that a careful distinction has to be drawn between Euratom's tasks and purposes according to Arts. 1 and 2 of the Treaty on the one hand and the powers conferred on Euratom's institutions as created by the Treaty on the other[14]. Finally Art. 2 e) of the Euratom-Treaty[15] indicates that the framers of the Treaty were aware of the possibilities for military uses of nuclear energy and, as a result, wished to ensure that appropriate measures could be taken against illicit military uses of fissile materials.

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

A general exemption of military uses from the ambit of the Euratom-Treaty could, if at all, only be read into Art. 84 (3) of the Euratom-Treaty. This provision states that the Euratom-Treaty's provisions regarding safeguards against the diversion of fissile materials to unintended purposes (Arts. 77-83) "may not extend to materials intended to meet defence requirements which are in the course of being specially processed for this purpose or which, after being so processed, are, in accordance with an operational plan, placed or stored in a military establishment." The plain meaning of the language used in this clause makes clear that materials which are "intended to meet defence requirements" but which are not in the course of being specially processed for this purpose" or which are not "in accordance with an operational plan, placed or stored in a military establishment" do come within the purview of Art. 77 Euratom-Treaty and - *a fortiori* - of any other provision of the Euratom-Treaty[16].

Furthermore, it is to be noted in this context that Art. 84 (3) of the Euratom-Treaty exclusively concerns the substantive scope of application of Chapter VII[17]. The provision's systematic position at the end of

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[14] Hence Errera et al. (supra note 4) at p. 64 point out that the Treaty's purposes - to promote the peaceful uses of nuclear energy - do not always correspond to the regulatory contents of a number of provisions which also deal with questions arising from military uses of nuclear energy for defence purposes. - It should also be noted that Arts. 30-39 of the Euratom-Treaty are provisions which confer powers on the Commission, and, according to the jurisprudence of the European Court of Justice, relatively far-reaching powers for the protection of the population and the environment against the risks of radioactive contamination, see Case 187/87, Saarland et al. v. Minister for Industry, Post and Telecommunications and Tourism et al., [1988] E.C.R. 5013, para. 11.

[15] The provision reads:
"In order to perform its task, the Community shall, as provided in this Treaty:

c) make certain, by appropriate supervision, that nuclear materials are not diverted to purposes other than those for which they are intended; ... ."

[16] Cf. Darryl A. Howlett, EURATOM and Nuclear Safeguards, Houndmills/Basingstoke/London 1990, 95-99, esp. at 98f. and J. Errera et al. (supra note 4), at 161. Errera et al. also point out that Art. 84 (3) Euratom-Treaty makes provision less for the practical scope of the safeguards provisions in Art. 77 Euratom-Treaty but for the way in which supervisory powers can be exercised to ensure compliance with the safeguards provisions:
"Il est donc bien exact de dire, comme nous l'avons fait plus haut, que les dispositions de cet alinéa de l'article 84 portent plus sur les modalités du contrôle que sur son étendue pratique."
Accordingly Errera et al. add that the provision concerning safeguards against diversion for unintended uses apply again as soon as fissile materials are no longer placed or stored in facilities used for military purposes.

[17] Nor does the ECJ's ruling in Case 1/78, [1978] 2151 command a different view. While the Court states in para. 12 of the ruling in an obiter dictum that materials and facilities used for military purposes remain outside the Treaty's remit, one cannot conclude from this explicit reference only to Art. 84 (3) Euratom-Treaty that, in the opinion of the European Court of Justice, military uses of nuclear energy have generelly been exempted from the

Chapter VII clearly indicates its limited scope. It can, therefore, only regulate the application of Chapter VII to military uses of nuclear energy but not how or to what extent the entire Treaty extends to military uses of nuclear energy[18]. It follows that Art 84 (3) Euratom-Treaty in particular makes no provision for the substantive scope of application of Arts. 30-39 Euratom-Treaty.

For this reason the fact that the factual requirements for applying Art. 84 (3) Euratom-Treaty would appear to be met by the French nuclear tests at Moruroa can only be relevant for purposes of applying the safeguards provisions of the Euratom-Treaty (Arts. 77 ff. Euratom-Treaty). In view of the limited scope of Art. 84 (3) Euratom-Treaty the general applicability of any other provision in the Treaty, therefore, remains unaffected[19].

While a construction of Art. 84 (3) Euratom-Treaty based on the plain meaning of its language and its systematic position at the end of Chapter VII would already furnish sufficient support for the view that the provision contains no general exclusion of military uses of nuclear energy from the Euratom-Treaty's ambit, a reference to the history surrounding the insertion of Art. 84 (3) into the Euratom-Treaty further illuminates the intent of Euratom's framers and lends additional support for this view. For the genesis of Art. 84 (3) Euratom-Treaty indicates that the framers of the Treaty merely intended not to exclude a priori the possibility of a military nuclear programme of individual member states, notably France, the only member state with military nuclear ambitions, as it was, at the time[20]. The provision marked a compromise between the governments of France on the one hand and the Federal Republic of Germany on the other. The latter, fearing discrimination against non-nuclear weapons states within Euratom, did not wish to have a comprehensive exclusionary clause inserted into the Treaty which would have exempted military programmes from the Treaty's remit. More specifically, the German government

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Treaty's remit. For the context in which the Court makes this observation makes it clear that it refers solely to the applicability of Chapter VII of the Treaty. The ECJ ruling under Art. 103 Euratom-Treaty concerned the signing and ratification of a convention by Euratom member states that was intended to be part of a series of international agreements to implement Art. III of the Non-Proliferation Treaty. The purpose of the particular convention at issue in the ECJ's ruling consisted in providing protection against dangers arising from unintended uses of fissile materials reserved for civilian uses. The proposed convention's purpose, therefore, corresponded to the purposes of Chapter VII of the Euratom-Treaty. For this reason one can safely assume that the comparison between the Treaty's and the Convention's scope of application was restricted to the safeguards system in Chapter VII. Furthermore the Court explicitly refers to Art. 84 (3) which, however, on its face, only concerns the safeguards provisions in Chapter VII.

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

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

[20] Darryl A. Howlett (supra note 16), at 95-99.

feared such a provision would enable a nuclear weapons state within Euratom to exempt itself from all of its obligations under the Euratom-Treaty[21].

1.2.3 Preferred access to nuclear fuels pursuant to Art. 223 Euratom-Treaty

A careful analysis of the history behind Art. 223 Euratom-Treaty would also, it is submitted, confirm the general applicability of the Euratom-Treaty to military uses of nuclear energy as well. For this provision was inserted into the Treaty in order to grant France preferred access to nuclear fuels for a period of ten years following the coming into force of the Treaty. The preferred access, which derogates from the principle of equal access to nuclear fuels enshrined in Art. 52 (1) of the Treaty, was meant to ensure that France would have sufficient access to fissile materials for reactors and installations for the separation of isotopes that would turn "critical" within seven years following the Treaty's entry into force. At the time these installations and reactors had been built as part of the fledgling French military nuclear programme[22].

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

That military uses of nuclear energy have not been exempted from the Treaty's scope in general is furthermore borne out by Art. 52 Euratom-Treaty. For paragraph one of this provision which guarantees every member state equal access to ores and fissile materials is said to preclude any kind of policy on the part of Euratom's nuclear supply agency which would discriminate against a member state on grounds of this member state carrying out a military nuclear programme as well[23].

