

## The Present State of International Environmental Law – Some Cautionary Observations –

by Günther Handl\*

M. le Recteur, Dean Bocken, Ladies and Gentlemen: It is a great pleasure and honour to be here today to receive the Elisabeth Haub Prize, an award for which I am extremely grateful as I am well aware of the many distinguished scholars and practitioners who have preceded me in this position of honoured guest. So, let me first of all thank the Haub family whose generosity made this award possible, the International Council of Environmental Law and the members of the jury for their confidence in me, as well as the persons responsible for arranging this ceremony. Occasions such as these, are not only joyous and festive events for the honouree and other participants. They also offer an opportunity for general reflection and analysis. With the United Nations General Assembly's Special Session, "Rio + 5"<sup>1</sup> just behind us and the turn of the century just ahead, it seems particularly appropriate today to reflect upon the present state of international environmental law and offer some remarks on the possible future course of legal developments.

Most of us are likely to agree that over the last few years international environmental law has experienced a quantum leap, both in terms of the scope and the depth of the normative prescriptions involved. Thus, as a system of international legal principles and concepts bearing on the protection and conservation of the environment, international "environmental law"<sup>2</sup> has undeniably come into its own right. With the concept of "sustainable development"<sup>3</sup> increasingly evolving into the operationally significant global paradigm it was designed to be, international environmental law has not only come to cover an ever wider spectrum of previously unregulated or under-regulated environmentally sensitive human activities. It has also generally benefited from a progressive integration of environmental concerns into political and economic decision-making, the "mainstreaming of the environment".

Notwithstanding such progress, "environmental trends continue to deteriorate." This finding regarding the global situation by last year's UN General Assembly Special Session<sup>4</sup>, has been followed by similarly disappointing conclusions in 1998 by the European Environment Agency for the European region.<sup>5</sup> A new WRI/UNEP/UNDP and World Bank report highlights that one in five children will not live to the age of five primarily because of environment-related diseases.<sup>6</sup> Most recently, UNDP's Human Development Report 1998 concludes that today consumption continues to undermine the envi-

ronmental resource base and to exacerbate existing social and economic inequalities worldwide.<sup>7</sup> Add to this the highest ever recorded global temperatures during the first five months of 1998, devastating forest fires, first in Southeast Asia in 1997, now in Central and South America, and record floods in China, due in part at least to severe deforestation in the middle and upper regions of the Yangzi river, and the global environmental picture looks hardly reassuring.

It is against this background, however, against these factual indicia of environmental and social stability or true ecological sustainability of the human enterprise, that international environmental law – its accomplishments and promises – ultimately have to be evaluated. Seen in this light, much of the success we have undoubtedly achieved legally and institutionally, may well be perceived as paltry. For much like an air quality regulator's Pyrrhic victory in reducing individual automobile emissions in an explosively motorizing society, international legal and political solutions and strategies devised thus far, are being dwarfed by the sheer size of the global environmental challenges and problems in the aggregate. Inexorably growing pressure on scarce environmental resources – fueled by an expanding global population, expanding economies and thus expanding demand for access to and the use of natural resources – raises the spectre of a rate of resource utilization that threatens the earth's carrying capacity.

This risk of destabilizing the balance between human enterprise and environmental resource base is, if not epitomized, certainly accentuated by the process of "globalization" – "the extension and accelerator" of the process of transnationalization as it has been called,<sup>8</sup> a process which has brought about major socio-economic and political changes that are now beginning to affect radically traditional core areas of the legal systems involved. Key defining aspects – both causative and consequential – of the transformation of national and international societies are the integration of markets (through the liberalization of trade in goods, services, and through direct foreign investment) as well as privatization of many national governmental functions. It is a process in which the role of the State is being reduced to that of mere facilitator of the market and in which the efficiency of the market system tends to become the overriding public policy concern. In other words, the increasing societal concern with the smooth functioning of the market has also come to imply the subordination of other social objectives to macro-economic efficiency criteria. Thus, Philippe Alston recently noted with alarm that "even some human rights norms are increasingly subject to an assessment of their market-friendliness in order to deter-

\* Speech on the occasion of the award of the Elisabeth Haub Prize to the author on 22 June 1998 in Brussels. See last issue at page 279. The author has the Eberhard P. Deutsch chair in Public International Law at Tulane University School of Law.

mine what, if any, weight will be accorded to them.”<sup>9</sup> Generally speaking, then, means which are indispensable to the globalization process tend to acquire the status of end-values in and of themselves: Privatization, deregulation, and reliance upon the market as a value-allocating mechanism, all become public policy ends in their own right.

From an environmental viewpoint two of the phenomena characteristically associated with this trend are particularly worrisome and as such warrant some specific comments today:

The privatization of certain law enforcement functions and the elevation of private or corporate property rights to that of a principal cornerstone of the new global order.

It is, of course, true that ever since their arrival on the environmental regulatory scene at the end of the 1980s, market-based voluntary (self-regulatory) schemes have raised various practical as well as ideological concerns regarding the nature and scope of a public-private partnership in environmental enforcement or compliance control.<sup>10</sup> At the multilateral international level, voluntary approaches, such as the European Community’s Environmental Management and Auditing Scheme (EMAS) or the 14,000 series standards of the International Organization for Standardization (ISO), were being given a cautious welcome. The role of environmental management system standards was initially clearly understood to be a supplementary one.<sup>11</sup> More recently, however, under the impact of the process of globalization these experiments in environmental compliance control are being given the – enthusiastic – *imprimatur* internationally at both regional and global levels, thereby inviting the mistaken belief that these market-driven approaches or systems could actually replace regulations. Thus, at the 1998 session of the United Nations Commission on Sustainable Development participants strongly endorsed the idea of a Government “dialogue with industry and stakeholders to promote the development of voluntary initiatives and programmes...”<sup>12</sup> UNEP itself now supports voluntary codes “as an important policy tool for improving environmental performance” and as an indicator that “business operations are being managed in a manner that will enhance economic growth, ensure environmental protection, and address social concerns.”<sup>13</sup> Relatedly, the European Commission has been promoting “environmental agreements with industry as a means of securing compliance with EU legislation, thereby raising *inter alia* the issue of whether EC directives could be “transposed” by way of voluntary agreements with industry rather than traditional implementing legislation.

The very real possibility, then, that these proposals might lead to a reduction of the State’s role in enforcing and monitoring compliance with environmental laws and regulations generally is a troubling one. Apart from the question to what extent, if at all, transaction costs could be appreciably reduced in a combined public-private environmental compliance control system, in order to be effective, such a system would have to be transparent

and ensure full accountability of those taking part in it.<sup>14</sup> These qualitative objectives, however, are notoriously difficult to achieve initially as well as to maintain once such a scheme is up and running. The chequered experience with industry’s self-regulation provides ample evidence of the difficulties involved.<sup>15</sup> Further damaging evidence emerges from recent environmental enforcement audits in North America. It shows that regulatory systems that include market-based incentives, a high degree of decentralization and elements of voluntary compliance, have a propensity to fail to ensure proper enforcement of the law.<sup>16</sup> In short, the importance of the tools and mechanisms under discussion at the international level is self-evident, but surely limited: These devices can supplement, but they cannot substitute<sup>17</sup> mandatory legal regulations<sup>18</sup>.

The second phenomenon of special concern in the context of our present discussion is the extraordinary level of protection that nowadays tends to be accorded to private and, in particular, corporate property rights. There is, of course, general agreement that a well-functioning system of private property rights is of cardinal importance to any effective environmental legal regime. What is troublesome today, however, is the fact that in the wake of “privatization” and the concomitant strengthening of the legal-political position of corporate entities as key players in the global market, we have witnessed an increasing societal willingness to disregard the social dimension of property-ownership. Past and present controversies over, for example, wetlands conservation or endangered species protection amply document the sensitivity of restrictions on private property for the sake of society’s benefit. The question of where to draw the line between the demands of the general interest of the community and the protection of the individuals fundamental rights has always been a challenging task. It is nowadays not only becoming ever more difficult, but controversial, as the balance seems to be shifting towards private rights and away from social responsibility, a phenomenon that occurs more frequently and increasingly so in transnational legal settings, pitting host countries against foreign investors.

A prime illustration of this development can be seen in recent arbitration/consultation proceedings pursuant to the North American Free Trade Agreement (NAFTA) involving the Government of Canada on the one hand and foreign corporations on the other. In the first of these instances, the plaintiff, United States-based Ethyl Corporation, by invoking the investment protection chapter of NAFTA argued that a Canadian legislative ban on the importation and inter-provincial trade of a fuel additive, MMT, of which Ethyl was the sole manufacturer and distributor in Canada, violated NAFTA. Ethyl’s claim for compensation was principally based on the allegation that the Canadian measures amounted to an illegal expropriation.<sup>19</sup> Ethyl thus forced the Canadian federal government into international arbitration over the latter’s enactment – in good faith<sup>20</sup> – of environmental protection legislation.<sup>21</sup> ➤

Following a formally non-binding, but politically highly embarrassing ruling in a separate claim brought by various Canadian provinces under the federal-provincial Agreement on Internal Trade,<sup>22</sup> the Canadian government decided to settle the international arbitration claim brought by Ethyl.<sup>23</sup> Most recently, S. D. Myers, an Ohio-based company, filed a similar expropriation claim against the Government of Canada under the investor-state arbitration clauses of NAFTA. Once again, the claim characterizes a Government of Canada environmental protection measure – a temporary export ban on PCB wastes to the U.S. – a violation of the corporation's property rights as guaranteed by NAFTA.<sup>24</sup> To date, two similar arbitration proceedings under NAFTA involving challenges to government environmental regulations have been brought against Mexico.

Whatever the outcome in these specific proceedings, the mere fact that a government's regulatory decision may in the future be open to challenges before international panels is likely to have a chilling effect on that government's willingness to take strong proactive and preventive measures to protect public health and safety and the environment. As a result, the margin of appreciation that host countries have traditionally enjoyed under international law<sup>25</sup> when taking *bona fide* measures restricting private property rights for the sake of protecting the public good, appears significantly reduced. From a basic policy perspective the desirability of such an implicit shift in the balance of public and private rights will be open to legitimate doubts. Moreover, it is highly questionable whether such a shift can be deemed compatible with the political and legal affirmation of the relevance of precautionary action.

It is true, of course, that the "internationalization" of the status of corporate entities is not entirely one-sided, *i.e.*, does not focus exclusively on enhancing the entitlement of corporations as claimants. There are some indications that the process of globalization is also beginning to engender normative expectations of a transnational accountability of corporate entities. However, these indications of efforts at reining in corporate activities remain spotty at best<sup>26</sup>, usually reflect voluntary<sup>27</sup> as well as market-based approaches and thus hardly match or offset the procedural strengthening *at law* of the positions of corporations under NAFTA or similar legal instruments<sup>23</sup> and the proposed Multilateral Agreement on Investment (MAI).<sup>29</sup> In short, the Ethyl and Mexican cases raise a host of issues that should be of concern to environmental lawyers and policy makers alike. Particularly so, as the NAFTA model may well be replicated in the Americas through expansion of NAFTA, and possibly world-wide, as the proposed MAI might well apply NAFTA-like standards.<sup>30</sup>

In conclusion, "globalization" of course, is not anathema to environmental protection. On the contrary, "open markets matter" as a synonymous OECD paper emphatically maintains.<sup>31</sup> In a world of scarcity, open markets play a critical role in ensuring the most efficient allocation of scarce resources, including environmental

resources. However, it must be clearly understood that there exists no identity of purpose or mutually all-validating interrelationship between respect for the market and the protection and improvement of the environment. Today, the paramount challenge that we as lawyers – academics and practitioners alike – face, is to acknowledge fully the simple truth that the free market is not an end in itself, but rather a means to an end. Maximization of efficiency is always subject to corrective considerations of justice and fairness. By the same token, our concern, indeed sometimes obsession, with the efficiency of individual economic and social regimes, must not make us lose sight of the big picture, the sustainability of economic activities in the aggregate as measured in relation to the globe's carrying capacity. □

## Notes

1 See Programme for the Further Implementation of Agenda 21, Adopted by the Special Session of the General Assembly, 23–27 June 1997.

2 As the various recent references by the International Court of Justice to "international environmental law" and "environmental law" confirm, today, it is no longer possible to question with any degree of plausibility the existence of a separate body of "international environmental law." See Judgment of 25 September 1997 in the Case concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), [1997] ICJ Reports, paras. 104 and 110.

3 "Sustainable development" is commonly defined as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs." The World Commission on Environment and Development, *Our Common Future* 43 (1987).

4 See *supra* note 1.

5 "While the amount of pollution in the EU continued to decline over the past three years, there has been no overall improvement in the quality of the environment: European Environment Agency, *Europe's Environment: The Second Assessment* (1998), referred to in BNA, 21 *International Environment Reporter* 552 (1998).

6 World Resources Institute, United Nations Environment Programme, United Nations Development Programme and World Bank, *World Resources 1998–99: Environmental Changes and Human Health* (1998).

7 United Nations Development Programme, Human Development Report 1998: Consumption for Human Development (1998).

8 Serge Sur, "The State between Fragmentation and Globalization," 8 *European J. Int. L.* 421, at 429 (1997).

9 Alston, "The Myopia of the Handmaidens: International Lawyers and Globalization," 8 *European JIL* 435, at 442 (1997).

10 For details, see, e.g., Roht-Arriaza, "Private Voluntary Standard-Setting, the International Organization for Standardization, and International Environmental Lawmaking", 6 *Yearbook Int'l Env. L.* 107 (1995).

11 For example, Chapter 8 of Agenda 21 ("Integrating Environment and Development in Decision-Making"), reiterates that the "laws and regulations suited to country-specific conditions are among the most important instruments for transforming environment and development policies into action," (Chapter 8.13), and maintains that regulatory and voluntary (self-regulatory) approaches play a complementary role in shaping attitudes and behaviour towards the environment. See Agenda 21, chapters 8.27 and 8.32.

12 United Nations Commission on Sustainable Development, Report of its Sixth Session, Doc. E/1998/29 & E/CN.17/1998/20, Chapter III (Chairman's summary of the industry segment of the sixth session of the Commission on Sustainable Development), para. 14.

13 See *Voluntary Industry Codes for Conduct for the Environment*, referred to in BNA, 21 *International Environment Reporter* 455 (1998).

14 Thus a September 1997 report of the European Environment Agency rightly warns, that "if voluntary environmental agreements between industry and governments are to be more widely used in Europe, their credibility and accountability must be improved...": "Pollution deals 'short on data'," *Financial Times*, September 12, 1997, p. 2.

