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REVIEW

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and their Possible Contribution to Toxic Trade

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

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Editorial

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

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

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

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

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

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

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

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

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

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

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

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

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

Nicola Below/Martin Führ
October 2010

European Environmental Law Forum Kick-off Symposium:

19th and 20th May 2011
in Leipzig, Germany

“Key Challenges and Developments of European Environmental Law”

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

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

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

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

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

Claire Dupont and Gretta Goldenman

1 Introduction

In its 2010 Communication on the European Neighbourhood Policy, the European Commission stressed that “[m]any partners are showing a growing interest in EU experience, and are today increasingly willing to converge with EU environment directives. Regulatory convergence should continue to be at the core of the European Neighbourhood Policy (ENP) as well as cooperation on environmental governance.”¹ This statement reflects the importance accorded the process of convergence within the framework of the relations of the EU with its neighbours.

The term “convergence” refers to the process by which a third country aligns its legislation with EU requirements. This terminology has developed to distinguish it from the approximation process to which the candidate countries – i.e., the countries that have been accepted by the EU as on track for future EU membership – are subject.

*Approximation relates to the processes undertaken by candidate countries for transposing and implementing all of the *acquis communautaire*, in order to demonstrate full and complete compliance with all of the EU legal obligations at the time of EU accession. In contrast, convergence is a more gradual process of bringing a country’s legal framework, administrative systems and implementation measures closer to the key EU requirements. It recognises that the ENP countries may have their own national priorities and challenges with respect to resources, and therefore provides for flexibility in setting alignment and implementation targets and timetables.*

This paper looks at the differences between both processes, taking the EU water legislation as an example.² After a description of the historical background, it focuses on what is meant by convergence with the EU legislation. It considers key elements and challenges and analyses how tools developed throughout the years can support the process. Then it draws on the authors’ own experiences in Georgia and Moldova to draw lessons learnt and to make suggestions with a view to improving the convergence process.

2 Background

The fall of the Berlin Wall and the collapse of the Soviet Union brought an historical opportunity for the EU to heal the division of Europe that occurred after the Second World War, following the Yalta Conference Agreement, through the process of enlargement to include Central Eastern Europe (CEE) countries. The path to the integration of the CEE European countries started with the conclusion of trade and cooperation agreements, the first one being signed with Poland in September 1989. These agreements were seen as “*the point of departure for the further development of its [the Community] relations with the countries concerned.*”³ These were followed by a series of bilateral Association Agreements, conditioned upon these countries demonstrating progress towards democratisation and economic liberalisation.⁴

In June 1993, the Copenhagen European Council officially launched the enlargement process and set the main criteria for EU membership, the so-called Copenhagen criteria. These are:

- Political: stable institutions to guarantee democracy, the rule of law, human rights and respect for and protection of minorities;
- Economic: the existence of a functioning market economy and the capacity to cope with competitive pressure and market forces within the EU’s internal market;
- Responsibility: the candidate’s ability to take on the obligations of membership including adherence to the aims of political, economic and monetary union.

This last criterion presupposes that prospective members of the EU should adopt the necessary laws to align with the entire body of EU law and policy.⁵

In 1997, the EU started the process of membership negotiations with ten countries of Eastern Europe, Cyprus and Malta, which all joined in 2004. Three years later, Bulgaria and Romania also became members of the EU.

¹ Communication from the Commission to the European Parliament and the Council of 12 May 2010 Taking stock of the European Neighbourhood Policy (COM(2010) 207).

² The authors have provided senior legal expertise on water sector convergence in several EU-funded technical assistance projects, including the *Environmental Cooperation for the Black Sea (ECBSea)* and *Western EECCA Water Governance* projects.

³ Communication from the Commission – The development of the Community’s relations with the countries of central and eastern Europe (Brussels, 18 April 1990).

⁴ Association Agreements were signed with Poland and Hungary in December 1991, Romania, Bulgaria, the Czech Republic and Slovakia in 1993, the Baltic States in 1995 and Slovenia in 1996.

⁵ This criterion is not a new one and already applied to previous enlargement from the 1960s.