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[21] Peter Weilemann, Die Anfänge der Europäischen Atomgemeinschaft. Zur Gründungsgeschichte von EURATOM 1955-1957, Baden-Baden 1983, p. 138, but see esp. at p. 125 (translation by S.D., notes omitted):

But the critics of Euratom were by no means inclined to soften their position now. On the contrary, their opposition grew after France had so obstinately insisted on its nuclear option [sc.: military nuclear option, S.D.]. The real justification for a monopoly on supplies consisted in comprehensive control to prevent abuses of nuclear energy. If, however, some states maintained their right to use nuclear energy for military purposes as well, then the legitimacy of having a centralized supply system would necessarily be eroded as well. In this connection it was less to be feared that France would divert an arbitrary amount of nuclear fuels to her military programmes and this way reduce supplies available for the other member states.

The real concern was of a different nature. Already in February the German side had drawn attention to the fact that possibly all military measures by one partner would fall outside Euratom's competence. Since it was difficult to distinguish clearly between the civilian and military sector in relation to nuclear energy, member states with military ambitions in the field, therefore, would have had the possibility to evade Euratom controls while other member states would have had to accept the Community's overall authority over their entire research programme. Only if all the member states renounced their right to a unilateral use of nuclear energy for military purposes could a free flow of knowledge with respect to nuclear energy develop.

Since France insisted on its nuclear option, the German delegation demanded to 'subject the military use of nuclear energy to the same general rules and controls as the use for peaceful purposes.'"

[22] Peter Weilemann (supra note 21), p. 177.

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

1.2.5 Definition of substantive scope of application in Art. 197 Euratom-Treaty

Hence the sole criterion for determining the Treaty's scope of application must be the definition of what constitutes "special fissile material" or "ores." Where these substances are the object of human activity anywhere within the Treaty's territorial scope of application, it applies in substance as well[24].

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

2. Violation of Art. 34 Euratom-Treaty

If the tests fall within the Treaty's general scope of application the question arises whether they require the assent of the Commission pursuant to Art. 34 (2) of the Treaty. Art. 34 concerns "particularly dangerous experiments" that a member state wishes to carry out. Before proceeding with such an experiment, the provision requires the member state first to notify the Commission and to obtain an opinion from the Commission as to the adequacy of obligatory additional health protection measures. The notification must, therefore, contain information about obligatory additional health protection measures. If the experiments are "liable" to have effects on a territory which is under the jurisdiction of another member state, they require the assent of the Commission pursuant to Art. 34 (2) of the Treaty as well. While it has been shown that the tests do not fall outside the Treaty's scope despite their military nature, Art. 34 Euratom-Treaty can only be relevant if the tests come within this particular provision's purview as well.

2.1 The substantive scope of Art. 34 Euratom-Treaty

In this regard cognizance should be taken of the *ratio legis* informing the provisions laid down in Chapter III on health protection in the Euratom-Treaty. According to the European Court of Justice, the *ratio legis* of Art. 37, a provision that requires notification of radioactive discharges and is comparable to Art. 34, consists, on a purposive method of interpretation, in allowing for the prevention of radioactive contamination hazards[25]. This purpose, in the Court's view, commands an interpretation guided by the provision's *effet utile*, if otherwise it could not be attained[26].

When construing Art. 34 Euratom-Treaty in keeping with the provision's purpose and *effet utile*, one, however, has to take into account the fact that a coherent radiation protection concept which exempts particular sources of radiation is impossible. For the effects of ionising radiation can hardly be differentiated

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

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

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

according to the different causes and sources of radiation[27]. For this reason there can only be a single and uniform legal concept for radiation protection which would have to fail its objective and be deprived of its practical effect [28] if one were to leave aside a priori particular radiation sources.

On this view, an interpretation of Art. 34 Euratom-Treaty which were to exclude from the provision's ambit sufficient protection against the dangers of ionising radiation due to a military use of nuclear energy would have to defeat the provision's purpose. For the latter can only be identical to the one informing Art. 37 Euratom-Treaty, namely to confer sufficient powers on the Commission prior to a particular hazard in order to be able to take precautionary measures against a possible radioactive contamination of the population or the environment which, in the case of Art. 34, is due to a "particularly dangerous experiment."[29] This purpose obviously would be defeated if particular causes of ionising radiation did not come within the substantive scope of application of Art. 34, e.g. because they are due to a particularly dangerous experiment which serves military purposes.

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

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

> Les dispositions de l'article 34 s'appliquent à toutes les expériences particulièrement dangereuses, civiles ou militaires.[30]

In total accordance with this view of the law, France did in fact notify its atmospheric military nuclear tests in the Sahara in the early 1960s[31] and complied with the procedure laid down in Art. 34 of the Euratom-Treaty[32].

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

[28] Ibid.

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

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

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

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

2.2 The factual requirements of Art. 34 (1) and (2) Euratom-Treaty

2.2.1 Particularly dangerous experiment

It should be self-evident that exploding an atomic device even at a depth of 1000 m below the lagoon's coral rock constitutes a "particularly dangerous experiment."[33]

According to press reports, however, there are apparently doubts in some quarters within the European Commission as to whether exploding a nuclear device for experimental purposes constitutes a particularly dangerous experiment[34]. It appears that France has thus far not submitted any data or information concerning the imminent new series of tests and their possible radiological effects. Concerning previous tests it is also unlikely that sufficient information has been made available to the Commission, as France has not complied with her obligations under Art. 35 Euratom-Treaty to communicate relevant data to the Commission. Only recently has the Commission taken appropriate steps to ask France to furnish such data[35]. Whether the Commission has received any materials in the meantime, is not known.

The results of previous scientific investigations into the environmental effects of nuclear tests at Moruroa do, however, permit the conclusion that due to fissures in the rock previous tests have resulted in a release of radionuclei into the Pacific Ocean[36]. Samples of plankton taken by Greenpeace outside the 12-mile-exclusion zone contained caesium 134[37]. Scientists believe that the rock has become fragile as a result of the previous tests' detonations[38]. Consequently it is to be feared that the environmental risk will substantially increase if testing is to resume. All research groups who worked around the atoll were given only a few days to take samples and measurements. As a result the real extent of a possible contamination due to underground nuclear testing is difficult to estimate. It is safe to assume, however, that health hazards exist as a result of the ocean's contamination with radionuclei. Fish frequenting the waters around the test sites can pick up contaminated algae and plankton. This way a food chain

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

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

[35] See EU-Nachrichten of 28 July 1995, p. 5; Europe Environment Service, No. 459 July 1995, p. 6.

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

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

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

accumulation of radionuclei can occur causing an internal exposure to radiation to the population living on Moruroa and neighbouring islands.

Furthermore no reliable information has been made available concerning the probability of accidents. In the event of an accident an uncontrolled release of radioactive substances into the atmosphere is to be feared that could lead to contamination of the entire South Pacific region.

Factual proof for this assumption was furnished by an accident which occurred in the summer of 1979. The atomic device remained stuck at a depth of 400m and could not be lowered to the planned depth of 1000m. Nevertheless the device was exploded and the ensuing shock waves engulfed the entire Tuamoto archipelago at a length of 1500km[39].

