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## ELNI NEWS

### elni Forum

The Öko-Institut/elni and the Centre d'étude du droit de l'environnement (CEDRE), Brussels, started an initiative in November 2001 to bring together environmental lawyers living or working in the Brussels area, who are interested in informal discussions on specific topics related to environmental law and policies. Since then five elni Forums were organised every few months at the Facultés universitaires Saint-Louis in Brussels.

In September 2002, Gerhard Roller, Professor of Environmental Law at Bingen University, gave an introduction on comitology procedures in EU environmental law. The elni Forum in November 2002 focussed on corporate social responsibility and the environment. Ludwig Krämer of the European Commission, DG XI, was invited to give a talk on this subject.

The sixth elni Forum is scheduled for February 2003. For more detailed information please check our website at www.oeko.de/elni. To be included on our invitation list, please contact Delphine Misonne at CEDRE, Tel. +32 2 211 7835 or misonne@fusl.ac.be.

# World Summit on Sustainable Development

*Prof. Dr. Eckard Rehbinder*

## The Three Dimensions of Sustainability: Emphasis on Development

The Rio Conference on Environment and Development of 1992 established sustainable development as the major guiding principle of international and national environment and development policy. The Rio principles, Agenda 21 and the Rio conventions constitute an ambitious expression of the determination of the international community to achieve economic and social development while conserving the environment and natural resources as the bases for life of present and future generations. It is generally recognised that sustainable development has an environmental, economic and social dimension which, although mutually dependent, are in potential conflict to one another. It is up to the states to define their own path towards sustainable development according to their needs and problems. This implies the possibility of setting different priorities among these dimensions of sustainable development.

The World Summit on Sustainable Development (WSSD) which was held in Johannesburg from August 26 to September 4, 2002 has laid a clear emphasis on the economic and social pillars of sustainable development. The conference dealt with five topical themes, namely water and sanitation, energy, health, agriculture and biodiversity (known under the WEHAB acronym) and in addition with the cross-cutting theme of implementation (finance, trade, technology transfer, sustainable consumption and production patterns, capacity-building, information and decision-making). Environmental issues only played a secondary role, and when they were addressed, often the utilisation aspect was dominant. On the other hand, the need for sustainable consumption and production patterns was fully recognised as a constituent element of sustainable development (Nos. 13-22 of the Implementation Plan)[1]. One can see this as a major break-through and even a modification of the three-pillars stereotype. However, all told the WSSD reflects a change of emphasis in relation to sustainable development towards development (which had already been expressed in the Millennium declaration).[2] Whatever one may think of the proper balance between the ecologic, economic and social dimensions of sustainable development, the inclusion, by the conference, of poverty eradication as such, economic and social inequality, gender equality, children's and maternal mortality, education, access to medical aid and AIDS is liable to water the notion of sustainable development to an extent that it will become a catchword for all simply synonymous to good policy. This expansionist understanding of sustainable development has the advantage that everybody can subscribe to it. However, it may

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[1] Cited according to the advance unedited text of 5 September 2002

[2] Environmental Policy and Law 30 (2000), 263

compromise the paramount need to conserve the environment and natural resources as natural bases for survival of humankind.

## Success and Failures in Setting Sustainability Targets

Most press coverage of the WSSD has dwelt on the disproportion between the huge size of the summit – about 65000 people attended – and its meagre results. Both statements have to be qualified. The people who actually participated in the negotiations did not amount to much more than 1000, the rest being advisors and other auxiliary personnel, representative of NGOs and the press. As regards the results, at the outset one should note that the background of the summit certainly was gloomy. Most of the Rio environmental targets, especially in the fields of global climate protection, conservation of forests, protection of biodiversity, erosion, and water have been missed.[3] This can be attributed to various economic reasons for which the industrial world bears the principal responsibility such as insufficiency of official development aid, protectionism, the debt trap, the unfavourable terms of trade of developing states, and furthermore to resistance against the concept of sustainable development and institutional failures; finally the disquieting demographic dynamics in major parts of the world are an important source of the ongoing road towards unsustainability. One might have expected that against this background the summit undertake a major push towards real progress in sustainability, and indeed argue that its results are disproportionate to the enormous problems the globe is confronted with.

On the other hand, the Rio principles and Agenda 21 are in place and have been "strongly affirmed" by the summit (No. 1 of the plan of implementation). It would not have made sense to entirely rewrite Agenda 21. The selective approach of the summit which focuses on implementation is in principle appropriate. Moreover 30 concrete targets for implementing sustainable development objectives have been agreed upon, although not always in a quantified form as proposed by the EU. These targets include better access to water and sanitation by 2015 (No. 7), control of hazardous chemicals with a view to minimizing significant adverse effects by 2020 (with particular reference to the "precautionary approach", No. 22), conservation and restoration of fish stocks by 2015 (No. 30), significant reduction of the loss in biodiversity by 2010 and sustainable forest management (Nos. 42, 43), and a substantial increase of the global share of renewable energy sources (No. 19 (e)). Although with respect to renewable energy, agreement on the EU target proposal of a 10 percent increase by 2010 could not be reached, it should be noted that No. 10 (e) of the implementation plan constitutes the first major commitment of the international community the weight of which is reinforced by referring to "a sense of urgency" with which the target shall be pursued.

However, this major achievement in the field of global climate protection and resource conservation is set off by the extremely weak commitment of the summit to the Kyoto Protocol. That states who have ratified the Kyoto Protocol simply "strongly urge" states who have not ratified to do so (No. 36), the international community as such showing its lack of interest in the matter, is a clear sign of the pressure the unholy alliance between the United States, Australia, and the OPEC states has been able to exert during the summit towards hampering all endeavours to effectively reducing direct $CO_2$ emissions from fossil fuels. It is true, though, that Canada has left the alliance and announced that it would ratify the Kyoto Protocol.

## Trade and Environment

Much to the surprise of many observers, the provisions of the implementation plan relating to trade and the environment did not simply repeat the Doha mandate[4] of reducing export subsidies of industrial states, especially for their agricultural products (No. 86 (c)). Rather, on the instigation of developing states and the EU, No. 91 of the implementation plan which enunciates the mutual supportiveness of trade, environment and development is couched in terms that preclude WTO precedence over environmental policy and thereby gives environmental concerns an increased weight. The original text whereby WTO consistency had to be ensured was finally removed. This is a clear mandate for the post-Doha negotiations on the relationship between trade and the environment towards a more balanced definition of their respective roles.

## Type-II Partnerships

Another important development that became visible at the WSSD is the opening of the international community, in the field of sustainable development, to civil society, although in a way that has remained controversial. NGOs had pleaded for setting forth strong language in No. 45 of the implementation plan about corporate responsibility. Even in the

[3] See, among others, Report of the Secretary General, Road map towards the implementation of the United Nations Millennium Declaration, United Nations, General Assembly, A/56/326 of 6 September 2001, Nos. 164-191

[4] Environmental Policy and Law 32 (2002), 56

absence of formal international accords transnational corporations would be bound to international standards relating to the environment, labour relations, human rights and transparency. This did not meet with general agreement. Rather, apart from weak statements on the promotion of corporate responsibility (No. 122 (f)), the WSSD has opted for a voluntary, cooperative approach for achieving practical results for sustainable development (No. 150). The idea underlying this concept of public/private partnership is cooperation between particular industrial and developing states, industry and NGOs in concrete sustainability projects (denoted as Type II partnership). 60 of such partnerships have been announced at the summit. This development mirrors the increasing reliance of states in their domestic environmental, social and economic policies on voluntary agreements and other forms of self-regulation. However, in the absence of guidelines as to the nature and extent of requisite industry commitments and consistency with national sustainable development goals it remains to be seen whether the voluntary approach is an equivalent substitute for full governmental commitments in the sustainable development process. It may open the door to privatising basic governmental responsibilities such as supply of drinking water in developing countries at the expense of the poor. Arguably, with experience gained on the various projects, some common understanding about indispensable requirements for relevant participation can be developed. The Commission on Sustainable Development will have to play an important role in oversight and guidance.

## Development of Environmental Law

Finally, from a legal perspective one must deplore the marginal role played by environmental law at the WSSD. In the general part of the implementation plan, commitment of all states to democracy, the rule of law and human rights was underlined (Nos. 4, 5, also No. 120 bis). Some important principles of environmental law such as the precautionary principle (in the attenuated form of "precautionary approach") and the polluter-pays principle have been mentioned in the implementation plan. However, all attempts to achieve progress on Rio principle 10 – access to information, participation and access to justice – suffered a major set-back. This is especially true of access to justice, but participation did not fare much better (see No. 146 bis: states should promote public participation). The proposal to establish international guidelines for access to justice, at least to call upon the states to ensure access to justice, and thereby open the door toward global commitment to the Aarhus Convention approach failed entirely. Access to justice is no longer mentioned at all and No. 152 of the implementation plan about the "possible relationship" between environment and human rights has remained rather vague as well. Under these circumstances the only encouraging signal from Johannesburg in this respect comes from the World Judges Symposium held immediately before the summit[5] which underlined the need for "improvement in the level of public participation in environmental decision-making, access to justice for the settlement of environmental disputes and the defence and enforcement of environmental rights, and public access to relevant information".

[5] Environmental Policy and Law 32 (2002), 236

# The European Convention and the Future of European Environmental Law- Resolution of the Avosetta Conference - October 11/12, 2002, Amsterdam

## Preamble

The Avosetta Group is a small informal group of lawyers whose main purpose is to further the development of environmental law in the European Union and Member States. "Avosetta" is the Latin name of a rare bird which caused the European Court of Justice to establish far reaching principles of European Nature Protection Law in the German Leybucht Case. The group held its inaugural meeting at Bremen University in January 2001.

Those participating in Avosetta are invited out of recognition of their outstanding distinction in European environmental law, and take part in a personal and independent capacity. Nevertheless, Avosetta discussions aim to reflect a comprehensive cross-section of legal cultures within Europe, and will generally include up to two participants from each Member and Accession State.

At its meeting on October 11 and 12, 2002, held in Amsterdam it adopted a resolution on 'The European Convention and the Future of European Environmental Law'. In view of the draft 'Constitutional Treaty' presented by the Presidium of the Convention on October 28, 2002 the final text of the Avosetta Conference was approved on November 2, 2002.

1. The Integration Principle of Article 6 EC should be maintained in the new Constitutional Treaty under Title III 'Union Competences and Actions'.

2. The objectives and principles in the current Treaties (Art. 2 EU; Art. 2, 6, 174 EC) on environmental protection and sustainable development do not need any major changes, but should be maintained in the new Constitutional Treaty. The following amendments would however be advisable:

   a. to include in Art. 174 (1) fourth indent a reference to possible 'unilateral' measures. The text of Art. 174 (1) fourth indent will then read as follows: 'promoting measures at international level to deal with regional or worldwide environmental problems. Such measures may include unilateral ones, without prejudice to other international obligations'.

   b. to include in Art. 174 (2) the principle of 'sustainable development'.

   c. to include in Art. 174 (2) the principle of 'inter-generational equity'. The text of Art. 174 (2, second sentence) should then read as follows: 'It shall be based on the principle of sustainable development, the principle of inter-generational equity, the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

3. All decisions on environmental affairs (Art. 174-176 EC) should be taken by co-decision. We suggest to delete Art. 175 (2).

   (1) As to provisions of a fiscal nature taxes in general (including the "greening" of general taxes) are anyway to be founded on Articles 90 to 93. Art. 175 can only be the basis for special environmental charges which are not taxes in the proper understanding of the term, such as e.g. a charge on aircraft emissions, on the discharge of waste water, etc. The same is true for the selling of emission rights. As these measures are environmental protection instruments complementing or replacing more traditional "direct and supervise" measures, there is no reason why they should be decided by special procedures.

   (2) As to measures concerning town and country planning, land use and management of water resources, these should indeed remain the primary competence of the Member States. This can however best be secured if they are not mentioned at all as a Community competence. The directives given by Art. 175 paragraph 1 EC provide sufficient guidance not to allow intrusion into these competences if they are not specially required by environmental concerns.

   (3) As to energy policy measures "significantly affecting a Member States' choice" will in most cases anyway be based on Art. 155 and/or Art. 86. Should there be specific environmental goals to be attained in the energy policy field these measures do not significantly differ from other environmental protection measures. Therefore they should be decided according to the same procedures.

4. The group has discussed whether the participation of environmental associations should be strengthened along the lines provided for management and labour according to Art. 138 and 139 EC. It is however of the opinion that the legislative procedure and the rules on access to information provide sufficient opportunities for public participation. Nevertheless and in order to ensure effective and balanced representation of environmental interests in the making of secondary legislation and executive rules Art. 174 should be amended by a paragraph 3a which may read as follows: "Before submitting proposals in the environmental policy field, the Commission shall consult environmental protection associations ensuring balanced participation".

   Dialogue and consultation between with NGOs and the Commission have to be seen in the framework of the decision making procedures of Art. 175 EC. In other words: dialogue and consultation to enhance the quality of the Commission right of initiative. Of course, this is not only relevant to environmental policy making, but in general one can say that timely consultations with all stakeholders concerned could improve the quality of the Commission's proposals (Aarhus!). There are other means to enhance a European wide public debate on environmental affairs. The Commission could organise – in the pre-proposal stage – things like public hearings, society-wide-discussion. Not on all, but on the important issues (Water Framework; EIA, Habitat Directive etc.).

5. The following provision should be inserted in the new Constitutional Treaty: 'Subject to imperative reasons of overriding public interests, significantly impairing the environment or human health shall be prohibited'. We suggest that this provision should be part of the environment paragraph of the new Constitutional Treaty (Part II, A3, V).

   The proposed amendment to the Treaty is inspired by the jurisprudence on the Treaty article 28-30 and has four functions. First, the intention is to ensure that environmental interests/protection in the balance of interests has at least the same priority as free trade. Second, the intention is to give environmental protection direct effect, requiring EU-institutions as well as Member State and their citizens not to take decisions or undertake activities which significant impair the environment or human health, unless such impairment can be reasoned by overriding public interests. Third, the scope is limited to "significant impairment" to ensure, that focus in the court of law is on substantial issues, which leave some discretion for minor impairment. Fourth, when the impairing source (the polluter, the project, the use of natural resources and so on) or the effected part of the environment are covered by EC legislation - it is the EC legislation which defines what is acceptable and thereby, what is significant - in the same way as exhaustive harmonization pre-empt Member States from recalling the Treaty article 30. The Avosetta Group find, that the proposed amendment establish a fair and reasonable balance between environmental protection and the importance of leaving discretion for policy-makers.

6. The Charter of Fundamental Rights of the European Union should be integrated in the Treaty. In stead of Article 37 (a provision similar to the Integration Principle of Article 6 EC) of the Charter the following text should added:

   'Everyone has the right to a clean natural environment. This right is subject to reasons of overriding public interests. It includes the right to participation in decision making, the right to access to courts and the right to information in environmental matters. A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

   Both the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) recognize a right or certain elements of such right of individuals to a clean environment. In various instances the Courts developed this jurisprudence in spite of the absence of legal provisions explicitly attributing rights in environmental matters to individuals. The basis for the respective findings of the ECHR are both the right to life and the right to respect for private and family life as set out in the Convention for the Protection of Human Rights and Fundamental Freedoms. The recognition of a violation of the said human right through the impairment of the environment is, however, limited to cases of immediate impact of environmental pollution, such as noise, smells and emissions, to individuals living in the vicinity of the respective polluter.

   Most European constitutions expressly recognise a right to a clean environment in one form or another (Article 66 of the Portuguese Constitution, Article 45 of the Spanish Constitution,

Article 24.1 of the Greek Constitution, Article 21 of the Dutch Constitution, Article 23 of the Belgian Constitution, Articles 2 and 73-80 of the Swiss Constitution, Article 20a of the German Constitution, Article 14A of the Finnish Constitution, Article 110B of the Norwegian Constitution). Even in those cases where the Constitution does not expressly recognise this right, it might be stipulated in framework laws (e.g. Article L-110-2 of the French Environmental Code.). All these constitutional and legal provisions give rise to both rights and obligations – rights to the extent that most of these Constitutional provisions recognise, either explicitly or implicitly, the right of citizens to be able to live in a healthy, balanced or protected environment. As we shall see below, procedural rights follow from this fundamental constitutional right, particularly as regards information, participation and access to justice.

Enshrining a proper right to a clean natural environment would allow individuals to take action against the impairment of environmental media, which would in many cases only indirectly, over a certain distance or after a certain time, lead to the actual prejudice of their well being. Such preventive action against impairment of the environment conforms with the basic principles of EC environmental law set out in Article 174 EC Treaty and according to which precautionary and preventive action should be taken, environmental damage should as a priority be rectified at source and the polluter should pay. The cited environmental directing principles may strengthen constitutional provisions that recognise environmental protection by setting out markers for action by public authorities. In other words, recognition of a constitutional right to environment only has meaning if it is informed by principles whose function is, precisely, to guide the public authorities in taking action intended to protect the environment more effectively.

The right to a clean environment is not absolute. Public, including economic interests might limit the breadth of the right to a clean environment. Such interests need, however, to be of overriding importance for the public. For other cases, the proposed formulation ensures that – when balancing varying interests – the interest of environmental protection enjoys at least the same importance as economic rights, such as the right to property or the free movement of goods.

7. The right to participation in decision making, the right to access to courts and the right to information in environmental matters are integral part of the right to a clean environment. The explicit mentioning of these rights pays tribute to the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), which needs to be implemented into Community law.

8. Art. 230 par. 4 EC should be redrafted in order to enhance the possibilities of NGO's and other parties concerned to bring to the ECJ an action for annulment of measures affecting the environment. We suggest either to delete the words 'and individual' or to replace the word 'individual' with 'significant' in the said paragraph.
In the light of the recent ECJ judgment of July 25, 2002, in case C-50/00P UPA, the conclusion must be that legal protection against measures of the EU institutions affecting the environment, remains unsatisfactorily. The ECJ itself concluded that the only way to change the current situation is to change the EC Treaty (Art. 230). We suggest this invitation of the ECJ is to be followed.

9. A system of division of powers between the EU institutions and the Member States on the basis of a so called '*Kompetenz-Katalog*' should be avoid. A further strengthening of the subsidiarity principle could also impair the development of European Environmental Law and is therefore also to be rejected.

10. Member States must have the right to maintain and take more stringent environmental measures than the European ones. Articles 176 and 95 4-6 EC must be formulated in a more parallel way. In doing so, the following guidelines should be respected:
    - The distinction between existing and newly introduced measures should be abolished.
    - The Member State has to prove - in case the more stringent standards affect the functioning of the Internal Market that the measures meet the proportionality principle.
    - A review procedure by the Community should be maintained.

11. On the enforcement of European law in general and environmental in particular we suggest to amend the Treaty-infringement-procedure (Art. 226 EC) more similar to the procedure in the ECSC Treaty (Art. 88 ECSC; not longer in force).

The Avosetta Group, Amsterdam November 5, 2002.

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# The Role of EU Institutions and the Influence of Citizens in the Enforcement of EU Environmental Law*

*Prof. Dr. Gerhard Roller*

## 1 Introduction

Different players share responsibility for good enforcement of EU environmental legislation. The following article will focus on the various EU institutions playing a role in enforcement, but we will also ask what individuals can do to improve enforcement.[1]

First of all, it should be noted from a legal point of view that implementation and enforcement of EU law fall within the sphere of competence of the Member States. They have to transpose directives and thus are the first addressees which are responsible for adequate implementation of environmental law; it is thus the Member States' authorities which have to enforce these rules. Consequently, we should also ask what instruments there are at a national level to ensure that EU law is transposed and adequately applied.