As the enlargement process was taking place, the EU also started developing a new policy towards the countries located at its new external borders. Launched in 2004, the ENP aims at building strengthened political dialogue and cooperation with the EU's new neighbours in both South and East. It is implemented through Partnership and Cooperation Agreements with Eastern countries and Association Agreements with Mediterranean countries.⁶

As part of these agreements, ENP Action Plans were negotiated between the EU and each neighbouring country. They prescribe for each specific policy area (including the environment) the steps that the country commits to undertake in order to come into line with EU values and policies. The environmental chapter of each country's Action Plan details specific measures to achieve progress in these areas, often with a long-term objective of gradual convergence with EU environmental policies.

Both the EU and the ENP partner countries have strong political and economic motivations to develop a reinforced relationship, including a progressive alignment of the partner countries with the *acquis*. However, despite commitments voiced at the political level, convergence is still lagging behind. Apart from obvious political reasons, this is also linked to the way the process itself is being pursued.

The EU still needs to integrate the enlargement that has already taken place and to honour its strong political commitment to the Western Balkan countries. Enlargement remains an on-going process with three candidate countries⁷ and five potential candidate countries in the Western Balkans⁸. Finally, the European Council has recently decided to open accession negotiations with Iceland.

In contrast, though the neighbouring countries have a special status, they cannot yet be given the full benefit and responsibility for membership. The EU has been quite clear about this and downplayed any perspective of them joining the European Union. The capacity of integration of the EU is central in this context. As already underlined by the Copenhagen European Council in June 1993, "*the Union's capacity to absorb new members, while maintaining the momentum of European integration, is also an important consideration in the general interest of both the Union and the candidate countries.*" Under the cohesion policy, the EU allocates significant financial resources to address economics and social imbalances at Union level. The neighbouring countries' deteriorating economies

would represent too a heavy burden. Political considerations also play a role.

For both former Soviet Union and South Mediterranean countries, convergence is first of all part of the technical assistance package. The adoption of new approaches that are already enshrined in EU legislation is also seen as part of a modernisation and democratisation process, along with a reinforcement of trade relations. In the case of the former Soviet Union countries, closer links with the EU are a way to gain independency from Russia although the influence of Moscow is still significant, especially in countries such as Armenia or Ukraine. This can actually represent a serious obstacle to the implementation of close cooperation agreements. In the Mediterranean region, the shared regional sea is also a strong incentive, although the crisis of the Union for the Mediterranean as shown by the recent postponement of the June Summit of the Heads of States, will certainly slow down the process of alignment.

3 Approximation versus convergence

For the purposes of accession negotiations, the EU *acquis* are divided into various chapters corresponding to the different policy areas, including one (Chapter 27) on environment. This has provided the basis for implementing and monitoring the so-called "approximation" process whereby the candidate countries must integrate fully and effectively all existing EU legislation.

Approximation requires the adoption of the EU *acquis* in the national legal order. It also entails setting in place the necessary administrative and enforcement systems and making the investments (*e.g.* in environmental infrastructure) to enable effective implementation. Difficulties in achieving full alignment by the time of accession have been dealt with via the adoption of time-limited transition measures.

In contrast to the clear standards for approximation, the notion of convergence in the context of the ENP has given rise to considerable misunderstanding. This is evidenced by the lack of consistency in the vocabulary used. For example, in the ENP Action Plans, the term "convergence" is rarely used, especially in relation to environment, while approximation is quite common. Many ENP Action Plans contain the following standard sentence: 'Implementation of the Action Plan will significantly advance the *approximation* of country's legislation, norms and standards to those of the European Union'. Another formulation used in the Action Plans is 'the process also advances and supports the *approximation* of the country's legislation, norms and standards with those of the Union in the areas covered by the plan'. In the Action Plans, the term *gradual convergence* is employed in relation to energy policy and legislation. Finally, the newly adopted National Indicative Programmes 2011-2013

6 Such agreements have been signed with twelve countries: Algeria, Armenia, Azerbaijan, Belarus, Egypt, Georgia, Israel, Jordan, Lebanon, Libya, Republic of Moldova, Morocco, Palestinian Authority, Syria, Tunisia and Ukraine. In addition, an Association Agreement with Syria is ready for signature.