2.2.2 Possibility of effects on a territory under the jurisdiction of another member state

Moreover the "particularly dangerous experiments" planned by France could have effects on a territory which is under the jurisdiction of another Member state. For the British colony Pitcairn Island lies only 800 to 1000km to the south-east of Moruroa[40]. Pitcairn Island is the last remaining British colony in the Pacific and is administered by the British High Commissioner in New Zealand[41].

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

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

Pitcairn Island is listed in Annex IV[42]. Consequently Pitcairn Island lies within the Treaty's territorial scope.

The Commission's assent pursuant to Art. 34 (2) Euratom-Treaty, however, is required only if a particularly dangerous experiment within the meaning of Art. 34 (1) can be said to affect Pitcairn Island.

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

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

[41] See supra note 34.

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

The evaluation whether a particularly dangerous experiment meets this factual requirement falls within the Commission's sovereign decision-making power[43].

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

As a consequence, all the factual requirements spelled out in Art. 34 (1) and (2) Euratom-Treaty would appear to be met by the intended French nuclear tests at Moruroa. The government of the French Republic, therefore, requires the assent of the Commission of the European Communities before it can proceed with the planned nuclear tests at Moruroa.

In addition, even if one were to doubt whether Pitcairn Island is liable to be affected by the tests, Art. 34 (1) Euratom-Treaty would still apply. France in any case, therefore, has to follow the procedure laid down in Art. 34 (1) Euratom-Treaty. The planned tests need to be duly notified including the obligatory additional health and safety measures. The Commission must be given an opportunity to state its opinion as to the adequacy of the additional health and safety measures before France could proceed with the tests.

2.2.3 Substantive standards for the Commission's decision under Art. 34 (2) Euratom-Treaty

Once it has been ascertained that the factual requirements of Art. 34 (2) Euratom-Treaty are met, a further question arises as to the substantive standards that the Commission has to follow in giving or withholding its assent under Art. 34 (2) Euratom-Treaty.

Given the context with health protection that Art. 34 (1) Euratom-Treaty establishes it would appear that the Commission may only take into account considerations related to protecting the health of the affected population. Since Art. 2 (b) Euratom-Treaty specifies in relation to Euratom's tasks that the Community is to ensure the application of uniform safety standards to protect the health of workers and of the general public, one would expect these uniform safety standards, adopted under Art. 31 Euratom-Treaty, to provide the Commission with an appropriate substantive standard for its decision under Art. 34 (2) Euratom-Treaty.

It is, therefore, arguable that the Commission could withhold its assent on the grounds that France has failed to produce conclusive evidence demonstrating compliance with the uniform safety standards and basic norms-directive 80/836/Euratom (see below), especially its justification and radiation minimization requirements in Art. 6 (a) and (b).

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[43] J. Errera/E. Symon/J. van der Meulen/L. Vernaeve (supra note 4), p. 92; the Commission apparently was of the opinion that this interpretation of Art. 34 Euratom-Treaty was correct when it evaluated the French nuclear tests in the Sahara for purposes of determining whether the requirements of Art. 34 (2) Euratom-Treaty were fulfilled, see Euratom, Dritter Gesamtbericht, 1960, p. 101f.

3. Violation of Art. 35 Euratom-Treaty

Under Art. 35 (1) the Member States "shall establish the facilities necessary to carry out continuous monitoring of the level of radioactivity in the air, water and soil and to ensure compliance with the basic standards."[44] Art. 35 (2) grants the Commission "the right of access to such facilities" which may be used to "verify their operation and efficiency." It falls within the Commission's discretion to determine whether facilities are "necessary" for purposes of fulfilling a Member State's obligation under Art. 35 Euratom-Treaty[45]. Pursuant to Art. 36 the Member States are under an obligation to communicate periodically to the Commission information obtained from their monitoring facilities so that the Commission "is kept informed of the level of radioactivity to which the public is exposed".

Should the measures adopted by a Member State prove to be inadequate to meet its obligation under Art. 35 to monitor the level of radioactivity and to comply with the basic norms, the Commission can bring infringement proceedings under Art. 141 of the Treaty[46]. The Commission has also resolved to exercise its right of access and verification[47].

France would thus have to demonstrate compliance with the basic norms-directive and the requirement to monitor the level of radioactivity. The facilities set up for these purposes would furthermore have to be sufficient in order for France to be able to comply with requirements to monitor and communicate data to the Commission under Arts. 35 and 36.

Should France refuse access at Moruroa to facilities referred to in Art. 35 to officials sent by the Commission, then this would also constitute a violation of France's obligations arising under the Euratom-Treaty.

4. Violation of secondary law

4.1 Violation of the basic norms-directive 80/836/Euratom

The announced resumption of underground nuclear tests at Moruroa could also violate the so-called "justification"-requirement laid down in Art. 6 a) of directive 80/836/Euratom[48] as amended by directive 84/467/Euratom[49]. This question arises in view of the somewhat higher levels of caesium 134 which have been observed in the waters around the lagoon and for which the French government has not

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[44] Basic standards have been adopted under Arts. 30-32 Euratom-Treaty in Council Directive 80/836/Euratom of 15 July 1980, O.J. No. L 246, p. 1 as amended by Council Directive 84/467/Euratom of 3 September 1984, O.J. No. L 265, p. 4.

[45] J. Grunwald (supra note 5), at 404.

[46] Ibid.

[47] J. Grunwald, Neuere Entwicklungen des Euratom-Rechts, 1990 Europäische Zeitschrift für Wirtschaftsrecht 209 at 211 referring to SEK (89) 2109 final.

[48] O.J. L 246, p. 1.

[49] O.J. L 265, p. 4.

been able to produce a convincing scientific explanation[50]. Under the justification requirement the various types of activities which entail exposure to radiation require prior justification by reason of the advantages to be gained through these activities[51].

France, therefore, would have to demonstrate first what the advantages of further nuclear tests are and why these advantages should outweigh the consequences of nuclear explosions for the natural environment and the health of the affected population. In balancing benefits and consequences, possible alternatives to nuclear testing by virtue of which the same benefits could be reaped would, as a matter of course, have to be considered as well. Such alternatives already exist in the form of simulation technology and would almost certainly be available to France if the French government decided to purchase the necessary technical equipment from the United States.

It is also questionable whether the decision to resume nuclear testing is compatible with the "minimization" requirement under Art. 6 b) of directive 80/836/Euratom[52]. Under this provision any exposure to ionising radiation is to be kept to a reasonably achievable minimum. Since neither the Euratom-Treaty nor the secondary law adopted under its authority contains an express ban of military nuclear programmes, one cannot presumably construe this provision so as to outlaw a priori any military nuclear explosion for experimental purposes that entails exposure to ionising radiation. Nevertheless one would think that the provision requires a Member State to take all reasonably achievable measures in order to protect the population which may be affected by a "particularly dangerous experiment" within the meaning of Art. 34 against any additional exposure to radiation. Given the importance of legally protected values such as human life and health and the technically existing possibility to simulate nuclear tests, it is , therefore, to be doubted whether any additional exposure of the local population to ionising radiation is compatible with the requirement under Art. 6 b) of the directive to keep such exposure to a reasonably achievable minimum.

Again it would not be possible to argue against the applicability of these provisions the military nature of the planned experiments. This is made clear by the language used in Art. 2 of the directive which defines the directive's scope. According to this provision, directive 80/836/Euratom applies, inter alia, to use, possession, storage, transportation and disposal of naturally and artificially radioactive substances as well as to any other activity entailing hazards due to ionizing radiation[53].