On the other hand, the Member States are not the only addressees in terms of EU law implementation. We have to distinguish two different types of law. Firstly, there are traditional regulations and directives, established by the Council and Parliament under the procedures laid down in the Treaty (that is, in most cases today, the cooperation procedure). But, very often, these rules cannot be directly implemented by the Member States, because there are more concrete technical standards and norms needed. In such cases, the Council can confer on the Commission implementing rights pursuant to Article 202 (former 145) of the Treaty. In this context, implementation means that EU legislation needs further rules of application. A lot of examples can be found in all environmental directives. The list of dangerous waste under the Dangerous Waste Directive, the adaptation of environmental standards to the progress of sciences, the conditions governing the use of chemicals, etc., all these rules are not made by the Member States but they are set up by the Commission according to so-called "Comitology procedures". In other words, the Commission is assisted by Committees composed of experts that represent the Member States. In the environmental policy sector alone, there exists 41 so-called Comitology Committees, whose task is to make Council and Parliament directives more concrete.[2] So, if we

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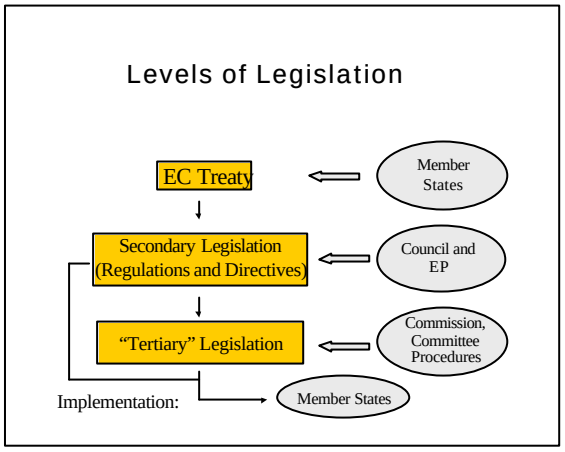
*This contribution is based on a speech given at the EEB Seminar on "New Chances for Better Enforcement of EU Environmental Legislation" held in Brussels, 20 September 2002. The papers of the seminar will be published by the EEB under the title of the EEB seminar.*

[1] The legal meaning of enforcement is not exactly the same as implementation. In the Treaty, both notions are used. Implementation is used in particular where further application rules are needed. From this point of view, implementation has a broader meaning than enforcement. A law is normally enforced (executed, applied in practice) by administrative authorities. But, to be enforced (applied in practice), EU law (e.g. Directives) often needs further (implementing) legislation in the Member States.

[2] For further information on this: G. Roller, La Comitologie – entre efficacité et légitimité démocratique, expériences récentes concernant la Comitolo-

look more closely at the law-making process, we can see that the Commission also plays a very important role in the implementation of EU law by laying down "tertiary legislation".




It is difficult to decide whether these procedures should rather be considered as part of the legislative process or the executive process. The decisions taken under these procedures are often clearly normative, though they are sometimes more executive in nature. Be it as it may, it seems to be clear, that – from an environmental point of view – "good" enforcement of EU law begins quite often with establishing implementation rules in these procedures.

If we turn to the main question of how EU institutions can control the enforcement of EU law in the Member States, we have, of course, first of all to consider the Commission, as it is certainly the most important institution monitoring and controlling the enforcement of EU law in the Member States.

## 2 The Commission

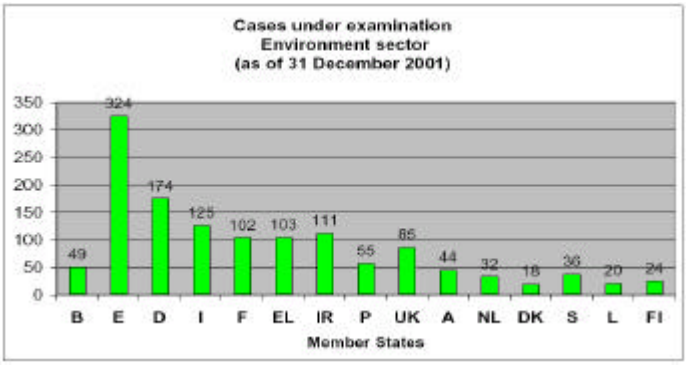
### 2.1 Spheres of competence

Pursuant to Art. 211 of the Treaty, the Commission has to ensure the proper functioning and development of the common market. It shall therefore ensure that the provisions of the Treaty and the measures taken by the institutions pursuant thereto are applied. The Commission thus acts as a "watchdog" for the proper implementation of EU law in the Member States.

### 2.2 Control instruments

In this respect, the Commission has a unique instrument at its disposal: the infringement procedure in accordance with Art. 226 of the Treaty. If any Member State fails to fulfil an obligation under the Treaty, which means any breach of EU law, the Commission can bring this Member State before the Court of Justice. This instrument is rather effective, all the more so since the Court can impose a penalty payment if the issue comes before the Court a second time (Art. 228).

The total number of procedures opened by the Commission in 2001 is about 1,050, which represents a 11.65% reduction compared with 2000. The number of complaints has increased (6.12%). 60% of the proceedings opened by the Commission are based on complaints.




Source: General Report of the Commission 2001

Looking more closely at the environmental field, it is interesting to note that one third of the complaints and infringement proceedings are to be found in the environmental sector. The Commission brought 71 cases before the Court and delivered 197 reasoned opinions to the Member States. That is a 40% increase (which runs counter to the general development trend). The Commission explains this increase *inter alia* by a greater environmental awareness of the public and the fact that people know more about EU environmental legislation and about the existence of the (complaint) infringement procedure. Certainly, this is due partly to the work of environmental associations in Europe.

Detailed further information relating to statistical data on this issue can be achieved by the Nineteenth Annual Report on Monitoring the Application of Community Law (2001).[3]

An infringement procedure can be started for different reasons. The Commission checks

gie dans la politique européenne de l'environnement, Rapport final, CEDRE 2001; A.E. Töller, Komitologie, Opladen 2002.

[3] http://europa.eu.int/eur-lex/en/com/rpt/2002/act0324en01/1.pdf. Regularly updated information can also be found at: http://europa.eu.int/comm/secretariat_general/sgb/droit_com/index_en.htm.

- whether the Member States have notified the transposition measures;
- whether legal measures are in accordance with EU law;
- whether EU law is correctly implemented in practice.

NGOs and EU citizens have the possibility of bringing any breach of law to the Commission, which must decide whether it will open a formal procedure or not. The applicant is informed, but he does not have a formal legal position in the later court procedure. He cannot influence the procedure in a legal sense. But, if the Commission does not deal properly with his complaint, he may complain before the Ombudsman or the EP Petition Committee.[4]

A general advantage of the complaint procedure in comparison with judicial review procedures is the fact that the applicant does not bear any risk in terms of costs. To be admissible, the complaint must relate to an infringement of Community law by a Member State. There is no requirement such as individual concern; individuals can use the complaint procedure as an instrument for objective legal control.

We have to consider this instrument as rather effective, given the fact that 40% of the proceedings opened by the Commission are initiated by complaints.

## 3 The EP Petition Committee

Parliamentary petitions are a traditional instrument to control executive power. The right to bring a petition before Parliament was already enshrined in 1953 in the Statute of the ECCS, but was of lower importance at the time. In 1989 the Commission and the Council put themselves under the obligation of cooperating with Parliament in the field of petitions via an interinstitutional agreement.

Today the legal basis is Art. 194 of the EC Treaty.

**Article 194 (ex-Article 138d) of the EC Treaty**
Any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State, shall have the right to address, individually or in association with other citizens or persons, a petition to the European Parliament on a matter which comes within the Community's fields of activity and which affects him, her or it directly.

The detailed procedure to be applied is laid down in the Rules of Procedure of the European Parliament.[5]

*Who may complain?*

Any citizen of the European Union, and any natural or legal person residing or having its registered office in a Member State.

*On what grounds?*

On the grounds of a matter which comes within the Community's fields of activity and which affects him, her or it directly.

There is no legal standing required in the sense that the petitioner has to be affected in his individual rights. In practice, the Committee is rather soft about proving this condition.

*Which rights does the petitioner have?*

It is considered in legal documents that the EP has to deal with the petition, so it has to decide whether it will act on the issue or not. The Committee may decide, for example, to draw up a report or otherwise express its opinion on the petition (Rule 175 al. 1). The petition has to be registered and the petitioner informed of the decisions taken and the reasons thereof (Rule 175 al. 7). But the petitioner has no means to force the Committee to act according to his views.

The right to petition can be an effective political instrument for enforcement control. Its advantage is that there are only low requirements and that almost every issue that has something to do with EU matters may be submitted to the Committee.

Referring to the EP Resolution of 6 September 2001 about the deliberations of the Committee on Petitions during the 2000 parliamentary year, we learn that the Committee completed the examination of some 500 petitions, relating in particular to social security, the environment, taxation, freedom of movement of persons and recognition of qualifications. The Commission was consulted on virtually all the petitions examined and sent communications to the EP about the various cases.

Parliament noted that the right to petition was an effective means of maintaining contact between citizens and their institutions and emphasised the direct link between the action of the Ombudsman and the work of the Committee on Petitions.

To evaluate the role of the European Parliament, we have to consider that the Petition Committee is not the only Committee that plays a role in enforcement control. The EP Environment Committee is naturally of major importance in this respect. It is regularly informed by the Commission on implementation issues. The Environment Committee and the Commission recently agreed on the handling of implementation issues within the Environment Committee, and especially on the handling of confidential information concerning infringement pro-

[4] A recent example is the Decision of the European Ombudsman on the complaint 1288/99/OV against the Commission.

[5] http://www.europarl.eu.int/home/default_en.htm

cedures.[6] In this respect, the Commission considers that information on infringement procedures should be only transmitted to the Committee if a final decision by the Commission has been taken. Thus, Parliament has no influence on the handling of infringement procedures as long as the file is under examination in the Commission.

## 4 The EU Ombudsman

Another important institution introduced by the Maastricht Treaty in 1993 is the European Ombudsman. It seems that he has become more and more important. The Annual Report of the Ombudsman for 2001 indicates that the Ombudsman dealt with 2,179 cases. Out of this total, 1,874 were new complaints received in 2001. 1,694 of these were directly sent by individual citizens, 83 came from associations and 86 from companies. Four complaints were transmitted by Members of the European Parliament. 301 cases were brought forward from the year 2000. The Ombudsman also started four own-initiative inquiries.

The Annual Report of the Ombudsman for 2001 indicates that during 2001, 29% of the complaints examined appeared to be within the mandate of the Ombudsman. Out of these, 313 met the criteria for admissibility, though 109 did not appear to provide grounds for an inquiry. Inquiries were therefore begun in 204 cases.

Most of the complaints that led to an inquiry were against the European Commission (77%). As the Commission is the main Community organ that makes decisions having a direct impact on citizens, it is normal that it should be the principal object of citizens' complaints. There were 16 complaints lodged against the European Parliament and five complaints against the Council of the European Union.

The Ombudsman's work is carried out in accordance with Article 195 of the Treaty, the Statute of the Ombudsman and the implementing provisions adopted by the Ombudsman under Article 14 of the Statute.

*Who may claim?*

The mandate of the Ombudsman, established by Article 195 of the EC Treaty, empowers him to receive complaints from *any citizen of the Union* or any natural or legal person residing or having its registered office in a Member State.

*On what grounds?*

There are two important requirements to be met. The complaint must concern instances of *maladministration*[7] in the activities of Community institutions and bodies, with the exception of the Court of Justice and the Court of First Instance (CFI) acting in their judicial role.

This is the case if any legal rule is breached but also if there is bad administrative behaviour.[8] In this respect, we can refer to the Charter of Fundamental Rights of the European Union. The Charter includes the right to good administration in its Article 41.

A further requirement, and a major difference with the right to petition, is that the complaint has to be made against a *Community* institution or body. Any maladministration in the Member States cannot be brought before the Ombudsman.

We conclude that a complaint is outside the Ombudsman's mandate if:

- the complainant is not a person entitled to make a complaint;
- the complaint is not against a Community institution or body;
- it is against the Court of Justice or the Court of First Instance acting in their judicial role *or*
- it does not concern a possible instance of maladministration.

If the person is not entitled to make a complaint, the Ombudsman can still decide to make an inquiry on his own initiative.

*Which procedure ?*

All complaints sent to the Ombudsman are registered and acknowledged. The letter of acknowledgement informs the complainant of the procedure for considering his or her complaint and includes the name and telephone number of the legal officer who is dealing with it.

*What other requirements have to be fulfilled?*

- The author and the object of the complaint must be identified (Art. 2.3 of the Statute).
- The complaint must be made within two years of the date on which the facts on which it is based came to the attention of the complainant (Art. 2.4)

[6] Letter from C. Jackson (head of the EP Environmental Committee) of 13 December 2001 and letter of Commissioner Wallström of 5 April 2002

[7] Maladministration occurs when a public body fails to act in accordance with a rule or principle, which is binding upon it.

[8] On 6 September 2001, the European Parliament adopted a resolution approving a Code of Good Administrative Behaviour which European Union institutions and bodies, their administrations and their officials should respect in their relations with the public. The European Parliament's Resolution of 6 September 2001 on the Code also calls on the European Commission to submit a proposal for a Regulation containing the Code of Good Administrative Behaviour, to be based on Article 308 of the Treaty establishing the European Community.

*What can the Ombudsman do?*

- As far as possible, the Ombudsman shall seek a solution with the institution or body concerned to eliminate the instance of maladministration and satisfy the complaint.
- If the Ombudsman finds there has been maladministration, he shall inform the institution or body concerned and, where appropriate, can make draft recommendations. The institution or body so informed shall send the Ombudsman a detailed opinion within three months.
- The Ombudsman has no instrument to enforce a decision.

Further information about the work of the Ombudsman may be found at: http://www.euro-ombudsman.eu.int.

## 5 IMPEL

The European Union Network for the **Implementation and Enforcement of Environmental Law (IMPEL)** is an informal network of the environmental authorities of the EU Member States. It was set up in 1992 in Chester, UK. In its self presentation on the IMPEL website, we can read that

> *"the objectives of IMPEL are to create the necessary impetus in the European Community (including the candidate countries) to make progress on ensuring a more effective application of environmental legislation. The Network promotes the exchange of information and experience and the development of a greater consistency of approach in the implementation, application and enforcement of environmental legislation, with a special emphasis on Community environmental legislation"*[9].

IMPEL provides useful information, draws up reports on various legal issues relating to enforcement (and also other issues such as Access to Justice, Report of May 2000) and it is a tool for coordination of the Member States' authorities. The information it provides could of course also be useful to NGOs. As it is a network, it has no competence in terms of enforcement. Its main field of work is industrial environmental law (pollution, waste, IPPC, EIA, etc.).

The current work programme of the Network can be downloaded from the IMPEL website.[10]

## 6 The Role of Citizens

The role of the public is a crucial one for the enforcement of environmental law. All the institutions, which are monitoring the enforcement of EU environmental legislation, are depending on information provided by citizens and citizens' groups. This is obvious as far as the competences of the EP Petition Committee and the Ombudsman are concerned: without complaints there are no inquiries. But this also holds true to a large extent for the work of the Commission: 60% of the Commission's infringements proceedings are initiated by complaints. A question remains: Are these instruments satisfactory or should they be improved or amended? This question leads us to my last point: the judicial review procedure. It is very clear that the possibility of getting judicial review is the most effective means of ensuring enforcement.

### 6.1 Access to the courts at Member State level

An old proverb says: Well, if no one complains ... But *can* a citizen complain before the courts, does he have access to them?

We have to distinguish the review of Member State decisions and of EU decisions.

In the Member States, the situation is rather different as regards access to the courts in environmental matters. In some Member States (in Germany, for example), there is only very restricted access for environmental associations. In other countries, legislation and the courts are more in favour of citizens or NGO access to the courts. The Aarhus Convention now gives citizens and NGOs a wide access to the courts. So, Member States will have to revise their legislation in the near future.

### 6.2 Access to the European Court of Justice

Regarding access to the European Court of Justice, we have to distinguish two ways: the direct one and the indirect one.

Third parties may get involved in preliminary procedure pursuant to Art. 234 of the Treaty. But apparently the cases dealt with by the European Court are all cases where the NGO concerned was already admitted before national courts. If national law does not provide for access to the court under the referring national legislation, for example because the provisions about *locus standi* are narrowly interpreted as it is the case under German administrative law, there will therefore be no national procedure and no preliminary procedure before the European Court of Justice. So there is a strong link with national laws.

Direct access to the European Court seems to be granted by Art. 230 al. 4. Pursuant to this article, "any natural or legal person may institute proceedings against a decision addressed to that person or against a decision which, although in the form of a regulation or a decision addressed to another per-

[9] http://europa.eu.int/comm/environment/impel/

[10] http://europa.eu.int/comm/environment/impel/

son, is of direct and individual concern to the former".

The problem with this article is that in its interpretation by the European Court of Justice, natural persons or NGOs only have locus standi before the Court if they are individually concerned by the act. This rationale was already put forward by the Court in a 1963 decision[11] and it has become established court practice since then. If the act concerns the plaintiff in a general and abstract way, like any other person in the same situation, the plaintiff is not individually concerned and for this reason his claim is not admissible.[12]

7. As regards, first, the locus standi of the applicants who are private individuals, the Court of First Instance, in paragraph 48, referred first to the settled case-law of the Court of Justice according to which persons other than the addressees may claim that a decision is of direct concern to them only if that decision affects them by reason of certain attributes which are peculiar to them, or by reason of factual circumstances which differentiate them from all other persons and thereby distinguish them individually in the same way as the person addressed (...).

28. As far as natural persons are concerned, it follows from the case-law, cited at both paragraph 48 of the contested order and at paragraph 7 of this judgment, that where, as in the present case, the specific situation of the applicant was not taken into consideration in the adoption of the act, which concerns him in a general and abstract fashion and, in fact, like any other person in the same situation, the applicant is not individually concerned by the act.

29. The same applies to associations which claim to have locus standi on the basis of the fact that the persons whom they represent are individually concerned by the contested decision. For the reasons given in the preceding paragraph, that is not the case.

**Judgment of the Court of 2 April 1998, Greenpeace v. Commission, Case C-321/95 P., ECR 1998, Page I 01651.**

For only few weeks, there was some light in darkness, however. A very recent decision of the Court of First Instance (CFI) has broken with the established court practice of a very narrow interpretation of the notion "individually concerned". The court held that in order to ensure effective judicial protection for individuals, a natural or legal person is to be regarded as individually concerned by a Community measure of general application that concerns him directly if the measure in question affects his legal position, in a manner which is both definite and immediate, by restricting his rights or by imposing obligations on him. The number and position of other persons who are likewise affected by the measure, or who may be so, are of no relevance in that regard.[13] Unfortunately, this brave decision has meanwhile been overruled by the Court in a similar case[14]. The court sticks to its overcome interpretation without really taking into consideration the arguments of the CFI.

| | **Commission** | **Petition Committee** | **Ombudsman** | **Court of Justice** |
|---|---|---|---|---|
| Complaint against MS Institution | yes | yes | no | Depends on national law |
| Complaint against EU Institution | no | yes | yes | If individually concerned |
| Cost risk | no | no | no | yes |

We must conclude that there are no means of getting judicial review if the plaintiff is not individually concerned in the above-mentioned sense. This is true, for example, for subsidies as is shown in the Greenpeace case or in any other case where an environmental NGO considers that EU implementation measures – for instance, market conditions for chemicals or GMOs – are not strict enough.

Only an amendment of the Treaty itself could change the situation, a vision that is quite unrealistic, even though in the framework of the deliberations of the Convention, this issue has been put on the Agenda by the Green Party and environmental associations such as the EEB and others has also urged on several occasions a "Greening of the Treaty" in this sense.

[11] Case 25/62 Plaumann v. Commission [1963] ECR 95.

[12] This narrow concept was also used in the Mururoa case, Danielsson et al. vs. Commission, see on this: Deimann, Elni Newsletter 1/1996, p.48.

[13] Court of First Instance (First Chamber, Extended Composition), 3 May 2002, T-177/01.

[14] Unión de Pequeños Agricultores, C-50/00 P, 25/7/02.

# Synergies between the Emissions Trading Proposal and the IPPC Directive

*Mercedes Fernández Armenteros*

## Introduction

The Emissions Trading (ET) Directive proposed by the EU Commission in October 2001[1] has provoked an array of questions derived from the novelty character of this instrument in the realm of EU environmental policy. Chiefly, the concerns raised by different actors – national decision-makers, industrial sector as well as NGOs – are rather the consequence of a lack of full understanding of the rationality of the system imbedded in the Directive, which is in turn due to the particular complexities and technicalities associated with a system of emissions permits. Among the various issues which have been the object of debate, the compatibility between the Integrated Pollution and Prevention Control (IPPC)[2] and the proposed Emissions Trading Directive has attracted a particular interest. With the purpose of eliminating any possible doubt regarding the way in which the IPPC and the ET Proposal complement each other, the Commission issued in January 2002 a Non-Paper on Synergies between the EC Emissions Trading Proposal (COM(2201)581) and the IPPC Directive.[3]

This short note intends to offer an overview of the most contentious items regarding the synergies between the IPPC and the proposed ET Directive.[4] Equally legal issues about the compatibility between both instruments will be raised if it is only to advance some of the juridical challenges with which environmental authorities will be confronted when implementing simultaneously both directives. While the interrelationship between both directives will in the future cover several legal spheres, only two areas will be the object of this note:[5] 1) compatibility of permits and 2) energy efficiency and emissions limits issues.

## Energy Efficiency and Emissions Limits Issues

At the outset it should be clarified that whereas the scope of application of both directives is not fully coincident, the Emissions Trading proposal will apply to most of the greenhouse emitting activities already covered by the IPPC directive, these activities being listed in Annex I of the ET proposal.[6] As for the substances covered, the term "pollution" included in Article 2 of the IPPC Directive is defined in a very large sense and although greenhouse gas emissions are not explicitly comprised, such a large definition encompasses as well those gases. This explains why the ET proposal directive also involves an amendment of the IPPC directive intended to exclude carbon dioxide and other greenhouse gas emissions from the scope of the IPPC insofar as they are regulated under an ET programme.