7 Turkey, Croatia, the Former Republic of Macedonia.

8 Albania, Bosnia and Herzegovina, Kosovo, Montenegro, Serbia.

often refer to *regulatory alignment* and/or *convergence*.

This diversity in the terminology is rather confusing. However, the obligation placed on Member States and candidate countries to fully and effectively incorporate the requirements of EU legislation into national legislation should be distinguished from third countries' commitment to gradually converge with EU legislation. Contrary to the approximation process, convergence does not involve a full alignment with EU legislation, within specified deadlines. As mentioned in guidance on convergence issued by the Commission,⁹ "*convergence implies that the main principles/features of one legal system should be reflected/integrated into the other legal system, taking into account the specificity of the other system and without necessarily adopting exactly the same requirements in detail.*"

In the framework of convergence, the neighbouring countries can make choices about what their priorities are and the timing of the process. Finally, convergence entails not only the gradual compatibility of national legislation with EU requirements; in order to achieve the objectives of the legislation and to provide the associated social and economic benefits, the implementation of the legislation in practice must be ensured. This implies that the appropriate administrative structures must be in place, along with any necessary implementing infrastructure and controls and penalties to ensure full and proper enforcement.

The ENP approach is country-specific and "*there are as many possible responses as there are partner countries, according to each partner's political situation, its level of ambition with regard to the EU, its reform agenda and achievements, and its level of socio-economic development*".¹⁰ This differentiated approach is also reflected in the new generation of more ambitious agreements currently being negotiated with some neighbour countries¹¹. From the point of view of convergence, the new association agreements under negotiation with Ukraine and Moldova are particularly interesting as they reflect a new and more focused approach. This consists of defining precisely which directives and which provisions of these directives should be subject to convergence. Deadlines are agreed for convergence with these specific obligations of the *acquis*. Since stricter timelines are set, the differences between approximation and convergence tend to decrease. However, the alignment with EU legislation is still partial as the focus is on key acts

such as framework directives and/or key provisions of the *acquis*.

A similar trend is reflected in the Treaty establishing the Energy Community, signed on 25 October 2005, which aims at establishing the conditions necessary for the establishment of integrated energy markets for electricity and gas between the European Union and nine South East European countries¹². While Ukraine's accession has been approved by the Ministerial Council of the Energy Community in December 2009, the signature of the Accession Protocol is subject to the adoption of a gas law in compliance with EU relevant rules. In particular, Title II of the Treaty requires the Contracting Parties "to implement" core parts of the *acquis*. Chapter III deals specifically with selected energy-related aspects of the environmental *acquis*, also including public participation¹³ and environmental impact assessment.¹⁴ The Treaty sets deadlines for complying with the obligation 'to implement' the relevant EU legislation. This obligation is worded in a stricter way than in relation to the IPPC Directive,¹⁵ which the Contracting Parties "endeavour" to implement. The term "implementation" implies that the Contracting Parties have to approximate their legislation and set in place the mechanisms necessary to a proper implementation and enforcement (including institutional structures). Of particular interest is a dispute settlement procedure¹⁶ which has been established under the Treaty; this could shed some light in the future as to the obligation to implement the *acquis*.

The blurred line between approximation and convergence has at times led to a type of overkill in the ENP countries. As part of the pre-accession process in the environment sector, the candidate countries were asked to show that they were taking the required legal and administrative steps to fully implement the environmental *acquis* through the Progress Monitoring effort. Under Progress Monitoring, the candidate countries had to fill out tables of concordance and implementation questionnaires for each of the environmental directives. Since EU regulations are directly applicable and therefore do not need to be transposed into national legal orders, only implementation ques-

9 Convergence with EU environmental legislation in Eastern Europe, Caucasus and Central Asia: a Guide, European Communities, 2003, p.10.