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[50] See Le Monde of 21 June 1995, p. 30 ("Les mystères du césium 134"). Although cesium 134 is not itself one of the byproducts of a nuclear explosion, its presence, according to the American physicist Norm Burk, is proof that the atoll "leaks".

[51] See also R. v. Secretary of State for the Environment, the Chief Inspector of Her Majesty's Inspectorate of Polluation und the Minister of Agriculture Fisheries and Food, ex parte Greenpeace and Lancashire County Council, Queen's Bench Division, Potts J., judgment of 4 March 1994, 6 (1994) J. of Environmental L. 312 at 323. According to Potts J., an abstract balancing of the advantages and disadvantages would be insufficient to comply with the requirement laid down in Art. 6 a) of the directive. The learned judge held that the provision required the balancing of "particular practices which affect particular individuals in particular circumstances".

[52] See also W. Schroeder, Die Euratom - auf dem Weg zu einer Umweltgemeinschaft, 1995 Deutsches Verwaltungsblatt 322 at 324 on the minimization requirement.

[53] O.J. No. L 246, p. 5.

Moreover, directive 80/836/Euratom and the directive adopted to amend it can find sufficient legal basis in Arts. 30-32 Euratom-Treaty. As has already been noted above, the latter provisions apply to hazards arising from ionizing radiation which is due to military uses of nuclear energy as well[54].

4.2 Violation of directive 89/618/Euratom

Finally the question arises whether the proposed tests come within the purview of directive 89/618/Euratom as well. This directive provides for adequate information to be available to the public in the event of a radiological emergency[55].

Pursuant to Art. 5 of this directive the Member States ensure that the public or any part thereof which could be affected by a radiological emergency, is kept informed about the relevant health protection measures which should be taken in the event of such an emergency. The information that is to be made public has to comply with minimum requirements laid down in Annex I to the directive. According to this Annex the information has to explain, for instance, basic concepts of radioactivity and its effects on human health and the environment. The information must furthermore indicate the type of radiological emergency considered for purposes of drawing up emergency plans and how the affected population is to behave in the event of a radiological emergency. Pursuant to Art. 5 (4) of the directive the information that is to be made available to the concerned population under Art. 5 (1) has to be updated and must be transmitted at regular intervals. Lastly, pursuant to Art. 10 (1) of the directive the information provided to the concerned population must be made available to the Commission as well on demand.

In order for directive 89/618/Euratom to apply, however, there has to be a radiological emergency within the meaning of the directive. Art. 2 No. 1 (d) defines as such a situation any accident other than the ones contemplated in Nos. 1 (a) to (c) which leads or can lead to a significant release of radioactive substances. What constitutes a "significant" release of radioactive substances is determined in Art. 3 of the directive by reference to the dose limits prescribed in Art. 12 of directive 80/836/Euratom.

If, therefore, these is a possibility that the dose limits laid down in Art. 12 of directive 80/836/Euratom can be exceeded as a result of the underground nuclear tests at Moruroa, France has to make available under Art. 5 (1) of directive 89/618/Euratom to the concerned population information that complies with the minimum requirements set out in Annex I to that directive. On demand France would furthermore have to communicate the contents of this information to the Commission.

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[54] See above under heading 2.

[55] O.J. No. L 357, p. 1.

II. ENFORCEMENT ACTIONS BEFORE THE EUROPEAN COURT OF JUSTICE

As has been shown, the planned tests at Moruroa would violate a number of provisions of the Euratom-Treaty and the secondary law adopted thereunder should France decide to proceed with its tests in September. This obviously begs the question of enforcement actions before the European Court of Justice.

1. Infringement proceedings under Arts. 141-143 Euratom-Treaty

The Euratom-Treaty, in Arts. 141 and 142, provides for a special remedy in case a Member State violates its obligations under the Treaty. Under these provisions either the Commission or any other Member State can bring what the Treaty refers to as an action for infringement of the Treaty. These procedures are for the most part identical to procedures under Arts. 169 and 170 of the EC-Treaty.

1.1 Infringement proceedings brought by another Member State

According to Art. 142 Euratom-Treaty any Member State can lodge an action before the European Court of Justice alleging that another Member State acted contrary to its obligations under the Treaty. It is not necessary that the Member State bringing an action is itself in any way adversely affected by the alleged infringement or has suffered loss[56]. An action, however, can only be lodged after a preliminary administrative procedures has been followed under Art. 142 (2) and (3) for which the Commission is responsible. In the course of the preliminary procedure the Commission has to draft a reasoned opinion. Before it does so the respondent Member State has to be given an opportunity to submit its observations both orally and in writing. If the Commission does not state its position within three months of being called upon to do so, the suing Member State can directly file the action with the European Court of Justice without having to go through the preliminary procedure under Art. 142 (2) and (3).

While the European Court of Justice renders merely a declaratory judgment stating in what respect a member state violated its obligations, the Member States are nonetheless under an obligation according to Art. 143 Euratom-Treaty to take the appropriate measures in order to comply with the judgment.

1.1.1 Violation of Art. 34

Performing a "particularly dangerous experiment" within the meaning of Art. 34 (1) Euratom-Treaty without seeking the Commission's prior opinion on the obligatory additional health protection measures or, indeed, without seeking the Commission's assent pursuant to Art. 34 (2) Euratom-Treaty constitutes a violation of Member State obligations under the Treaty. Any other Member State can bring an infringement action to have such a violation sanctioned by the European Court of Justice[57].

The preceding paragraph contemplates a situation where France has actually proceeded with its experiments and where, as a result, a violation of the Treaty can be said to have already occurred. Currently, however, France has not yet carried out any of the planned tests (if one leaves aside for a moment the fact that tests carried out at Moruroa between 1966 and 1992 were illegal because none of

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[56] Case 7/71, Commission v. French Republic, [1971] E.C.R. 1003, para. 47/50.

[57] J. Errera/E. Symon/J. van der Meulen/L. Vernaeve (supra note 4), p. 92.

them were notified or, following the accession of the United Kingdom, assented to under Art. 34 Euratom-Treaty). It could be doubtful, therefore, whether an action for infringement of the Treaty could be brought at this stage.

It is to be noted, however, that to date France has made no effort to notify the tests or obtain the Commission's assent under Art. 34 (1) and (2) Euratom-Treaty. Nor has the French government given any indication that it will take appropriate steps in order to comply with the Treaty. Hence one can safely assume that saving unforeseen circumstances France will proceed with the tests without following the procedures laid down in Art. 34 and will, as a consequence, infringe the Treaty. If, in this situation, it were not possible to bring infringement proceedings, the certain result would be that the Community's system of legal remedies would be restricted to repressive sanctions, that is to sanctions in the form of declaratory judgments coming only after a violation of the Treaty has occurred. No preventive measure to prevent a violation from occurring in the first place would be possible.

Yet in the case of the German heavy goods traffic tax the European Court of Justice held an infringement action admissible and granted interim relief despite the fact that the necessary preliminary procedure had not yet been completed and that the alleged violation of Community Law could not have occurred yet either as the particular legislation at issue had not yet come into force[58]. One can infer from the European Court's ruling in this case that in the context of an application for interim relief an action can be brought before a violation has occurred at least if otherwise severe and irreparable damage to material and immaterial values would be the consequence[59].