A logical consequence in order to allow the Emissions Trading Directive to deploy its full economic and efficiency effects is the modification of Article 9.3 of the IPPC directive as put forward by Article 25 of the proposed ET directive in the sense that

> *"whenever emissions of a greenhouse gas from an installation will be covered by the emissions trading scheme, the IPPC permit relating to the installation at stake will not require any limit on its emissions of that greenhouse gas unless it is necessary to ensure that no significant pollution is caused".*

While Article 25 removes greenhouse gases from the IPPC gases submitted to an emission limit value, that should not lead to think that the proposed ET directive involves a "deregulation". Rather the Emissions Trading Directive strengthens to a large extent the control on $CO_2$ and other greenhouse emissions since Member States' implementation of the IPPC directive has so far ignored the inclusion of $CO_2$, other greenhouse gases and energy efficiency aspects within the integrated permits that Member States have issued for implementing the Dir. 96/61. Most probably such an omission might be owed to the imprecision of the

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[1] Proposal for a Directive establishing a framework for greenhouse gas emissions trading within the European Community and amending Council Directive 96/61/EC, COM (2001) 581, 23.10.2001.

[2] Directive 96/61 EC of 24 September 1996 Concerning Integrated Pollution Prevention and Control, OJ L 257/26 10.10.96. Hereinafter, Directive. 96/61 or IPPC directive.

[3] Non-paper 22.1.02. Hereinafter Non-Paper

[4] For a comprehensive analysis of the ET proposal and its generation see: J. Lefevere, Greenhouse Gas Emission Allowance Trading in the EU: a Background, to appear in the next issue of Journal of Environmental Law.

[5] For discussions about the compatibility between the Emission Trading Programme and the German Legislation see for instance: Luftbewirtschaftung durch Europäischen Emissionshandel, Freshfields Bruckhaus Dringer, Februar 2002; H-J Koch & A. Wieneke, Klimaschutz durch Emissionshandel: Das Europäische und Deutsche Anlagengenehmigungsrecht als Ordnungsrahmen, Vol. 116 DVBL, 2001, 1085-1160.

[6] Combustion installations over a threshold of 20 MW are included into the ET proposal.

IPPC directive regarding energy efficiency requirements (Article 3 IPPC Directive) and greenhouse emissions reductions constraints.

The inaccuracy of the wording of Article 25 of the proposed ET led several actors – including Member States – to request the Commission for clarification.[7] Basically, the Commission through the Non-Paper explained that the imposition of an emission limit value – as it would be required by the IPPC Directive – would eliminate the possibilities of trading as that would prevent operators to increase its greenhouse gas emissions. Furthermore, one should keep in mind that $CO_2$ does not cause local pollution. Yet, other greenhouse gases – $CH_4$, $N_2O$, HFCs, PFCs and $SF_6$ –, which in the future will be included into the emissions trading, might have local effects. In this last case, Article 25 adds that Member States shall include emissions limit values from those gases into the IPPC permit in order to avoid significant local pollution. Accordingly, as the Commission explained also in its Non-Paper, in case of significant local pollution, operators will continue to be able to participate in emissions trading but without the possibility of increasing emissions above the emissions limit values included into the IPPC permit.

It is clear that through Article 25 the Commission intended to guarantee a high level of environmental protection. Nevertheless, Article 25 presents certain deficiencies. First of all, Article 25 only refers to greenhouse gases, whereas substances or gases other than greenhouse gases might be intimately related with the emission of greenhouse gases and originate as well local pollution effects. This problem appears for instance when the emission of a greenhouse gas is directly associated with the emission of other substances/gases. If the emission of a greenhouse gas automatically implies the increase of another regulated substance, or to the contrary, if the decrease in emissions from a substance is followed by the increasing of a greenhouse gas, there will automatically be a conflict of environmental laws. Such a discordance is not, however, exceptional, and as a matter of fact implementing authorities are frequently exposed to this kind of situations and trade-offs among environmental regulations.

Thereby one could foresee conflicts of that kind when the Emission Trading Proposal will enter into force in parallel with the IPPC Directive. In addition, the broad discretion and flexibility retained by Member States both under the IPPC and the proposed ET Directive in the implementation process might accentuate the above described problem. Indeed, according to Article 9.4 of the IPPC Directive, Member States should fix emission limit values for pollutants based on the Best Available Techniques (BAT) taking due considerations of the technical characteristics of the installation, its geographical location and the local environmental conditions, these last requirements giving a large margin of discretion to Member States. As far as the ET Proposal Directive is concerned, it does not include the concept of Best Available Technology, but one should consider the Report by the EU Parliament[8] which in its amendment 42 upon the allocation criteria called for the allocation of allowances being based on the benchmarks derived from reference documents relating to the BAT. Equally, Annex III of the proposed ET Directive referring to the criteria for national allocation plans provides for very flexible guidelines and concepts such us the consideration of technological potential of installations.

All that simply means that both directives will be differently implemented in different Member States, and that in case of conflicting points between the IPPC and the ET environmental authorities will dispose according to both directives of a large discretion to decide about the environmental trade-off to be undertaken. In this respect, an illustrative example is the English case, in which the regulator (Environmental Agency) in its Horizontal Guidance Note, IPPC H2 – Integrated Pollution Prevention and Control IPPC, Energy Efficiency[9] - has shed light on the integration of the UK Emission Trading program within the energy efficiency requirement by stating that:

> *"Nothing in a Climate Change Agreement or Trading Agreement will prejudice any other requirement. In the case of trade-off between increased energy consumption and improvement of other environmental objectives the Operator should undertake an environmental assessment, taking into account the costs and environmental benefits, to justify the selection of the BAT for prevention and minimising pollution to the environmental as a whole".*

[7] Art. 25 of the proposed ET directive:
In Art. 9(3) of the Directive 96/61 the following sub-paragraph is added:
Where emissions of a greenhouse gas from an installation are specified in Annex I to Directive / /EC of the European Parliament and of the Council [establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC) in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emission of that gas (unless it is necessary to ensure that no significant pollution is caused). Where necessary, the competent authorities shall amend the permit to remove the emission limit value".

[8] Parliament Report on the proposal for a European Parliament and Council directive establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC, A5-0303/2002, 13-09-2002.

[9] Horizontal Guidance Note, IPPC H2 - Integrated Pollution Prevention and Control IPPC, Energy Efficiency, January 2001, Environmental Agency.

Thus, the English regulator admits the eventual emergence of trade-offs and proposes a procedural method to be used before by the operator, namely, to undertake an environmental assessment. From another point of view, it might become as well problematic how Member States will implement the term "*significant pollution*" embedded in Article 25. Nevertheless, it should be noticed that the European Court of Justice can carry out as a last resort a judicial control over the way Member States implement both directives, and as a consequence indeterminate concepts like BAT, significant pollution or the criteria for national allocation as included in Annex III of the Directive will be fully scrutinized by the judicial control of the ECJ.

Together with emission limit values energy efficiency emerged as another overlapping area between ET and IPPC. Article 2 of the ET proposal incorporated a paragraph 2 according to which the ET Directive "*will be without prejudice to any requirement pursuant to Directive 96/61 that relate to energy efficiency*". As one should know, energy efficiency is one of the factors to be included by state authorities into the integrated permit according to Article 3 (d) of the IPPC Directive[10]. As enlightened by the Commission Art. 2 of the ET proposal would involve that the IPPC establishes a common level of effort for the efficient use of energy, which in any case must be carried out by every operator. Although the Commission insisted in its Non-Paper that this bottom line for energy efficiency should not create big concerns, in the recent Council of the EU[11] the reference to energy efficiency was removed from Article 2 as suggested as well by the opinion of different Committees within the EU parliament reading. The question remains then which are those basic efficiency criteria and in which way Member States – if ever – have considered efficiency criteria when issuing IPPC emission permits. It seems that IPPC permits as emanated from different Member States' authorities have often overlooked efficiency criteria and when energy efficiency were considered different requirements were imposed by Member States.[12]

Additionally, energy efficiency and emission limits as required by the IPPC on greenhouse gases recover much more of their significance in view of the recent Council's political agreement on the ET Directive that embraced the possibility of temporary exclusion of certain installations (Article 25 (a)). In a parallel modification the Council amended Article 25 of the Commission's proposal by integrating a fourth paragraph stating that, in case of temporary exclusion, Article 9.3 of the IPPC Directive will fully apply.[13] That means that whenever there is an exclusion of certain installations from the Community's Greenhouse Gas Emission Trading Programme, Member States will need to consider all requirements included in Article 9.3 when limiting emissions through national policies.

It could also be possible that IPPC BAT determinations could provide benchmarks that may help resolve the issue of initial allowance allocation. The interest of this scenario lies in its use of information generated by the IPPC process to facilitate a trading scheme. Furthermore, although the regulatory cultures and traditions of each Member State will have an important influence on how each Member State interprets and implements the IPPC Directive,[14] the

[10] On how the implementation of IPPC energy efficiency requirements could constrain or facilitate the participation of regulated emissions in any trading scheme and presenting different scenarios, see: A. Smith and S. Sorrell, Interaction between environmental policy instruments: carbon emissions trading and integrated pollution, Vol. 15 N. 1, International Journal of Environmental and Pollution, 2001, pp. 22-41.

[11] Council of the European Union, Brussels, 11 December 2002.

[12] For instance in Germany, the IPPC directive was integrated into German law in its Federal Law on Immissions (BImSchG). Its Art. 5 includes the conditions that all installations must fulfil. Whereas in the old law the requirement to use heat was included, in the new law this requirement was eliminated and the new requirement to use energy efficiently and energy saving manner was introduced. (Art. 5.4 Pflichten der Betreiber genehmigungsbedürftiger Anlagen: ...Energie sparsam und effizient verwendet wird). In other national juridical orders such an explicit reference is lacking. On this issue see: Interaction in EU Climate Policy, German policy context - other climate policy instruments, http://www.susx.ac.uk/spru/environment/research/wp5germany.pdf.

[13] Art. 25 modified by the Council reads: In Article 9(3) of the Directive 96/61/EC the following sub-paragraphs are added: Where emissions of a greenhouse gas from an installation are specified in Annex I to the Directive / EC of the European Parliament and of the Council (establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC) in relation to an activity carried out in that installation, the permit shall not include an emission limit value for direct emissions of that gas unless it is necessary to ensure that no significant local pollution is caused. For activities listed in Annex I of Directive / /EC Member States may choose not to impose requirements relating to energy efficiency in respect of combustion units or other units emitting carbon dioxide on the site:
Where necessary, the competent authorities shall amend the permit as appropriate. The three preceding paragraphs shall not apply to installations temporarily excluded from the Community greenhouse gas emissions trading scheme in accordance with Art. 25 (a) of the Directive / /EC.

[14] In England the Horizontal Guidance Note: IPPC H2 Integrated Pollution Prevention and control (IPPC) Energy Efficiency, Environment Agency England, January 2001 provides information on the interface between IPPC and Emissions Trading.
In England, all IPPC installations have to meet the initial energy efficiency requirements. At this point the regulations diverge. The sector guidance notes outline a number of other areas for improving process efficiency for organisations not covered by separate agreements with the government. These cover the full range of energy efficiency techniques available to industrial installations from design considerations through the selection of energy efficient equipment to options for energy supply. However, organisations that are included in a climate change agreement are not covered by these requirements. Neither are installations taking part in the new carbon trading schemes. Instead, they have a target for efficiency improvements, negotiated with DETR (now DEFRA). These provide for a specified improvement in efficiency over a 10-year period, with biennial reviews. Such agreements are not regulated by the environment agencies: indeed, the Agency guidance does not say: The regulators will not enforce any part of the climate change agreement or trading agreement. The government says that this will ensure installation-specific basic energy requirements are delivered, while allowing industry the flexibility of

interpretation of the energy efficiency requirements in the BREFs (BAT reference documents) notes may restrict the scope for Member States competence[15]. That is why it will be important to be attentive to the way in which BREFs will include basic energy efficiency requirements.

Finally, one should also bear in mind that, as some authors have suggested despite the fact that energy efficiency relates intimately to carbon savings, energy efficiency can generate beneficial policy outcomes greater than carbon savings alone. In the industrial sector more efficient energy use nevertheless reduces other pollutants (such as substances and sulphur) and it reduces risks related with security of energy supply. So energy efficiency gains are not directly interchangeable with carbon savings.[16]

## Permitting Procedures

As in the IPPC Directive, the central concept of the ET proposal rests on the concept of a "permit" (Article 4 of the ET proposal) which will include an obligation for the operator to hold allowances equal to the actual emissions as well as to fulfil his obligations in terms of monitoring and reporting of emissions.[17] Through the comparison of both directives it can be observed that those articles related with the permit follow a parallel structure and logic: permits, application for permits, conditions for and contents for the permit. Thereby from a procedural point of view both instruments are designed according to the same logic and as such they are, or at least should be fully compatible.

Probably the most significant aspects regarding the permitting procedure is that the proposed ET Directive not only allows but also encourages Member States to design the ET permit upon the already existing permitting procedures under the IPPC Directive (12 Explanatory Memorandum). In this sense Article 8 of the proposed ET Directive states that not only

> *"…Member states shall take the necessary measures to ensure that …the conditions of, and procedure for, the issue of greenhouse gas emission permit are fully co-ordinated with those for the permit provided for in that Directive (IPPC Directive)",*

but equally that Member States

> *"may fulfil the requirements pursuant to Art. 5, 6 and 7 through a single procedure in accordance with Directive 96/61".*

In other terms, requirements upon an application for permits, conditions for and contents of the permit as well as changes to installations can be linked to those required by the IPPC Directive under a single process.

The wording of the article might lead to think that the co-ordination in the issue of permits under both directives has an imperative character. Yet that seems improbable. One the one hand, from the Explanatory Memorandum it can be deduced that the ET proposal seems to give a large margin of manoeuvre to Member States concerning the co-ordination of permits since, as declared in point 12, Member States could for instance decide whether the permitting authority will be the same or whether the permits might be issued in a single or multiple procedure. The same procedural flexibility is reflected in the Non-Paper on Synergies in which the Commission declares that Article 8 does not oblige to combine both procedures. Thus, although the combination is not required Article 8 seems to require the "co-ordination" of both permits. That would mean according to the Non-Paper that, for instance, the compulsory consultation of the IPPC competent authority before issuing an ET permit is required. Indeed Article 8 calls for an extension of the "integrated approach" set forth in Article 7 of the IPPC Directive.[18] In this respect, it would interesting to analyse the way in which national authorities have implemented the integrated and co-ordinated approach of Article 7 of Dir. 96/61 to anticipate how and to which extent there will appear an effective co-ordination of permits between IPPC and ET Directives. Unfortunately, few data exist so far upon the approach adopted by Member States

delivering the additional requirement I as the most effective cost way. See for a detailed study of the synergies between the Emission Trading system and other policy instruments in the UK, Adrian Smith, UK Policy context - non trading climate policy instruments, SPRU Project, October 2001. http://www.susx.ac.uk/spru/environment/research/wp4ukfinal.pdf.

[15] To help Member States with the implementation of the IPPC directive, the EU Commission settled the European IPPC bureau based at the Joint Research Centre in Seville. The IPPC bureau is responsible for co-ordinating and publishing a series of BREF documents which provide technical information and benchmark emission levels for industrial processes. These BREFs are intended to assist the licensing authorities to assess BAT.

[16] A. Smith, Steve Sorrell and Jim Watson, The EU Climate Policy Context: Interaction in EU Climate Policy, August 2001 SPRU, p.46, see also http://www.susx.ac.uk/spru/environment/research/interact_final.pdf "Because obligated efficiency measures meet wider policy objectives than just carbon savings, it appears undesirable for under-complying target groups to meet a shortfall in their energy efficiency obligation by buying from a carbon permit market".

[17] For a clear exposition of the conception of the IPPC see, N. Emott, An Overview of the IPPC directive and its Development, p. 23-43 in Integrated Pollution Prevention and Control: The EC Directive from Comparative Legal and Economic Perspective, ed. Chris Backes and Gerrit Betlem, Kluwer International, 1999.

[18] Art. 7 Dir. 96/61 "Member States shall take the measures necessary to ensure that conditions of, and procedure for the grant of, the permit are fully co-ordinated where more than one competent authority is involved, in order to guarantee an effective integrated approach by all authorities competent for this procedure."

for a fully integrated permit, due to the fact that the IPPC permit only applies for the time being to new installations and the fact that the transposition of the IPPC Directive into national law has been delayed due to the complexity of the directives itself and also to limitations of resources.

As it is also the case with Dir. 96/61 the proposal for an ET Directive does no specify a whole list of commandments to be abide for by Member States. For instance, there is no stipulation regarding the frequency or interval of permit reviews. In such a respect it would be desirable that the review of IPPC permit and the ET permit should take place in parallel.

Eventual difficulties might also emerge with the interpretation of Article 6 of the proposed ET Directive.[19] Does Article 6 have a coercive nature in the sense that national authorities are positively obliged to issue a permit? Could it be interpreted, for instance, that the silence of the administration before the operator's application amounts to a tacit authorisation? Although this problem might appear in those administrative legal systems which accept tacit authorisations – authorisations considered to be granted in case the administration does not react within a certain period of time –, this issue has recently been examined by the ECJ in a case against Belgium concerning environmental authorisation regarding the Environmental Impact Assessment Directive, in which the Court has clearly declared that tacit authorisation cannot be compatible with those directives prescribing prior authorisation or grant of authorisation, since national authorities are "required under each of those directives to examine individually every request for authorisation".[20] Such an ECJ decision would imply that Member States' authorities should issue individual permits after having investigated every single request for a permit and the monitoring and reporting conditions included in the guidelines to be adopted in developing Art. 14 of the proposed Directive.

Questions about the co-ordination between particular interval permit reviews as well as the equivalence of terminology in concepts such as "installations" should be the object of analysis. Equally, it should be interesting to explore the concept of change in Article 7 of the ET proposal and whether such a "change" corresponds to the definition of change (Article 12.1) or substantial change (Article 12.2) as settled in Dir. 96/61.[21]

Aiming at procedural efficiency, the Commission's proposal has inserted the co-ordination clause in order to eliminate as far as possible the overlapping of administrative procedures for those installations subject to permits under both directives. Nevertheless, none of the directives fixes the exact procedural mechanisms of such a co-ordination which implies that Member States will be competent for such a procedural design and for its integrating within their national administrative traditions. Thus, the remaining question is to see to which extent the implementation of Dir. 96/61 and the proposed ET Directive by national authorities will foster the compatibility between permits or, on the contrary, the co-ordinated approach will be limited to a simple assemblage of concrete data and information.

Both Directives 96/61 and the ET Directive proposal include an equilibrated balance of substantive and procedural environmental law. While the Directive on Emissions Trading provides for flexibility in the way Member States should achieve their greenhouse emissions reductions, there is not doubt that the ET Directive proposal has increased the debate on the regulation of greenhouse gases and energy efficiency at least if compared with the lack of relevance of both issues under the Integrated Pollution and Prevention Control Directive. Yet, in the end the question will be to what extent the implementation of both directives by national authorities will foster synergies between permits.

[19] Art. 6 Emissions Trading Dir. Proposal : "The competent authority shall issue a greenhouse gas emissions permit if it is satisfied that the operator is capable of monitoring and reporting emissions in accordance with the guidelines adopted pursuant to Art. 14".

[20] C-230/00, 14 June 2001, paragraph 16.

[21] The IMPEL study: "The changes in industrial operations", Helsinki 200, p.141, shows the differences in the interpretation of Art. 12 of the IPPC Directive by Member States. For instance, whereas in the Netherlands there are three kinds of changes, in Denmark a change in operation is not defined as such and in the UK the two-split definition of the concept of change (change and substantial change) in Art. 12 of the IPPC Directive was problematic to be accommodated within the three categories concepts existing into the legal system. The study displays as well the differences in national legislation regarding the obligation of notification from the part of the operator in case of change.

# A Report on the Eighth Session of the Conference of the Parties

*Frédéric Jacquemont*

The eighth Session of the Conference of the Parties (COP 8) to the United Nations Framework Convention on Climate Change (UNFCCC) took place in New Delhi, India, from October 23 to November 1, 2002, together with the seventeenth session of the Subsidiary Body on Scientific and Technological Advice (SBSTA) and the Subsidiary Body on Implementation (SBI).[1] COP 8 was primary about the implementation issues of the UNFCCC, and on secondary issues left open by the Marrakech Accords on the rules for the implementation of the Kyoto Protocol (KP), which is not yet into force.[2] Beyond this formal and technical agenda a vigorous debate over next steps in the development of the future climate change regime took place that underlined fundamental divergent positions between developed and developing countries. The Indian presidency's objective was to make adaptation to the adverse effects of climate change the core issue of this COP. However, it did not have a clear strategy on how to address this issue, although through the G77/China Group, India pushed the idea of adopting an additional adaptation Protocol, and setting this process within the final declaration.