10 Communication from the Commission, 'A Strong European Neighbourhood Policy', COM(2007) 774 final, p.3.

11 Such agreements are currently being negotiated with Ukraine, Moldova, and more recently with Armenia, Georgia and Azerbaijan, the ongoing discussions with Morocco on an "advanced status" and with Israel on an upgrading of relations.

12 Albania, Bulgaria, Bosnia and Herzegovina, Croatia, the former Yugoslav Republic of Macedonia, Montenegro, Romania, Serbia and the United Nations Interim Administration Mission in Kosovo.

13 Directive 2003/35/EC providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment.

14 Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 97/11/EC.

15 Council Directive 96/61/EC concerning integrated pollution prevention and control. See also the congress report on ELNI-VMR-VVOR-congress 2010: "Talking about the environmental effects of industrial installations the European Directive on Industrial Emissions (IED/ current IPPC Directive)" report in this issue of the elni Review on p. 91.

16 Articles 90 to 93 of the Energy Community Treaty and Procedural Act No 2008/01/MC-EnC of 27 June 2008 on the Rules of Procedure for Dispute Settlement under the Treaty.

tionnaires were required for the environmental regulations.

The use of provision-by-provision tables of concordance was designed to bring some honesty to the candidate countries' statements about their progress and to help them track how far along they were in ensuring that each EU obligation was transposed into the national legal order. It also provided the European Commission with a reliable way of monitoring each country's status with respect to approximating the environmental *acquis*.

But provision-by-provision approximation is less appropriate when the objective is convergence. If the ENP neighbouring countries are advised to focus on the details of legal transposition, by carrying out gap analysis via detailed tables of concordance, they may lose sight of the bigger picture. The emphasis can too easily become literal transposition out of context, resulting in legislation that cannot be implemented and that is inconsistent with other legal acts, instead of concentrating on the foundational task of building effective environmental management systems. In Moldova, the Centre for Legal Harmonisation, set up under the Ministry of Justice to coordinate the convergence process, tended to apply such a formal method in its role of assessing all draft legislation against the requirements of EU legislation. Such a method prevents the adoption of a gradual and flexible approach to convergence as it leaves little room to a step-by-step introduction of EU requirements.

Thus convergence is a complex process that starts with a close analysis of the EU framework requirements to pull out the main principles and key requirements. The starting point is usually the framework legislation. The legal analysis considers what administrative systems and other elements, such as infrastructure investment, may be required in order to achieve effective implementation of the key requirements. In this context, the implementation questionnaires developed as a progress monitoring tool can be helpful, in that they draw attention to the need to ensure that the necessary systems for administering the requirements are in place, along with mechanisms for working with the stakeholders who will be asked to comply with the requirements.

Convergence can be facilitated by careful planning and a step-by-step approach. One of the most challenging aspects of convergence planning is allocation of tasks and responsibilities. It is critical to determine who will do what, how they will do it, and within what timeframe. Since resources are always limited, priorities need to be set. This is important when setting time frames, including identification of what can be done now ("quick wins"), as well as what actions need to be done first to pay the way for the next actions, *i.e.*, a step-by-step approach.

Convergence planning is iterative and based on joint agreement and commitment of the relevant parties. It recognises the often significant levels of knowledge and skill that may exist within a neighbouring country, and considers national and local needs along with the EU requirements. It is based on careful analysis of the country's existing situation, including an assessment of the current legal framework, implementation status, and institutional and investment needs. It provides for gradual implementation when available financial and human resources are limited. Ideally it will involve all stakeholders so that the steps identified are realistic and achievable within the agreed timescale.

4 Convergence and the EU water sector legislation

The EU legislation in the field of water aims at achieving an integrated approach to water management. This integrated approach is considered key to cost-effective and institutionally efficient implementation of the measures needed to ensure adequate quantities and quality of a nation's water resources so as to achieve sustainability for the future.

Sustainable management and protection of water resources are also important elements of the ENP. This is partly because many Eastern European countries have past pollution issues stemming from the emphasis on heavy industry during Soviet times, partly because of the links between water resources and nature protection efforts across Europe, and partly because of the importance of the regional seas, including the Baltic, Black and Mediterranean Seas.