It would also be possible to commence infringement proceedings in relation to the previous experiments performed by France in the South Pacific. Contrary to the tests in the Sahara in the early 1960s, no opinion or assent was obtained from the Commission for any of the tests executed on Moruroa between 1966 and 1991. There is no statute of limitation attached to bringing proceedings for infringement of the Euratom-Treaty[60]. These proceedings could thus allege a violation of the Treaty with respect to both past and future tests carried out at Moruroa. By arguing that France violated her obligations arising under the Euratom-Treaty in the past as well, it could be made plain that Treaty infringement have in fact already occurred and that without timely action on the part of the Commission or the Court of Justice they would be certain to recur.

In short the object of an action for infringement of the Treaty in combination with an application for interim relief could be:

- an interlocutory injunction requiring France to refrain from carrying out any tests and to suspend its series until judgment has been delivered in the main action;
- a declaratory judgment authoritatively stating that France would act in violation of her obligations under the Treaty if she proceeded with the tests without obtaining the Commission's opinion and assent;

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[58] Case 195/90 R, Kommission v. Fed. Rep. of Germany, ruling of 12 July 1990, [1990-I] E.C.R. 3351.

[59] The relevant provisions in the EC-Treaty are identical to the ones in the Euratom-Treaty so that the ECJ ruling can be applied to issues arising under the Euratom-Treaty as well.

[60] ECJ, judgment of 14 December 1971, Case 7/71 Commission v. French Republic, [1971] E.C.R. 1003, para. 5/6.

- a declaratory judgment requiring France to obtain the Commission's opinion or assent in conformity with the Euratom-Treaty prior to resuming or continuing further tests.

1.1.2 Violation of Arts. 35 and 36 Euratom-Treaty

A violation of member state obligations under Arts. 35 and 36 can also give rise to infringement proceedings pursuant to Art. 142 Euratom-Treaty. Failure to comply with the requirements laid down in Arts. 35 and 36 to communicate data on radioactivity in the test area or to grant access to monitoring facilities to Euratom officials constitutes an infringement of obligations under the Euratom-Treaty. Apparently the French Republic has thus far refused to comply with the requirements laid down in Arts. 35 and 36[61]. Legal action before the European Court of Justice in relation to France's obligations under Arts. 35 and 36 could result in a declaratory judgment which authoritatively states France's obligation to abide by the Euratom-Treaty's provisions.

1.1.3 Violations of secondary law

Infringement proceedings can also be brought to have any other violation of obligations under the Euratom-Treaty sanctioned by the European Court of Justice, notably a violation of the obligation spelled out in Art. 192 Euratom-Treaty which requires Member States to ensure compliance with any provision of the Treaty or of the secondary law adopted under the authority of the Treaty. Hence failure to comply with the basic norms laid down in directive 80/836/Euratom and subsequent amendments or the information and notification requirements under directive 89/618/Euratom concerning radiological emergencies can also become the subject of an infringement action brought by another member state.
With respect to compliance with the basic norms directive Art. 38 (2) and (3) Euratom-Treaty would appear to open up further possibilities for legal action. Under these provisions the Commission can serve any member state with a particular directive asking the member state to ensure compliance with dose limits or any other provision laid down in the basic norms directive. If the Member State fails to ensure compliance within the time limit set by the Commission in the directive, any other Member State whose territory is affected by a failure to ensure compliance with the Euratom basic norms can bring an action for infringement of the Treaty directly before the European Court of Justice without having to go through the procedures laid down in Art. 142 (2) and (3). In this case, therefore, given the proximity of Pitcairn Island, the United Kingdom could directly bring an action before the ECJ alleging, for instance, a failure to comply with the justification and minimization requirements laid down in Art. 6 a) and b) of the basic norms-directive.

1.2 Infringement proceedings brought by the Commission

Under Art. 141 Euratom-Treaty, infringement proceedings can also be brought by the Commission. The Commission has to go through an administrative preliminary procedure as well which ends with the Commission delivering a reasoned opinion. In its opinion the Commission has to state the reasons for believing that the Member State has acted in violation of its obligations under the Treaty and it has to set

[61] See EU-News of 28 July 1995, p. 5.

a time-limit for ending the violation[62]. If the Member State fails to comply with the Commission's opinion within the given time frame, the Commission can commence infringement proceedings before the European Court of Justice.

1.3 Interim relief

If proceedings are brought before the European Court of Justice under Arts. 141 and 142, Art. 158 Euratom-Treaty in combination with Art. 83 of the Court's Rules of Procedure authorizes the Court to "prescribe any necessary interim measures." Given the clear language used in both Art. 158 Euratom-Treaty and Art. 83 § 1 (2) Rules of Procedure interim relief is not possible unless an action is already pending before the Court[63].

Although an action brought under Art. 141 or 142 Euratom-Treaty is limited to an authoritative declaration by the European Court of Justice that the Member State concerned has violated an obligation arising under the Treaty, an interlocutory injunction granted under Art. 158 Euratom-Treaty can order a Member State to perform or, as the case may be, refrain from performing a specific act[64]. As has already been noted above, France could thus, by virtue of an interim order granted under Art. 158 Euratom-Treaty, be enjoined from carrying out any tests until the Court has delivered its judgment in the main action and has authoritatively disposed of the legal questions involved, namely whether the tests at Moruroa would be unlawful without the Commission's assent under Art. 34 (2) Euratom-Treaty.

Pursuant to Art. 83 § 2 of the Court's Rules of Procedure an interlocutory injunction can only be granted if an application for interim relief alleges circumstances disclosing an urgent need for a Court order. An urgent need for a Court order will be deemed to exist if it is necessary to prevent the performance of an act which is at issue in the main action and the occurrence of which can lead to serious and irreparable damage[65].

In the present case, it is submitted, the urgent need for an injunction could easily be established if, because of the procedural requirements under Arts. 141 and 142, an action can only be brought after France has resumed nuclear testing at Moruroa without abiding by the procedures provided for in Art. 34 Euratom-Treaty. For in this case it would be clear that any subsequent tests would also be carried out in violation of Art 34 which is intended to afford adequate protection to the population and the environment against radioactive contamination. The possible collapse of the coral reef and the ensuing release of highly radioactive and toxic substances into the seas surrounding Moruroa would, furthermore,

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[62] T.C. Hartley, The Foundations of European Community Law, 3d. ed., Oxford 1994, p. 310-315; B. Beutler/R. Bieber/J. Pipkorn/J. Streil (supra note 2), at p. 262.

[63] See ECJ, ruling by the President of 6 July 1993, Case C-286/93 R. Atlanta AG, Bremen et al. v. Council of the European Communities, (1993) Europarecht 285, para. 4; J. Grunwald (supra note 5), at 407.

[64] Hartley (supra note 62), at 325-7.

[65] ECJ, ruling of 29 June 1993, Case C-280/93 R, Fed. Rep. Germany v. Council of the European Communities, 1993 Europarecht 286, para. 22; ruling of 29 June 1994, Case C-120/94 R, Commission v. Greek Republic (not yet reported), para. 89; see also Case 61/77 R, [1977] 937 at 954 per Advocate-General Reischl where the need for an injunction was held to be urgent because the Republic of Ireland merely applied fisheries conservation measures that the Commission alleged were contrary to Ireland's obligations under the EC-Treaty.

constitute serious and irreparable damage for the affected population and the environment and, consequently, for interests protected under Euratom-Community law.
Thus, as soon as an action for infringement is pending before the Court, the requirements for an injunction pursuant to Art. 158 Euratom-Treaty in combination with Art. 83 of the Court's Rules of Procedure could be met.