Meanwhile, growing opposing views and tension mainly between Northern and Southern countries on how to address adaptation could be perceived during the two weeks, which affected negotiations on other issues as well. Some developed countries, especially the European Union (EU), wanted to link adaptation and mitigation measures together as being the two sides of the same coin, while developing countries claimed that mitigation and adaptation are separate issues, mitigation applying to developed countries and adaptation applying to developing countries. The peak of this harsh discussion was reached during the last negotiations on the Delhi Declaration, a political statement meant to reflect consensus among the parties. When Mr. Baalu, the Indian President of the Conference, initiated a draft declaration that stressed adaptation, sustainable development and implementation by developed countries of their commitments under the UNFCCC, without mentioning the KP, and any future commitments, most of Annex I countries, with the notable exception of the United States (US), questioned his presidency leadership.

Despite the adoption of a revised Delhi Declaration, several countries expressed dissatisfaction with the COP-outcome. On the one hand, the EU, which gained the introduction of a mention calling Parties to the UNFCCC to ratify the KP within the final draft of the Delhi Declaration, together with Canada, Japan, the Eastern European Countries (CG-11) and the Small Islands Developing States (AOSIS) stated disappointment as the Declaration failed to respond to IPCC's Third Assessment Report conclusions on global warming and on future mitigation actions. Environmental NGOs echoed the same discontent, while the business sector showed satisfaction regarding the development of simplified modalities and procedures for Clean Development Mechanism (CDM) small-scale projects, and was gratified for its key role in technology development by the UNFCCC Executive Secretary and several ministers during COP 8.[3] On the other hand, the G77/China led by the OPEC countries together with the US, plainly supported the Delhi Declaration as being well balanced and reflecting the needs of the developing countries.

## The OPEC-US Axe

A special mention deserves the roles played by the US together with the OPEC countries, as Venezuela had the presidency of the G77/China. The US has adopted a low profile during the two last climate change negotiations in Bonn and Marrakech, which were focused on the adoption of KP's regulations, since President Bush rejected the KP. During

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[1] The conference of the parties to the UNFCCC operates as the ultimate body for adopting decisions and regulations under the Convention, while the SBSTA provides the COP with timely information and advice on scientific and technological matters relating to the Convention . It serves as the link between information and assessment provided by expert sources on one hand, and the policy-oriented needs of the COP on the other hand. The SBI is more administrative oriented by working on budgetary, scheduling, and other practical matters that are essential to keep the Convention process on track. Also, it plays a key role in helping with the assessment and review of the Convention's implementation, such as examining the national communications and emissions inventories that Parties submit.

[2] See Mercedes Fernández Armentero: "An overview of the Marrakech Agreement", elni Review No. 2/2001, p.32.
To date, 96 Parties to the UNFCCC have ratified the KP, including Annex I Parties accounting for approximately 37,4% of the $CO_2$ emissions of Annex I Parties in 1990, when 55% of $CO_2$ emissions from Annex I Parties are needed for the KP to enter into force. The entry into force of the KP hinges on the Russian ratification.

[3] The CDM, one of the Kyoto Protocol's flexibility mechanisms, allows developed countries to meet their emission targets in part with certified emission reductions (CERs) generated through emission reduction and sinks projects in developing countries.

COP 8, the Americans surprisingly came back on the stage, playing a new and artful negative role within the negotiations process as a party to the UNFCCC. Above all, during the negotiations on the Delhi Declaration, the American delegates made a sudden change of opinion from their historical position of broadening commitments for developing countries. The US, after having repeatedly emphasized the lack of developing countries commitments for its rejection of Kyoto Protocol, adopted an astonishing statement declaring that *"it would be unfair (…) to condemn developing nations to slow growth or no growth by insisting that they take impractical and unrealistic greenhouse gas targets"*.[4] It became clear that the US favoured a weak text that undermined future steps in climate change mitigation regime.

This turn in the American attitude was expressly thanked during the closing plenary by Nigeria, an OPEC country, which considers the KP as an impediment to its economic interests. Beyond the Delhi Declaration, it was certain that the US, a non-party to the KP, feared to lose any influence on the KP process. Thus, it claimed for more transparency regarding the possibility for observers of attending certain meetings. US delegates unexpectedly pushed for new procedures for notification and participation in intercessional workshops and expert bodies. Furthermore, they asked for a better attendance of observers at CDM Executive Board meetings. This attitude put environmental NGOs in an awkward position. NGOs traditionally request a better transparency within the negotiation process. However, they could not back this American proposal knowing perfectly that it was rather an attempt to slow down the dynamic of the working process of such bodies´ meetings than a genuine demand for more transparency and participation on the American side. The US also interfered in other KP issues, such as opposing the new Canadian proposal that requested an analysis of the role of trade in cleaner energy in meeting the objective of the UNFCCC and the KP. This other change of attitude from the US was also surprising, since at the SBSTA-16 meeting in Bonn last June, the US did not contest the original Canadian proposal to gain credits for exporting cleaner energy to a non-party to the KP, namely the US. Again, one may speculate that the US was trying to discourage the Canadian ratification of the KP. Meanwhile, OPEC countries led by Saudi Arabia hampered substantive conclusions on policies and measures, adaptation to adverse effects of climate change, and clean energy exports, in linking constantly these items with the issue of the adverse economic effects of mitigation measures. This attitude triggered a strong opposition from the EU, blocking the whole process, while there was too little resistance within the G77/China to this position. There was an obvious axe between the US and the OPEC countries that aimed to undermine the climate change negotiation process. In addition, the change of attitude of the US towards future commitments that pleased India and China, gave the sentiment that they were building a new coalition. As a result, parties often stuck to hard positions and made little significant progress. Many issues were deferred for further consideration at future meetings.

This short analysis will review the content of the Delhi Declaration and other controversial COP 8 outcomes.

## The Delhi Declaration

After a harsh political discussion dominated by the issue of future commitments, the Delhi Ministerial declaration on Climate Change and Sustainable development, as adopted, states the following:

- Parties that have ratified the KP strongly urge others to do so in timely manner.
- It refers to the IPCC's Third Assessment Report that confirms significant cuts in global emissions will be necessary to meet the Convention's ultimate objective.
- All parties should continue to advance the implementation of their Convention commitments, and developed countries should demonstrate that they are taking the lead in modifying long-term emission trends according to Parties' common but differentiated responsibilities principle.
- Calls for policies and measures specific to each country's condition, development priorities and circumstances.
- Economic and social development and poverty eradication are the overriding priorities of developing countries.
- It recognises adaptation to adverse effects of climate change as a high priority, exchange of information on climate change impacts, and implementation of response measures to enable countries, and in particular the least developed countries and small island countries, to adapt to the impacts of climate change.
- Actions are required to develop cleaner, more efficient and affordable energy technologies, including fossil fuel and renewable technologies, and technology transfer.

[4] American chief negotiator Harlan Watson's statement at COP Plenary on Friday, 25 October 2002, see ENB COP 8 Final, 4/11/02 at http://www.iisd.ca/linkages/climate/cop8/.

- Actions are required, with a sense of urgency, to substantially increase the global share of renewable energy sources.
- It stresses the need for Annex II developed Parties to implement their financial obligations.

As the environmental NGOs stated that this declaration just recycles the text of the Johannesburg Plan of Implementation of Sustainable Development that already called for greenhouse gas emission reductions, ratification of the KP, provision of technical and financial support and capacity building, ensuring energy access and increasing share of renewable energy resources. It just confirms that the world community in order to achieve sustainable development should implement climate change objectives. This affirmation is balanced by the wording stating that the implementation of climate change objectives should depend on each country's economic and social features without impeding economic growth, which is the overriding priority of developing countries. This means that no additional burden of emissions cuts on developing countries are foreseeable in the next future until developed countries have demonstrated tangible emission reductions results.

Regarding future commitments as stated before, there was a surprising reversal of roles by the EU and the US, with the former pressing the question of future steps and the later stating such a discussion premature. The attempt of the EU to shape the Delhi Declaration in order to initiate a formal process on broadening future commitments faced massive opposition from the G77/China supported by the US. The EU, echoed by Australia, Canada and Japan, specified that it was not talking about imposing emission reduction targets on developing countries but, rather starting a process for a more inclusive, broader and balanced participation in a future climate change regime. Within the G77/China, the AOSIS group responded favourably to the inclusion of such a request in the Delhi Declaration. However, the OPEC countries, Brazil, China and India, imposed their view within the G77/China.. Also, the European attempt confronted with the Indian idea of an adaptation protocol within the Delhi Declaration, an idea that was opposed by AOSIS within the G77/China, but the Indian presidency of the COP kept pressing the issue of adaptation. Finally, the Delhi Declaration, as a compromise, just refers to the Third Assessment Report conclusions while no concrete additional measures were taken on adaptation as a result of this conflict. On this item, and in order to weaken the OPEC voice within the G77/China, the EU would have to convince the Low Developing Countries and Brazil that it is in their interests to be involved in such a process by starting an active dialogue with them, and by fulfilling their technology, capacity building and funding obligations.

## Funding

At COP 7, parties decided to replenish the Global Environmental Fund (GEF) and to establish three new funds, the Special Climate Change Fund and the Least Developing Countries Fund, both under the Convention, and the Adaptation Fund under the KP, to assist developing countries in meeting their Convention commitments, while some developed countries will contribute up to $ 410 million.[5] Furthermore, it was decided that additional guidance to the GEF for managing these new funds should be adopted. During COP 8, concerns were raised by developing countries regarding the condition criteria for GEF funding which delays disbursement of funds for projects. They pressed for a greater effectiveness of existing funds to implement adaptation projects, the adoption of detailed guidance to the GEF on two of the new funds for a prompt start and, for regular contributions to the funds. It was recognised that there was possible inconsistencies between COP guidance to the GEF and GEF decisions on funding modalities. However, developing and developed parties could not agree on the priorities for the guidance' s modalities.

Concerning the Special Climate Change Fund, the adoption of guidance is postponed to COP 9, and GEF current operational procedures would apply until adoption of additional guidance. The provisional decision promotes complementarity of the funds, but ensures financial separation from other funds.

As regards the LDC Fund, parties agreed on additional guidance that request a speedy release and disbursement of funds to assist LDC in preparing their national adaptation programs of action and the organisation of four regional workshops on the advancement of the preparation of their national adaptation programs of action.

Parties requested that the UNFCCC and GEF secretariats undertake a comprehensive assessment of developing countries needs and submit a report at the SBI-20 meeting (in summer 2003). It also requests GEF to review its project cycle with a view to making it simpler and more efficient and to initiate its third review of financial mechanisms at the next SBI-21.

[5] Namely the EU, Canada, Iceland, New Zealand, Norway and Switzerland.

## Communication from Non-Annex I Countries

The UNFCCC requires developing countries with funding support from developed countries through the GEF to submit national communications detailing their emissions by source and removal by sinks, as well as steps they are taking to meet their Convention requirements. As many developing countries did not yet submit their initial reports, discussions on improved guidelines for Non-Annex I countries took place at this COP.

Developing countries, especially LDC, presented their difficulty in preparing their national communications, and claimed for a less stringent and a more transparent financial support. While GEF representatives expressed concern about the inestimable funding requirements of the proposed guidelines, the EU, supported by Canada, pressed for stronger guidelines with the publication by LDC of their national 'adaptation programmes of action' in order to assess and compare their needs, with the view of tying adaptation finance resources and technology transfer to the completion of national communication. Furthermore, the EU pressed developing countries to start a voluntary review of national communications which is an Annex I countries' obligation. Parties had difficulty in agreeing on what should be reported, the debate adaptation/mitigation was the core of this negotiation. Indeed, on the one hand, developing countries had an interest in reporting on their adaptation needs. On the other hand, the improvement in the content and the comparability of national communications could make it more difficult for developing countries to secure funding if they fail to provide necessary information. Furthermore, good quality information on developing countries' emissions and capacities could be a way to broadening commitments. Finally, Parties adopted a Chair's compromised text that resembles the views of non-Annex I parties on adaptation and adverse effects of climate change, although the EU called for the Chair's text to reflect a balance between adaptation and mitigation reporting requirement.

- It was decided that developing countries that have not submitted initial national communications should do so, as soon as possible, on the understanding that LDCs may submit their national communication to their discretion.
- The mandate of the Consultative Group of Experts on non-Annex I countries is prolonged to identify and assess technical problems and constrains that have affected the preparation of initial reports.
- The Secretariat will prepare a report on initial national communication and a document describing steps taken by non-Annex I countries to implement the UNFCCC.
- Non-Annex I countries should use the improved guidelines for the second and subsequent national communications.
- Although developed countries wanted the report to include data showing emissions trends over several years, a single-year data was agreed upon as favoured by developing countries.
- These improved guidelines should be used to provide guidance to financial operating entities for funding the preparation of national communications.
- The frequency of reporting is to be decided at COP 9.

On the question of capacity building, developed countries and especially the EU disregarded the developing countries' needs. As stated by the G77/China, the COP 7 decision on capacity building, which provides finance to support capacity building within developing countries, has not been implemented by the GEF and, little has been done by developed countries in this field. More efforts should be undertaken by the EU in order to help the developing countries to set up national greenhouse gas inventories. By this mean, the EU could make developing countries keener to discuss further commitments within a future climate change regime. However, the EU did not adopt this strategy.

## Policies and Measures and Adverse Effects of Response Measures

The UNFCCC and its related KP require Annex I countries to undertake policies and measures to reduce greenhouse gas emissions and enhance sinks, allowing each country a certain flexibility to adopt its own set of measures, but they impose an obligation to report and to exchange information on the measures taken. Since Kyoto, the EU has pushed for the development of methodologies to assess the effect of policies and measures on greenhouse gas emissions and to elaborate good practice. As well, the KP (art. 2.3 and 3.14) require Annex I parties to implement policies and measures that minimise adverse effects of climate and minimise the impact of the implementation of response measures on developing countries. This issue was left open after Marrakech and no substantive work was done at SBSTA-16 in Bonn last June. Two factors impeded the conclusion on this matter.

Firstly, the EU's attitude that called for a voluntary exchange of information on non-Annex I countries' policies and measures and for the organisation of regular workshops that could include interested countries outside Annex I Parties. This proposal led

developing countries to oppose the EU proposal on the ground that it opens the door for new commitments for non-Annex I countries. Also, when the EU proposed the development of an 'analytical framework' for comparing policies, the US rejected the idea arguing that each country must use its own criteria based on its own national feature (?), and thus comparison was not possible.

Secondly, the OPEC countries led by Saudi Arabia constantly pressed that the assessment of policies and measures should focus not only on their effectiveness in reducing emissions, but also on their adverse effects on developing countries and, in particular oil-producing countries. The EU strongly opposed Saudi Arabia's request to include discussion on adverse effects of policies and measures on the agenda. When Parties realised that no consensus could be reached, Saudi Arabia and the G77/China were concerned how adverse effects should be included into the draft conclusion, requesting the Secretariat to analyse this issue on developing countries. Due to this harsh opposition, SBSTA was not able to adopt substantive conclusions, and decided to continue consideration at its next session.

Behind discussions on policies and measure, a different debate took place on mitigation/adaptation. Developing countries, reacting to the EU proposal and led by China, India and Saudi Arabia, clearly stated that they were not concerned by the obligations regarding policies and measures. This of course conveniently overlooks the UNFCCC Article 4.1 requirement that all Parties should formulate and implement measures to mitigate climate change. Nevertheless, they considered mitigation exclusively in terms of implementation of existing commitments, noting that developed countries policies and measures were inefficient in reducing emissions. This means that developed countries have to show progress before talking of new developing countries' commitments. The US rejection of the EU analytical framework for comparing policies and measures may be motivated by the fear of an international assessment of its own national greenhouse gas emissions reduction plan, proposed as an alternative to the KP, that could not be acceptable for the US. Ultimately, the US backed up the OPEC countries' continuous obstruction. As a result, the European attempt to convince developing countries that adaptation will ultimately be useless unless climate change is reversed by global mitigation efforts did not match. This debate affected the scientific and methodological aspects of the Brazilian proposal held within SBSTA.

### Brazilian Proposal

During the negotiation of the KP, Brazil proposed a formula for establishing emission targets for developed parties according to the impact of their historic emissions on temperature rise. Through SBSTA consideration the focus fom developed countries extended to all countries. Further, recent studies have indicated that it may not be favourable to developing countries as first thought. Because of this evolution, some developing countries expressed serious concerns about possible implications for future developing countries' commitments. It was decided that further scientific work would be needed and reported to SBSTA-20.

### Adaption of Adverse Effects of Climate Change (UNFCCC Art.4.8 and 4.9)

These articles set the legal framework on adaptation to adverse effects of climate change, inviting parties to take actions related to funding, insurance and technology transfer in order to meet the specific needs of particular developing countries. The Marrakech Accords adopted two new funds under the Convention (see Funding above). However, some improvements were needed to implement this adaptation framework. Discussions took place within the SBI. The G77/China expressed concern about the lack of financial support for the implementation of the Marrakech Accords on this issue and called for financing foreseen workshops on insurance and risk assessment. Canada supported the venue of these workshops. Samoa stressed that all losses in developing countries due to extreme events are not covered by insurance, while Iran for the G77/China came back with the adverse effects of response measures, stressing that these workshops should also address adaptation to the impact of response measures. It was decided that the Secretariat would organise workshops on insurance and consider their reports at COP 9.

What should have been the hardcore of adaptation discussions was in fact disappointing. Firstly, few developing countries were aware of this UNFCCC and KP adaptation framework. Secondly, the tremendous role played by the OPEC countries blocked the discussion process to the disfavour of the most vulnerable developing countries to adverse effect of climate change, namely LDCs and small islands. These countries were not organised and lacked of capacity to thwart the OPEC countries within the G77/China. Finally, the actual insurance market is of little help for developing countries that are most affected by extreme climate events. Most of the insurance companies do not want to secure these risks in Caribbean and Pacific islands regions anymore. In order to respond to this specific case, the recent ideas propose to develop an insurance pool supported by developed countries for sea rise level and a special reinsurance market for climate change.

## Development and Transfer of Technology

This issue is still very contentious, with little progress beyond the technology needs assessments that have been completed by developing countries and Parties with economies in transition. Developing countries suggested that technology transfer has been ineffective and required additional assistance for both mitigation and adaptation.

SBSTA conclusions urged developed countries to continue to provide support to developing countries and request the Secretariat to prepare technical papers and to organise workshops enabling environments for technology transfer.

## Clean Development Mechanism Executive Board

CDM allows developed countries to meet their emission targets in part with certified emission reductions (CERs) generated through emission reduction and sinks projects in developing countries. At COP 7, the parties adopted general rules for CDM and established an interim executive board to get CDM under way pending the entry into force of the KP.

The executive board presented its first year activity, including accreditation for operational entities, simplified modalities and procedures for small scale projects, and proposed rules of procedure, which were adopted with few modifications.

During the discussions, the most contentious issue was when the US claimed a better attendance and transparency for non-parties to the KP and observers. Attendance for the US means access to the meeting room. During previous meetings observers were not allowed in the meeting rooms but instead had to watch the venue on video. These arrangements, as argued by the Secretariat and the Executive board, are more economic and allow a better intimacy and informality. It was decided that the executive board would inform the next COP in its annual reports about how it implements transparency.

## Effective Participation in the UNFCCC Process

In addition, pressed by the US being particularly concerned with its potential exclusion from observing meeting of the CDM executive board, the parties within SBI considered a new agenda item on effective participation in the Convention process, especially in inter-session workshops and meetings of limited experts bodies. Canada, together with Australia and the EU, advocated transparency while recognising financial constrains. The US supported participation through new approaches including a constituency system. SBI called for notification of workshops on the web and request the Secretariat to tailor the number of observer participants to the nature of each workshop, while recording that the EU did not agree with the conclusions since the text had not been previously available.

## Sinks under CDM

Sinks, the possibility for Annex I countries to meet their emission targets through forest and land projects (LULUCF) under CDM was a very controversial issue during last Conferences. At Marrakech, it was agreed that sinks under CDM would be limited to afforestation and reforestation projects during the first commitment period, and that new definitions of these activities taking into account the issues of non-permanence, additionality, leakage, uncertainties, socio-economic and environmental impacts, including impacts on biodiversity and natural ecosystems, would be elaborated to be adopted at COP 9. Informal discussions on these issues took place within SBSTA.