15 Thus, while, for example, the U.S. chemical industry's Responsible Care programme is often held out as a successful self-regulatory programme, the same industry's codes and principles have been rightly criticized as being too accommodating and lacking in transparency to permit verification of compliance, hence to ensure that the programme's objectives are being met by the industry across the board. See, e.g., Roht-Arriaza, *supra* note 10, at 113.

16 See, e.g., "E.P.A. and States Found to be Lax on Pollution Law," *New York Times*, June 7, 1998, 1; "Audit Reveals Nation Failing to Meet Domestic, International Environmental Pledges," BNA, *International Environment Reporter* 558 (1998).

17 Quite apart from the fact that a market-based environmental management approach, without careful policing by the State, may well cause a serious misallocation of natural resources. An illustration of this problem is the seriously detrimental impact of emission-trading under the U.S. Clean Air Act on environmentally sensitive areas of the Adirondacks, in the North-East of the U.S.

18 This essential point is at least implicitly acknowledged in the CSD report, *supra* note 12, at para. 12, which notes: "With regard to government policies, many participants emphasized that Governments had an important role to play in promoting responsible entrepreneurship because voluntary initiatives by industry complemented rather than replaced government intervention."

19 Besides a violation of Articles 1110 (Expropriation and Compensation) of NAFTA, Ethyl additionally asserted a violation of Articles 1102 (National treatment) and 1105 (Performance Requirements).

20 Thus the Panel deciding the issue of whether the ban was consistent with the intra-Canadian Agreement on International Trade, concluded that the Canada legislation served a legitimate purpose, namely to eliminate the use of the fuel additive in Canada, and was based on a reasonable assumption that the Act would achieve that objective. See Report of the Article 1704 Panel concerning a Dispute between Alberta and Canada regarding the *Manganese-Based Fuel Additives Act*, June 12, 1998, File No. 97/98-15- MMT-P058, 7-8, para. 11.

21 Thus the Canadian government maintained that the ban was necessary from an environmental protection perspective because MMT interfered with emission control systems of automobiles. It did not ban MMT directly, as evidence of the additive's toxicity – at least in small amounts – was inconclusive. See "Panel Rules against MMT Ban," *The Globe and Mail*, June 24, 1998, p. 38.

22 Report of the Article 1704 Panel, *supra* note 22.

23 See "Canada to Pay \$ 13m to Settle Imports Dispute," *Financial Times*, July 21, 1998, p. 6.

24 See "Ottawa Faces Claim over PCB Waste Ban," *Financial Times*, September 2, 1998, p. 4.

25 See, e.g., Dolzer, "Indirect Expropriation of Alien Property," 1 *ICSID Review – Foreign Investment L.J.* 41, at 65 (1986).

26 Thus, efforts to improve corporate conduct worldwide as focused, e.g. in the International Corporate Governance Network, recently failed again to adopt a mildly normative global code for business standards. See "Conference fails to Agree Global Code for Business Standards." See "Conference fails to Agree Global Code for Business Standards," *Financial Times*, July 13, 1998, p. 4.

27 See, e.g., "Multinationals Making 'Explicit Commitment' Financial Ties," *Financial Times*, April 22, 1998, p. 9; and "Nike Pledges to End Child Labour and Apply U.S. Rules Abroad," *New York Times*, May 13, 1998, C1.

28 Such as, for example, the Energy Charter Treaty, whose Art. 26, para. 3 (a) provides for international arbitration or conciliation for the settlement of disputes between an investor and a contracting party.

29 It is true, of course, that recently the MAI has fallen on hard times. Nevertheless, today it seems premature to conclude that the MAI proposals are totally beyond resurrection as a realistic proposition.

30 Thus Chapter V, D, para. 2 of the MAI offers investors a variety of options, including arbitration, to seek a resolution of an investment disputes with the host country.

31 See OECD, *Open Markets Matter: The Benefits of Trade and Investment Liberalisation* (1998).

## Alpine Convention – Importance Increasing –

The Fifth Alpine Conference met on 16 October 1998, in Bled, Slovenia.

Following a report concerning ratifications of the Convention and Protocols, the Conference appealed to the Contracting Parties to speed up the ratification process so that soon, in addition to the Convention, the Protocols could also come into force.

There was a special appeal to ratify the Protocol accepting the accession of Monaco as a Contracting Party.

The report of the Permanent Committee, concerning the activities between the Fourth and Fifth Conferences, was adopted. In this connection, a general discussion took place, where the participating Ministers or their Deputies expressed the opinions of the Contracting Parties. The representatives of observing NGOs made a number of practical proposals. In general, these were pushing for the speedier implementation of the Convention and the Protocols.

A special agenda point dealt with the implementation of the protocols not yet in force. The States promised to implement them now as far as legally possible.

Special measures were discussed in connection with the Protocol on Protection of Nature and Management of Landscape. The German delegation proposed the establishment of an *ad hoc* working group of the Permanent Committee for consultation in drafting regulations for the implementation. There was also a German proposal concerning the description of the actual situation relating to the elaboration and implementation of the objective of "quality of the environment."

The Conference authorised the Permanent Committee, as far as necessary, to create working groups for the

implementation of the Protocols in conformity with the rules of procedure.

A long discussion developed on the relationship between the Alpine Convention and the draft European Charter for Mountainous Regions. As had been expressed in earlier meetings, there was the feeling that the latter could not only weaken, but also be in conflict with, the provisions of the Alpine Convention. The Conference underlined the necessity of avoiding the risk of legal incompatibility between the two instruments.

It stated that the Alpine Convention, together with its Protocols, gives a much more precise guidance for its field of application, so that it should be seen as a *lex specialis* when compared to the much more general European Charter. The Conference asked the Parties and Signatories to reiterate this opinion before the Council of Europe.

The Conference requested the Permanent Committee to draft a specific programme for the implementation of the Convention and its Protocols. It decided to adopt the Protocols on Soil and asked the Member States to ratify as soon as possible after signing.

The Conference decided to adopt the Energy Protocol. It then discussed the still outstanding problems with the finalisation of the Transport Protocol. Since all the initiatives in the past have not ensured a proper result, the Conference decided to institute a new working group to draft a transport protocol, starting from scratch, under the Chairmanship of Liechtenstein. In this process, the results of expert meetings which took place in March and June 1998 are to be taken into account. ➤

It is expected that this working group will present a report to the Permanent Committee, at least six months before the next Alpine Conference.

The proposed system for monitoring and information concerning the Alps was under discussion. The Permanent Committee received the mandate to re-examine the regime at the end of the transitional period on the basis of information obtained and to make proposals for the regulation of its functioning.

The question of a permanent secretariat was again raised. Opinions were still divided. Up until now, the State Party in the Chair provides the secretariat, but several States and observing NGOs felt that a permanent secretariat would be much more successful.

The Conference has given the Permanent Committee the mandate to prepare a report for the next conference on the establishment of a permanent secretariat. This report should contain the following elements:

- 1) Definition of the objectives and tasks of the secretariat
- 2) Definition of a possible reporting system
- 3) Estimate of costs and rules for financing. And finally,
- 4) The procedure concerning the decision on the candidature for the seat of the secretariat.

The Conference also decided on a Logo for the Alpine Convention (as shown).



Delegates expressed special thanks to Slovenia, who since December 1994 has had the Chair for the Conference of the Ministers and the Permanent Committee. Following a short discussion, the Chair was transferred to Switzerland.

After the adoption of the Conference report, a very long signing procedure for the Protocols was held. Most of the representatives with plenipotentiary power from the States and the European Union signed the new Protocols and Switzerland and Liechtenstein also signed those they had not signed before.

During the celebratory glass of champagne, a general feeling of satisfaction was voiced that several problems had been solved and that the importance of the Alpine Convention had increased. Many more results in favour of the Convention can be expected. (WEB) □

## Enhanced Implementation of the Biological Diversity Convention by Judicial Control

by Alfred Rest\*

### Introduction

This article<sup>1</sup> inquires into the general problem of transformation and effective implementation of international environmental treaties into national law taking the Convention on Biological Diversity (CBD) as an example. After having highlighted the various recent legal activities and mechanisms in Germany for transposing CBD, the fundamental question asked is whether by the control of a judicial instrument, such as a future International Environmental Court, the implementation and application of international law by the "Treaty-States" could be guaranteed, enhanced and arranged more effectively or not.

To keep step with the increasingly huge number of international environmental treaties is nearly impossible. Related to the field of *biological diversity* around 154 multilateral agreements and amending protocols are in existence, concerning for instance *animal species protection* (52), *plant species protection* (40), *marine*

*resources conservation* (32) and *protected areas* (30) to name but a few. Parallel to this real "fall-out" of Conventions is a huge *deficiency* in implementing and enforcing treaty norms. The reasons are manifold and very complex: besides the missing will of the States to relinquish their sovereignty with regard to the use of natural resources and to decide themselves on implementation according to their national policies, financial and socio-economic aspects as well as the lack of knowledge in the natural science of interrelated causes and effects may be the main obstacles for effective implementation. In addition – at least in the past – States have been very reluctant to incorporate in treaties efficient mechanisms of judicial control and of enforcement, which could be indispensable for the surveillance of the implementation process, in particular when compliance-mechanisms<sup>2</sup> fail or recommendations or decisions of the Conference of the Parties are not enacted. In the following, therefore, the fundamental and conceptional questions will be raised: do we still need a *judicial instrument* to control the implementation of environmental law? Could a "new" International Environmental Court perhaps be the

\* Dr. jur., University of Cologne, Germany.

proper legal instrument to enhance and speed up the application and enforcement of environmental treaty regulations? Can it achieve or guarantee greater efficiency? Before answering these questions brief attention will be focussed on the implementation of the Convention on Biological Diversity in Germany.

### Importance of Biological Diversity for Germany

The awareness of the importance of biodiversity has a long-standing *tradition* in Germany. For example, the sustainable use of forests has been subject to statutory regulations for over 150 years.<sup>3</sup> Also, aspects of nature protection always ranked very high. Today several strategies for integrating the concept of sustainable use have been put into place wherever components of biological diversity are being used by humankind, as emphasised by the *Government's National Report on Biological Diversity of 1998*.<sup>4</sup> For the implementation of these strategies a powerful and varied set of legal, institutional and organisational instruments exists, based, *inter alia*, on the principle of precautionary action, the polluter-pays-principle and the principle of cooperation. Nevertheless, because of Germany's geographical and economic situation the threats to biological diversity could increase. So in the last 150 years, industrial development has led to a sharp decline in semi-natural and extensively used habitats – leaving aside the case of forests – not least as a result of the intensification of agriculture, the ongoing sprawl of human settlement and the construction of transport and water networks.<sup>5</sup>

### Background data on Germany's economic situation

With 81.8 million inhabitants living in an area of around 357,000 km<sup>2</sup>, Germany is a highly industrialised and densely populated country. Despite this, some 55 per cent of the country's surface area is used for agriculture. 30 per cent of the surface area is covered by forest and woodland. The areas used for settlement and transportation occupy approximately 11 per cent. The current slight rise in population is a trend that will continue until the year 2000. A clear decline in population is expected from 2020. The high degree of industrialisation and Germany's position in the middle of Europe have led to very high volumes of traffic, which have again increased considerably in the wake of German reunification, the commercial opening to Eastern Central Europe and the creation of an international market for Europe as a whole. Current forecasts predict a significant growth in traffic over the next fifteen years. High industrial output and high living standards go together with the German economy's strong international orientation. Both imply necessarily a high consumption of energy and raw materials. The latter and also consumer goods are imported to a large extent from

abroad. The problem of pollutant emissions into the aquatic environment and the atmosphere was recognised already at an early stage in Germany and led to ambitious preventive and precautionary environmental policies at the beginning of the 1970's. To this extent, Germany is internationally renowned for its high standard of technical environmental protection. Nevertheless, the ongoing threats to biological diversity have not been stopped.

These general conditions outlined have an impact on the various components of biological diversity, *i.e.*, the diversity of ecosystems, the diversity of species and the genetic variety within species.

### Existing status of biological diversity in Germany

#### a) Diversity of ecosystems

About 750 different types of biotope have been identified in Germany.<sup>6</sup> Natural habitats or biotic communities mainly exist in relatively small areas, such as certain water sources, cliffs, raised bogs, the Wadden Sea, some forests and woods and high-alpine regions. They all are to some extent impaired by pollutant impacts. Apart from the forest components, there has, over the last 50 years, been a decline in the total area covered by semi-natural biotopes. By far the largest area of land is now occupied by *anthropogenic habitats*, *i.e.* those which have evolved from human activity and differ in their structure and composition from natural biotopes. Examples here are fields, grasslands used to varying degrees of intensity, forests and industrial habitats. The anthropogenic biotopes also include many of the heaths, coppice and composite forests, oligotrophic grasslands and marshes usually considered valuable in terms of their special diversity, which mainly emerged from semi-natural forests as a result of particular management practices, over-exploitation or clearing.

#### b) Species diversity

About 45,000 animal species and 28,000 plant species – including lower plants; vascular plant species of approximately 3,200 – have so far been identified in Germany.<sup>7</sup> By international comparison, however, Germany displays the same lack of endemic flora and fauna found in most Central European countries. But on the other hand, Germany is, even on a world scale, a major wintering and resting ground for migrating animals (migratory birds and bats) on their passage from the West and South in the Autumn and on their return to the northern breeding grounds in the Spring.

#### c) Genetic variety

Genetic variety is essential to the ability of species and populations to adapt to changing environmental conditions and is therefore a prerequisite for their survival. However, there is little knowledge about the extent of the historical changes, and the threat to genetic variety in natural populations. ➤

Forest tree species are found in Germany in the form of wild populations, which are still autochthonous, and populations used by humans, the latter being predominant.

In general, the genetic resources of wild species must be differentiated from genetic resources for agriculture or forestry. The latter underlie a deliberate genetic change and control to facilitate commercial use and possess a comparatively rapid genesis.

In Germany some 1,400 species are used in agriculture, forestry and horticulture.<sup>8</sup> Whereas the grassland communities are predominantly made up of native species, a large proportion of the fruit species originate from other geographical and climatic regions of the world. Moreover, some native plants underwent domestication as crops, such as in the case of certain fruit species, vegetables or dye and oil-producing plants.

Of the approximately 40 species of domesticated animals occurring worldwide, cattle, pigs, sheep, goats, horses and poultry are of particular economic importance in Germany.