Indeed, because of the many river basins shared among the EU Member States and their neighbours, the EU has a particular interest in and responsibility for facilitating and reinforcing cooperation with neighbouring countries with respect to the water sector *acquis*. This is underlined in several of the key directives. Under the Water Framework Directive,¹⁷ Member States are required to cooperate with non-EU countries in relation to water basins extending beyond the boundaries of the EU. Similarly, under the Marine Strategy Framework Directive,¹⁸ Member States should cooperate with relevant non-EU countries within the same marine region to develop and implement strategies for their marine waters. The Flood Risks Directive¹⁹ (2007/60/EC) also requires Member States to endeavour, wherever the basin extends beyond the boundaries of the Community, to produce one single international flood risk management plan or

17 Directive 2000/60/EC establishing a framework for Community action in the field of water policy, as amended, Art. 3(5) and 13(3).

18 Directive 2008/56/EC establishing a framework for Community action in the field of marine environmental policy, Art. 6(2).

19 Directive 2007/60/EC on the assessment and management of flood risks, Art. 8(3).

a set of flood risk management plans coordinated at the level of the international river basin district.

Of the EU water sector requirements, the Water Framework Directive is considered the highest priority directive since it sets forth a number of key elements for overall water resource management. In environmental terms, convergence with the Water Framework Directive may create the following benefits over time:

- more sustainable use of water, and more efficient and effective management at the river basin level;
- reduced flood risks and preventive measures;
- protected and well-managed groundwaters;
- reduced pollution and improved treatment of wastewater;
- benefits for human health in relation to drinking and bathing water, benefits for ecosystems, improved conditions for economic activities (e.g. tourism);
- instruments to address water scarcity;
- water pricing as a tool to raise funds and steer consumer behaviour;
- ownership among stakeholders as result of public participation.

Other water sector directives considered important for the ENP process of convergence include:

- Bathing Water Directive²⁰ (2006/7/EC)
- Urban Wastewater Treatment Directive²¹ (91/271/EEC).
- Groundwater Protection Directive²² (2006/118/EC).
- Priority substances in the field of water policy and environmental quality standards.²³
- Nitrates Directive²⁴ (91/676/EEC).
- Communication on Integrated Coastal Zone Management (COM(2000) 547 final).
- Communication on water scarcity and droughts in the EU (COM(2007) 414 final).

The water sector directives relate to each other and are in some cases inter-dependent. For example, compliance with the Urban Wastewater Treatment Directive will in many cases contribute to compliance with the standards of the Bathing Water Directive.

EC water sector legislation comprises hundreds of pages of text in total. Many of the requirements require new administrative arrangements and significant financial investment in water sector infrastructure. In recognition of the difficulties in implementing the water sector requirements, Member States are typically allowed a reasonable number of years to take the practical steps needed to meet the legal requirements. Thus convergence in the context of the Water Framework Directive and the other EU water sector requirements requires a long-term perspective.

Moreover, for many of the European neighbourhood countries, some of the concepts in the Water Framework Directive are new. While the river basin approach is well established in most Mediterranean countries, this is not the case in the Eastern Europe neighbours where it has only recently begun to take root. The concept of the combined approach to emission limits for polluting substances presents another new challenge.

In addition, the Water Framework Directive, along with the Floods Directive and the Marine Strategy Framework Directive, place considerable emphasis on the importance of participatory planning. The focus on stakeholder consultation as essential for the development of effective management plans is a strong link to the democratic roots of the European Union, and a challenge to implement in those ENP countries where democratic processes are still not fully entrenched.

These challenges are still not fully implemented in the 27 Member States. But the standard is clear: it involves complete transposition of each of the obligations set forth in the EU legislation in their national legal order, along with full implementation. Moreover, to assist in implementation of the investment-heavy directives, such as the Urban Wastewater Treatment Directive, the EU has provided considerable financial assistance to the less prosperous Member States through pre-accession financing instruments and post-accession structural funds.