In relation to definitions Parties argued on a new baseline for projects, which will determine the land available for projects in allowing reforestation projects in new deforested lands. The EU opposed the Canadian proposal, made at SBSTA-16 in Bonn, to change the baseline from 1989 to 1999, by stressing its support for the definitions set out in the Marrakech Accords for forest projects within Annex I countries. Colombia said that a 1989 baseline could impede projects.

Two options were proposed to address non-permanence of forest projects: an insurance option against the destruction or degradation of forest sinks proposed by Canada, and the creation of a different type of CER unit that would be temporary, the so-called TCER. This last option was elaborated by the EU, based on an idea already presented by Colombia. The Canadian proposal assigns liability for any re-emission of $CO_2$ to the project developer that must contract a compulsory insurance for the lifetime of the project. Under the European option, CERs generated by sink projects would expire at the end of each commitment period and would have to be cancelled by the country using them, either through substitute credits or reissued credits if the original project still exists. On that last item, Tuvalu recalled that the Marrakech Accords establish sinks projects only for the first commitment period and not beyond.

Regarding socio-economic and environmental impacts, some countries were pushing the introduction of international environmental standards, like Switzerland that highlighted bio-diversity concerns and links with the UNFCCC and the Biodiversity Convention, and promoted the participation of local community in decision-making. Tuvalu and India pressed for a compulsory environmental impact

assessment and the development of a checklist of socio-economic and environmental criteria that should be implemented by project developers. Instead, the EU, Canada and Chile stated that the Marrakech Accords addressed these issues and that the development of such standards lies upon the host countries.

An option paper on sinks under CDM will be prepared by the secretariat and a workshop will be held in Brazil in February 2003.

### Arrangements for COP/MOP-1

The KP provides that following Kyoto's entry into fore, the COP will serve also as the Meeting of the Parties (MOP) to the KP. However, the KP is silent on whether the meetings should be held successively or concurrently. With the possible entry into force of the KP, SBI considered the arrangements for the COP/MOP in relation to the COP. The Secretariat proposed a concurrent meeting with two separate agendas clearly identifying which items are COP items, which are COP/MOP items and which are common items to be considered in joint meeting. SBI had considerable discussion on how decisions would be adopted regarding issues of common concern to both Convention and KP. The EU, Canada, Australia and Japan were supporting the Secretariat proposal for the sake of efficiency, while the US was stressing the need to ensure that its contributions were used to support the UNFCCC process only. Because of lack of time, the issue was forwarded to next sessions.

### Next Steps

After Delhi, the next COP will be held in Italy, probably in Milan. Little has been achieved at COP 8, as Parties only agreed on rules and procedures for CDM and small scale projects, guidelines for reporting and review under Articles 5, 7, and 8 of the KP, and additional guidance to the LDC Fund. COP 9 will have to face many unsolved issues, such as defining guidance for the Special Climate Change Fund, frequency of national communication from non-Annex I countries, policies and measures, developing rules for adaptation, technology transfer and capacity building, and adopting definitions for afforestation and deforestation under CDM.

If the EU is still willing to initiate a formal process on the broadening of future commitments, it will have to adopt a favourable attitude towards developing countries' needs and difficulties, especially towards LDCs. High-level talks with southern countries before COP 9 will be essential to establish the level of trust needed to secure the foundations for a just, equitable, and adequate global climate agreement.

The next crucial task is the entry into force of the KP. If Canada, and now New Zealand are willing to ratify the KP, its entry into force essentially hinges on the ratification by Russia, which would achieve the necessary threshold of ratification by 55 Annex I parties accounting for 55 percent of carbon dioxide emissions.[6] At the World Summit in Johannesburg last summer, Russian representatives stated that the KP would be ratified by November 2002. However, the ratification process is still pending at the Douma. Russian members of the Parliament, invited at COP8, while stressing the debt that the world owns to Russia for keeping most of the earth ecological resources, gave conflicting signals on the likely timing of a ratification decision. They are still assessing the economic benefits of being out or in. One may think whether waiting for the Russian ratification means waiting for Godot?

[6] The Canadian Senate ratified the KP on the 10th of December 2002, but the Canadian government has not deposited its instruments of ratification yet.

# Central and Eastern European Countries and Climate Change Regime

*Leonardo Massai*

Climate change is a relatively recent issue and its importance, when considering national environmental policies, is fast increasing. The problem affects all the Accession Countries to the European Union[1], which are committed to both the United Nations Framework Convention on Climate Change (UNFCCC) adopted in 1992 and the Kyoto Protocol agreed in 1997 and which are developing their national policies on climate change. The Kyoto Protocol will probably enter into force by 2003 and the accession to the EU is scheduled for 2004.

This article aims to give a general overlook of some legal and political issues concerning the participation of these countries to the international climate regime. Capacity building issues are also taken in consideration, as well as national and international initiatives carried on in order to fulfil the Central and Eastern European Countries' commitments to the UNFCCC and the Kyoto Protocol.

## Central and Eastern European Countries within the UN Framework Convention on Climate Change and the Kyoto Protocol

The Central and Eastern European Countries (CEEC)[2] are fully integrated in the shaping of an international action to combat climate change. Despite several political and economic changes these countries have faced from the beginning of the nineties, a general awareness concerning global warming among the policy makers and public opinion has considerably raised in the recent past. These states are now legally and politically committed to the international treaties on climate change and they are called to play a dominant role especially after their accession to the European Union. All Candidate Countries have ratified the United Nations Framework Convention on Climate Change[3] and are Annex I Parties[4]. Annex I countries are the ones which have committed themselves to reduce greenhouse gas emissions by the year 2000 to 1990 levels as prescribed by article 4.2 of the Kyoto Protocol. They are the OECD countries excluding Mexico, together with the designated Economies in Transition Countries and Turkey.

The Accession Countries to the EU have now also accepted the Kyoto Protocol and they are indicated as Annex B parties[5]. Parties with quantified emission limitation or reduction commitment, so-called individual emission targets, are listed in Annex B of the Kyoto Protocol. These are countries included in Annex I to the UNFCCC having assumed legally binding commitments for the period 2008 to 2012 as indicated in article 3.1 of the Kyoto Protocol.

In both Annex I and Annex B, Accession Countries are indicated as "Economies in Transition" (EITs), in other words, states that are in the process of making the transition to a market economy[6]. The acknowledgement of this status is quite important as these countries are sometimes considered in a different manner compared to the other Parties and this is showed for instance by the "certain degree of flexibility"[7] in the implementation of their commitments granted to this group of countries from both the Kyoto Protocol and the UNFCCC. CEEC are members of the Annex I Expert Group[8] which is supporting these countries' efforts in order to address and develop climate change policies. Furthermore, the group meetings reflect the EITs concerns and aim to increase the exchange of information at a governmental level.

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1 The current Accession Countries to the EU are Bulgaria, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Romania, Slovakia and Slovenia.

2 The CEEC are among those classified under the UNFCCC as Economies in Transition (EITs) to a market economy. Ten of these countries are negotiating to join the EU: Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. In the context of this article, Central and Eastern European Countries (CEEC) and Economies in Transition (EITs) refers exclusively to these ten countries, unless otherwise specified. Malta and Cyprus, also in the process to join the EU, are not considered in this paper.

3 The Czech Republic and Slovakia have deposited the approval of the convention and not the ratification instrument.

4 The Czech Republic, Slovakia and Slovenia were added to the Annex I list by an amendment that entered into force on 13 August 1998, following decision 4/CP.3 adopted at COP 3. Malta and Cyprus have ratified the UNFCCC but they are not Annex I Parties.

5 Cyprus accepted the Kyoto Protocol only on the 16.07.99. Malta signed the Protocol on the 17.04.98 and ratified it on the 11.11.01. They are both not listed in Annex B.

6 Within the UNFCCC and the Kyoto Protocol, EITs are the ten Candidate Countries to the EU without Malta and Cyprus with the addition of Croatia, Belarus, Russian Federation and Ukraine. In the context of this article, EITs refers only to ten EU accession countries, without Malta and Cyprus, unless otherwise specified.

7 See Article 4.6 of the UNFCCC and article 3.6 of the Kyoto Protocol. Article 3.6 of the Kyoto Protocol stresses once more the possibility for the Conference of the Parties serving as the meeting of the Parties to the Protocol itself, to allow a certain degree of flexibility to the Parties with economies in transition when implementing their commitments.

8 The Annex I Expert Group is an ad hoc group of government officials from Environment, Energy and Foreign Affairs ministries from countries that are listed in Annex I to the UNFCCC, and those that have acceded to Annex I commitments. It is supported by the OECD and the IEA secretariats.

Following the expressed intention to complete the ratification process in order to achieve the entry into force of the Kyoto Protocol at the World Summit for Sustainable Development held in Johannesburg in September 2002[9], several countries have so far ratified, accessed or approved the Kyoto Protocol. Table 1 shows the status of the Kyoto Protocol ratification within the CEEC[10].

*Table 1*

| Country | Signature | Ratification or Accession |
|---|---|---|
| Bulgaria | 18.09.1998 | 15.08.2002 R |
| Cyprus | - | 16.07.1999 Ac |
| Czech Republic | 23.11.1998 | 15.11.2001 Ap |
| Estonia | 03.12.1998 | |
| Hungary | - | 21.08.2002 Ac |
| Latvia | 14.12.1998 | 05.07.2002 R |
| Lithuania | 21.09.1998 | |
| Malta | 17.04.1998 | 11.11.2001 R |
| Poland | 15.07.1998 | |
| Romania | 05.01.1999 | 19.03.2001 R |
| Slovakia | 26.02.1999 | 31.05.2002 R |
| Slovenia | 21.10.1998 | 02.08.0202 R |

Source: UNFCCC (2002)
R : Ratification; Ac : Accession; At : Acceptance; Ap : Approval

Not all countries have used the same method to adopt the Protocol. According to Article 25 of the Kyoto Protocol, Parties are in fact free to choose the legal instrument to deposit in the Secretariat according to their different constitutional and political constraints: ratification[11], acceptance and approval[12] or accession[13]. Estonia, Slovenia and Poland still have to decide whether to ratify the Kyoto Protocol or not. These countries' governments have not expressed their intention to not ratify, but they have also not indicated a timeframe. A ratification will probably occur for several reasons. First of all, CEEC emissions levels are already below the Kyoto targets which means that EITs will not face particular problems to fulfil their commitments. Moreover, the participation in the flexible mechanisms like International Emissions Trading (IET) and Joint Implementation (JI) as indicated in decision 15/CP.7 of the UNFCCC[14], compels CEEC to conclude the ratification process if they want to profit from several economic and environmental advantages derived from the implementation of those flexible instruments[15].

The following table presents the total carbon dioxide emissions of CEEC Annex I Parties in 1990 in order to calculate the percentage for the entry into force of the Kyoto Protocol[16].

*Table 2*

| Party | $CO_2$ Emissions (Gg)[17] | Percentage Within KP |
|---|---|---|
| Bulgaria | 82,990 | 0.6 |
| Czech Republic | 169,514 | 1.2 |
| Estonia | 37,797 | 0.3 |
| Hungary | 71,673 | 0.5 |
| Latvia | 22,976 | 0.2 |
| Poland | 414,930 | 3.0 |
| Romania | 171,103 | 1.2 |
| Slovakia | 58,278 | 0.4 |
| **Total** | **1029,261** | **7.4** |

Sources: Data from COP 3 UNFCCC (1997)[18]

The emission targets for Annex B Parties were fixed at COP 7 in Kyoto in 1997 after long and tiring negotiations. The initial proposal concerning binding commitments presented on December the 9th saw all the CEEC with a global –8% reduction commitment. The final decision was taken on 11 December 1997, when Ukraine and the Russian Federation led and carried on discussions until 3:30 am. At the end, Poland and Hungary moved from –

9 The concept was included in the conclusion of the informal meeting between Ms. Wallström (European Commission) and the Ministers of the Environment of the EU Candidate Countries, held in Brussels, on 27 November 2001.

10 Updated to the November 2002.

11 Through the ratification of an international treaty a state shows its consent to be bound to it. In the case of the Convention and the Protocol, the Secretariat must collect the ratification of all states. Through the ratification the state commit itself to give domestic effect to the treaty itself. See Vienna Convention on the Law of Treaties 1969, Articles 2 (1) (b), 14 (1) and 16.

12 Acceptance and approval have the same legal effect as ratification. These two instruments are often used by some states when their constitutional law does not expressly requires the treaty to be ratified to entry into force. See Vienna Convention on the Law of Treaties 1969, Articles 2 (1) (b) and 14 (2).

13 Accession has the same legal effect as ratification and with this instrument a state accepts to become a party to a treaty already negotiated and signed by other parties. See Vienna Convention on the Law of Treaties 1969, Articles 2 (1) (b) and 15.

14 See UNFCCC document FCCC/CP/2001/13/ADD.2.

15 To note that the Kyoto Protocol will enter into force 90 days after being ratified (or approved, accepted, or acceded) by at least 55 states representing the 55% of the total $CO_2$ emissions for 1990 for the Annex I Parties.

16 See article 25 of the Kyoto Protocol.

17 In the UNFCCC documents emissions are measured in gigagrams, while several other studies considers the emissions in terms of $CO_2$ equivalents in million tonnes.

18 The table does not include data from Lithuania, Slovenia, Malta and Cyprus as it is based on the information from Annex I Parties which submitted their first national communications on or before 11 December 1997. See UNFCCC documents FCCC/CP/1996/12/Add.2 and FCCC/SB/1997/6.

8% to – 6% while the other CEEC emission targets were confirmed to the initial –8%. Malta and Cyprus were not compelled to any binding reduction commitment.

All Parties to the UNFCCC and the Kyoto Protocol are grouped in different coalitions in order to enable reasonable round of negotiations in a regime involving nearly 200 states.

The Central and Eastern European Countries take part in the UNFCCC negotiation process and they have recently assembled in the Central Group 11 (CG11)[19], which embraces eleven Central and Eastern European Parties with emission reduction targets under the Kyoto Protocol and common views on certain issues. They are the 10 Accession Countries to the EU [20] as well as Croatia.

The group was created in order to develop a common strategy within the international climate change negotiations with the aim to establish a common path towards the implementation of the Kyoto Protocol. The CG11 is currently assessing the various advantages and disadvantages of the Protocol implementation through the participation in the flexible mechanisms and other issues like capacity building needs within the region. A common climate change strategy has in any case not yet been reached due to several problems like national differences and unclear environmental policies.

The group discussions are based on the principle of consensus and on the division of tasks. The CG11 is often trying to cooperate with the EU group in order to produce joint submissions or statements within the UNFCCC. Equally, the CG11 is also planning to strengthen the coordination and collaboration among the group through the establishment of a Secretariat, a web site and more publications. Several workshops and meetings among these countries have taken place especially before the Conference of the Parties[21]. A CG11 presidency is already set , which changes every six months following the countries alphabetic order, Hungary being currently in charge of the presidency.

## National Communications

Under articles 4.1 and 12 of the UNFCCC, Parties are required to prepare and submit periodical national communications with information on their implementation of the Convention. Most Annex I Parties have presented their first national communications in 1994 or 1995 while the second round was submitted by most Parties in 1997. Economies in Transition were arranged a longer timeframe and the second national communications were presented by the majority of countries in 1998. The Third national communication was requested by 30 November 2001 but not all parties complied with this requirement. The following table shows the situation of the national communication submissions within the CEEC[22]:

*Table 3*

| Country | 1st Nat Comm | 2nd Nat Comm[23] | 3rd Nat Comm[24] |
|---|---|---|---|
| Bulgaria | 11.03.1996 | 30.06.1998 | 31.07.02 |
| Czech Republic | 17.10.1994 | 06.08.1998 | 28.12.01 |
| Estonia | 06.05.1995 | 31.03.1998 | 30.11.01 |
| Hungary | 22.11.1994 | 01.12.1997 | 02.07.02 |
| Latvia | 20.09.1995 | 02.06.1998 | 30.11.01 |
| Lithuania | 18.05.1998 | | |
| Poland | 02.02.1995 | 29.04.1998 | 30.11.01 |
| Romania | 14.03.1995 | 01.02.1999 | |
| Slovakia | 11.10.1995 | 06.08.1997 | 24.10.01 |
| Slovenia | 28.02.2002 | | |

Source: UNFCCC (2002)

Slovenia is drawing up its third national communication to the UNFCCC and has skipped the preparation of the second one. Romania and Lithuania are also preparing their third version, while Malta is currently preparing its first national communication.

The Conference of the Parties[25] decided also to request Annex I Parties to submit to the Secretariat an annual inventory of their greenhouse gas emissions by sources and removals by sinks by 15 April every year since 1996. Information on GHG emissions and removals for the period 1990-2000 are collected by the Secretariat and are currently available on the UNFCCC web site.

When Annex I Parties have to prepare their national communications and GHG inventories, they are required to follow special guidelines. The contents of these guidelines are defined by the COPs and until now they have been revised twice: at COP 2[26] for the preparation of the second national communications and at COP 5[27] for the preparation of the

[19] The group was created at COP 6 in The Hague.

[20] Malta and Cyprus are officially part of the group as observers.

[21] Several workshops on the issue were organized by the United Nations Conference on Trade and Development (UNCTAD) and the Earth Council Institute (ECI) Geneva. "Greenhouse Gas Emissions Trading, Regional Workshop for Counties with Economies in Transition", Moscow, 19-24 September 1999; " CG 11 Workshop on capacity building and emissions trading", Zagreb, Croatia, 28-29 May 2002.

[22] Data refer to the day Secretariat received the document.

[23] See UNFCCC document FCCC/SBI/2000/INF.14

[24] Status of submission as at 14 October 2002, FCCC/SBI/2002/INF.7.

[25] See COP decisions 9/CP.2 and 3/CP.5.

[26] COP2 to the UNFCCC, Geneva, 8-19 July 1996.

[27] COP5 to the UNFCCC, Bonn, 25 October – 5 November 1999.

third round of communications, where some specific reporting guidelines for annual inventories of greenhouse gases were also indicated[28].

Moreover at the twelfth session of the subsidiary bodies[29], Parties agreed to consider the good practice guidelines included in the IPCC report "Good Practice Guidance and Uncertainty Management in National Greenhouse Gas Inventories"[30] as a model the Annex I Parties should follow when preparing their national inventories to be submitted in 2001, 2002, 2003 and beyond. A two-year extension period was granted to Annex I Parties with economies in transition in order to comply with the guidelines, while its revision has been agreed and decided at the last COP 8[31].

Table 4 provides information on data sources of GHG emissions/removals and it indicates the year of the annual inventory submissions or national communications for those parties that have not yet submitted their inventories in 2002. As of 15 September 2002, Bulgaria, Lithuania, Romania and Slovenia had not submitted the 2002 greenhouse gas inventory[32], with Lithuania, Romania and Slovenia facing major difficulties in preparing their national inventories.

## Greenhouse Gas Emissions

The base year - the year upon which commitments to reduce emissions are based[33] - is indicated in Article 3.1 of the Kyoto Protocol and for nearly all countries it is the year 1990. According to Article 4.6 of the UNFCCC and Article 3.5 of the Kyoto Protocol[34], some Parties included in Annex I which are Economies in Transition have agreed on different base periods as indicated in decision 9/CP.2 of the Second Session of the Conference of the Parties[35] and decision 11/CP.4 of the Fourth Session of the Conference of the Parties[36].

In this regard five CEEC have invoked the principle of flexibility mentioned in Article 4.6 of the Convention[37] during COP 4 and have agreed to change their base years: Bulgaria has chosen 1988, Hungary the average between 1985-1987[38], Poland 1988[39], Romania 1989[40] and Slovenia 1986[41]. The reason why these countries have asked and obtained to disregard 1990 as the base year to calculate their emissions level rests on several political and economic changes occurred in the region in that year.

The latest available data on greenhouse gas emissions and removals from CEEC excluding removals from LULUCF activities are indicated in Table 5.

28 The two sets of guidelines are indicated in document FCCC/CP/1999/7.

29 SBSTA 12, 12-16 June 2000, Bonn, Germany.

30 Available on the Internet at: http://www.ipcc-nggip.iges.or.jp.

31 COP8 to the UNFCCC, New Delhi, 23 October – 1 November 2002, Decision –/CP.8, available on the Internet at: http://unfccc.int/cop8/latest/5_sbstal5add1.pdf.

32 See UNFCCC document FCCC/SB/2002/INF.2, 11 October 2002, 3.

33 It is the year indicating the establishment of the first national greenhouse gas inventory and it is used to calculate the countries' emissions targets.

34 Article 3.5 of the Kyoto Protocol gives the possibilities to those countries which have not yet submitted their first national communication to propose a historical base year different from 1990 by the notification to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol. Malta and Cyprus, which have not yet submitted their national communications to the Secretariat, could invoke this article.

35 See UNFCCC document FCCC/CP/1996/15/Add.1

36 See UNFCCC document FCCC/CP/1998/16/Add.1

37 This article gives some parties the possibility to ask in their first national communication to use a base period different from 1990 according to the principle of flexibility.