1.4 Interim relief before completion of preliminary procedure

As has been noted above, an application for interim relief can only be filed if an action is already pending before the Court. An action for infringement of the Treaty, however, is admissible only if the preliminary procedures provided for in Arts. 141 and 142 have been followed. Under Art. 142 (2) Euratom-Treaty a Member State may commence infringement proceedings against another Member State directly in the Court only if three months have lapsed since notification of the Commission under Art. 142 (2). In a like manner the Commission in proceedings under Art. 141 has to set a Member State a time-limit to comply with its obligations under Community law before it can commence proceedings before the European Court of Justice. Although these time-limits have at times been very narrow indeed, it is still possible that no preliminary procedure can be completed prior to the planned first test, given the announcement by the French government that tests are to resume some time in September. It follows that on the face of the provisions dealing with interim orders and infringement proceedings no application for an injunction could be lodged before the first device will be exploded in September.
It is not entirely inconceivable, however, that the European Court of Justice would hold an action - and as a consequence an application for an interim order - admissible even before completion of the administrative preliminary procedure under Arts. 141 (2) and 142 (2) and (3) if otherwise serious and irreparable damage could occur. It should be remembered that the Court held an action for infringement of the EC-Treaty brought by the Commission against the Federal Republic in the case of the heavy goods traffic tax admissible despite the fact that the preliminary procedure had not been completed. Once the main action was pending the Commission in that case was also able to file successfully an application for an interim order restraining the Federal Republic from letting legislation introducing the tax come into force.
Considering the Court's pragmatic approach in the case of the German heavy goods traffic tax, similar procedural moves do not seem a priori unfeasible in this case either.

2. Action for failure to act against the Commission (Art. 148 Euratom-Treaty)

The Commission for its part, should it fail to require France to notify duly and to seek the Commission's assent under Art. 34 Euratom-Treaty, can be sued for failure to act before the European Court of Justice pursuant to Art. 148 of the Euratom-Treaty.
According to Art. 148 (2) Euratom-Treaty, such an action is, however, admissible only after the institution that is being sued has been formally asked to state its position either by a Member State or by another institution of the Community, which includes the European Parliament. Only if the Commission fails to state its position within two months of receiving a formal demand to do so can a Member State or another institution of the Community bring an action for failure to act.

The act demanded by a Member State or another institution of the Community has to be sufficiently precise so as to allow a declaratory judgment to be enforceable[66]. It is not necessary, however, that the applicants request adoption of a reviewable and legally binding act (i.e. a regulation, directive, or a decision within the meaning of Art. 161 Euratom-Treaty)[67].

In contrast, a decision to bring infringement proceedings against a Member State cannot be requested, as the Commission enjoys a large measure of discretion to bring such proceedings and to open the preliminary administrative procedure under Art. 141 Euratom-Treaty[68].

In this instance an appropriate request to act could call upon the Commission to serve the government of France with a formal notice demanding France first to notify the tests in accordance with the procedure laid down in Art. 34 (1) Euratom-Treaty and, second, to obtain the Commission's assent pursuant to Art. 34 (2) Euratom-Treaty. Similarly, the Commission could be called upon to adopt a formal decision withholding its necessary assent under Art. 34 (2) Euratom-Treaty vis-à-vis the government of France.

A subsequent action for failure to act will be successful if the Commission is legally bound to deliver the requested opinion or to adopt the requested decision[69]. The Commission's duty to adopt the requested acts can, however, be inferred from the plain meaning of the words used in Art. 34 Euratom-Treaty. For the provision's language makes clear that the Commission's opinion under Art. 34 (1) and its assent under Art. 34 (2) Euratom-Treaty are to be legally binding procedural requirements which must be fulfilled before a Member State may proceed with a particularly dangerous experiment ("Any Member State ... shall take additional health and safety measures, on which it shall first obtain the opinion of the Commission" and the "assent of the Commission shall be required ... .")[70].

Although the factual evaluation as to whether an experiment is likely to have effects on a territory under the jurisdiction of another member state is to be made by the Commission[71], this does not mean that the exercise of powers conferred upon the Commission in Arts. 30-39 Euratom-Treaty to supervise health protection measures and especially compliance with the "assent"-requirement under Art. 34 (2) by the Member States is discretionary. For similar powers conferred upon the Commission to supervise the activities of the Euratom supply agency under Art. 53 Euratom-Treaty the European Court of Justice has

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[66] B. Beutler/R. Bieber/J. Pipkorn/J. Streil (supra note 2) at 273.

[67] ECJ, judgment of 27 September 1988, Case 302/87, European Parliament v. Council of the European Communities, para. 16; see also T.C. Hartley (supra note 62), at 401; Schweitzer/Hummer, Europarecht, 4th. ed. Neuwied 1993, p. 116.

[68] ECJ, judgment of 14 February 1989, Case 247/87, Star Fruit S.A. v. Commission, [1989] E.C.R. 291, para. 11; B. Beutler/R. Bieber/J. Pipkorn/J. Streil (supra note 2), at 262; H.G. Schermers/D. Waelbroek, Judicial Protection in the European Communities, 5th ed. Deventer/Boston 1992, p. 309.

[69] Schweitzer/Hummer (supra note 67), at 116.

[70] J. Errera/E. Symon/J. van der Meulen/L. Vernaeve (supra note 4), at 92.

[71] See above at I 2.2.2.

just confirmed this view[72]. The Commission is, therefore, also under a legally binding obligation to exercise its powers under Art. 34 Euratom-Treaty and to call on France to notify the tests in accordance with Art. 34 (1) Euratom-Treaty. Moreover, given the proximity of a British territory, the Commission is also legally required to adopt a decision under Art. 34 (2) addressed to France.

Should the Commission within two months of being called upon to act - either by the European Parliament or by another Member State - fail to take a position, an action can be brought before the European Court of Justice seeking a declaration that the Commission's failure to act infringed the Treaty, notably Art. 34 Euratom-Treaty.

If, on the other hand, the Commission does take position by stating unequivocally that it will not request the government of France either to notify the tests or to obtain the Commission's assent, doubts could arise as to whether the Parliament, in this situation, could still bring an action for failure to act.

For the Court has declared in previous judgments that an unequivocal refusal to act constitutes in itself a reviewable and legally binding act the legality of which can only be challenged before the Court by way of an action for annulment[73] - in the case of the Euratom-Treaty under Art. 146 Euratom-Treaty. The Parliament, however, lacks *locus standi* to bring such an action to the extent that it does not seek to protect merely its own prerogatives (Art. 146 (3)).

Yet, in the "comitologie"-judgment the European Court of Justice has unequivocally stated that the Parliament could bring an action for failure to act under Art. 175 EC-Treaty (which corresponds to Art. 148 Euratom-Treaty) in the face of a flat refusal to adopt the requested act[74].