This brief outline of Germany's geographical and economic situation as well as of the existing biological diversity is evidence of the *great interest and need for a rapid and effective implementation of the CBD in German legislation.*

## Implementation of CBD by German Law

### German Legislation

Before the CBD, biodiversity was never addressed comprehensively in an international legal context. Such aspects were always protected globally by special international agreements regulating: 1. Areas of internationally important sites (*UNESCO World Heritage Convention*<sup>9</sup>), 2. Wetlands (*Ramsar Wetlands Convention*<sup>10</sup>), 3. Endangered species (*Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)*<sup>11</sup>) and 4. Migratory species of wild animals (*Bonn Convention on Migratory Species*<sup>12</sup>). Parallel to this international process, German legislation on biodiversity aspects was split into numerous laws regulating the various fields, a long time before 1992; for example, those related to nature conservation (1976), animal protection (1972), plant protection (1986), forest conservation (1975), regional planning (1965), emission control (1974) and water management (1957), to name a few. On 21 March 1994, the CBD entered into force in Germany.<sup>13</sup> Also, influenced by numerous EC Regulations/Directives and international conventions, most German Acts were issued and amended for adaptation to international law. This is illustrated by the following table<sup>14</sup> showing a selection of the most important German legislation on the federal level, directly concerned with biological diversity. The table does not include EC law and statutes to implement international agreements. Also the numerous

laws and ordinances of the German countries (*Länder*) which concretise the Federal laws for effective, regional implementation and execution, cannot be reproduced here.

The table shows that *Germany* by comprehensive legislation *has largely implemented the CBD.*

### Parallel Implementation of EC Biodiversity Law

As a Member State of the European Community – the EC has ratified the CBD too<sup>15</sup> – Germany at the same time has enacted parts of the EC Strategy to implement the Convention. Important elements of this strategy can already be found in the *Fifth EC Action Programme on the Environment of 1992*.<sup>16</sup> These are also reflected, *inter alia*, by *EC Regulation 1467/94 on the conservation, characterisation, collection and utilization of genetic resources in agriculture*<sup>17</sup> and *Regulation 2078/92 on agricultural methods compatible with the requirements of the protection of the environment and the maintenance of the countryside*.<sup>18</sup> In this context the *Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora of 1992*,<sup>19</sup> as well as the *Directives 79/409 EEC*<sup>20</sup> and *97/49 EEC*<sup>21</sup> on the conservation of wild birds should be mentioned. Germany also strongly supports the *Pan-European strategy on biological and landscape diversity of 1995*,<sup>22</sup> which is conceived as a parallel European measure to promote the implementation of the CBD and is connected with the *European Forest Genetic Resources Programme (EUFORGEN)*, which in general aims at a coordination of efforts to conserve forest genetic resources.<sup>23</sup> Due reference is drawn to the National Report<sup>24</sup> for the numerous German activities to implement the CBD by international cooperation with States and International Organisations.

Coming back to German legislation and its application, one must be aware of the fact, that the *Länder* generally bear responsibility for the implementation of measures aimed at achieving the objectives of the CBD, in particular, in cases of nature conservation and forestry.

### Implementation by Public Authorities and NGOs

Concerning the application and execution of such measures, it is very important to emphasise that the activities of public organs at federal, regional and local level (ministries, public authorities of the *Länder* and of municipalities), find strong support by nearly all parts of society, especially by non-governmental organisations (environmental protection associations and interest groups), branches of industry and active individuals. Examples of NGOs acting very effectively abound, such as: World Wide Fund for Nature, Germany and WWF Foundation; Nature Protection Union (*Naturschutzbund Deutschland e.V. (NABU)*); German Association for Nature Protection (*Deutscher Naturschutzring*); German Federal Working Group for Environmentally Conscious Management (*Bundesdeutscher Arbeitskreis für Umweltbewußtes Management e.V. (B.A.U.M.)*); German Forest Protection Association (*Schutzgemeinschaft Deutscher Wald e.V. (SDW)*);

| Legal Regulation   | Objective / content  |
|--|--|
| Basic Law ( <i>Grundgesetz</i> ) of 23 May 1949, <sup>a</sup> amended 26 March 1998 <sup>b</sup>   | Protecting the "natural sources of life"   |
| Federal Nature Conservation Act ( <i>Bundesnaturschutzgesetz</i> ) of 20 Dec. 1976, <sup>c</sup> amended 30 April 1998 <sup>d</sup>  | Securing on a sustainable basis the proper functioning of the ecosystem, the utility of nature's resources, fauna and flora as well as the variety, uniqueness and beauty of nature and the landscape to serve as the basis of human life and a source of recreational enjoyment of nature and the countryside; offering <i>inter alia</i> comprehensive protection of specific biotopes; provisions governing, in particular, the protection of, trade in, and the keeping and breeding of certain animal and plant species or populations of such species; provisions on the release of non-native species |
| Federal Ordinance on the Conservation of Species ( <i>Bundesartenschutzverordnung</i> ) of 18 Sept. 1989, <sup>e</sup> amended 6 June 1997 <sup>f</sup>  | Specifying individual restrictions on extraction and sale; placing protection orders on endangered animal and plant species  |
| Regional Planning Act ( <i>Raumordnungsgesetz</i> ) of 8 April 1965, <sup>g</sup> amended 15 Dec. 1997 <sup>h</sup>  | Sustainable regional planning designed to bring the social and economic demands on land space into accord with the ecological functions of that space  |
| Building Code ( <i>Baugesetzbuch</i> ) of 27 August 1997 <sup>i</sup>  | Sustainable planning of urban development and socially equitable land use helping to create an environment worth living in   |
| Land Consolidation Act ( <i>Flurbereinigungsgesetz</i> ) of 14 July 1953, <sup>j</sup> amended 18 June 1997 <sup>k</sup>   | Development of rural areas; creation of better and healthier living, housing and working conditions for people living in the countryside; preserving, caring for and restoring threatened or damaged historical landscapes; ensuring the continued proper functioning of the ecosystem   |
| Federal Soil Protection Act ( <i>Bundesbodenschutzgesetz</i> ) of 13 March 1998 <sup>l</sup>   | Maintaining or restoring the soil's ability to perform its functions; its role as a basis of life and as a habitat for animals, plants and soil organisms is expressly mentioned as one such function; enforcing an obligation to protect against and eliminate hazards to the soil, to remedy soil pollution sources and contaminated sites and to take precautionary action against future detrimental impacts on the soil   |
| Federal Forest Act ( <i>Bundeswaldgesetz</i> ) of 2 May 1975, <sup>m</sup> amended 27 July 1984 <sup>n</sup>   | Enforcing an obligation to conserve and, where appropriate, expand forests and woodlands and use them sustainably; maintaining the forest's economic, protective and recreational functions taking into account biological diversity; promoting forestry; reconciling conflicts of interest between wider community and forest owners; ensuring the participation of forest authorities in public planning and measures; the framing of more detailed legislation is left to the <i>Länder</i>   |
| Federal Hunting Act ( <i>Bundesjagdgesetz</i> ) of 29 Nov. 1952, <sup>o</sup> amended 26 January 1998 <sup>p</sup>   | Enforcing an obligation to care for game, defined as the maintenance of habitat-appropriate, species-rich stocks and management and safeguarding of the environment they need; protecting specific species; detailed framing by the <i>Länder</i>  |
| Federal Game Protection Ordinance ( <i>Bundeswildschutzverordnung</i> ) of 25 Oct. 1985 <sup>q</sup>   | Transposing into national law the restrictions stipulated under the EC Directive 79/409 on the Protection of Wild Birds with respect to those birds species defined in the Federal Hunting Act; bans on ownership and sale   |
| Federal Animal Protection Act ( <i>Bundestierschutzgesetz</i> ) of 24 July 1972, <sup>r</sup> amended 22 Dec. 1997 <sup>s</sup>  | Protecting animals against needless pain and anguish; granting species-characteristic and suitable keeping of animals  |
| Plant Protection Act ( <i>Pflanzenschutzgesetz</i> ) of 15 Sept. 1986, <sup>t</sup> amended 30 April 1998, <sup>u</sup>  | Licensing and application of plant protection agents   |
| Fertiliser Act ( <i>Düngemittelgesetz</i> ) of 15 Nov. 1977, <sup>v</sup> amended 27 Sept. 1994 <sup>w</sup> ; Fertiliser Ordinance ( <i>Düngeverordnung</i> ) of 26 January 1996 <sup>x</sup> , amended 16 July 1997, <sup>y</sup>  | Licensing and application of fertilisers   |
| Animal breeding legislation ( <i>Tierzuchtrecht</i> )  | Regulating animal breeding taking into account the need to safeguard genetic resources (domesticated animals)  |
| Commercial Seeds Act ( <i>Saatgutverkehrsgesetz</i> ) of 20 August 1985, <sup>z</sup> amended 25 Oct. 1994 <sup>aa</sup>   | Assuring the quality of seeds  |
| Law on the Protection of New Varieties of Plants ( <i>Sortenschutzgesetz</i> ) of 19 Dec. 1997, <sup>ab</sup>  | Protecting the intellectual property rights of plant breeders regarding varieties  |
| Commercial Forestry Seed Act ( <i>Gesetz über forstliches Saat- und Pflanzgut</i> ); of 25 Sept. 1957, <sup>ac</sup> amended 2 August 1994, <sup>ad</sup>  | Improving the economic yield and environmental benefit of the forest; provisions cover 19 main tree species used in forestry; consideration of genetic diversity aspects; labelling of seeds and plants with reference to autochthony and region of origin, categorised according to ecological conditions and phenotypical and genetic characteristics of forest stands   |
| Law on the joint Federal / Länder Task of Improving Agricultural Structures and Coastal Defences ( <i>Gesetz über die Gemeinschaftsaufgabe „Verbesserung der Agrarstruktur und des Küstenschutzes“</i> ) of 3 Sept. 1969, <sup>ae</sup> amended 8 August 1997, <sup>af</sup> | <i>Inter alia</i> : improving productivity and working conditions in agriculture and forestry; managing the development of countryside; hydrological and agronomical measures; improving market structures in agriculture, fisheries and forestry  |
| Genetic Engineering Act ( <i>Gentechnikgesetz</i> ) of 20 June 1990, <sup>ag</sup> amended 21 Sept. 1997, <sup>ah</sup>  | Provisions governing work in genetic engineering facilities, the release of genetically engineered organisms, bringing products containing genetically engineered organisms onto the market  |
| Federal Immission Control Act ( <i>Bundesimmissionsschutzgesetz</i> ) of 15 March 1974, <sup>ai</sup> amended 21 Sept. 1997, <sup>aj</sup> and 27 Ordinances ( <i>Bundesimmissionsschutz-Verordnungen</i> )  | Protecting humankind, animals and plants, the soil, water and the atmosphere, as well as cultural and other physical assets from harmful environmental impacts and from substantial problems caused by emissions   |

| Legal Regulation  | Objective / content   |
|---|---|
| Federal Water Management Act ( <i>Wasserhaushaltsgesetz</i> ) of 27 July 1957, <sup>ak</sup> amended 30 April 1998, <sup>al</sup>   | Limiting emissions into the aquatic environment; ensuring economical use of water, maintenance of the quality of surface and groundwater and the functions it performs; enforcing an obligation to conserve the aquatic environment as the natural habitat for animals and plants |
| Closed Substance Cycle Waste Management Act ( <i>Kreislaufwirtschafts- und Abfallgesetz</i> ) of 27 Sept. 1994, <sup>am</sup> amended 12 Sept. 1996; <sup>an</sup> Sewage Sludge Ordinance ( <i>Klärschlammverordnung</i> ) of 15 April 1992, <sup>ao</sup> amended 6 March 1997, <sup>ap</sup>   | Promoting closed substance cycles (recycling waste materials) to reduce the depletion of natural resources  |
| Chemicals Act ( <i>Chemikaliengesetz</i> ) of 16 Sept. 1980, <sup>aq</sup> amended 14 May 1997, <sup>ar</sup>   | Protecting people and the environment from the effects of hazardous substances and preparations; prohibiting certain substances from being brought into circulation   |
| <p><sup>a</sup> BGBl. 1949 I, pp. 1, <sup>b</sup> BGBl. 1998 I, pp. 610, <sup>c</sup> BGBl. 1976 I, pp. 3574, <sup>d</sup> BGBl. 1998 I, pp. 823, <sup>e</sup> BGBl. 1989 I, pp. 1677, 2011, <sup>f</sup> BGBl. 1997 I, pp. 1327, <sup>g</sup> BGBl. 1965 I, pp. 306, <sup>h</sup> BGBl. 1997 I, pp. 2902, <sup>i</sup> BGBl. 1997 I, pp. 2141; BGBl. 1998 I, pp. 137, <sup>j</sup> BGBl. 1953 I, pp. 591, <sup>k</sup> BGBl. 1997 I, pp. 1430, <sup>l</sup> BGBl. 1998 I, pp. 502, <sup>m</sup> BGBl. 1975 I, pp. 1037, <sup>n</sup> BGBl. 1984 I, pp. 1034, <sup>o</sup> BGBl. 1952 I, pp. 780, <sup>p</sup> BGBl. 1998 I, pp. 164, <sup>q</sup> BGBl. 1985 I, pp. 2040, <sup>r</sup> BGBl. 1972 I, pp. 1277, <sup>s</sup> BGBl. 1997 I, pp. 3224, <sup>t</sup> BGBl. 1986 I, pp. 1505, <sup>u</sup> BGBl. 1998 I, pp. 823, <sup>v</sup> BGBl. 1977 I, pp. 2134, <sup>w</sup> BGBl. 1994 I, pp. 2705, <sup>x</sup> BGBl. 1996 I, pp. 118, <sup>y</sup> BGBl. 1997 I, pp. 1835, <sup>z</sup> BGBl. 1985 I, pp. 1633, <sup>aa</sup> BGBl. 1994 I, pp. 3082, <sup>ab</sup> BGBl. 1997 I, pp. 3164, <sup>ac</sup> BGBl. 1957 I, pp. 1388, <sup>ad</sup> BGBl. 1994 I, pp. 2018, <sup>ae</sup> BGBl. 1969 I, pp. 1573, <sup>af</sup> BGBl. 1997 I, pp. 2027, <sup>ag</sup> BGBl. 1990 I, pp. 1080, <sup>ah</sup> BGBl. 1997 I, pp. 2390, <sup>ai</sup> BGBl. 1974 I, pp. 721; 1193, <sup>aj</sup> BGBl. 1997 I, pp. 2390, <sup>ak</sup> BGBl. 1957 I, pp. 1110, <sup>al</sup> BGBl. 1998 I, pp. 2390, <sup>am</sup> BGBl. 1994 I, pp. 2705, <sup>an</sup> BGBl. 1996 I, pp. 1354, <sup>ao</sup> BGBl. 1992 I, pp. 912, <sup>ap</sup> BGBl. 1997 I, pp. 446, <sup>aq</sup> BGBl. 1980 I, pp. 1718, <sup>ar</sup> BGBl. 1997 I, pp. 1060</p> |   |

Organic Farming Association (*Arbeitsgemeinschaft Ökologischer Landbau e. V. (AGÖL)*); German Breeding Association (*Bundesverband Deutscher Pflanzenzüchter e. V.*) and Association of Pharmaceutical Manufacturers Active in Research (*Verband Forschender Arzneimittelhersteller (VFA)*).<sup>25</sup> By numerous self-binding declarations and covenants, branches of industry have shown their preparedness to protect nature and the environment and to cooperate with public authorities.<sup>26</sup>

*To summarise:* Germany has developed comprehensive legislation to implement the CBD and EC-Strategies and EC-Law too. The proposed instruments and measures to enforce the existing laws seem encouraging although much more must be done to achieve effective conservation and protection of biodiversity. But optimistically evaluated, Germany is one of the few countries which has finished its initial part of the starting phase.