38 "In the light of characteristic features of process of economic transition, the period of 1985-1987 which precedes the current economic recession is considered as the base period for comparison of the carbon dioxide emissions", Hungary's First National Communication under the UNFCCC, 1994, 8.

39 The baseline chosen is 1988 because 1990 was a very particular moment for Poland under the economic and political point of view. The 1990 does neither represent the normal Polish emissions trend nor the realistic Polish economic situation as this was the first year after the economic and political reforms due to the recession.

40 "The pollutant emissions in Romania have decreased starting with 1989, especially due to the cut-down in the production activities, a situation which makes 1989 as a possible reference year when preparing reports on pollution abatement", Romania's First National Communication under the UNFCCC, January 1995, 8.

41 "The transformation of the political and economic systems in the late 1980s resulted in a temporary decline in industrial production and the standard of living in Slovenia. This in turn temporarily reduced greenhouse gas emissions", Slovenia's First National Communication under the UNFCCC, Ljubljana, July 2002, 8.

*Table 4*

| Party | Base Year | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Bulgaria | 1998 | 2001 | 2001 | 2001 | 2001 | 2001 | 2001 | 2001 | 2001 | 2001 | 2001 | ND |
| Czech Republic | 1990 | 2002 | 2NC & 1999 | 2NC & 1999 | 2NC & 1999 | 2NC & 1999 | 2NC & 1999 | 2002 | 2002 | 2002 | 2002 | 2002 |
| Estonia | 1990 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 |
| Hungary | 1985/ 1987 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 |
| Latvia | 1990 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 |
| Lithuania | 1990 | 1NC | ND | ND | ND | ND | 1999 | 1999 | 1999 | 2000 | ND | ND |
| Poland | 1988 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 |
| Romania | 1989 | 2NC | 2NC | 2NC | 2NC | 2NC | ND | ND | ND | ND | ND | ND |
| Slovakia | 1990 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 | 2002 |
| Slovenia | 1986 | 1NC | ND | ND | ND | ND | ND | ND | ND | ND | ND | ND |

Source: UNFCCC (2002) web site
NC : National Communication
ND : No Data

*Table 5*

**Aggregate emissions of $CO_2$, $CH_4$, $NO_2$, HFCs, PFCs and $SF_6$ a 1990-2000, excluding $CO_2$ emissions/removals from land-use change and forestry (Gigagrams of $CO_2$ equivalent and percentage change)**

| | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 | 1998 | 1999 | 2000 | Change 1990 to latest reported estimate (2000) (%) |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| Bulgaria[a] | 157090 | 115679 | 103710 | 102084 | 92586 | 98083 | 101894 | 89811 | 81360 | 77697 | | -50.5 |
| Czech Republic | 192019 | 175323 | 161221 | 154710 | 147291 | 148272 | 154907 | 158879 | 148602 | 140421 | 146792 | -23.6 |
| Estonia | 43494 | 40585 | 29934 | 23490 | 24482 | 22287 | 23454 | 23663 | 21502 | 19659 | 19746 | -54.6 |
| Hungary[a] | 101633 | 87905 | 79078 | 78974 | 77161 | 77916 | 79184 | 76853 | 83687 | 86546 | 84338 | -17.0 |
| Latvia | 31054 | 24908 | 20478 | 16831 | 15350 | 13435 | 12715 | 11986 | 12149 | 11384 | 10672 | -65.6 |
| Lithuania[b] | 51548 | | | | | | | | 23851 | | | -53.7 |
| Poland[a] | 564419 | 437450 | 439110 | 429624 | 438973 | 417353 | 437388 | 427243 | 403516 | 401584 | 386187 | -31.6 |
| Romania[a] | 264879 | 179762 | 172168 | 167187 | 164026 | | | | | | | -38.1 |
| Slovakia | 72937 | 64293 | 59609 | 55433 | 52464 | 54284 | 54017 | 54134 | 52812 | 51462 | 48667 | -33.3 |
| Slovenia | 19 233 | | | | | | | | | | | |

[a] Different base year

[b] Only emissions of $CO_2$ and $CH_4$, not $N_2O$ for 1995-1997 and no aggregate emissions are indicated in the table for these years

Source: UNFCCC (2002)[42]

[42] See UNFCCC document FCCC/WEB/2002/10, 15 October 2002, 48-49.

Central and Eastern European Countries aggregate greenhouse gas emissions dropped significantly since the late 1980s and they are now far below the "base year levels"[43]. The decline ranges from 65.6% in Latvia to 17% in Hungary or 23.6% in the Czech Republic. This is principally a side effect of the severe economic recession in the early 1990s as well as market reforms and economic restructuring[44]. Measures like basic fuel switching and general environmental programs[45] introduced by CEEC governments over the last decade have in fact improved energy efficiency and have reduced carbon intensity.

Thus, the reduction of greenhouse gas emissions within the region is therefore more the result of unexpected political and economic developments than the effect of domestic and international policies and measures aimed to curb global warming. Yet it is important to stress that while emissions were decreasing, mostly all countries have seen their economic trends to recuperate. Indeed the relation between greenhouse gas emissions and gross domestic product (GDP) significantly dropped down in these countries between 1990 and 2000. Poland is a symbolic example: despite a high economic growth after 1995 with an annual rate of 6,6% between 1995 and 1997 and 4,3% between 1998 and 1999, the country still met emissions reductions in the same period[46].

All Accession Countries are now below the Kyoto Protocol targets and there could be potential for the so-called "hot air". This term indicates the greenhouse gas emissions reductions attained in 1990 and due to economic reasons, mainly the shut down of a large number of industrial plants. Hence, "hot air" represents exactly the extent of the exceeding "emissions" resulting from the difference between the legally binding emission limits set up by the Kyoto Protocol and the business-as-usual emissions trends considered in the period 2008-2012[47]. It is clear that the "hot air" potential will allow these states to sell emissions reduction units to countries not complying with their commitments once the international trade regime indicated by the Kyoto Protocol will be in force. Nevertheless, the "hot air" trade will only be an incentive to implement some of the flexibility measures but it will not have any effect on the overall level of emissions.

CEEC are very likely to have an emissions surplus in the first commitment period and even further emissions reduction could be met in the following one thanks to higher levels of energy intensity, even if the table above shows that during the last years greenhouse gas emissions within CEEC have stabilized or only slightly decreased[48]. The problem that these countries will face in the future is how to allocate this surplus, even if a constructive dialogue among policy makers and stakeholders already started. Several options like banking these emissions through different periods, concern expressed by Poland and Slovakia, or trying to integrate measures adopted domestically with the international financial mechanisms, are being discussed. Compared to the trends of the other CEEC, Slovenia and likely Lithuania will represent an exception as they will reveal an excess in the absolute emissions at the end of the first commitment period[49].

The role that Joint Implementation and Emissions Trading will play in the allocation of the emissions surplus will be very crucial and the implementation of these flexible mechanisms represents big chances for revenues for CEEC. Activities Implemented Jointly (AIJ)[50] have already been experienced among these countries with the participation of mainly EU Member States, while initiatives and proposals on Emissions Trading schemes have been so far advanced only in Slovakia, the Czech Republic and Poland. The implementation of JI and ET within CEEC is a tricky issue especially regarding the accession to the EU. In this respect, it is illustrative that the EU, through the Emissions Trading directive proposal, is currently considering how to link the other flexible instruments within the ET system. With such a purpose, the EU Commission

[43] Petkova, E. Faraday, G. "Good Practices in Policies and Measures for Climate Change Mitigation", REC/WRI, March 2002, Szentendre, Hungary, 49.

[44] Rizzo, F. "Bonn deal includes good news for CEE", The Bulletin, September 2001, Szentendre, Hungary, 6.

[45] Structural changes included for example a shift toward cleaner fuels like natural gas or a more diffuse use of energy efficient devices. This was the case of Czech Republic, Poland and Slovakia which have produced essential energy efficiency gains in their economies (from 15 to 32%), see also UNFCCC document FCCC/SBSTA/2002/INF.13, 09 October 2002, 15.

[46] See UNFCCC document FCCC/SBSTA/2002/INF.13, 09 October 2002, 11-13.

[47] The "hot air" issue was object of a long discussion within the AGBM in 1997. See also ECO, newsletter of the Climate Action Network (CAN) published at the UN climate talks, issue number 4, volume XCVII, 27 October 1997, Bonn, Germany.

[48] See supra note 42, 51.

[49] In Slovenia, which will probably have to reduce its emissions in order to meet the Kyoto Protocol targets, this is due to the high emissions growth in the beginning of the nineties. In Lithuania, the disclosure of the first Ignalina nuclear reactor by 2005 will affect the general level of emissions, while the second one will be closed by 2009 - see supra note 41, 101-. Ignalina nuclear power station in Lithuania supplies 70/80% of national electricity consumption. The disclosure of its two reactors was agreed within the framework of the EU accession negotiations on the energy chapter.

[50] Decision 5/CP.1 at COP 1 launched the pilot phase of AIJ, a period during which Parties can implement in the territories of other Parties projects in order to reduce greenhouse gas emissions or foster removals of greenhouse gas by sinks in addition to the business as usual activities. However, no credits can be generated by these projects.

will issue by year 2003 a directive proposal on that topic.

Another example of the lack of clarity within the EITs climate policy is represented by the fact that within the recent discussions over the Kyoto Protocol second commitment period[51] these countries do not have a clear official position yet. Even if future emissions levels are still quite uncertain, it is very probable that some CEEC will have a surplus also for the next commitment period. Especially after the accession to the EU an economic growth is expected and great opportunities to continue to reduce greenhouse gas emissions remains. There are in fact high energy intensity level perspectives in these countries, even if it is still not clear whether the baseline will consider only coal or also renewable energy including nuclear.

## Shaping Policies and Measures

According to the principle of common but differentiated responsibility indicated in Article 3.1 of the UNFCCC, Accession Countries, like all the other parties involved in the climate change process, have to adopt policies and measures in order to curb global warming[52]. The mentioned principle invites all Parties "to implement its provisions" in order "to achieve the objective of the Convention"[53] and it is recalled and reinforced by article 2 of the Kyoto Protocol. This article is more detailed and precise and it urges Annex I Parties to adopt several domestic policies and measures, even if Countries are let free to choose their policies[54].

The UNFCCC and the Kyoto Protocol identify three main conditions in order to adopt policies and measures. These actions shall aim to reduce greenhouse gas emissions and to contribute to the Convention's overall goals[55], they should promote sustainable development[56] and minimize the adverse effects of climate change[57]. Despite the "hot air" and the low level of greenhouse gas emissions, CEEC are also required to adopt policies and measures if they want to comply with the current and future Kyoto Protocol targets and for that purpose they have already started to launch some initiatives in order to mitigate climate change.

Greenhouse gas emissions within the Accession Countries will decrease just by joining the EU in comparison with business as usual policies. Indeed, when talking about policies and measures within these States it must be stressed that the EU accession requirements have driven the CEEC policies on climate change more than the international obligations related to the UNFCCC and the Kyoto Protocol. The reason is that accession requirements will force these countries to set up new measures which will affect the national strategy to curb global warming. Thus, many EU legal instruments like the IPPC directive or energy efficiency standards, as well as the changes in the Community Agricultural Policy (CAP) will affect the level of emissions.

As a consequence, the establishment of policies and measures within CEEC is therefore strictly related to the EU accession requirements, as the harmonization of the *Acquis Communautaire* within these countries is one of the inflexible conditions to join the EU. Moreover, CEEC will also have to find a joint strategy with the EU in order to participate in the future EU legislation on climate change which is already in progress like for instance the European Climate Change Programme[58] and the forthcoming Emissions Trading scheme proposal[59]. It is not by chance that representatives from these CEEC are already officially participating in working groups aimed to design the second phase of the European Climate Change Programme since policies and measures in the EU and in EITs cannot be considered separately. Furthermore, there are also other current discussions concerning new EU measures which will be relevant for the future CEEC climate policies such as the proposal for a directive on the promotion of biofuels[60], the proposal for a directive to promote combined heat and power (CHP) biofuels[61], the communication considering vehicle taxation[62], the draft directive linking JI/CDM with ET and other provisions on agriculture and sinks.

One should not ignore the financial instruments disposed by the EU to promote environmental im-

[51] According to article 3.9 of the Kyoto Protocol, the negotiations and considerations on the second commitment period shall start in 2005.

[52] According to the UNFCCC guidelines, we can divide policies and measures in different sectors: energy, transport, industry, agriculture, forestry and waste management. Moreover there also several types of policy instruments such as economic instruments, fiscal instruments, voluntary agreements, regulations, information, education and public awareness and research.

[53] Article 3 of the UNFCCC.

[54] Activities suggested by article 2.1 (a) include energy efficiency, greenhouse gas sinks, sustainable agriculture, renewable energy, carbon sequestration, no subsidies or market imperfections, reforms in relevant sectors, transport policies, waste management.

[55] Article 3.3 of the UNFCCC and Article 2.1 of the Kyoto Protocol.

[56] Article 3.4 of the UNFCCC and Article 2.1 of the Kyoto Protocol.

[57] Article 3.3 of the UNFCCC and Article 2.3 of the Kyoto Protocol.

[58] European Climate Change Programme, European Commission COM (2001) 580.

[59] Proposal for a framework Directive for greenhouse gas emissions trading within the European Community, European Commission COM (2001)581.

[60] Proposal for a directive on alternative fuels for road transportation and on a set of measures to promote the use of biofuels, European Commission COM (2001)547.

[61] Proposal for a directive to promote cogeneration of heat and power, European Commission COM(2002)415 final.

[62] Taxation of passengers cars in the EU, European Commission COM (2002) 431.

provements in the Accession Countries. For instance, the European Commission is actively making use of programmes like PHARE, SAPARD or ISPA so as to provide financial and methodological support to these countries with a view to facilitate a rapid and successful implementation of EU legislation and its parallel environmental monitoring systems. Nevertheless, the objective will not be a whole harmonization of environmental protection standards but rather different national conditions and structures will allow Accession Countries to establish diverse national environmental policies.

From an institutional point of view there is still a lack of coordination among the different affected departments. It can be noticed that a joint effective collaboration among ministries is not yet in place but rather in most of the CEEC responsibilities for climate change policy remain fully in hands of the Environmental Ministry. That provokes that policies and measures adopted so far within CEEC are often not related and a more coordinated approach is envisaged.

## Capacity Building

As Annex I Parties to the UNFCCC, CEEC have severe constraints and they need to improve and reorganize their national systems and capacities in order to be ready to implement the Protocol when it will enter into force. As indicated above, the participation in the flexible mechanisms will only occur in compliance with the Kyoto Protocol targets.

Capacity building means capacity to fulfil the requirements indicated by the UNFCCC and the Kyoto Protocol in order to participate to the Protocol itself and its flexible mechanisms. Which are these requirements ?

First of all Annex I Parties have to submit to the Secretariat national communications and national inventories of greenhouse gas emissions, as well as "detailed description of the policies and measures" adopted in order to curb global warming[63]. Furthermore, Annex I Parties shall comply with the Kyoto Protocol reduction obligations and shall present data following the decided guidelines. The Protocol and the Marrakesh Accords have set up the rules for emission monitoring, government reporting and review of information and an accounting system for transaction under the flexible mechanisms and the sinks activities. These provisions are indicated in the guidelines under article 5, 7 and 8[64] and article 7.4[65]. Article 5 requires Annex I Parties to set up national systems for the estimation of greenhouse gas emissions by sources and removals by sinks to be in place by no later than 2007[66], article 7 calls for annual submissions of greenhouse gas inventories and periodical national communications, to be reviewed by independent experts according to article 8. Moreover, the Kyoto Protocol and the Marrakech Accords require Annex I Parties additional procedures for accounting assigned amounts before the first commitment period in order to participate into the flexible mechanisms. To comply with the eligibility criteria national registries have to be set up since they will serve to track emissions transfers under different units representing greenhouse gas reductions and to record and account emission reductions. At COP 8, Parties agreed to set up technical standards in order to allow an accurate, transparent and efficient exchange of data between national registries, the Clean Development Mechanisms and the transaction log. These standards should be adopted by COP/MOP 1[67].

The issue of capacity building within CEEC has been addressed to the international community. This problem was officially recognized by decision 11/CP.5[68] when the Conference of the Parties identified capacity building as an issue that could undermine "the effective participation of countries with Economies in Transition" in both the Convention and the Kyoto Protocol. Following decision 11/CP.5, the UNFCCC secretariat prepared a report based on the information submitted by countries with Economies in Transition in order to recognize their needs and priorities for capacity building[69]. After COP 5, COP 7 returned on the issue and agreed capacity building guidelines under decision 3/CP.7[70]. The importance of capacity building for the EITs is once again stressed in this decision and the agreed guidelines recognize "the need to enhance their ability to address climate change issues"

63 Article 4.1 and article 12 of the UNFCCC.

64 Methodological issues, reporting and review.

65 Guidelines for the preparation of greenhouse gas annual inventories.

66 Methodological issues. Guidelines under Articles 5,7 and 8 of the Kyoto Protocol. Report on intersessional consultations on registries. Note by the Chair of the consultations, FCCC/SBSTA/2002/INF.20 and Methodological issues. Guidelines under Articles 5, 7 and 8 of the Kyoto Protocol. Report on intersessional consultations on registries. Note by the Chair of the consultations, FCCC/SBSTA/2002/INF.2.

67 Decision -/CP.8 on the UNFCCC guidelines for the technical review of greenhouse gas inventories from Parties included in Annex I to the Convention, Decision -/CP.8 on the technical standards for data exchange between registry systems under the Kyoto Protocol, Decision - /CP.8 on the additional sections to be incorporated in the guidelines for the preparation of the information required under Article 7, and in the guidelines for the review of information under Article 8, of the Kyoto Protocol.

68 Capacity building in Countries with Economies in Transition, see UNFCCC document FCCC/CP/1999/6/Add.1.

69 Capacity building in Countries with Economies in Transition – Compilation and synthesis of information on capacity-building needs and priorities of Parties included in Annex I to the Convention but not included in Annex II, see UNFCCC document FCCC/SB/2000/INF.2, 19 May 2000.

70 Decision 3/CP.7, Capacity building in countries with economies in transition, see FCCC/CP/2001/13/Add.1.

as well as the mutual responsibilities of EITs and developed countries. Annex II Parties to the UNFCCC are in fact urged to provide financial and technical support to CEEC for the implementation of the guidelines through multilateral and bilateral agencies or through the involvement of the private sector. EITs shall primarily drive the capacity building activities which are based on learning by doing. Country teams and national focal points in each country are needed even if the existing institutions and bodies have to play an active role in the process. Subsidiary bodies will monitor the developments of the capacity building process.

Economies in Transition have also started a plan of implementation in order to follow decision 3/CP.7: preparation of national inventory systems, integrated registry systems, JI and ET focused actions. It is clear that the final framework for the systems indicated above in order to participate in the Kyoto Protocol and its mechanisms has not yet been established. Still EITs have already stressed the need to set up a common strategy in order to launch coordination units in each countries.

As it was already stated above, EITs are also under the EU accession process and this item represents an additional test for their national systems. CEEC have to implement the *Acquis Communautaire* through the harmonization of their national law in accordance with EU provisions even if the framework of the EU legislation on climate change is not yet completely defined. What is clear is that CEEC are called to raise efforts and resources in the capacity building sector[71] if they want to meet EU accession requirements. However, the situation on capacity building within EITs is far from positive even if all these countries have already taken their first steps in this direction.

As indicated above, not all CEEC have submitted their national inventories which, despite the collection of data activity is carried on mostly in all countries by national institutions or organization[72] as prescribed by the UNFCCC guidelines[73], often display bad quality and missing data. CEEC have also problems when updating the national inventories mainly due to the demanding timeframe and also to difficulties in the estimation of uncertainty. Many factors and actors are involved in the preparation of national emission inventories and deficiencies within CEEC primarily regard the lack of internal structures such as the country's focal points, staff, agencies or institution specialized in preparing these documents[74]. A main challenge is also represented by the difficulties in collecting and using data given that too much secrecy regarding access to information still subsists originating that data are not actually circulating. By the same token legal barriers and obstacles prevent an effective access to emissions data[75]. Adequate provisions to define public accessibility and confidentiality for entities involved in collecting emissions data are required in most all CEEC[76].