3. Proceedings under Art. 146 Euratom-Treaty

Should France decide to submit an application for the Commission's assent under Art. 34 (2) Euratom-Treaty after all, a decision adopted by the Commission under this provision would also be reviewable before the European Court of Justice. Judicial review of such a decision could become relevant if the Commission, for instance, decides to give its assent to the planned nuclear tests. The Commission's assent, however, would appear to be unlawful if France had not prior to obtaining the Commission's assent been able to furnish conclusive evidence as to compliance with Euratom's basic norms directive 80/836/Euratom.

In this case any Member State or the Council could, as "privileged applicants", challenge the decision pursuant to Art. 146 (2) Euratom-Treaty without having to demonstrate a sufficient interest in the matter or that they are in any way affected by the decision.

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[72] See ECJ, judgment of 16 February 1993, Case C-107/91, E.N.U. v. Commission (not yet reported).

[73] ECJ, judgment of 18 October 1979, Case 125/78, G.E.M.A. v. Commission, [1979] E.C.R. 3173, para. 21; hence a position taken by the Commission under Art. 148 (2) Euratom-Treaty (a provision which corresponds to Art. 175 (2) EC-Treaty) constitutes a legally binding decision within the meaning of Art. 161 (4) Euratom-Treaty (which corresponds to Art. 189 (4) EC-Treaty), see R. Streinz, Europarecht, 2nd. ed. Heidelberg 1995, para. 544.

[74] ECJ, judgment of 27 September 1988, Case 302/87, European Parliament v. Council of the European Communities, [1988] E.C.R. 5615, para. 17.

As has already been noted, the European Parliament can bring actions for annulment under Art. 146 (1) and (3) Euratom-Treaty only to the extent that, in doing so, it wishes to protect its own prerogatives. Actions for annulment have to be brought within two months after the act for which judicial review is sought has been adopted.

III. ACTIONS BY INDIVIDUALS

Art. 146 (4) Euratom-Treaty also provides for actions for annulment to be brought by individuals against legally binding acts adopted by the institutions of the Community.

1. Actions by individuals against the Commission's assent

Hence the question arises whether citizens of French Polynesia or Pitcairn Island could challenge a decision by the Commission giving the Commission's assent under Art. 34 (2) Euratom-Treaty. A further question would be whether individuals could challenge an opinion delivered by the Commission under Art. 34 (1) Euratom-Treaty by alleging that a particularly dangerous experiment would have required the Commission's assent under paragraph 2 of the provision.

Individuals can challenge decisions not addressed to them only if they are directly and individually concerned. Furthermore, the act challenged must be an act in a material or substantive sense. In other words it is not necessary that the challenged act was adopted in the form of a decision within the meaning of Art. 161 (4) Euratom-Treaty[75]. The essential requirement rather is the act's legally binding force to regulate individual cases[76]. This comprises decisions addressed to a Member State[77]. Conversely, individuals are barred from bringing actions to challenge acts (e.g. mere opinions) which are not legally binding.

By giving its assent under Art. 34 (2) Euratom-Treaty, the Commission authorizes France in a constitutive manner to carry out a particularly dangerous experiment which is likely to affect a territory under the jurisdiction of another Member State. Since a decision under Art. 34 (2) Euratom-Treaty is binding on the Member State to which it is addressed[78], the assent under Art. 34 (2) constitutes a decision within the meaning of Art. 161 (4) Euratom-Treaty.

Such a decision, as has been observed above, is in principle subject to judicial review. The question that remains to be answered in the present context is whether citizens of French-Polynesia or Pitcairn-Island would be directly and individually concerned by it.

1.1 Direct concern

The element of direct concern asks whether any legally relevant harm suffered by the applicant can be directly linked to the decision by the Commission or any other institution of the Community. A decision that is not addressed to an individual is nevertheless of direct concern to her or him if it will directly

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[75] T.C. Hartley (supra note 62), at 363.

[76] Streinz (supra note 73), at para. 518; B. Beutler/R. Bieber/J. Pipkorn/J. Streil (supra note 2), at 198.

[77] ECJ, judgment of 23 November 1971, Case 62/70, Bock v. Commission, [1971] E.C.R. 897; judgment of 15 July 1962, Case 25/62, Plaumann v. Commission, [1963] E.C.R. 95.

[78] J. Errera/E. Symon/J. van der Meulen/L. Vernaeve (supra note 4), at p. 92.

cause him or her harm without any further act by a Member State or an institution of the Community having to intercede[79].

In this instance the Commission's assent would be the last legally binding act that could still prevent France from proceeding with the tests and that, furthermore, is constitutive for the tests' lawfulness for purposes of European law. The harm that citizens of Polynesia and Pitcairn Island are certain to suffer if France decides to carry out the tests can thus be directly linked to the Commission's decision. A decision by the Commission to give its assent under Art. 34 (2) Euratom-Treaty would thus be of direct concern to citizens of Polynesia and Pitcairn-Island.

1.2 Individual concern

In a like manner a decision by the Commission to give its assent under Art. 34 (2) Euratom-Treaty would have to be of individual concern to the citizens of Polynesia and Pitcairn Island. An individual is individually concerned if the challenged act affects an individual's legal interests by virtue of special circumstances which distinguish that person from the public in general and which lead to that person being de facto individualized by the challenged act in the same way as an addressee of the act[80].

Citizens of Polynesia and Pitcairn Island can be distinguished from the general public insofar as they live within the range of adverse effects that the tests can have and in particular any accidents that can occur. The legal interests that may be at issue here are Polynesians' and Pitcairn Islanders' right to life and physical integrity as well as those legally enforceable rights and interests that France is under an obligation to confer on Polynesians by virtue of the directives adopted under Arts. 30-32 Euratom-Treaty. For directives the purpose of which is to afford protection for human health as in directives 80/836/Euratom[81], 84/467/Euratom[82] and 89/618/Euratom[83] require Member State implementation that enables individuals to rely on legally binding provisions to enforce their rights[84].

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[79] Hartley (supra note 62), at 366-8.

[80] See ECJ, judgment of 26 April 1988, Cases 97, 193, 99 and 215/86, Asteris AE et al. and Greek Republic v. Commission, [1988] E.C.R. 2181, para. 14; judgment of 18 November 1975, Case 100/74, CAM v. Commission, [1975] E.C.R. 1393, para. 19.

[81] See the Preamble, 10th recital, O.J. No. L 246 of 17 September 1980, p. 1.

[82] See the Preamble, 10th recital, O.J. No. L 265 of 5 October 1984, p. 4.

[83] See Preamble, 15th recital, O.J. No. L 357 of 7 December 1989, p. 31.

[84] ECJ, judgment of 30 May 1990, Case C-361/88, Commission v. Fed. Rep. of Germany, [1991-I] E.C.R. 2567, para. 16 (my emphasis). - In this context the question also arises whether in view of the purposes of Chapter III of the Euratom-Treaty in general (see above the Saarland/Cattenom case in note 25) Art. 34 Euratom-Treaty confers directly effective rights on individuals. The provision in any case meets the requirements set out by the European Court of Justice for direct effect of primary community law. For Art. 34 lays down a sufficiently precise obligation to notify particularly dangerous experiments within the meaning of Art. 34 (1) Euratom-Treaty and to obtain the Commission's assent where the factual requirements of Art. 34 (2) Euratom-Treaty are met. This obligation is furthermore subject to no condition or third act whatsoever on the part of the Member State or the Commission to intervene so that it also meets the requirement of being unconditional. See ECJ, judgment of 5 February 1963, Case 26/62, van Gend & Loos, [1963] E.C.R. 1; judgment of 16 June 1966, Case 57/65, Lütticke v. HZA Saarlouis, [1966] E.C.R. 257; judgment of 8 April 1976, Case 43/75, G. Defrenne v. Société anonym belge de navigation

Likewise, citizens of Polynesia and Pitcairn Island constitute a concrete and permanent group that - unlike members of a particular profession that can be taken up or given up[85] - can be distinguished from the public in general by virtue of their limited number and their names. One cannot at any one time[86] become a citizen of Polynesia or Pitcairn Island[87].