## Importance of Judicial Control

### National jurisdiction – Germany, Europe

There is no doubt, that in States possessing an advanced legal system and a developed mechanism of jurisdiction, judicial control plays a very essential role for the implementation and execution of environmental law. So in Germany, according to a long-standing tradition in jurisdiction, potentially injured legal persons and individuals can rely on the lawful execution of national environmental law by claims brought to the competent courts. Judicial decisions can also promote legislation by constructive criticism on a possible lack of concrete regulations. As far as the litigation concerns *only national matters* of disputes and the application of national environmental law, the German judiciary grants effective legal protection. But as soon as *transboundary or transnational effects* and objectives of international environmental law are at stake, national jurisdiction may be

insufficient or even fails. This is evidenced for instance by German case law concerning the cases of *Chernobyl*, *Sandoz* and of the nuclear power plant of *Lingen*,<sup>27</sup> to name but a few. These all reflect the general tendency that in cases of transboundary/transnational pollution the injured individual victims have no prospect of success and only a limited opportunity to bring an action against a foreign polluter, and specifically against a foreign polluter-state or its organs before national courts.<sup>28</sup> Cases such as the *Dutch-French litigation concerning the salinisation of the river Rhine* and the judgements of Austrian and Swiss courts in the case of *Chernobyl* or the cases of the nuclear power plants of *Mochovce* and *Temelin* (Slovakia) as well as of the Slovenian Hydropower plant at *Soboth*, demonstrate the same tendency in almost all European States.<sup>29</sup>

The recent project of the *American Society of International Law's Interest Group on "International Environmental Law in Domestic Courts"*, 1997,<sup>30</sup> examining for instance the national judiciary in Australian, Canadian, Dutch, German, Indian, Japanese and U.S. Courts, also states, that for the time being, international environmental law aspects are not sufficiently regarded and implemented by national courts (exemption: Dutch judiciary). At a *symposium "on the Role of the Judiciary in Promoting the Rule of Law in the Area of Sustainable Development"* of UNEP and the South Asia Co-operation Environment Programme (SACEP), held from 4–6 July 1997 at Colombo, Sri Lanka,<sup>31</sup> it was recommended and emphasised that the national judiciary has the responsibility to mould emerging environmental law principles – such as the polluter-pays-principle, the precautionary principle, the principle of continuous mandamus and of the *erga omnes* obligations – with a view to giving these a sense of coherence and direction.<sup>32</sup> The published *Compendium of Summaries of Judicial Decisions in Environment Related Cases*,<sup>33</sup> also evidences the still *existing deficiency* in national jurisdiction in the application of international environmental law, which

must be changed. The conference further emphasised the problems of the “aggrieved person” and of “*locus standi*” in regard to environmental damage and liability, which need to be solved.

As regards the German courts’ practice, a distinction needs to be made between civil, public and criminal law cases. When it comes to litigation before *civil courts* of



Courtesy: Das Parlament

the polluted State it is not only claims for compensation which have failed but also actions to cease environmentally harmful and hazardous activities.<sup>34</sup> Moreover, little if any attention is paid to aspects of protecting the *global commons*.<sup>35</sup> There are a number of reasons for this, including:

- individuals mostly abstain from filing a lawsuit because of the potentially high costs and the problem of dealing with a foreign language;
- immunity from jurisdiction may hinder the competence of the home-courts as well as of the court of the polluter-state;
- pursuant to the rules on the law of conflicts or of the *ordre public*, the application of the substantive law can be excluded; and
- immunity from enforcement can bring down the enforcement of a foreign decision.

As regards lawsuits brought before the *administrative courts* of the polluter-state the *ius standi* can be problematic. In particular, the application of the substantive law, dominated by the principle of territoriality, can be refused if it does not protect foreign legal interests. By reason of sovereignty the home-court of the injured individual has no competence to examine public foreign law aspects. The polluter-state’s court will argue, that its decision cannot be enforced abroad by reason of immunity from enforcement.

With regard to environmental protection by the *criminal courts*, the German Supreme Criminal Court has emphasised in a case concerning the transboundary movement of hazardous waste from Germany to Poland that the German criminal law does not protect the legal interests of foreign injured individuals and will only apply on German territory.<sup>36</sup>

Accordingly, national judicial proceedings are *still mostly ineffective* because they lack the requisite powers and have to be further improved in matters concerning international environmental law. The long duration of litigation, lasting sometimes more than a decade (as with the *river Rhine salinisation case*, the *Lingen case*) also undermines legal protection. The protection of the global commons remains outside the scope of national jurisdiction and courts refuse, or are very reluctant to guarantee these legal interests by an interpretation pursuant to public international law. Perhaps such a task of interpretation demands too much from the national judge who is not so proficient in international law.

*To summarise:* if even in a country like Germany, having achieved an advanced legal system and well developed jurisdiction, a deficiency still exists in the application of international environmental law for the time being, in countries having not yet established a legal system, the lack of implementation will increase and be even greater. Therefore, to support the development of a legal order and to promote national jurisdiction mechanisms according to international law principles, strong safeguards can be offered by instruments and institutions at the international law level. In that respect, concerning the judiciary, an international instrument, such as an international environmental court – postulated since 1988<sup>37</sup> – could be the proper institution not only for the surveillance of the application of international regulations agreed to by environmental treaties. It could also give guidance to national courts on how best to apply international environmental law within the framework of national law. It is highly desirable in future that such an international court could be appealed to by NGOs or individuals too, or be addressed by national courts, to decide by procedure of preliminary decision or by interpretation, conflicts between international and national environmental law. Then its decisions certainly could have enormous impact and supporting influence on the further development of national environmental law and the national judiciary as well.

#### Need for Judicial Control in International Environmental Law – A General Problem –

According to the theory of separation of powers it belongs to the hallmarks of each democratic legal order that at least an *independent judicial institution* is empowered to control the legislative and executive organs to guarantee the implementation, application and execution of law. Without such an instrument every legal system is in danger of being abolished. Accordingly, the need for a judicial institution at the *national level* is accentuated by *principles 10 and 26 of the Rio Declaration*<sup>38</sup> by calling on States to provide “effective access to judicial and administrative proceedings, including redress and remedy.” The most recent *ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998*<sup>39</sup> fulfills this task. The Århus Convention was signed by 35 countries and the European Community; (see Environmental Policy and Law, Vol. 28, p. 171). ➔

As to the *international* level, paragraph 39.10 of Agenda 21<sup>40</sup> emphasises, *inter alia*, the importance of the judicial settlement of disputes. It calls on States "to further study mechanisms for effective implementation of international agreements, such as modalities for dispute avoidance and settlement." It identifies the full range of techniques such as: prior consultation, fact-finding, commissions of inquiry, conciliation, mediation, non-compliance procedures, arbitration and judicial settlement of disputes. There is general consensus that all *preventive instruments* of dispute avoidance should be favoured in principle. In this respect the "political" non-confrontational mechanisms of "*compliance-procedure*"<sup>41</sup> as well as of "*Conference of the Parties (COP)*" need special attention.<sup>42</sup> With regard to the *Biodiversity Convention* it should be noted, that the CBD does not contain a provision establishing a compliance regime.<sup>43</sup> Instead of this the COP-mechanism is favoured in Art. 23. In case an agreement cannot be achieved by further negotiation or a decision of the COP, Art. 27 para. 3 CBD provides for an agreed compulsory settlement of disputes either by arbitration or submission of the dispute to the International Court of Justice. Insofar CBD also recognises the indispensability of a judicial control mechanism, if all modalities for dispute avoidance remain unsuccessful. Laudable though this approach is, it must be stressed that the judicial instruments foreseen only operate as *organs of the States*. NGOs or private third parties are not involved. They also do not participate in the non-compliance procedure. But what is needed, in effect in future, is an institution, which also provides NGOs, environmental associations and interest groups and even individuals with direct access, thus controlling activities of state organs. Most recently this postulation has been supported by two *Resolutions of the Institut de Droit International*.<sup>44</sup> A control of state activities by all parts of the society is necessary, because States themselves may commit or tolerate environmental destruction.<sup>45</sup> State interests, in particular its economic priorities, seldom coincide with those of its citizens and the environment.<sup>46</sup> Therefore States, not infrequently, refuse to support their injured nationals by means of diplomatic protection as, for instance, in the *Chernobyl case*.

But one must be aware of the fact that even a tribunal or a court in the end cannot gender or replace the *will of States* to implement effectively their obligations under international agreements because the competence of an international arbitral or tribunal institution also depends on the will of the States, *i.e.* on an agreement or compromise. Nevertheless, decisions of a court and impending potential sanctions, may press States to implement their obligations.

### Judicial Control by an international Environmental Court

The next question is whether one of the *existing* international courts meets the task of an international environmental court. Or do we need a new international environmental court?

### International Court of Justice (ICJ)

Although in 1993 it established an *ad hoc chamber* for environmental matters, the *International Court of Justice* cannot be the right forum, because *States alone* have direct access. This is regrettable because by its very function, the ICJ could be the proper institution to control the implementation of environmental treaty obligations – as shown in the most recent *Gabcikovo-Nagymaros case*<sup>47</sup> – to develop further and improve international environmental law and to concentrate on the urgent problems of protecting the global commons by applying the concept of *erga omnes* obligations. Sooner or later, under the influence of the current efforts and programmes of the State community to strengthen and enhance the legal position of NGOs, non-state actors will also be granted legal access to the ICJ. But such a step would require States to relinquish sovereignty<sup>48</sup> and expose themselves to legal proceedings as a prerequisite. Such necessary reform of the ICJ Statute and of the UN Charter seems to be *unrealistic* at the moment.

### International Tribunal for the Law of the Sea (ITLS)

As regards the protection of the *marine environment*, the States Parties to the *Law of the Sea Convention*,<sup>49</sup> can submit disputes concerning interpretation and implementation of the regulations to the *International Tribunal for the Law of the Sea*, established in October 1996.<sup>50</sup> Pursuant to Part XI (The Area) of the Convention, or by special agreement conferring jurisdiction on the Tribunal, the Tribunal is also "open to entities other than States".<sup>51</sup> But it must be emphasised that this regulation only enables a *limited jurisdiction* in the field of the "Area" and does not go beyond. Moreover, the term "entities" still needs to be precisely defined by future jurisprudence of the Tribunal. Finally, a comprehensive protection of the marine environment is not actually granted, as evidenced, *inter alia*, by Art. 135 which "shall not affect the legal status of the waters superjacent to the Area or that of the air space above those waters."

### Court of Justice of the European Communities (ECJ)

In Europe NGOs and individuals have access to the *Court of Justice of the European Community*, if the interpretation of secondary European environmental law or the correct implementation and application of EU-Regulations and Directives is at stake. The court can be proud of an extensive case-load in environmental matters,<sup>52</sup> but according to the *restricted regional field* of application of European Law its jurisdiction does not go as far as is desirable for global environmental protection. Nevertheless, the Court's importance for the further development of regional environmental law and general environmental principles remains unquestioned.

### European Court on Human Rights (ECHR)

The recent jurisdiction of the *European Court on Human Rights*<sup>53</sup> paves new ways to improve environmental protection through an expanded concept of human rights and by linking both fields of law which tra-

ditionally have been treated separately. By its groundbreaking *López-Ostra* decision in 1994<sup>54</sup> the Court has now opened the door for the protection of human rights against *nearly all sources of environmental pollution*, as opposed to just noise emissions and radiation, as was the case in the 1970s and 1980s. This welcomed progressive decision provides for a more comprehensive environmental protection of the individual and stimulates the discussion on the existence of a *human right to a decent environment*. The Court has also promoted the *concept of State liability*, which has been debated by the *UN International Law Commission* for over 30 years and which still remains unsolved.

By its most recent judgement in the Mühleberg (Canton of Berne, Switzerland) nuclear power station case of 1997<sup>55</sup> the Court regrettably has not pursued or even extended its progressive judiciary. In this case the applicants – living within a radius of four or five kilometres from the nuclear power station – appealed against the extension of the nuclear installation's operating licence for an indefinite period and maintained that the power plant did not meet current safety standards. The applicants argued that they were exposed to a risk of accident which was greater than usual and their civil rights were affected. They also stressed the lack of access to a Swiss Court when attacking the decision of the Federal Council (executive, administrative authority) and pleaded a violation of Arts. 6 and 13 of the European Convention on Human Rights. By twelve to eight votes the Court rejected the applicants' objections. It stated, that the applicants "did not establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Mühleberg power station exposed them personally to a danger that was not only serious but also specific and, above all, imminent."<sup>56</sup> The effects on the population therefore remained hypothetical. It is remarkable that the dissenting opinions of seven judges with regard to the proof of a link and of a potential danger have emphasised that the majority of the judges "appear to have ignored the whole trend of international institutions and public international law towards protecting persons and heritage, as evident in European Union and Council of Europe instruments on the environment, the Rio agreements, UNESCO instruments, the development of the precautionary principle and the principle of conservation of common heritage".<sup>57</sup> These judges also underlined the importance of the Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment,<sup>58</sup> stressing the special hazards of certain installations, which need to be obviated by new international law measures and through the exercise of effective remedies. Such a statement is laudable and encouraging. It facilitates that in the future the judges will take into account these new trends in international environmental law and thereby pursue the progressive *López-Ostra* judiciary; but perhaps in general, decisions in the field of nuclear energy aspects will follow their own rules because of their political importance.