Several examples illustrate those problems. Concerning data verification, peer reviews from external and independent experts represent a good practice even if they are still not in place in most countries while all EITs have hosted at least one In-Depth Review (IDR) visit so far[77]. Regarding the level of the online information only Bulgaria has an official greenhouse gas web site; the Czech Republic, Estonia, Latvia, Lithuania, Malta, Poland, Slovakia do not have a specific web site but they have other sources with good links to information regarding climate change and greenhouse gas emissions; Hungary, Romania, Slovenia and Cyprus[78] still present some gaps in providing online information on climate change. Another example is offered by Activities Implemented Jointly (AIJ) and Joint Implementation. Several CEEC are very active in AIJ/JI activities but they have not yet established coordinating agencies or offices in order to support and assist people involved in these projects. In the worst cases, it is even not yet clear who should supervise these activities at the ministerial level[79]. As for the lack of information and public awareness on climate change issues in CEEC, this is in part derived from other determinant factors. As a matter of fact, environmental concerns do not yet play a prominent role in these countries - either for the general public or for stakeholders - despite the fact that the importance of climate change is often stressed by politicians. Rather, efforts and resources are preferably transferred to social, economic and political sectors. Knowledge and awareness of the

71 Levina, E. „Climate Change Capacity Building in Annex I EITs: Issues and Needs", OECD/IEA, Paris, 2002, 13.

72 Some examples are the Czech Hydro-Meteorological Institute (CHMI) in the Czech Republic, the Institute for Environmental Management (KGI) in Hungary, the National Statistical Institute (NSI) in Bulgaria and the Research and Engineering Institute for Environment (ICIM) in Romania, while in Poland several different entities contribute to the data collection.

73 See supra note 65.

74 Jane, Ellis Pershing, Jonathan Mullins, Fiona, "Transition Country perspectives on the Kyoto Protocol", OECD/IEA, 2001, 6.

75 See supra note 74, 8.

76 Buchman, A. Baumert, K. Rizzo, F. "Complying with the Kyoto Protocol requirements: capacity needs in Central and Eastern Europe", REC and WRI, Szentendre, Hungary, 2001, 22.

77 The In-Depth Review Report is required by the UNFCCC as a mean to assess the Party's National Communication.

78 For Hungary, Romania and Slovenia, the problem is that web sites do not have substantial English version. For Cyprus there are practically no online data on greenhouse gas emissions.

79 See supra note 71, 12.

problem is very low even at the governmental level, the EU accession being more a priority than climate change.

Nevertheless, CEEC governments and organizations are currently undertaking large investments and efforts in the field of capacity building, having already reported much progress in order to develop their Kyoto Protocol implementation strategies and national systems for the preparation of greenhouse gas inventories. Very often, CEEC activities are undertaken in collaboration with other Annex I countries or international organizations and NGOs[80]. These international projects are either activities directed to provide a general assistance or actions clearly focused on the CEEC region or even bilateral initiatives[81]. CEEC have in fact common needs but also differentiated situations and capacity building activities should be addressed in a flexible way trying to take the countries' special circumstances in consideration.

These are some of the capacity building projects: the Energy Standards and Labelling Programme established by the United Nations Department of Economic and Social Affairs (DESA) and directed in our case to Poland as well as to Asia, Middle East and Central America countries, a project aiming to foster the developments of energy standards in 2000 and 2001; the Interdepartmental ad hoc Working Group on Climate established by the FAO, a project directed to the role of LULUCF activities in order to curb global warming; the UNITAR (United Nations Institute for Training and Research) Programme of Training for the Application of International Environmental Law which concerns the training of CG 11 government officials in order to respond to the UNFCCC guidelines on inventory systems; the Environmental Energy Agency assistance in the shaping of GHG national inventories through the offer of training activities or software tools; the Intergovernmental Panel on Climate Change (IPCC) which provides workshops and seminars on the IPCC approach and methodology in order to offer capacity assistance; the Global Environmental Facility (GEF) from UNDP which supplies assistance either on capacity building issues like national inventories and national communications, or in the project activity sector like energy efficiency and renewable energy.

Among the most innovative regional initiatives appear the National CDM/JI Strategy Studies Program of the World Bank, an ongoing project with activities in the Czech Republic and Slovakia so far, which aims to train local experts in order to estimate, promote and establish initiatives to reduce greenhouse gas emissions like JI projects; the PCFplus from the World Bank, which refers as well to the promotion of training and research and the development of activities and projects to combat global warming[82]; the Annex I Expert group of the OECD/IEA, a group composed by Annex I countries' government officials which supports the CEEC mainly through the organization of workshops and the exchange of information in several fields of the climate regime like monitoring and compliance as well as the development of policies and measures and ET and JI projects; the US initiative through the Environmental Protection Agency (EPA), which is trying to support and enhance greenhouse gas markets in Poland, Slovakia and the Czech Republic; several projects sponsored by the European Commission. The EPA is in fact very active and together with the Baltic Sea region countries' governments has established the BASREC project funded through the SYNERGY programme of the European Commission in order to promote the implementation of flexible mechanisms within the CEEC[83] or the BASE project funded through the European Commission Fifth Framework Programme and aiming at the development of clean energy investments through JI projects in Estonia, Slovenia, Hungary, Czech Republic and Poland. Furthermore, the European Commission established other programmes like TACIS and PHARE which are providing resources and funds to the CEEC in relation to areas which require more investments.

Support to the CEEC is also coming from some NGOs and business association like the Capacity for Climate Project from REC and WRI in order to assist capacity building within CEEC in the area of institutional framework; the Regional Environmental Centre (REC), which is sponsored by several Annex I government related institutions and which has also set up the Climate Change Program in order to assist CEEC capacity building; the International Energy Agency (IEA) assistance on ET for entities in Estonia, Latvia, Lithuania, Poland and Russia and the Center for Clean Air and Policy (CCAP) that supports Slovakia, Poland and the Czech Republic in the development of climate

80 Only CEEC considered in this article are mentioned here even if the projects described often involve also other countries like Russia and Ukraine.

81 Bilateral support activities in the CEEC have been carried on so far by the Netherlands, the USA, Canada, Japan, Finland and Sweden but they are not assessed in the article.

82 At the moment some PCF projects are implemented in Latvia and Poland.

83 At the moment there are some projects on ET and JI in Estonia, Latvia, Lithuania and Poland.

change strategies and in the understanding of IET through its Economies in Transition Program.

Bilateral assistance to CEEC has been so far provided by several Annex I Parties and in particular by the Netherlands which have currently JI projects directed to Bulgaria, Romania and Slovakia through the ERUPT scheme (Emission Reduction Unit Procurement Tender).

Table 6 shows the status of the targeted assistance to CEEC undertaken so far.

*Table 6*

| Country | ET | GHG monitoring and reporting | AIJ/JI | National registries |
|---|---|---|---|---|
| Bulgaria | | | v | v |
| Czech Republic | v | v | | |
| Estonia | | | v | |
| Hungary | | | | |
| Latvia | | | v | |
| Lithuania | | | v | |
| Poland | v | v | v | |
| Romania | | | v | |
| Slovakia | v | v | | |

Source: OECD/IEA (2002)

Although these assistance activities have produced very positive effects for the development of national systems in view of implementing the Kyoto Protocol in EITs, the experience has shown that country-driven activities involving local officials and stakeholders are more effective. Unfortunately, the attention of the international community has so far been devoted mainly to JI projects, ignoring other relevant issues like the preparation of national inventories and registries or the future participation in emissions trading[84].

## Steps to be taken

CEEC climate change policies have been up to present too fragmented, requiring therefore a more centrally coordinated and strategic approach as well as a better distribution of tasks and responsibilities. Climate change will turn out to be an outstanding issue for the environmental and economic development of CEEC. Thus, more attention should be paid by Accession Countries' governments in order to promote the participation and the involvement of stakeholders and the private sector in the shaping of JI and ET activities. Equally, the road to the implementation of the Kyoto Protocol and its mechanisms should be more clearly defined and based on a long term perspectives.

Regarding capacity building - a problem which affect not only EITs - there is an urgent need of strengthening institutions in order to develop climate policies, as well as exchanges of methodologies on data issues like monitoring, collection, estimation and verification. More assistance on legal issues concerning ET and JI and activities in order to spread public awareness, education and training should be envisaged[85].

Keeping in mind that projects and policies and measures aiming to reduce greenhouse gas emissions respond not only to environmental issues but provide also additional benefits for CEEC, national and international efforts in this sense should be supported.

84 See supra note 71, 6-14.

85 See supra note 76.

# The Water Framework Directive and Its Non-Deterioration Clause: Practical Implications for the Spanish Hydrological Plan

*Ana Barreira*

Water is the sector with the most comprehensive coverage in EU environmental regulation with around 25 Directives and Decisions[1]. Adopted in September 2000, the Water Framework Directive[2] (WFD) aims to provide an umbrella for the implementation of the various instruments of EU water policy as well as to introduce new standards and tools for the protection of the ecological quality of waters. The WFD sets common approaches and goals for the management of water in 27 countries (15 Member State (MS) countries and 12 pre-accession countries which should conform in the long-term with Community law). The implications of the WFD are far-fetched and beyond the limits of Europe as it sets out a new legal and institutional approach to water management that may be useful and adopted in other parts of the world[3].

The objective of this article is to provide an overview of the main elements and obligations of the WFD with special emphasis on the practical implications of its non-deterioration clause for the Spanish Hydrological Plan.

## Main Elements and Obligations of the WFD

The WFD sets common objectives for water policy and establishes a coherent legal and administrative framework, which may facilitate implementation of these objectives through co-ordinated measures within an overall planning process. The WFD introduces a remarkable change in Community water legislation. The policy moves from protection of particular waters of special interest (a nature area, specific aquatic organisms, drinking water) to protection and use based on overall appreciation of the hydrology and ecology of the entire natural cycle of each river basin (Olsen, A. 2001).

The new WFD has a double objective: on the one hand, it intends to prevent further deterioration and enhance the status of water ecosystems, and on the other, to promote sustainable water use based on a long-term protection of available water resources[4]. Its main goal is to achieve a good status of community waters by 2015. This goal is translated into **environmental objectives**[5] referred to surface waters (good ecological and chemical status), groundwater (good quantitative and chemical status) and to protected areas (compliance with standards and objectives specified in community legislation establishing those areas). The environmental objectives are to be achieved with the development and implementation of river basin management plans and of programmes of measures. It also provides specific obligations on active and real public participation in the preparation, review and updating of the river basin management plans for Member States[6].

This EC instrument establishes the **river basin district**[7] as the main unit for river basin management. This unit is comprised of the area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters. Therefore, it provides for an **integrated management and planning** of surface waters, groundwaters, transitional and coastal waters.

The WFD, in accordance with its objective of establishing a coherent and efficient legal framework, integrates existing EC Water Law. Until the WFD becomes fully operational, the current EC Water legislation will be in force.[8] It establishes specific

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1 We can identify two phases. During the first phase two kind of directives were developed: "directives water use" (water for drinking, bathing and for fish and shellfish harvesting) and the "water pollutant directives" which regulated the permissible levels of discharges of dangerous pollutants. In the second period the emphasis shifted to the control of pollution at the source (uniform requirements for the installation of waste-water treatment plants and integrated programmes for the protection of vulnerable zones from agriculture-related nitrate pollution).

2 Directive 2000/60/EC, O.J. L 327/1 of 22.12.00.

3 The Draft Plan of Implementation, one of the outcomes of the World Summit for Sustainable Development, refers to the need to establish integrated water resources management (Chapter IV. Protecting and managing the natural resource base of economic and social development, Para 25).

4 Article 1 WFD.

5 Article 4 WFD.

6 Article 14 WFD.

7 Article 3 WFD.

8 The following legislation will be in force until 22.12.2007: Directive 75/440/EEC concerning the quality required of surface water intended for the abstraction of drinking water; Council Decision 77/795/EEC establishing a common procedure for the exchange of information on the quality of surface freshwater in the Community; Council Directive 79/869/EEC concerning the methods of measurement and frequencies of sampling and analysis of surface water intended for the abstraction of drinking waters in the Member States.
On 22.12.2013 the following directives will be repealed: Council Directive 78/659/EEC on the quality of freshwaters needing protection or improvement in order to support fish life; Council Directive 79/923/EEC on the quality required of shellfish waters; Council Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous

ecological and chemical quality objectives for all kinds of water bodies and defines a series of mechanisms and procedures to check that those objectives have been achieved[9], taking into account the ecological characteristics of each territory. In addition, the WFD establishes the need to adopt measures aimed at the progressive reduction, cessation and phasing-out of discharges, emissions and losses of priority hazardous substances[10].

In accordance with recent initiatives to give specific weight to economic instruments in environmental policy, the WFD fosters the use of water-pricing policies to motivate its sustainable use and recover the cost of water services[11].

The timetable for implementation of the obligations varies, taking into account the nature of the objectives, which must be achieved. On December 22, 2003 Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with the WFD. However, due to the complexity and variety of provisions required, Member States should work gradually to comply with the obligations. Therefore, though the deadline is at the end of 2003, it is necessary that Member States start the implementation process. Without doubt, considering the complexity of changes that the Directive involve, it is evident that the efforts required to achieve this will not be trivial. The inclusion of new objectives in national policies is a difficult task that implies the modification of many legal provisions and management models within Member States.

Having in mind that this is a framework directive, all its elements are described in general terms. Conscious of the need to further develop this instrument to ensure its effective and coherent implementation, Member States, the European Commission and Norway elaborated the WFD "Common Implementation Strategy" which was agreed in May 2001 (WFD CIS). This WFD CIS is built around four "Key Activities":

- Sharing of information
- Management of information and data
- Development of guidance on technical issues
- Application, testing and validation of guidance.

Within the "Key Activity" on development of technical guidance for specific WFD implementation issues, 10 Working Groups, under the leadership of one or more Member States, have been established. The issues of these Working Groups are:

1. Analysis of pressures and impacts
2. Reference conditions inland surface waters
3. Typology, classification of transitional, coastal waters
4. Heavily modified water bodies
5. Geographical Information Systems
6. Intercalibration
7. Monitoring
8. Economic analysis
9. Tools on assessment, classification of Groundwater
10. Best practice in river basin planning

Though Member States have until December 22, 2003 to implement into national legislation the necessary provisions to comply with this directive, there is one obligation that entered into force from the day of its entry into force. That is, the obligation to prevent further deterioration of community waters, known as the non-deterioration clause (Barreira A. 2001; Olsen A. 2001).

## The Non-Deterioration Clause

This Directive aims at maintaining and improving the aquatic environment in the Community[12]. Taking into account that this WFD integrates most of the water legislation in force, and in accordance with the provisions of article 1 and 4, Member States must prevent further deterioration of community waters from December 22, 2000 with the aim of achieving their good status by 2015.

Article 1 provides that "the purpose of this Directive is to establish a framework for the protection of inland surface waters, transitional waters, coastal waters and groundwater which:

> *(a)* ***prevents further deterioration*** *and protects and enhances the status of aquatic ecosystems and, with regard to their water needs, terrestrial ecosystems and wetlands directly depending on the aquatic ecosystems;…" (emphasis added)*

Article 4 mentions the non-deterioration clause twice referring to surface and ground waters:

> *"Member States shall implement the necessary measures* ***to prevent deterioration of the status of all bodies of surface water****, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8;. ..." article 4,1 (a) (emphasis added).*

> *"Member States shall implement the necessary measures to prevent or limit the input of pollut-*

substances; Directive 76/464/EEC, with the exception of Article 6, which was repealed when the WFD entered into force (22.12.2000).

9 Article 8 WFD.

10 Article 16 WFD.

11 Article 9 WFD.

12 Recital 19.

*ants into groundwater and to prevent the deterioration of the status of all bodies of groundwater, subject to the application of paragraphs 6 and 7 and without prejudice to paragraph 8 of this Article and subject to the application of Article 11(3)(j);…" article 4, 1(b).*

Considering that these "non-deterioration clauses" do not specify a date for achieving the objective of preventing deterioration, we can imply that these provisions entered into force immediately upon the publication of the WFD. The WFD indicates specific dates for the rest of the objectives to be achieved[13]. This clause was highly contested during the conciliation process where Council wanted to link compliance to 15 years after the entry into force of the Directive and the European Parliament wanting it to enter into force immediately upon entry into force of the Directive. The deadline of 15 years ( or indications of a deadline expressed otherwise) after entry into force remains explicitly stated for all other provisions in Article 4,1. However, the deletion (absence) of a date in this clause reflects that the Parliament's opinion prevailed.

The "chapeau" to Article 4,1 makes reference to the programme of measures, which must be established for each river basin district according to article 11,

*"In making operational the programme of measures specified in the river basin management plans:…"*

Such programmes of measures must be established by 22 December 2009 and must be fully implemented by 2012[14].

The reference to the programme of measures could produce a wrong interpretation on the entry into force of the non-deterioration clause. However, the inexistence of a specific date on this clause could be understood as an indication of its immediate entry into force. In addition, the "basic" compulsory measures of the programme of measures which represent the minimum steps required to achieve "good status" include measures required by 11 existing EU water-related Directives (*inter alia* the Bathing Waters Directive, Drinking Water Directive, Urban Waste Water Directive, Nitrates Directive, Birds Directive and Habitats Directive). As an indication of avoiding further deterioration of the community waters, the European Commission has taken legal action against some Member States for non-compliance with some of those Directives[15].

If there would be any doubt on the entry into force of the non-deterioration clause from the day of publication of the WFD, Mr. Liikanen from the European Commission referred to this clause during a debate at the European Parliament on water management in Europe in the following terms[16]:

*"...The Directive does not prohibit water transfers per se. However, it imposes a binding legal requirement that they should not harm the environment. It seems particularly important in this context that* ***since the directive entered into force on 22 December 2000 a strict non-deterioration clause has applied****, which should prevent a repetition of past errors. The possibilities for derogation are restricted and subject to mandatory conditions". (emphasis added)*

Use of derogation to the non-deterioration clause to which Mr. Liikanen referred to is linked to two conditions. The first is temporary deterioration, mainly due to circumstances of natural causes or *force majeure*, which could not reasonably have been foreseen or which are exceptional[17]. The second consist on the failure to prevent deterioration which makes impossible to achieve good status due to the reasons for those modifications or alterations are of overriding public interest and/or the benefits to the environment and to society are outweighed by the benefits of the new modifications or alterations to human health, to the maintenance of human safety or to sustainable development.[18]

## Practical Implications of the Non-Deterioration Clause

The question on the entry into force of this clause has become very relevant in the discussions and arguments against the Spanish Hydrological Plan[19]. The Spanish Government and the Spanish Parliament approved this Plan that provides for water transfers from the North to the South of Spain to satisfy increasing water demands mainly from the agricultural and the tourism sectors. To transfer this water is necessary to build big infrastructures. This transfer and the construction of these infrastructure will affect negatively to the Delta of Ebro river, to

[13] Article 4 states a number of other objectives in 4.1.a(ii), 4.1.a (iii), 4.1.b(ii), for which a date (22 December 2015) is indicated for their achievement, and in 4.1.a (iv) and 4.1.b (iii), for which the date of their application is defined by reference to other Articles, which will specify such dates.

[14] Article 11, 7 WFD.

[15] In July 2001, the Commission sent Letters of Formal Notice to Spain, Belgium, Luxembourg and Italy for failing to adopt pollution reduction programmes for 99 dangerous substances. In February 2002, the Commission took legal action against France, Greece, Germany, Ireland, Luxembourg, Belgium, Spain and the United Kingdom for non-compliance of the Directives governing Surface Water, Bathing Water, Drinking Water, Shellfish Water, Urban Wastewater and Nitrates. In July 2002, the Commission acted against Portugal, Spain, Italy, Sweden, Belgium, Luxemburg, The Netherlands, France and Greece for not complying with the directives on bathing water, drinking water, urban wastewater, nitrates and discharges of dangerous substances.

[16] European Parliament debate hold on 15th March, 2001.

[17] Article 4.6.

[18] Article 4,7 (c ).

[19] Ley 10/2001 of 5/07/2001, Spanish Official Journal (BOE) n. 161 (6/07/2001).

many protected areas and to the ecosystems of the rivers. As a result, this Plan has been highly contested by Spanish civil society that starred a walking demonstration called the "blue demonstration" from Aragón to Brussels in August 2001. A group of individuals and associations has submitted a complaint to the European Commission against the Spanish Hydrological Plan. In fact, during the European Parliament debate mentioned above, the Spanish Plan was object of discussion:

> *"The Spanish national water plan is a general policy document to be followed by a large number of detailed projects. The national water plan is not comparable with a river basin plan under the WFD....*
>
> *At the same time, a strict deterioration clause applies; impacts and measures that cause deterioration of a water body are prohibited, unless the Member State invokes one of the limited derogation clauses, which in turn are subject to meeting a range of conditions…." (Mr. Liikanen)*

Holding that the non-deterioration clause entered into force by 22 December 2000, we are in a position to question the legality of the Spanish Hydrological Plan since this Plan will deteriorate the status of water. It is quite astonishing that the Spanish Administration has recognized the immediate entry into force of the obligation of non-deterioration, as we will see below.