In the context of convergence, the ENP countries have the possibility to take more of a step-by-step approach and set priorities based on their current needs and available human and financial resources. One of the stumbling blocks can be the institutional aspects of implementing the water sector *acquis*. Though the Water Framework Directive is relatively flexible in the sense that it does not impose a model for institutional structure, it does set up some principles that must be reflected at the institutional level. Local institutional systems may need to be adapted in order to enable a system of coordination on river basin level.

The environmental permitting system as a whole is also a critical element in implementing the water sector *acquis*. This links to convergence with the EU requirements on integrated pollution prevention and control (IPPC).

20 Directive 2006/7/EC concerning the management of bathing water quality and repealing Directive 76/160/EEC.

21 Council Directive 91/271/EEC concerning urban waste water treatment.

22 Directive 2006/118/EC on the protection of groundwater against pollution and deterioration.

23 Decision No 2455/2001/EC establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC and Directive 2008/105/EC on environmental quality standards in the field of water policy, amending and subsequently repealing Council Directives 82/176/EEC, 83/513/EEC, 84/156/EEC, 84/419/EEC, 86/280/EEC and amending Directive 2000/60/EC.

24 Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources.

Another important factor is financial, as some of the requirements of EU water legislation are very expensive to implement. The best example is the Urban Wastewater Treatment Directive, which requires heavy investment in wastewater treatment plants; convergence with the Drinking Water Directive also involves significant investments in infrastructure for drinking water supply. Institutional costs need to be taken into consideration, including any requirements for new personnel and related equipment. Good cost estimates are important in order to identify possible sources of financing, whether from national or local budgets or donor support.

5 Experiences with water sector convergence planning

As mentioned above, a major incentive for the ENP countries to undertake convergence with the EU water sector *acquis* is the link to EU technical assistance. The EU, through its programmes of assistance to third countries, has devoted considerable resources over the past decade to support improvement of water resources management and pollution control in the ENP countries. River basin management ideas and practices formed part of many of these projects, but uptake of the concepts introduced through these projects has been poor.

Part of the reason for this lack of uptake has been the episodic and time-limited nature of most technical assistance projects. Technical assistance projects are an important way to focus the minds of the beneficiary countries, but change driven by technical assistance is unreliable. It can take six months for a complex multi-country project to get off the ground. Since most projects are limited to a couple of years, not much time is left for implementation. If a second donor-funded project is not in the pipeline, the information and expertise transferred during the project often gets set aside in the pressure of daily events.

However, from 2007 to 2010, two EU Tacis²⁵ projects provided impetus for helping the Eastern European neighbours to make progress with respect to their commitments to achieve convergence in the water sector – the Environmental Cooperation on the Black Sea (ECBSea) and the Western EECCA Water Governance projects. This allowed for some continuity of technical assistance with respect to water sector convergence, though once again the time period proved to be too short.

In the context of the ECBSea, assistance was provided to prepare water sector convergence plans for Moldova and Georgia, and to take initial steps towards

legal and technical convergence in those countries. In both countries, convergence planning started with the key principles and requirements of the Water Framework Directive. In Georgia, which has a large tourism industry on the Black Sea coast, convergence with the Drinking and Bathing Waters Directives were also considered as priorities. The Nitrates Directive was an additional priority for Moldova.

In Georgia, previous Tacis projects had introduced aspects of river basin management planning in the context of a pilot project. As a result, a number of Georgian experts had a base knowledge how to undertake river basin assessment and water body characterisation. However, despite this considerable technical and scientific knowledge on water management, two important aspects of the Water Framework Directive – integrated river basin management planning and environmental permits setting emission limit values – presented particular challenges for Georgia.

A previous proposal by environmental officials to set in place a system of integrated river basin management had envisioned establishment of several river basin management authorities; this proposal had been rejected by the political hierarchy as too costly for Georgia. During convergence planning, an alternative approach was developed based on coordination of existing administrative structures. This alternative approach was considerably more cost-effective. Though it depended on input from local and regional authorities who had even fewer resources than those at national level, it also had the attraction of bringing river basin management planning closer to the local stakeholders who would be expected to implement any agreed-on management measures.