Consequently citizens of Polynesia and Pitcairn Island would also be individually concerned by a Commission decision under Art. 34 (2) Euratom-Treaty.

1.3 Grounds of review

The applicants would have to argue one of the grounds of review listed in Art. 146 (2) Euratom-Treaty:

- lack of competence;
- infringement of an essential procedural requirement;
- infringement of the Treaty or any rule of law relating to its application;
- misuse of powers.

Which ground of review the applicants would have to argue is dependent on how the Commission justifies its decision under Art. 34 (2).

It is conceivable, for example, that the Commission considers France's radiation protection measures sufficient despite the fact that the Euratom radiation protection dose limits will be exceeded. Another possible scenario would be a Commission decision based on insufficient radiation forecasts and data. A Commission decision suffering from any of these substantive flaws would be in violation of Art. 34 Euratom-Treaty. Moreover should the Commission, in deciding whether to give its assent or not, be guided by considerations extraneous to the issue such as a politically motivated fear to offend France, the decision would be vitiated by an abuse of power.

Since in any of the above mentioned scenarios all the requirements necessary under Art. 146 (4) Euratom-Treaty are met, citizens of Polynesia or Pitcairn Island could challenge a decision by the Commission to give France its assent to particularly dangerous experiments under Art. 34 (2) Euratom-Treaty.

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aérienne Sabena, [1976] E.C.R. 455, para. 30/34.

[85] Judgment of 23 November 1971, Case 62/70, Bock v. Commission, [1971] 897, para. 10.

[86] See ibid.

[87] To stick to Hartley's terminology, the citizenry of Polynesia and Pitcairn Island which lives within the range of possible effects from the tests constitutes a "closed group", see Hartley (supra note 62), at 375.

2. Actions against opinions delivered under Art. 34 (1) Euratom-Treaty

Since an opinion delivered by the Commission under Art. 34 (1) Euratom-Treaty is not binding for the Member State[88], actions to challenge these are not possible, although the other requirements for bringing an action under Art. 146 Euratom-Treaty may be present[89].

3. Actions for failure to act against the Commission

It would, however, be possible to bring an action to challenge an opinion delivered by the Commission under Art. 34 (1) Euratom-Treaty by arguing that the Member State concerned would have required the Commission's assent under Art. 34 (2). Such an action would in fact not be an action to challenge an opinion delivered by the Commission under Art. 34 (1) Euratom-Treaty but to request the adoption of a legally binding decision under Art. 34 (2). Under the European Court of Justice's recent jurisprudence such a request can be pursued by way of bringing an action for failure to act under Art. 148 (3) Euratom-Treaty even if the requested decision, were it to be adopted by the Commission, would not be addressed to the applicant; in this situation the sole requirement would be that the applicant be individually and directly concerned by the requested act[90]. In order to avoid excessive formalism the applicant would not even have to wait for the time-limit set in Art. 148 (2) Euratom-Treaty to expire before bringing an action if the Commission has already been called upon by third parties to define its position in accordance with this provision [91].

Consequently, if the Commission decides to deliver merely an opinion under Art. 34 (1) Euratom-Treaty in spite of having been called upon, for example, by the European Parliament to refuse its assent under Art. 34 (2), a citizen of Polynesia or Pitcairn Island could bring an action for failure to act immediately against the Commission, provided the remaining requirements of direct and individual concern can be met.

As has already been noted, however, citizens of Polynesia and Pitcairn Island are directly and individually concerned by a decision that the Commission has to address to France under Art. 34 (2) Euratom-Treaty. By way of an action for failure to act under Art. 148 Euratom-Treaty citizens of Polynesia and Pitcairn Island can thus challenge the Commission's failure to withhold its assent under Art. 34 (2) which is implicit to delivering merely an opinion under Art. 34 (1) Euratom-Treaty.

Should citizens of Polynesia or Pitcairn Island, however, wish to bring an action even before another institution of the Community has called upon the Commission to define its position pursuant to Art. 148

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[88] J. Errera/E. Symon/J. van der Meulen/L. Vernaeve (supra note 4), at p. 92.

[89] See also J. Grunwald (supra note 5), at 407.

[90] ECJ, judgment of 14 February 1993, Case C-107/91, E.N.U. v. Commission, Recueil 1993-I, p. 599.

[91] Ibid.

(2) Euratom-Treaty, they would have to follow the normal procedural steps provided for in this provision. Hence a citizen of Polynesia or Pitcairn Island affected by the tests would first have to call upon the Commission to adopt a decision with which France is refused the Commission's assent under Art. 34 (2) Euratom-Treaty. If the Commission fails to define its position in regard to such a request, a citizen of Polynesia or Pitcairn Island could bring an action for failure to act - notwithstanding the fact that the requested decision would be addressed to France and not to him or her.

If, on the other hand, the Commission decides to define its position in accordance with Art. 148 (2) Euratom-Treaty by explicitly refusing to adopt a decision withholding its assent to the particularly dangerous experiments planned by France, citizens of Polynesia or Pitcairn Island - unlike the Parliament - would have to pursue their request by way of bringing an action for annulment. For in this case the Commission's outright refusal would constitute in its own right a decision within the meaning of Art. 161 (4) Euratom-Treaty that is of direct and individual concern to citizens of Polynesia and Pitcairn Island. Such a decision to refuse - with binding force for the directly and individually concerned citizens of Polynesia and Pitcairn Island - adoption of a decision with which the necessary assent under Art. 34 (2) Euratom-Treaty is withheld can only be challenged with an action for annulment[92].

4. Jurisdiction

Actions brought by natural persons or body corporates under Art. 146 (2) and 148 (3) Euratom-Treaty come within the jurisdiction of the Court of First Instance[93].

5. Interim relief

In accordance with Art. 104 § 1 (2) of the Rules of Procedure of the Court of First Instance an application for an interim order can be lodged under Art. 158 Euratom-Treaty if the same conditions that apply in proceedings before the European Court of Justice are met.

It has to be noted, however, that no application can be lodged for an interlocutory injunction restraining France from resuming nuclear testing, since France would not be a party to a suit in which actions for failure to act or for annulment are brought against the Commission. It is conceivable, however, that an application for an injunction can be filed with which the Commission is ordered to adopt a temporary decision withholding the necessary assent of the Commission under Art. 34 (2) Euratom-Treaty at least until the Court has delivered judgment in the main action.

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[92] See above at IV 2.

[93] See Art. 3 (1) (d) of Council Resolution on establishing a Court of First Instance of the European Communities of 28 October 1988, O.J. Nr. L 319, p. 1 as amended by Council resolution of 8 June 1993, O.J. No. L 144, p. 21.

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