To achieve the good status of waters by 2015, Member States will have to ensure for each river basin district that an analysis of its characteristics, a review of the impact of human activity on the status of surface waters and on groundwater, and an economic analysis of water use are undertaken by 2004[20]. The WFD establishes a concrete methodology in its Annex II to carry out the initial characterization of waters. This characterization will be the base for determining the water status afterwards.

One of the accompanying studies of the Hydrological Plan on "Environmental Analysis" recognizes the obligation to not deteriorate waters from the entry into force of the WFD[21], therefore a water body cannot have an inferior ecological status to the status previous to its entry into force. We can say that the water transfers included in the Spanish Hydrological Plan represents a threat to the non-deterioration clause in force.

[20] Article 5 WFD.

[21] "If a Member State decides to execute a water transfer, it would be necessary to consider the magnitude of its effects on the water ecological status and the principle of non-deterioration which implies that a water body cannot be of an inferior ecological status from the moment the WFD enters into force" (translation of the author, emphasis added) page 23 Documento Análisis Ambientales.

The "Environmental Analysis" document indicates some formula to avoid the application of the obligation of reaching the good ecological status by 2015 to the waters to be transferred[22]. One of these formula would be to declare those waters as artificial and heavily modified bodies of water. Then, the aim would be achieving good ecological potential and good surface water chemical status by 2015[23]. Nevertheless, the water characterization should be ready by 22 December 2004 as mentioned before. Will it be possible to characterize the waters to be transferred as artificial or heavily modified water bodies? If it were possible, this would mean that the works necessary to transfer waters have been carried out.

We must conclude that if the water transfers of the Spanish National Water Plan are carried out, it would infringe the non-deterioration clause of the WFD.

## Conclusions

The WFD represents a challenge not only to community waters but also to the way of formulating environmental policies. It is evident that the status of community waters must be improved. Member States and accession countries will have to make a significant effort to reach the objectives of the WFD. It should not be allowed that a Member State could carry out actions that will worsen the status of community waters and even, less to let a State use community funds to finance them. This WFD represents a change in the way environmental policy has been formulated. The European Commission used to wait until a directive entry into force to monitor its implementation and compliance by Member States. Now, the Commission cooperates with Member States to ensure the effective and coherent implementation of the WFD through the CIS.

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[22] Article 4.1. a) (ii).

[23] Article 4.1. a) (iii).

# Successes and Failures of Biosafety Law in Moldova

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## 1 Introduction

The draft of the Law on Biological Safety was initiated by the Moldovan Ministry of Environment at the beginning of 2001 and, to a great extent, resembled the Romanian Ordinance of 2000[1]. On 21 December 2001, just before going into its winter recess, the Parliament of Moldova passed the Biosafety Law in the second reading and submitted it to the President for promulgation. However, the text coming out of the second reading, hastily adopted, appeared to include many newly incorporated and surprising provisions that made the Law chaotic, leaving plenty of opportunities for abuse, as well as for unintentional mistakes. The pressure and lobbying by environmental non-governmental organisations (NGOs) prompted the President of the country to refuse promulgation and to return the Law to Parliament for an additional reading.[2] In May 2002 the Parliament made substantial changes to the Law, following almost all of the NGOs' recommendations as supported by the President. The Biosafety Law was promulgated in June 2002.[3] This article intends to focus on the positive and negative aspects of the new legislation, which presents one of the first attempts to regulate genetic engineering in the Newly Independent States.

## 2 The Content of the Biosafety Law

### *A. What is regulated?*

The Biosafety Law regulates a wide range of activities: production, testing, distribution, and contained use of GMOs; environment; the placing of GMOs and products thereof on the market; unintended release of GMOs into the environment; use of GMOs in research; import/export of GMOs and products thereof; unintended transboundary movement of GMOs; and the storage, disposal and elimination of GMOs and products thereof (Art.2(1)).

At the same time, the Biosafety Law provides that it does not apply to certain spheres (Art.2(2)). These include cleared (refined) products, notably pharmaceuticals designed for humans or animals. Also, it does not apply to transportation as such, irrespective of the means of transportation. It does not apply to imports/exports that are covered by other legal acts. However, the alarming provision is that the Biosafety Law does not apply to GMOs that are listed in the *Regulations on licensing and permitting for activities connected with creation, experiments, use and sale of GMOs*. In this case, the Law points us to non-existing governmental *Regulations*, which will govern an undetermined number and range of GMOs. In addition, the Law assigns some other important areas to be determined solely by the *Regulations*. For example, the content of an application for a permit is not even outlined in the Law (Art.10(1)) and will be decided exclusively by the Government in the future *Regulations*. As the vast majority of Moldovan laws are drafted by the Government, the Parliament is frequently criticized for enacting framework, declaratory and unworkable documents. Moreover, parliamentary documents are often later arbitrarily interpreted by the Government in governmental regulations.The Biosafety Law follows this unfortunate tradition by exempting an uncertain range of GMOs.

### *B. National Commission*

The Biosafety Law establishes a National Biosafety Commission (hereinafter National Commission or Commission) as a governmental institution to issue permits for various activities connected with GMOs (Art.5 and Art. 6). The composition of this body was the most debated issue in the drafting process. Now the Commission consists of 13 members whose term of office is five years. Five commissioners represent four Ministries (Environment (2), Economy, Agriculture and Health). Seven commissioners are scientists from the Academy of Sciences of Moldova and other scientific institutions. An important victory for the NGOs is the fact that one member of the Commission will now come from environmental NGO. Initially, this seat was reserved for a representative of the Labour Ministry. This will ensure more transparency and accountability of the National Commission.

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1 Moldovan legislation often follows the examples of neighbouring countries with transition economies. Due to strong historical ties and linquistic identity of Moldova and Romania, Romanian experience often serves as a starting point to develop new areas of legislation in Moldova. *See* Ordinance N 49/2000 on the Regime of Creation, Testing, Use and Commercialization of GMOs and Products Thereof, Monitorul Oficial al Romaniei N.48/31.01.2000.

2 In his statement, President Voronin directly referred to the "text and spirit" of the Aarhus Convention, arguing that the Law needs more openness and transparency. For the Aarhus Convention *see* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters [hereinafter: Aarhus Convention], June 25, 1998, 38 I.L.M. 255. Moldova was the first country to ratify this Convention on 7 April 1999.

3 Law on Biological Safety N.755-XV [hereinafter: Biosafety Law], Monitorul Oficial al Republicii Moldova N.75/13.06.2002.

The other success is the provision on incompatibility of office for the commissioners, rejected by the Parliament in the second reading[4] but later adopted into the final text of the Law. It explicitly prohibits the commissioners from having any labour relations with natural persons and legal entities that are occupied with the production and/or realisation of GMOs. This provision should prevent cases, such as those that have already happened in several countries of Central and Eastern Europe, when GMO-producing companies have contracted commissioners as consultants thus compromising their ability to make independent decisions.[5]

### C. Permitting and Licensing

Activities classified as 3rd and 4th classes of risk require licensing prior to and in addition to permits of the National Commission. Such activities of higher risk are all those other than contained use, activities which fall under contained use but go beyond laboratory research, and *some other* activities of contained use classified as 3rd or 4th classes of risk (Art. 3and Art. 4). Unfortunately, the Law does not make it clear how an applicant will know in advance that licensing is required for a proposed activity prior to starting the permitting procedure at the National Commission which is responsible for deciding on the class of risk.

Licences are issued by the Licence Chamber. A licence for activities in the area of genetics and microbiology will cost 1800 Moldovan lei (around 130 US dollars). Further provisions on licensing will be included in the future governmental *Regulations*. At the same time, the Law has been improved compared to the text of the second reading which, apparently by mistake, provided for the licensing of illegal transboundary movement of GMOs and failed to clarify how licensing coincided with permitting.

### D. Procedures

The Biosafety Law differentiates four types of activities that require different permitting procedures within the Commission: (1) contained use of GMOs; (2) deliberate release of GMOs; (3) the placing of GMOs and products thereof on the market; and (4) import/export of GMOs and products thereof.

The first three procedures require of an applicant to submit an application to the National Commission. The content of the application is, again, to be determined later in the governmental *Regulations*. The applicant shall conduct the assessment of the proposed activity and suggest what class of risk that activity should be assigned to. The Commission verifies whether the application is in conformity with the *Regulations*, whether the risk assessment is correct, and whether measures of protection, measures in case of an accident and measures on waste management are adequate. The National Commission may ask the applicant for additional information. It may also limit the term of validity of the permit and establish additional requirements in the permit.[6]

The version of the Law adopted by the Parliament in the second reading considered the first procedure – contained use of GMOs – as posing much less danger than the other three procedures. According to that version, the Commission had no power to refuse granting a permit in the first procedure, while it had a right to refuse granting a permit in the second and third procedures (deliberate release of GMOs, and the placing of GMOs and products thereof on the market). Also, in the case of the first procedure, there was no requirement in the text of the second reading to obtain Opinion Papers from the central authorities on agriculture, food industry, health and consumer protection, which are obligatory for the second and third procedures. The final text of the Law shows an important victory for NGOs as they managed to completely change the character of the permitting procedure for the contained use of GMOs (1). Contained use is no more regarded as an "easy" case because of "less danger". In the final text, the Commission has a right to refuse granting a permit in all three procedures. Also, the request for Opinion Papers from the central authorities on agriculture, food industry, health and consumer protection is now a requirement for all three procedures (contained use of GMOs (1), deliberate release of GMOs (2), and the placing of GMOs and products thereof on the market (3)).[7]

The only remaining shortcoming in this regard is that the Law does not require the Commission to inform and consult with the public in the case of contained use (1), which is mandatory for the second and third procedures (deliberate release of GMOs (2), and the placing of GMOs and products thereof on the market (3)).[8]

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4 The Parliament justified the rejection of the provision on incompatibility of office saying that members of the Commission are automatically prohibited from taking another office as state servants according to the Law on State Service. However, this reasoning could not justify the rejection, since seven members of the Commission from the scientific community are not state servants and are not subjects to the Law on State Service.

5 "The President of the [Biosafety] Committee [in Yugoslavia] is Goran Bekavac, from the Institute for Field and Vegetable Crops, who is co-operating with Monsanto on the field trials of GE plants taking place there"; "Two of the three laboratories doing GMO-testing [in Yugoslavia] are based in the institutes undertaking field trials of GMOs". Both citations come from: Iza Kruszewska and Olivera Radovanovich, *Biosafety Policy and Practice in Yugoslavia*, ANPED NORTHERN LIGHTS, Spring 2002, p.4.

6 Biosafety Law, *supra* note 3, Art. 10,12, 14, 19, 20, 23(1).

7 Biosafety Law, *supra* note 3, Art. 12(1), 14(2)(c), 20(1)(b), 20(2), 23(1).

8 Biosafety Law, *supra* note 3, Art. 20(1)(a), 23(1).

As far as the third procedure (the placing of GMOs and products thereof on the market) is concerned, the Law requires that GMOs and products thereof shall be in conformity with the requirements of national legislation, and if no such requirements exist, they shall conform with the relevant provisions of the European Union's legislative rules or international agreements.

The labeling of products to be placed on the market shall be determined in advance. The words "This product contains genetically modified organisms" are obligatory for the label. The final text of the Law contains the improved wording stating that labeling is required if GMOs exceed 1% of the total product weight, or 0.3% of seeds weight. Also, a great achievement is the introduction of the provision that the wording "This product contains genetically modified organisms" shall occupy not less than 10% of the packaging or accompanying documentation.[9]

The import/export procedure (4) mostly repeats the basic provisions of the Cartagena Protocol on Biosafety,[10] including the advance informed agreement procedure, the notification, acknowledgement of receipt, and the decision procedure.

Risk assessment is required in all procedures and shall be based on two principles: scientifically sound character and transparency. Risk assessment is performed by public authorities or scientific institutions that are chosen by the Commission and paid for by the applicant.[11]

The permit issued by the Commission shall stipulate the conditions of use.. The permit given for the deliberate release of GMOs into the environment shall contain the size of the genetic safety zone. That zone shall not be less than 3 km for nature protection territories.[12]

### *E. Public consultation - Confidentiality*

To ensure the transparency of the activities of the National Commission, a special procedure on consultations with the public is part of the Biosafety Law. After having received an application for the deliberate release of GMOs into the environment and/or for release of GMOs and products thereof to the market, the Commission needs to inform the public within 10 days. Comments must then be sent to the Commission within 30 days. The Commission shall take comments into account. Depending on the comments, public hearings may be organized. The Commission shall be guided by national legislation and international agreements to ensure public participation.[13] This includes undoubtedly the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters.[14]

Unfortunately the Biosafety Law establishes no duty to inform the public in the case of applications on the contained use of GMOs, apparently interpreting "deliberate release" from the Aarhus Convention[15] as not including "contained use". It is important that the Commission and other authorities follow the Guidelines on Access to Information, Public Participation and Access to Justice with respect to Genetically Modified Organisms,[16] and organize public participation in decision-making procedures for "contained use" as well.

The Commission may consider some information as confidential with respect to relevant protection of intellectual property rights. The general description of GMOs, name and address of the applicant, purpose and site for the use of GMOs, class of risk, conclusions of risk assessment, methods and plans of monitoring, and emergency measures cannot be confidential (Art. 11).

### *F. European Union*

The Biosafety Law makes a number of references to EU legislation and practice, with a tendency to simplify significantly the application procedures for GMOs approved in the EU. Besides that, the Biosafety Law says that Moldovan legal acts shall take into account the changes and new acts adopted by the EU.[17]

In theory, Moldova does not have any obligation to implement EU legislation. It is not an accession country and, therefore, it is not required to absorb the *acqui communitaire*. The partnership and cooperation agreement of 1994[18] between Moldova and the EU certainly does not require the application of EU norms in Moldova's territory. Generally, the tendency to refer to EU practice and expertise in

9 Biosafety Law, *supra* note 3, Art. 23(3), 24 (1) (c).

10 Cartagena Protocol on Biosafety to the Convention on Biodiversity, 29 Jan. 2000, 39 I.L.M. 1027 (2000). Moldova signed Cartagena Protocol on 14 Feb. 2001, and ratified it on 11 Oct. 2002.

11 Biosafety Law, *supra* note 3, Art. 34.

12 Biosafety Law, *supra* note 3, Art. 20(4).

13 Biosafety Law, *supra* note 3, Art. 39.

14 The Aarhus Convention, *supra* note 2.

15 Article 6 on public participation of the Aarhus Convention provides: "Each Party shall, within the framework of its national law, apply, to the extent feasible and appropriate, provisions of this article to decisions on whether to permit the deliberate release of genetically modified organisms into the environment." See Aarhus Convention, *supra* note 2.

16 Guidelines on Access to Information, Public Participation and Access to Justice with Respect to Genetically Modified Organisms. First Meeting of the Parties to Aarhus Convention, Lucca, 21-23 Oct. 2002, available as draft at http://www.unece.org/env/pp/mop1.htm (visited 23 Oct. 2002).

17 Biosafety Law, *supra* note 3, Art. 13(1), 19(7), 23(3), 27(2), 29(3), 42.

18 The Partnership and Cooperation Agreement between Moldova and the EU and its Member States (signed 27 Nov. 1994, entered into force 1 July 1998), OJ L 181, 24.6.1998, p.3.

Moldovan legislation seems quite strange from the point of view of international law.[19] Besides, the provisions that allow simplified procedures for GMOs approved in the EU can be interpreted as discriminatory by GMO applicant companies.

On the one hand, such a tendency is not a positive reflection of the Moldovan legislature. By acknowledging that what is good for the EU shall also be good for Moldova, Moldovan legislature waives the governmental responsibility before Moldovan society for making a decision on specific GMOs or products thereof when the Moldovan authorities, not the EU bodies, are ultimately accountable to the Moldovan public.

From the other perspective, a small country with an economy in transition may not have sufficient scientific, technical and financial capacity to ensure adequate risk assessment. From this point of view, allowing simplified procedures in Moldova for GMOs, as approved by the EU which is perceived to be the leader of environmentally sound policies, is not necessarily bad for the country, its environment and consumers.

## 3 Precautionary Principle

The precautionary principle cannot be characterized as a firm and established one in Moldovan legislation. It has never been explicitly mentioned by the Parliament, though some governmental acts have mentioned and applied this principle.[20] There are wordings reflecting the precautionary principle in the National Program on Use of Industrial and Consumption Wastes (2000), Regulation on Environmental Audit (1998), National Action Plan on Hygiene of the Environment (2001) and other acts.

NGOs invoked the precautionary principle in the debates on the Biosafety Law to encourage the state institutions to take a stricter policy on GMOs. For many people, the wording of principle 15 in the Rio Declaration read as a requirement to prohibit GMOs in Moldova. For some, flexible interpretations of the precautionary principle were perfectly acceptable, meaning that Moldova just needed to be cautious while allowing GMOs.

Many environmentalists argued that flexible provisions of the Law permitting GMOs in Moldova, where the only economic wealth is agriculture, are against any precaution. Moldova has nothing to rely upon for its economy except the traditions of clean, though old-fashioned, agriculture. The fear is that, after the introduction of GMOs, Moldovan agricultural products are likely to be disfavored in former Soviet countries and may also lose their last chances to compete on European markets. Today, the image of Moldovan agricultural products in the West is not high. The country is still perceived as highly polluted with pesticides from the Soviet time, though in reality this danger is already gone. The use of GMOs is likely to further discourage any potential exports.

However, the precautionary principle facilitated the argument for harder rules in the Biosafety Law. Luckily, the Law was adopted in the final reading before the World Summit on Sustainable Development, which diminished the precautionary principle to an "approach".[21] It would be much harder to use the precaution argument today, after the summit in Johannesburg.

The legislators apparently tried to include elements of precaution in the Biosafety Law, for instance the provision on reconsidering previous decisions based on new data.[22] The Law provides that if the holder of the permit gets new information, or if there is a change to the circumstances of use, the holder of the permit shall inform the Commission. Also, if the Commission becomes aware of new data, it may revise its decision.[23] However, the Law is inconsistent with the threshold of harm that shall be established in order to initiate the revision procedure in the Commission. In cases of contained use, only serious harm to human health and environment shall be the reason for revision. In cases of import/export permits, there shall be scientific data on potentially harmful effects in order to initiate the revision.

## 4 Implementation

The Biosafety Law will come into force in June 2003. By then, the Parliament needs to amend the Administrative Code and the Criminal Code to include responsibility for violations of the new legislation. In particular, it is important to provide concrete responsibility for import, export and use of GMOs without a permit; negligence in contained use; lack of labeling or inadequate/false labeling; and violation of genetic safety zones..

The period until June 2003 shall be used to address another obstacle to the implementation of the Law: the lack of adequate technical capacity to determine GMOs, namely lack of proper laboratories, equipment and skills to undertake testing for GMOs in

[19] It is understandable that Moldovan legislation has many references to WTO rules, as Moldova is a member of the WTO. However, direct references to EU legislation have no legal grounding.

[20] Iulia Trombitcaia, *Report on the Republic of Moldova*, In IMPLEMENTING RIO PRINCIPLES IN EUROPE: PARTICIPATION AND PRECATION, European ECO-Forum, Oct. 2001.

[21] See Plan of Implementation for the World Summit on Sustainable Development, Advance unedited text 4 September 2002 at www.johannesburgsummit.org (visited 21 Sept. 2002).

[22] The guidelines given in the European Commission's Communication state that measures based on the precautionary principle should be subject to review. *See* Communication from the Commission on the Precautionary Principle, COM(2000)1, point 6.

[23] Biosafety Law, *supra* note 3, Art. 15, 19(5,6), 21, 33.

order to assess applications for GM-connected activities in Moldova. The country needs to approach for international help in this regard.

It cannot be excluded that GMOs are already used in Moldova. For this reason, it is important to perform the evaluation of current situation. Capacity and awareness building for public authorities and NGOs, as well as for the general public, are on the agenda. Close cooperation with neighbouring countries (Romania and Ukraine) shall be developed to ensure implementation of the Cartagena Protocol and the Biosafety Law.

## 5 Conclusions

The lobbying by the environmental NGO community allowed for the removal of many shortcomings that were present in the Biosafety Law and specifically introduced clearer procedures and provisions to make decision-making more open. These improvements shall guarantee that a high-level of corruption and poor enforcement of legislation, which are very common in Moldova, will not lead to uncontrolled introduction and dissemination of GMOs into the country and across its borders, and will not make Moldovan agricultural products disfavored by current and potential markets. Today, when Eastern Europe serves as a basket for GM food rejected by the EU and is generally afraid to resist the penetration of GMOs because of WTO rules,[24] the Moldovan Biosafety Law is one of the first attempts to tackle this issue with caution. To a great extent, it also represents the victory of civil society.

[24] For the story about the Croatian ban for GMOs *see* Iza Kruszewska, *US Government Threatens WTO Action If Croatia Bans GMOs*, ANPED NORTHERN LIGHTS, Winter 2001/2002, p.1.

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