Despite this decision, the main *problem of direct access* to the ECHR still remains. An individual is only allowed access to the Court after having exhausted all local remedies, *i.e.* all stages of jurisdiction of his home-state. Such a time-consuming, thorny procedure considerably blocks better protection of environmental human rights.

#### *International Criminal Court (ICC)*

A conceivable perspective for the next century could perhaps also be the *International Criminal Court* which for a long time was under discussion in the UN International Law Commission and the General Assembly.<sup>59</sup> On 17 July 1998, the *United Nations Diplomatic Conference of Rome* decided to establish a permanent International Criminal Court with power to exercise its jurisdiction



*The Logo of the International Criminal Court*

over persons for the most serious crimes of international concern.<sup>60</sup> Those crimes are genocide, crimes against humanity, war crimes, as well as the crime of aggression, once an acceptable definition for the Court's jurisdiction over it is adopted.<sup>61</sup> To establish its jurisdiction in environmental matters it would be necessary to extend and amend the list of crimes to "*crimes against the environment*." This topic was not on the agenda for discussion in Rome. But if at a propitious moment Art. 19(d) of the *ILC's Draft Articles on State Responsibility*<sup>62</sup> become binding treaty law, then the Court could also prosecute crimes against the human environment committed by state organs or private polluters. Although the "criminal approach" is based on "*individual responsibility*" this concept could also easily be extended to responsibility of state organs. The Criminal Court's competences in general need not be regarded as competing with the pursuits of the other courts mentioned, because of its specific criminal law approach. On the contrary, in combination with the other international courts, and acting as a complement to them, an effective basis to fight international environmental pollution could be developed. But this target can only be achieved, if NGOs and individuals have legal access too. ➔

*To sum up:* at the moment the existing, above-mentioned international courts cannot offer an optimum solution for the protection of the environment and the injured individual. They can only play an important, desired, and complementary role.

### Permanent Court of Arbitration (PCA) as proper forum

For the time being, however, the *Permanent Court of Arbitration*, The Hague, could be the appropriate forum to settle environmental disputes. Already at a Conference held in Venice in 1994, this author proposed that an examination of whether the PCA could meet the necessary tasks of a future Environmental Court adequately should be undertaken.<sup>63</sup> The idea was strongly supported by the Secretary-General of the International Bureau of the PCA, who at the Venice Conference and at subsequent meetings emphasised the potential role of the PCA in environmental law matters.<sup>64</sup> There are a number of reasons which favour the PCA.

First, it is a very flexible and unique institution, because it offers facilities for four of the dispute-settlement methods listed in Art. 33 of the UN Charter: enquiry, mediation, conciliation and arbitration. As regards *conciliation*, the PCA established in 1996 new Optional Conciliation Rules,<sup>65</sup> enabling the Parties, including States, International Organisations, NGOs, companies and private associations to use this mechanism. The Rules are based on the *UNCITRAL Conciliation Rules*<sup>66</sup> and can be linked with possible arbitration. Concerning *arbitration*, the Court adopted in 1992 *Optional Rules for Arbitrating Disputes between Two States*,<sup>67</sup> and in 1993 *Optional Rules for Disputes between Two Parties of Which Only One is a State*.<sup>68</sup> As a consequence, disputes between a non-state actor and a State can be submitted to the Court. In May 1996, the set of Optional Rules was extended to *Rules for Arbitration involving International Organisations and States*<sup>69</sup> as well as between *International Organisations and Private Parties*.<sup>70</sup> By widening its jurisdiction to all Parties of the community of states, including organisations, and all members of society, it goes far beyond the competence of the International Court of Justice. In June 1996, a *Working Group on Environmental and Natural Resources Law*, established by the PCA, discussed a background paper on "*Environmental Disputes and the Future Role of the PCA*."<sup>71</sup> The representatives of Governments from Australia, Brazil, China, India, Russian Federation and Samoa, unanimously favoured using the PCA as the appropriate judicial instrument to settle environmental disputes and to promote international environmental law. It was decided that the PCA should instigate a publicity campaign to draw attention to its new role in the context of environmental protection. At the follow-up meeting on 24 February 1998, the Working Group discussed whether there is need or not to amend and concretise the Optional Rules by special environmental regulations or to draft completely new procedural rules for the dispute settlement of

environmental matters.<sup>72</sup> It was decided to formulate new rules.

*Second*, the important issue of the extra *financing* required for a new Court for the Environment speaks in favour of the PCA. The operating costs of the International Bureau are covered by the UN budget. The costs of arbitration proceedings are borne by the parties.

*Third*, the flexibility of the Court with regard to the *place of arbitration* should also be noted. In transnational environmental litigation, in particular, this place can be important in terms of providing evidence of the harm which has occurred. The parties can agree on it. Where there is no agreement, the arbitration shall take place at The Hague, the seat of the PCA.

Although the PCA would be the proper institution to settle environmental disputes, one must bear in mind that it is only by an *agreement of the parties or by compromise*, that the competence of the Court can be established. If the parties are States or only one is a State, this huge impediment must be overcome. Ultimately, submitting a dispute to the court depends on the *political preparedness* of a State. Therefore, the arduous task of convincing governments to support the idea of an International Environmental Court has yet to be undertaken. In this respect it would be great progress, if the States would rule in future environmental treaties the competence of the PCA by a special dispute settlement clause, as done for instance in the *Bonn Convention on the Conservation of Migratory Species of Wild Animals*, 1979<sup>73</sup> and foreseen in the *IUCN Draft International Covenant on Environment and Development*, 1995.<sup>74</sup> In 1998, the PCA already developed guidelines for negotiating and drafting such dispute settlement clauses.<sup>75</sup>

Nevertheless, what is encouraging is the *increasing number of arbitral decisions* of the PCA in 1996, as manifested, for instance, by proceedings between an African State and two foreign investors and between an Asian State and a foreign enterprise.<sup>76</sup> For the first time the Optional Rules for Arbitrating Disputes between Two Parties of which only One is a State were applied by an award of 25 November 1996, in a dispute between Technosystem SpA (Italy) on the one side and Tabara State on the other.<sup>77</sup>

### Conclusion

For the protection of the environment, the endangered global commons and the threatened or injured individuals in cases of transboundary/transnational pollution an *International Environmental Court is indispensable*. The *national courts*, as illustrated by German and European jurisdiction, are *still most ineffective*. As regards the *international level*, courts such as the ICJ, ITLS, ECJ, ECHR and ICC also cannot offer an optimum solution. These either do not have a comprehensive competence to protect the environment sufficiently, or cannot guarantee the rights of NGOs or individuals, because of lack of legal access. Nevertheless, the international courts mentioned are also prerequisite to evolve international environmental law. They can also play a very *important complementary*

role to support the work of the PCA, which for the time being, could be the proper forum. There is no doubt that the involvement of NGOs and individuals for the protection of the environment will constantly increase. Transnational environmental problems can be solved effectively only by all parts of national and international society. States need this cooperation and support of private institutions. In this respect, these private elements must be merged still more in inter-state mechanisms, especially in international environmental treaties, to give them a real chance of efficient contributions in decision-making, as well as in implementing international environmental law. States must cooperate with non-state actors *albeit with the limitation of their sovereignty*.

As to *judicial control*, NGOs, companies and individuals should be granted a *ius standi* in future. This target could be achieved by incorporating accordingly *dispute settlement clauses* in environmental agreements. Concerning the CBD it should therefore be envisaged to extend the dispute settlement clause of Art. 27 CBD also to the competence of the PCA besides the ICJ. But admittedly, at the moment the attention of the CBD is concentrated on other vital problems waiting to be solved. In general, as reiterated, a judicial instrument is *indispensable* for the surveillance of the implementation of treaty regulations, if preventive mechanisms, such as *compliance- and COP-systems*, fail. Thus, by the control of an international environmental court the implementation and application of international environmental (treaty-) law could additionally be sustained and enhanced.

The forcible *demand* for an International Environmental Court now draws worldwide support.<sup>78</sup> Besides the PCA, in Germany this idea is supported by Eurosolar (NGO). The German Federal Government is still hesitant. What is needed is to convince the governments to get possession of the political will for the establishment of such a court. The increasing destruction of the environment, the growing consciousness of the public, as well as the progressive role of NGOs, will force this procedure. So all that remains to be done is to acknowledge openly the need, indeed the essentiality of a separate International Environmental Court and to act swiftly to bring that court into existence. Otherwise, nature and environment will teach us a lesson that will be hard to bear. □

## References

- 1 This essay is based on a talk held at the UNITAR Conference in Tokyo on 12 September 1998
- 2 G. Handl, Compliance Control Mechanisms and International Environmental Obligations, in: Tulane Journal of International and Comparative Law, 1997, p. 19; A. Rest, The Aftermath of Rio: Hurdles and Obstacles in Implementing Environmental Policies and Law – Some Examples of Preliminary Efforts in State Practice, in: K. H. Böckstiegel (ed.), Proceedings of an International Colloquium, Cologne, 7–9 June 1995, (Cologne, 1996), p. 257
- 3 Cf. Federal Government Report under the Convention on Biological Diversity. National Report on Biological Diversity, edited by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, Bonn, March 1998, p. 7 (in the following cited: National Report 1998)
- 4 See note before: National Report 1998, pp. 21
- 5 National Report 1998, p. 13
- 6 National Report 1998, p. 14

- 7 Cf. for the details table 2 in the National Report 1998, p. 15 et seq.
- 8 See National Report 1998, p. 17 with further references
- 9 Cf. Convention concerning the Protection of the World Cultural and Natural Heritage of 16 Nov. 1972, in: vol. 1037 UNTS, pp. 151
- 10 Convention on Wetlands of International Importance especially as Waterfowl Habitat of 2 February 1971, in: vol. 996 UNTS, pp. 245
- 11 Convention on International Trade in Endangered Species of Wild Fauna and Flora of 3 March 1973, in: vol. 983 UNTS, pp. 243
- 12 Convention on the Conservation of Migratory Species of Wild Animals of 23 June 1979, in: ILM 1980, pp. 19
- 13 Cf. BGBl.(Federal Official Journal) 1993 II, pp. 1741; BGBl. 1995 II, pp. 350
- 14 The table taken from National Report 1998, pp. 18 has been amended by the author
- 15 EC OJ 1993 No. L 309 of 13 Dec. 1993, pp. 1
- 16 EC OJ No. C 138 of 17 May 1993, p. 1
- 17 EC OJ 1994 No. L 159, pp. 1
- 18 EC OJ 1992 No. L 215, pp. 85
- 19 EC OJ 1992 No. L 206, pp. 7
- 20 EC OJ 1979 No. L103, pp. 1
- 21 EC OJ 1997 No. L 223, pp. 9
- 22 For the details cf. National Report 1998, p. 12
- 23 See National Report 1998, p. 13
- 24 For the numerous examples of running projects cf. National Report 1998, pp. 90
- 25 For further details cf. National Report 1998, pp. 121
- 26 Cf. for examples A. Rest, Die rechtliche Umsetzung der Rio-Vorgaben in der Staatenpraxis, in: Archiv des Völkerrechts, 1996, pp. 145; pp. 153; K. W. Grewlich, Umweltschutz durch "Umweltvereinbarungen" nach nationalem Recht und Europarecht, in: Die öffentliche Verwaltung (DÖV) 1998, pp. 54
- 27 To these and further cases see A. Rest, International Environmental Law in German Courts, in: EPL 1997, p. 409
- 28 A. Rest, The Need for an International Court for the Environment: Underdeveloped Legal Protection of the Individual in Transnational Litigation, in: Towards the World Governing of the Environment, IV. International Conference 2–5 June, Venice, a cura di G. Cordini/A. Postiglione, Pavia 1996, p. 591
- 29 For the details see A. Rest, The Need for an International Court for the Environment? in: EPL 1994, pp. 173
- 30 Cf. Workshop of the ASIL Interest Group for Environmental Law of 9 April 1997, Washington, D.C. The preliminary Report of national jurisdiction in the various countries is partially published in: Review of European Community & International Environmental Law (RECIEL), vol. 7, issue 1, 1998, pp. 1
- 31 For the details see L. Kurukulasuriya, Role of Judiciary in Promoting Sustainable Development, in: EPL 1998, pp. 27
- 32 EPL 1998, p. 28
- 33 Cf. Compendium of Summaries of Judicial Decisions in Environment Related Cases – with special Reference to Countries in South Asia –, in: SACEP/UNEP/NORAD Publication Series on Environmental Law and Policy No. 3, 1997
- 34 For the numerous decisions see A. Rest, International Environmental Law in German Courts, in: EPL 1997, pp. 412; for litigation in the 50s and 60s cf. A. Rest, The more Favourable Law Principle in Transfrontier Environmental Law – A Means of Strengthening the Protection of the Individual? in: Beiträge zur Umweltgestaltung, 1980, pp. 69
- 35 For a discussion on global commons, common heritage, common concern and interest, and *erga omnes* obligations cf. A. Rest, Ecological Damage in Public International Law, in: EPL 1992, pp. 31
- 36 To this and other criminal law cases cf. A. Rest, International Environmental Law in German Courts, EPL 1997, pp. 419
- 37 To such postulation of environmental lawyers, judges and environmental protection associations cf. A. Rest, Zur Notwendigkeit eines Internationalen Umweltgerichtshofes, in: Liber amicorum in honour of Prof. I. Seidl-Hohenveldern (G. Hafner/G. Loibl/A. Rest/L. Sucharipa-Behrmann/K. Zemanek, eds.), The Hague 1998, pp. 575; 577
- 38 (31) ILM 1992, pp. 876
- 39 ECE Doc. ECE/CEP/43 of 25 June 1998
- 40 Cf. Agenda 21: Earth's Action Plan, (N. A. Robinson, ed.), IUCN Environmental Policy & Law Paper No. 27, 1993, p. 626
- 41 To the details of "compliance procedure" in the various international environmental treaties see P. Széll, Compliance Regimes for Multilateral Environmental Agreements – A Progress Report – in: EPL 1997, pp. 304; W. Lang, Compliance Control in International Environmental Law: Institutional Necessities, in: (56) Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht (ZaöRV) 1996, pp. 685; P. H. Sand, Institution Building to Assist Compliance with International Environmental Law: Perspectives, in: (56) ZaöRV 1996, pp. 774; pp. 786–788; p. 793
- 42 Art. 6 of the Convention for the Protection of the Ozone Layer (ILM 1987, pp. 1516) has incorporated the COP-mechanism too. Together with the amending Montreal Protocol on Substances that Deplete the Ozone Layer (ILM 1987, pp. 1541) this mechanism is combined with the non-compliance-procedure ruled in Art. 8
- 43 Cf. to this statement P. Széll, EPL 1997, p. 305
- 44 Institut de Droit International, Session de Strasbourg, Resolution on "Environment", adopted 3 Sept. 1997; cf. Art. 11; Resolution on "Responsibility and Liability

under International Law for Environmental Damage", adopted 4 Sept. 1997; see Articles 26–28. The text of the second Resolution is published in: Review of European Community & International Environmental Law (RECIEL), vol. 7, 1998, pp. 99

45 Example: the forest burning in Indonesia was tolerated by the government, although the existing law prohibited such activities. For the details and further examples see A. Rest, Zur Notwendigkeit eines Internationalen Umweltgerichtshofes, in: Liber Amicorum, *Seidl-Hohenveldern*, The Hague/London/Boston 1998, pp. 575; pp. 579

46 On several occasions this was pointed out by A. Postiglione, The Global Village without Regulations. Ethical, Economical, Social and Legal Motivations for an International Court of the Environment, (ICEF, Florence 1992), pp. 24 and A. Rest, The Indispensability of an International Environmental Court, in: RECIEL 1998, pp. 63; p. 64

47 See the judgement of 25 Sept. 1997 which has conciliation character, Case Concerning the Gabčíkovo-Nagymaros Project between Hungary and Slovakia in: ICJ Reports No. 92; to further details cf. A. Rest, Zur Notwendigkeit eines Internationalen Umweltgerichtshofes, in: Liber Amicorum, *Seidl-Hohenveldern*, 1998, p. 581

48 What is necessary is a new understanding of sovereignty which can meet the environmental challenges of our world in transition. Cf. S. Bhatt, Ecology and International Law, in: Indian Journal of Interantional Law 1982, pp. 422

49 (21) ILM 1982, pp. 1261

50 R. Wolfrum, Der Internationale Seegerichtshof in Hamburg, in: Vereinte Nationen 1996, pp. 205; T. Treves, The Law of the Sea Tribunal: Its Status and Scope of Jurisdiction after November 16, 1994, in: (55) ZaöRV 1995, pp. 421

51 Cf. Art. 20 and 21, Annex VI of the Convention

52 For examples of ECJ-decisions cf. E. Hey, The European Community's Courts and International Environmental Agreements, in: RECIEL 1998, pp. 4; L. Krämer, Die Rechtsprechung des Gerichtshofs der Europäischen Gemeinschaften zum Umweltrecht 1992–1994, in: EuGRZ 1995, pp. 45

53 For a survey see A. Rest, Improved Environmental Protection Through an Expanded Concept of Human Rights? in: EPL 1997, pp. 213; *idem*, Europäischer Menschenrechtsschutz als Katalysator für ein verbessertes Umweltrecht, in: Natur und Recht (NuR), 1997, pp. 209

54 López-Ostra v. Spain, ECHR Series A, Vol. 303/C

55 The judgement of 26 August 1997 in the case of Balmer-Schafroth and Others v. Switzerland is published in: European Court of Human Rights, Reports of Judgements and Decisions, No. 43, 1997, pp. 1347

56 Cf. Reports of Judgements and Decisions, No. 43, 1997, p. 1359 under para. 40

57 For the dissenting opinion of Judge Pettiti, joined by Judges Gölcüklü, Walsh, Russo, Valticos, Lopes Rocha and Jambrek and of Judge Foighel cf. Reports of Judgements and Decisions, No. 43, 1997, pp. 1361, 1367. The statement quoted is at p. 1363

58 Convention of 21 June 1993, in: (32) ILM 1993, pp. 1228

59 Cf. for example Report of the ILC on the work of its forty-fifth session, 3 May to 23 July 1993; General Assembly Official Records 48<sup>th</sup> session, Suppl. No. 10 (A/48/10), pp. 255

60 Cf. Press Release L/ROM/22 of 17 July 1998 edited by the UN Diplomatic Conference, Rome

61 For the details of the various kinds of crimes see the Bureau of the Conference Proposal for the Draft Statute – on jurisdiction, admissibility and applicable law (A/ Conf. 183/C. 1/L. 59) – containing over eight pages of options for Article 5 (crimes within the jurisdiction of the Court); cf. Press Release L/ROM/16 of 13 July 1998

62 Art. 19(d) provides: "the serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas" as an international crime. Cf. YILC 1980, Vol. II, Part Two, pp. 30; at p. 32

63 A. Rest, The Need for an International Court for the Environment. Underdeveloped Legal Protection for the Individual in Transnational Litigation, in: Towards the World Governing of the Environment, IV. International Conference 2–5 June 1994, Venice (Italy), a cura di A. Postiglione, Pavia 1996, pp. 178

64 See P. J. H. Jonkman, Resolution of International Environmental Disputes: A Potential Role for the Permanent Court of Arbitration, in: Towards the World Governing of the Environment, Pavia 1996, at pp. 435

65 PCA, Optional Conciliation Rules of 1 July 1996. All Optional Rules concerning Conciliation and Arbitration are published by the International Bureau of the PCA, Peace Palace, The Hague

66 The Rules of the United Nations Commission for International Trade of December 1976 are published in: A. Bülow/K. H. Böckstiegel/R. Geimer/R. A. Schütze, Der Internationale Rechtverkehr in Zivil- und Handelssachen, Vol. II, loose-leaf-collection, 1997, under No. 753

67 Optional Rules of 20 October 1992

68 Optional Rules of 6 July 1993

69 Optional Rules of 1 July 1996

70 Optional Rules of 1 July 1996

71 Environmental Disputes and the Permanent Court of Arbitration: Issues for Consideration, Background Paper for the Secretary-General of the PCA prepared by Ph. Sands, (FIELD, March 1996)

72 Cf. Protocol of P. J. H. Jonkman, Secretary-General of PCA of 19 May 1998, Procedural Rules for the Settlement of Environmental Disputes Before The Permanent Court of Arbitration – Summary of views expressed during a discussion held at the Peace Palace on February 24, 1998

73 Cf. Art. XIII of the Convention of 23 June 1979, in: ILM 1980, pp. 19

74 See Art. 62 para. 2 of the Draft International Covenant on Environment and Development of the World Conservation Union in cooperation with the International Council of Environmental Law, in: Environmental Policy and Law Paper No. 31, Gland/Cambridge 1995

75 Cf. Guidelines for Negotiating and Drafting Dispute Settlement Clauses for International Environmental Agreements, prepared by Ph. Sands and R. MacKenzie, International Bureau of PCA, The Hague, January 1998

76 Cf. PCA, 96<sup>th</sup> Annual Report, Nos. 18–22, at p. 9

77 PCA, 96<sup>th</sup> Annual Report, No. 21, at p. 9

78 For the numerous recommendations coming from 54 States and several International Organisations see: The Global Demand for an International Court of the Environment, *International Report 1998* of the International Court of the Environment Foundation (ICEF), Rome 1998

## REGIONAL AFFAIRS

### MERCOSUR

## A Green Challenge on the Road to a Single Market

by Hernan Lopez\*

### Introduction

The Mercado Comun del Sur (MERCOSUR) is the legal outcome of the integration process of Argentina, Brazil, Paraguay and Uruguay initiated with the signa-

ture of the Treaty of Asuncion in 1991. However, it operates within the context and terms of regional groupings such as the Latin American Integration Association (ALADI)<sup>1</sup> and the World Trade Organization (WTO), of which this process is a part.<sup>2</sup>

During an initial period of transition (December 31<sup>st</sup>, 1991–December 31<sup>st</sup>, 1994), the process of integration

\* Pace University School of Law in White Plains, New York. This article is taken from an address to the International Law Society & Environmental Law Society Meeting.

was directed towards the achievement of a general liberalization of trade. During this initial stage measures such as automatic reduction of tariffs, along with the elimination of restrictions on trade between the member countries, were adopted with a view towards arriving at a zero tariff and no "non-tariff" restrictions for the entire tariff area by 31 December 1994.<sup>3</sup>

On August of 1994, at a summit held in Buenos Aires, Argentina, the foreign and economic ministers of the four member countries signed a final agreement on the definitive implementation of Mercosur, establishing the union of customs by January 1st, 1995, as the main goal. In December 16, 1994, the four Presidents of the Mercosur countries met in Ouro Preto, Brazil, and reached the "Protocol of Ouro Preto" (POP), the agreement that defined the institutional structure of Mercosur and enacted the common market since January 1st, 1995. Among other measures, the POP principally allowed the adoption of a Common External Tariff (CET) for the purposes of the customs union and the harmonization of macroeconomics and sectoral policies.<sup>4</sup>

The process was envisioned by the original members of the group as a common market of at least 240 million of people inhabiting a surface of 12,000,000 sq. km or 7,500,000 sq. miles, with an output of well over \$1 trillion.<sup>5</sup> The market will allow goods and services to be freely traded among member countries and to permit the unrestricted movement of factors of production as labour and capital.<sup>6</sup> Besides the main goal of market integration, the Parties to the agreement also recognized that the real meaning of the integration should embrace other goals. In that sense, the adoption of a common commercial policy, the coordination of macroeconomics and sector policies, and the harmonization of national legislation in the relevant areas in order to enhance competitiveness in the world economy,<sup>7</sup> are included among them.

Although the objectives described above are within the economic area, the formula used to declare the intention of the countries "...to further a more strength relationship between the countries..."<sup>8</sup> is the basis of a broader process of integration that would encompass many other non-economical issues. That makes the process more reliable than other past regional experiences and the ability of the parties to incorporate other non-economic issues will play a key role in making the integration an enduring and strong process.

The open future of the integration also foresees the possibility of association with other regional blocks as a means of accelerating the process over the next five years.<sup>9</sup> The first steps seeking to negotiate either their accession to or associate membership of the regional grouping<sup>10</sup> were taken for the formal welcoming of Chile and Bolivia during 1996<sup>11</sup> and the countries of the Andes group (GRAN).<sup>12</sup> The Mercosur is also negotiating some form of link with NAFTA<sup>13</sup> within the framework proposed by the United States for the development of the proposed Free Trade Area of the Americas

(FTAA) by 2005,<sup>14</sup> and with the European Union (EU).<sup>15</sup>

The protection of the environment is given an important place within the process and is recognized in the preamble to the Treaty of Asuncion (TA) where the Parties agree that the integration "... must be achieved through the efficient use of the available resources and the preservation of the environment ...".<sup>16</sup>

Most of the documents adopted during the transition period recognized the importance given to the protection of the environment in the preamble of the TA. In June 1992, in the valley of Las Leñas, City of Malargue, Mendoza, Argentina, Mercosur ministers adopted a timetable for the coordination of policies of different areas. Many environmental directions were placed within the authorities given to the technical "working groups" in charge of the development of policies of the process of integration.

In addition, the "Specialized Meeting of Environmental Issues" (in Spanish "Reunion Especializada de Medio Ambiente", hereinafter REMA), was summoned in 1993 for the first time by the Common Market Group (CMG). The CMG – executive institution of the group – summoned the REMA with the purpose of the analysis of the environmental legislation of the four countries of the region in order to harmonize the activities of the different working groups and to eliminate environmental restrictions to free trade.

Finally, the Protocol of Ouro Preto also triggered the adoption of new documents regarding environmental protection of free trade activities. The most relevant resolutions are related to the harmonization process of environmental legislation and the coordination of sectoral policies of the different member countries.

This article focuses its analysis on the evolution in the consideration of environmental legal issues within the legal framework of the Mercosur and its influence in the process of integration.

## Discussion

### 1. Overview of the general legal framework of the Mercosur

The definitive institutional framework of the Mercosur is given by the "Protocol of Ouro Preto – Additional Protocol to the Treaty of Asuncion on the institutional structure of the Mercosur of 1994".<sup>17</sup> This additional protocol also embodies an Annex related to the "General procedure for reclamation before the Commerce Commission of the Mercosur."<sup>18</sup> As *Pedro Tarak* explains in his work about the region, the process of integration "... is an institutional system of negotiation, adoption of decisions, resolution of commercial conflict, characterized by the juridical effect of the supra-nationality ...".<sup>19</sup> The author also states that the integration does not create a supranational institutional system similar to the European Union; and he emphasizes that the enforcement of the supranational decisions – despite their mandatory character – is within the power of each country Party of the treaty.<sup>20</sup>



### a. Institutions and authorities

The institutions are endowed with different authority and can be classified relying on their functions as follows:

a) *Policy-making*: the principal and highest policy-making body is the Common Market Council (CMC), the political "arm" and the legal representative of the group. The CMC is composed of the ministers of economic and foreign affairs respectively. The presidency of the council rotates on a semester basis and gathers the Presidents of the four countries at least twice a year. The CMC adopts supranational "decisions" on a consensus basis and the governments of the four country Parties have the mandatory duty to enforce the decisions.<sup>21</sup>

Second, the Common Market Group (CMG) is the executive branch of the CMC and observes the enforcement of the original legislation of the group. With headquarters in Montevideo, Uruguay, the CMG is the principal body responsible for proposing draft resolutions to the CMC and making the necessary arrangements to comply with the CMC's decisions. The CMG also adopts programmes and approves the general budget of the Mercosur. The group is coordinated by the ministers of foreign affairs and works with the support of alternate members representing governmental areas such as foreign and economic affairs and the central treasury. The group also is authorized to create "technical working subgroups" that support its activities and to call "special meetings" for the analysis of inter-sectoral issues such as the protection of the environment (i.e. the REMA).<sup>22</sup> The CMG adopts "resolutions" on the same supranational consensus basis and with the same duties of individual enforcement for the four countries.

Finally, the Mercosur Trade Commission (MTC) is the responsible body for the coordination of a common trade policy and the supervision of the enforcement of the common external tariff (CET). The MTC also proposes rules and amendments to the enacted regulation of commerce and customs and is the recipient authority of the different claims of particular entities, corporations and governments. The MTC adopts "directives" on the same basis explained for the CMC and CMG.

b) *Consultative*: first, the Joint Parliamentary Commission (JPC), supports the activities of the policy making bodies in the incorporation of the regulations of the Mercosur within the juridical systems of the four countries of the region. It is composed of representatives of the different national parliaments of the Parties.

Second, the Economic and Social Consultative Forum (ESCF), is a body of intergovernmental and inter-sectoral nature that gathers principally the production sector, unions and associations of each of the four countries.

Both institutions are able to give the CMC "recommendations" through the CMG.<sup>23</sup>

c) *Administrative*: the Administrative Secretariat of the Mercosur (SAM), is the administrative support of the other policy-making and consultative bodies and is in charge of the publication of the Official Bulletin of the Mercosur.

### 2. Environmental legal protection in the Mercosur

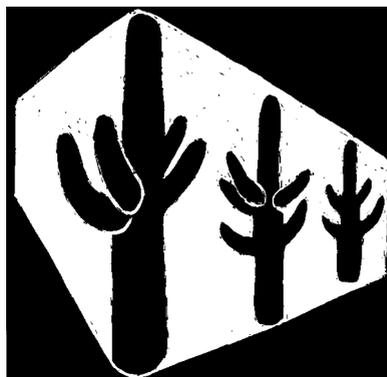
#### a. Treaty of Asuncion

As explained above in the introduction, the protection of the environment is given an important place within the process of integration. The preamble of the Treaty of Asuncion declares that the integration "... must be achieved through the efficient use of the available resources and the preservation of the environment ...".<sup>24</sup>

The preamble is the only section of the treaty that contains references to the protection of the environment. However, the preamble tells governments that the process of integration must be developed within a framework, which includes the protection of the environment among other principles that should be observed.<sup>25</sup>

#### b. The Declaration of Canela<sup>26</sup>

The Declaration of Canela is the written document of the summit of Presidents held in the city of Canela, Brazil in 1992. In that meeting, the presidents of the countries of the Mercosur analyzed and adopted a regional common position upon the agenda that would be discussed at the "United Nations Conference on the Environment and Development (UNCED '92)." Although the document is not adopted within the legal framework of the Mercosur, the declaration contains the common political position of the region on issues such as biodiversity, global change, water resources, human settle-



*Drawing by Peter Scott*

ments, forests, soils, international trade, maritime ocean protection, hazardous wastes and the institutional strengthening towards sustainable development.

#### c. Las Leñas Meeting<sup>27</sup>

This meeting was held in the city of Mendoza, Argentina in 1992. It was summoned to agree on the use of means for the defence and protection of the environment, promotion of regional exchange of goods and support in cases of emergence of temporary admission of goods and people.

After the meeting, the Parties adopted a timetable for the coordination of policies during the transition period between the TA and the POP. The CMG as the executive

branch of the CMC received instructions from the different “working groups”, regarding the protection of the environment. Many of the instructions were related to the harmonization of the different legislations of the four countries. In fact, working group N° 7 on Industrial and Technological Policy and working group N° 9 on Energy Policy were instructed on the identification of the asymmetries between the different legislations in order to propose a harmonization scheme.<sup>28</sup>

Other instructions were indirectly related to the protection of the environment. In that sense, each working group has different assignments, as follows:

- N° 1 on commercial issues: analysis of subsidized products;
- N° 2 on customs issues: analysis of the classification of dangerous substances if they may harm the environment;
- N° 3 on technical standards: analysis of the qualities of food products, characteristics of containers and materials in contact with food;
- N° 5 on land transportation: analysis of the transportation of goods by highways and railroads;
- N° 6 on maritime transportation: adoption of a multilateral agreement for the sector;
- N° 8 on agricultural activities: must track the legislation and policies of the sector in order to achieve the sustainability of agricultural products and the environmental protection of the activities of the sector;
- N° 11 on labour relations and employment: analysis of the international conventions of the International Labour Organization regarding the environmental protection of the work place<sup>29</sup>.

#### *d. Special Meeting on Environmental Issues.<sup>30</sup> (REMA)*

After the meeting of Las Leñas, the CMG – considering the need for analysis of environmental legislation within the countries of the region and the interdisciplinary character of its legislation – issued Resolution No. 22/92 to create the REMA. This group is aimed at developing the coordination of the activities of the different groups charged with environmental assignments. The REMA has the authority to analyze the environmental legislation in force in the different member countries and to propose actions and recommendations to be developed within the various areas. The different working groups with environmental responsibilities (see above) have the duty to participate in the REMA in order to harmonize their activities.<sup>31</sup>

The first meeting of the REMA established the general goals. Among other issues, the main goal is to propose recommendations to the CMG in order to assure adequate protection of the environment within the general framework of the process of integration. The REMA is also given the authorization to establish adequate internal and external conditions of competitiveness for the goods produced in the Mercosur.

The first meeting also established the following functions for the REMA:

- identification of general and operating criteria for environmental protection;

- formulation and proposal of basic directives on environmental policy;
- coordination and orientation of the activities of the other working groups;
- identification and analysis of international agreements related to the protection of the environment and directly related to the general objectives of the Mercosur, in order to propose the incorporation of the international principles into the juridical systems of the four countries;
- analysis of environmental legislation of member countries of the region and identification of asymmetries and the proposal of adoption of common criteria.<sup>32</sup>

It is also important to describe the second meeting of the REMA<sup>33</sup> where the group worked on the proposal for the following directives:

- achievement of efficiency in the management of natural resources and in the development of sustainable activities;
- consideration of the environmental costs in the cost structure of the production of goods;
- mitigation of probable environmental impacts of the actions of the Mercosur;
- systematization of procedures for enforcement of international agreements;
- strengthening of the authority of the institutions of the Mercosur through the incorporation of information, education, training and research institutions into the decision making process.

In order to achieve the goals of the directives mentioned above, the REMA establishes the following means of implementation:

- use of environmental impact assessment in the localization and development of certain activities;
- adoption of rules for the management and disposition of hazardous wastes; and,
- adoption of standards of quality for solid, liquid and gaseous discharges.<sup>34</sup>

The most important meeting of the REMA was the third one, where the four countries discussed the harmonization process of environmental legislation.<sup>35</sup> The meeting recommended the CMG approval of the “Basic directives on environmental policy.”<sup>36</sup> The CMG finally issued Decision N° 10/94, approving the recommendation of the REMA and defining the real meaning of the harmonization of environmental legislation established as one of the principal goals of the REMA.

The decision establishes that the process of integration must assure the harmonization of environmental legislation between the country Parties. It also recognizes that “... harmonization does not mean the establishment of a single legislation ...”.<sup>37</sup> The decision also states that the comparative analysis of the enacted legislation must consider the present enforcement of the rules and that in case of loopholes, the adoption of rules that consider the environmental issues involved and assure impartial conditions of competitiveness in the Mercosur.<sup>38</sup> The decision recognizes that the harmonization process encompasses the harmonization of legal

procedures for the issuing of permits and the realization of monitoring activities on the environmental impact of the activities developed in areas of shared ecosystems.<sup>39</sup>

In general, the decision represents the document that reflects the reaffirmation of the main goals of the REMA and of many of the issues that were recommended in the first two meetings described above. In that sense, the decision recognizes that the inclusion of the environmental costs in the analysis of the cost structure of any productive process will help to achieve single conditions of competitiveness between the four countries.<sup>40</sup> The decision also claims the improvement of the coordination of common environmental criteria in the negotiation and implementation of international agreements with influence in the process of integration<sup>41</sup> and for the promotion of the strengthening of the institutions for the achievement of sustainable management.<sup>42</sup>

Among other issues, the decision recognizes the importance of the adoption of non-pollutant practices in the use of natural resources,<sup>43</sup> the adoption of sustainable management in the use of renewable natural resources in order to guarantee their future use,<sup>44</sup> the minimization of discharges of pollutants through the development and adoption of environmentally sound technologies, recycling activities and proper management of wastes.<sup>45</sup>

Finally, the sixth meeting is relevant for the analysis because the Parties reviewed the institutional role of the REMA. In that sense, the group recommended to the



*Ravanaia madagascariensis*

Drawing by Peter Scott

CMG the upgrading of the consideration given to environmental issues in the process of integration in order to allow the total implementation of the "Basic directives for environmental policies" adopted by the CMG in Res. n° 10/94. The REMA argues that "... [it] is not conceivable a CMG that does not assign relevant consideration to environmental issues when the increase of the international trade as a consequence of the process will have a significant impact on the environment."<sup>46</sup>

#### e. The "Declaration of Taranco"

The "Declaration of Taranco" is a document adopted by the Ministers and Secretariats of the environment of the Mercosur in the city of Montevideo, Uruguay on

June 21, 1995. In this document, the authorities recognize the performance developed by the REMA throughout its history and achievements in the process of harmonization of environmental legislation and other original goals.

Principally, they consider that the increasing importance of many regional and international environmental issues such as the evolution of the ISO-14000 procedures, the duty of the countries in implementation of Agenda 21 and the environmental impact assessment of the hydro-highway Paraguay-Parana, must be addressed properly by Mercosur. Such reasons made the participants of the meeting to consider appropriate the proposal to upgrade the category of the REMA largely requested and recommended in previous meetings. The CMG accepted the recommendation and issued Res. N° 20/95, enacting working group N° 6 on environmental issues.

#### f. The "Working Sub-group N° 6" (SGT N° 6) on environmental issues

The first meeting of the new group took place in Montevideo on October 18/19, 1995. The group discussed and adopted the "action plan" for 1996–1997 to be recommended to the CMG, which in general described the goals of the group.<sup>47</sup> The SGT N° 6 is the renewed version of the ex-REMA and must continue with the achievement of the goals originally assigned to the special meeting. In particular, the plan recognizes the existence of many priorities to be developed by the group. The most important assignments are as follows:

- analysis of the harmonization of non-tariff restrictions related to the protection of the environment;
- regulation of the Custom Code, taking into consideration environmental issues in the procedures of control in the border areas;
- definition of common strategies for international conventions and agreements related to the protection of the environment that could affect the process of integration, in particular the implementation of Agenda 21 and other multilateral agreements;
- establishment of adequate conditions of competitiveness between the countries Parties to the Mercosur and third countries;
- follow-up of the evolution of the ISO-14000 process and the analysis of the impact in the process of integration;
- elaboration of a draft legal environmental document for the Mercosur, based on the principles enacted in the basic directives of Res. n° 10/94;
- design, development and operation of an environmental information system to support the decision making process;
- development of an environmental green seal for the Mercosur;
- improvement of the cooperation process with the CEE on environmental issues;
- development of a procedure for the transboundary movement of goods that possess risks for human health and the environment.<sup>48</sup>

g. *Environmental legislation of the Mercosur*

In addition to the documents, meetings and declarations considered above, the Mercosur adopted many regulations for the different areas in the process of integration. The rules can be classified upon the following basis.<sup>49</sup>

a) regulations that reflect the need for harmonization of the enacted legislation: the CMG adopted resolutions related to the following areas:

– technical standards: creation of the national structure for the incorporation of products according to the international ISO and IEC directives;<sup>50</sup> adoption of “technical regulations for food aromatic and flavouring additives”;<sup>51</sup> rules for the use of pesticides in selected agricultural products;<sup>52</sup> rules for additives of food containers,<sup>53</sup> and food containers<sup>54</sup> and the “rules for the technical harmonization of security and sound emissions of motorcycle issues”;<sup>55</sup> sound emissions in vehicles,<sup>56</sup> and maximum limits for emissions of pollutant gases.<sup>57</sup>

– industrial and technological policy: adoption of the “programme of cooperation in quality and productivity”.<sup>58</sup>

b) regulations that reflect the need for coordination of sectoral policies: the CMG adopted the “Code of behaviour for the introduction and release of agents of biological controls into the environment”<sup>59</sup> and the “Basic directives for environmental policies”.<sup>60</sup>

c) regulations that reflect both the need for coordination of sectoral policies and the harmonization of the enacted legislation: the CMC adopted the “Agreement on transport of dangerous goods”.<sup>61</sup>

## Conclusion

The protection of the environment is given an important place in the process of integration and the Treaty of Asuncion considers it a goal that must be achieved in the development of the process. The Parties have the duty to harmonize their environmental legislation to achieve the goal of integration. However, the process is not intended to provide a common environmental regulation for the four countries of the region.

In conclusion, the improvement of the consideration of environmental issues with the recent creation of the “working group on environmental issues” gives the authorities the possibility to introduce those issues within the decision-making process of the Mercosur.

The adoption of regulations containing environmental considerations will take place along with the consolidation of the process of integration. Many factors such as the growing influence of the new ISO-14000 rules, the duty of implementation of Agenda 21, but principally, the impact on the environment that comes with the increase of trade, will encourage the adoption of a comprehensive environmental regulation for the activities of the region. □

## References

1 Mercosur countries envision the Treaty of Asuncion as the final step in bringing about the ultimate goal of the development of a common market of the Latin

American Integration Association (ALADI). The ALADI was enacted by the Governments of Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Mexico, Paraguay, Peru, Uruguay and Venezuela through the adoption of the “Treaty of Montevideo of 1980” with the purpose of establishing a gradual and progressive Latin American common market. This intent was followed by the Argentine-Brazilian Integration Treaty of 1988, which provided for the creation of a common market by 1998, and of the Buenos Aires Charter of 1990, also signed by both countries, which reduced to five years the period in which to create a common market.

2 The WTO gives regional trade agreements an important place within its regional agenda. The main question is, however, their compatibility with the WTO multilateral trading system. The WTO requires that “the purpose of a regional trade agreement is to facilitate trade between the constituent territories and not to raise barriers to the trade of other WTO members which are not parties to the agreement.” This question is central to both Article XXIV of the GATT Agreement 1994 and Article V of the GATS. In that sense, WTO decided to establish a Committee on Regional Trade Agreements in February 1996. The Committee was primarily created to centralize efforts and to examine future regional trade agreements notified to the WTO. To date, 144 regional trade agreements have been notified to the GATT/WTO. By the end of 1997, the Committee will have continued or started to examine around 44 regional trade agreements, including the MERCOSUR.

WTO home page (Visited March 20, 1998 URL: <http://www.wto.org/wto/develop/regional.htm>)

3 Treaty of Asuncion (T.A.), art. 5

4 As at the inauguration of the customs union in January 1995, approximately 80 percent of all products traded – about 8,000 categories of goods – began to be traded duty-free within the bloc. The parties agreed to keep lists of exceptions, including textiles, steel, automobiles, and petrochemicals, which will remain protected by domestic tariffs for a period of four years until 2001.

5 The Economist Survey on Mercosur – 12/10/96 <http://www.demon.co.uk/Itamaraty/mercosur.html>

6 T. A., Preamble

7 T. A., Preamble

8 T. A., Preamble

9 The decision in 1994 to proceed to a customs union involved a second debate as to how open Mercosur should be. Argentina, like Uruguay and Paraguay, had low tariffs on capital goods; one of its aims in opening its economy was to allow its firms cheap access to imported technology. Brazil, in contrast, wanted to protect its own capital-goods industry. *The Economist Survey on Mercosur* – 12/10/96 (Visited 4/21/97) <<http://www.demon.co.uk/Itamaraty/mercosur.html>>

10 T. A. art. 20, provides for the accession to Mercosur through negotiation.

11 At the most recent summit of the Common Market Council held in June 1996, in San Luis, Argentina, the preliminary association of Chile to Mercosur was signed. An “Agreement of Economic Complementation MERCOSUR-Chile” was approved by the CMC (MERCOSUL/CMC/DEC N° 03/96). Bolivia also reached the attention of the Mercosur and the “Agreement of Economic Complementation MERCOSUR-Bolivia” was also approved by the CMC (MERCOSUL/CMC/DEC N° 04/96). (Visited 4/21/97) <<http://www.mre.gov.br/getec/webgetec/bila/18/indice.htm>>

12 Mercosur and the country members of GRAN (Grupo Andino - Group of the Andes) agreed to exchange lists of products with tariff reductions, which will open the way for the creation of a free trade area between the two blocks. The lists to exchange must specify those products, which will have a zero tariff, those with a ten years term, and the so-called “sensitive” which will demand more time and negotiations. One of the present areas of discord involves the certificate of origin of the products, that is Mercosur demands 60 per cent of local components while GRAN insists on just 50 per cent. Trade between Mercosur and GRAN reached six billion dollars in 1995, a 193 per cent increase over 1985 and 50 per cent over 1994. At the beginning of March, 1998, both groups established to solve their differences on the basis of an intermediate timetable. Once it has been completed, both groups will start full negotiations to eliminate and reduce import duties and tariffs, with a target date of January 2000. Mercopress News Agency Home Page. (Visited March 20, 1998 URL: <http://www.falkland-malvinas.com>)

13 An agreement was signed – The Rose Garden or “Four Plus One” – in 1991 and provided the US and Mercosur members the structure to negotiate reciprocal trade and investment arrangements. *The Portable Encyclopedia for Doing Business with Argentina*. Fundación Invertir Argentina © 1995 World Trade Press. <“WorldPress@aol.com”>

14 The agreement to establish the FTA was the principal outcome of the Americas Summit held in Miami in December 1994. The first hemisphere meeting of Trade Ministers held in Denver, Colorado on 30 June 1995, established seven working groups to address a range of issues including market access, customs procedures and rules of origin, investment, standards and technical barriers to trade, sanitary and phyto-sanitary measures, subsidies, anti-dumping and countervailing duties. The last meeting of Presidents was held in Santa Cruz de la Sierra, Bolivia, in December 1996. *Secretariat of the Summit of the Americas in collaboration with the Sustainable Development Network of Bolivia and Virtual Production Services* (visited April, 21, 1997) <<http://coord.rds.org.bo>>

15 The 1992 meeting culminated in the signature later that month of an inter-institutional cooperation agreement aimed at passing on Europe’s experience of regional integration, provided for exchanges of information, training, technical assistance and institution-building. In November 1994, both Parties agreed to a

two-stage proposal for further strengthening bilateral relations which would ultimately lead to the conclusion of an EU-Mercosur free trade agreement covering industrial goods and services, with provision for the gradual liberalization of agricultural trade. Officials from both blocks revealed to news agencies that they would be signing the first free trade agreement among economic regional blocks in 1999. (See Mercopress News Agency Home Page. Visited March 20, 1998, URL: <http://www.falkland-malvinas.com>)

16 T. A., Preamble

17 The Protocol of Ouro Preto was adopted December 17, 1994.

18 *Id.* The regime applied during the transition period for the solution of controversies was based on the "Additional Protocol of BRASILIA for the resolution of controversies" signed in 17/12/91 and contains the rules for the solution of controversies up to the adoption of a permanent system no later than December 31, 1994. In general, it establishes that the disputes are to be settled by direct negotiation. When no solution is reached, a dispute is referred to the Common Market Group. Disputes which the CMG fails to resolve are then referred to the Common Market Council for an arbitration procedure.

In the view of "The Economist", the adoption of a system to settle disputes is imperative because "...in practice, disputes have been settled politically, by the Mercosur presidents themselves. Until now, this system has worked: to safeguard the whole project, the presidents have been prepared to compromise and, when need be, rewrite the rules. But this carries a cost, in reducing certainty..." (*The Economist Survey on Mercosur* - 12/10/96 (Visited 4/21/97) <<http://www.demon.co.uk/Itamaraty/mercosur.html>>).

19 Pedro Tarak, *El medio ambiente en el Mercosur*, Estudio Analítico N° 4, *Bases para la armonización de exigencias ambientales en el Mercosur*, Grupo Y'Guazu, Fundación Ambiente y Recursos Naturales, Argentina (1995)

20 Protocol of Ouro Preto (POP), art. 40, establishes that the States after the adoption of the regulations, must incorporate them into their national legal systems and must communicate that incorporation to the Administrative Secretariat of the Mercosur (SAM) which in turn, must inform the other Parties about the incorporation. After the round of communications, the regulations become officially enacted at the same time in the four countries.

21 Pedro Tarak, *supra* note 17.

22 *Id.*

23 *Id.*

24 T. A., Preamble

25 Pedro Tarak, *supra* note 17. He interprets that the protection of the environment includes environmental duties within the executive functions of the institutions of the Mercosur.

26 The "Common position of the southern cone countries upon the United Nations Conference on Environment and Development (UNCED '92)" was adopted in February of 1992 in the city of Canela, Rio Grande do Sul, Brazil, to

reflect the political position of the countries of Latin America in view of the Conference.

27 The "Agreement of partial effect of cooperation and trade of goods used in the defence and protection of the environment" was adopted within the general framework of the "Agreement of Montevideo of 1980" (ALADI), which foresees the possibility of bilateral cooperation for the establishment of single legislation and its harmonization.

28 Pedro Tarak, *supra* note 19.

29 Republica Argentina, B.O. N° 27.982, 1a. Seccion 23/9/94; B.O. N° 27.983, 1a. Seccion, 26/04/94

30 Reunion Especializada de Medio Ambiente - REMA.Res. N° 22/94, art. 1ro Res. N° 22/94, art. 2do

32 REMA, Acta N° I/93, June 29/30 1993, Uruguay

33 REMA II, Acta II/94, April 1994, Argentina

34 *Id.*

35 REMA III, Acta N° III/94, June 1994, Brasil

36 REMA III, Acta N° III/94, Annex IV, Recomendacion N° 10/94 de la REMA, June 1994, Brasil

37 *Id.*

38 *Id.*, art. 1

39 *Id.*, art. 8

40 *Id.*, art. 2

41 *Id.*, art. 9

42 *Id.*, art. 10

43 *Id.*, art. 3

44 *Id.*, art. 4

45 *Id.*, art. 6

46 REMA Acta N° 6/95, e, (h) Uruguayan representative position

47 SGT N° 6, Acta N° 6/1995, Buenos Aires, August 1995

48 *Id.*

49 Pedro Tarak, *supra* note 17.

50 CMG Res. n° 40/93

51 CMG Res. n° 46/93

52 CMG Res. n° 23/94

53 CMG Res. n° 21/93

54 CMG Res. n° 19/94

55 CMG Res. n° 85/94

56 GMC/Res. n° 84/94

57 GMC/Res. n° 86/94

58 CMG Res. n° 53/95

59 *Id.*

60 CMG Res. n° 10/94

61 CMC Dec. n° 2/94

EU

## Forestry Strategy

The Commission has recognised the need for a co-ordinated policy to be developed to ensure recognition for the diversity of European forests, their multifunctional roles and the need for environmental, economic and social sustainability. On 18 November 1998, it adopted a Communication (COM(98) 649) to the Council of Ministers and the European Parliament on a forestry strategy for the Union.

The forest area in the EU of 130 million hectares, represents 36 per cent of the total European area. Of this, 87 million hectares are exploitable forests (managed for wood production and services). The proportion of private forests is 65 per cent, with 12 million forest owners.

The Strategy, according to the Commission, should be considered as an essential contribution at EU level to the implementation of the international commitments on

the management, conservation and sustainable development of forests, as advocated by the 1992 UN Conference on Environment and Development (UNCED), the Ministerial Conferences on the Protection of Forests in Europe (Strasbourg 1990, Helsinki 1993 and Lisbon 1998), as well as the international Conventions (climate change, biodiversity, desertification, transboundary air pollution), and the 5<sup>th</sup> Environmental Action Programme Towards Sustainability. These are to be implemented by means of national or sub-national forest programmes as part of measures taken by the EU when they can offer value added help.

The Treaties on European Union make no provision for a comprehensive common forestry policy. Within the Community context, forests and related industries have been until now run directly by the Member States or as part of the Common Agricultural Policy (CAP) or Struc-

tural Funds. For the first time, the Commission is paying heed to the links between forestry and industry. The aim is to improve coordination and the way national and Community policies and schemes complement each other, and for the Member States to retain power in this area out of respect for the subsidiarity principle. The forestry strategy recommended is primarily based on proposals in the Commission's Agenda 2000. For example:

- *Rural development support measures*, for protecting forests, developing and enhancing the socio-economic potential of forests, preserving and improving the ecological value and restoring damaged forest, promoting new outlets for the use of wood, extending forest areas, and education and training programmes.
- *Pre-accession measures for agriculture and rural development in the application countries of Central and Eastern Europe*: Community aid for the sustainable adaptation of the farm sector and rural areas in the implementation of the EU's legislative achievements as regards the Common Agricultural Policy and related policies, and help for the management, conservation and sustainable development of forests in Central and Eastern Europe.

The Commission also stresses the need to take account of a number of issues that have a direct bearing on forests, such as the certification of forests that are

sustainably managed (assessment criteria and principles to apply in this area), conservation and improvement of biodiversity, creation of protected areas, wood as a source of energy, and forests in the context of climate change (carbon cycle).

The Strategy is in line with general principles such as free movement of goods, no distortion of competition, and the EU's international obligations. It is also intended to help the competitiveness of the EU's forestry sector in due course while furthering the principle of integration of sustainable development and environmental protection in forest-related policies.

It is estimated that forest-based industries' production value amounts to almost ECU 300 billion, representing 10 per cent of the total for all manufacturing. About 2.2 million people are employed in forest-based industries.

One of the main industries concerned, the paper industry, broadly welcomes the Commission's approach but feels it falls down by continuing to regard forestry as a separate industry.

The issue of Community support for the use of wood as a source of energy is currently being discussed within the framework the Agenda 2000 proposal on rural development, and the proposed strategy will help fuel this debate. (MJ) □



Courtesy: Species

## Environment, Employment and Enlargement

The European Consultative Forum on the Environment and Sustainable Development is an environmental consultation body under the Fifth Action Programme on the Environment, created by the European Commission in 1997. It covers all issues relevant to sustainable development and has members from the European Economic Area (EEA) and the associated countries of Eastern and Central Europe. It advises the European Commission on policy development.

The Forum adopted in November 1998, a package of principles and recommendations on how *environment and employment* policies can be integrated so as to lead to positive synergies.

The Forum's recommendations have been timed to influence the political debate at the moment when both employment and environment strategies are amongst the highest political priorities, both of the EU and individual Member States. The Forum believes that the achievement of joint policy goals can only be attained through an approach built on some key principles:

- Environmental policy cannot be justified on employment grounds; however, environment policy can be refocused to bring about a positive effect on employment and vice versa.
- It is necessary to have a competitive European industry based on efficient industrial and agricultural production to maintain and create new employment.
- Europe's high environmental standards must be exported to achieve an international environmental playing field.
- Economic instruments are flexible, cost-effective and broaden the range of tools available to policy makers. They do not replace more traditional approaches to environmental management, but they can raise revenue, which can be used to offset reductions in levels of labour taxes and thus reduce labour costs.
- Incentives for technology development can achieve environmental improvement and yield commercial and employment benefits. ➤



Courtesy: Council of Europe

- Environmental policies should be closer linked to European and national labour market policies.

- The Forum's paper explores the relationship between environment and employment with reference to four case study sectors:

1) *Transport*, where the demand has to be reduced and a shift to more sustainable transport modes must take place. There are positive employment effects in part of the sector, although they are not evenly distributed and the net effect is not clear.

2) *Tourism*, where linkages, particularly at local level, between the environment and employment are stronger than in most other sectors of the economy. Visitor numbers must not exceed the environmental and social capacities of an area. Where this is the case, visitor numbers must be reduced at peak periods.

3) *Agriculture*, where the introduction of sustainable practices is likely to result in significant changes to labour patterns. Seeking alternative uses for set-aside agricultural land may have positive employment effects.

4) *Energy*, where improving energy efficiency and developing renewable sources are likely to have significant employment effects. Implementing the Kyoto Protocol will require far-reaching promotion campaigns and new sources of funding.

In a related report of December 1998, the Forum made recommendations which directly address the key issues on the *accession of Central and Eastern European States* to the European Union.

The paper makes strategic recommendations on environment and sustainable development issues in the enlargement process, with a focus on four issues which the Forum considers to be of critical importance:

1. integration of environmental considerations in all relevant areas of policy;
2. institutional development;
3. costs (including the environmental benefits of enlargement); and
4. transparency, information and participation.

The two key messages for the Commission are that:

- enlargement must be understood as one element in a wider process of sustainable development;
- protection of environmental quality should be the overall guiding principle in the enlargement process.

The recommendations also contain two core messages for the accession countries:

- Accession countries should strive for negotiated results which preserve their existing strong points (for example, in relation to environmental assets such as biodiversity and landscape; cultural diversity; environmental quality standards; and which make the most of cost effective approaches to environmental protection.
- Accession countries should place a high value on enhanced investment in environmental elements of their institutional infrastructure.

The Forum noted the principles that new member States must fully adopt existing EU environmental legislation and policies, and shares the Commission's view that this is not an end in itself. Adopting the EU *acquis* should not lead to deterioration in the quality of the environment and nature in the candidate countries. It believes that the candidate member states should be represented in existing EU programmes and policy fora on environment, energy and sustainable development.

The report states that the enlargement process might also provide a significant opportunity for the European Union to take another look at its own environmental policy and implementation, for example, reviewing the lack of compliance with environmental directives in the member States. (MJ) □

## Endangered Species: Restrictions

The Commission has adopted a Regulation, introducing a new list of species of wild flora and fauna subject to import restrictions in the European Union.

The new Regulation amends Annex B of Council Regulation 228/97/EC on the protection of endangered

species through trading restrictions, applying the Convention on the International Trade in Endangered Species (CITES). It abrogates Regulation 2551/97/EC and is directly applicable in all the Member States. (MJ) □