Another obstacle was the lack of any system of environmental permitting, which is essential for implementing the combined approach of setting emission limit values for discharges to the aquatic environment. Several years ago, the previous system for issuing environmental permits for industrial facilities had been abolished by politicians who thought it would make Georgia more “investor-friendly.”²⁶ Changes in the political climate had given rise to hopes among environmental authorities that it would soon be possible to put in place a system of environmental permitting.²⁷

As part of the technical assistance provided to support convergence planning, EU funding was also provided for a Georgian environmental lawyer to start to work on a new framework Water Law for Georgia. This was particularly appreciated by the beneficiary Ministry of Environment because Georgia had committed itself to

²⁵ The EU Technical Assistance to the Commonwealth of Independent States (Tacis) run from 1991 to 2006, with several projects such as the ECBSea and the Western EECCA Water Governance projects taking place later and being financed by the remaining Tacis funds. It is now replaced by the European Neighbourhood and Partnership Instrument (ENPI).

²⁶ Green Alternative. *Environmental Governance in Georgia and How Can the EU Contribute to its Strengthening* (Tbilisi, 2006).

²⁷ “Concept for New Framework Water Law of Georgia” (ECBSea project document, 2009).

developing a new Water Law before the end of 2009 in its negotiations with the EU in the context of its ENP Agreement. Additional support was then provided through the Western EECCA Water Governance project.²⁸ It shows how important it is to ensure that national lawyers are involved in the drafting of new laws. In ENP countries, environmental legislation is often developed by technical people without support from environmental lawyers.

Careful coordination with previous or ongoing technical assistance projects is also crucial as it allows for synergies to be developed between different initiatives, overlaps to be avoided and institutional memory to be maintained. For example, in Moldova, both the ECBSa and the Western EECCA Water Governance projects build on a new system of surface water quality standards developed under the OECD project "Support for Convergence with EU Water Quality Standards in Moldova". This work served as a basis for developing a draft regulation on surface water protection, which was to cover the existing legislative gap as the Soviet quality standards have been repealed through the so-called 'guillotine' process without being replaced.²⁹ This draft regulation served as a step towards convergence with the Water Framework Directive as it provides for surface water classification, the possibility of revising water quality classes, the establishment of target water quality class for specific water body, and monitoring and measures in the case of non-compliance with the standards.

Despite these efforts, convergence with the EU water sector legislation remains fragile in Georgia and other ENP countries. The discouraging reality is that top policymakers in the neighbourhood countries view environmental protection as a luxury, and environmental officials often lack the power and resources to be as innovative and active as they would like to be.

6 Conclusions, including lessons learned

The Lisbon Treaty (Art. 8) recognises that the Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation, through new reinforced association agreements.

Given the EU's new responsibilities for external policy under the Lisbon Treaty, including the appointment of the High Representative/Vice-President and establishment of the European External Action Service, some expect the European Neighbourhood Policy to benefit from a greater consistency, coherence and coordination. The appointment of a Commissioner

with a specific regional mandate which allows him to devote extra attention to the ENP and the countries it covers is also viewed by Europe's neighbours as a positive development.

But it is not clear at this time whether these new developments will enable the EU to provide its neighbours with the consistent support that is needed to move forward on convergence.

Despite strong declarations at the highest political level and a flurry of partnerships and cooperation initiatives, convergence is still in its infancy and is taking a very long time. While at the technical level, many people are convinced of the necessity of converging their legislation with EU requirements and have the relevant know-how, there is a lack of involvement of the 'middle' level and other stakeholders such as NGOs or business representatives.

In particular, there is a need for the European Commission's assistance programmes to have more of a long-term vision, consistency and policy commitment. The Commission's policy of moving officials to new positions every few years leads to a loss of institutional memory; cycles of country programming and project preparation may not coincide with beneficiaries' needs. Better donor coordination is also needed. While coordination among Commission services in Brussels is efficient, communication with the delegations in the field can be lacking. Such coordination is increasingly important in view of the growing roles of the delegations with the coming into force of the Lisbon Treaty.

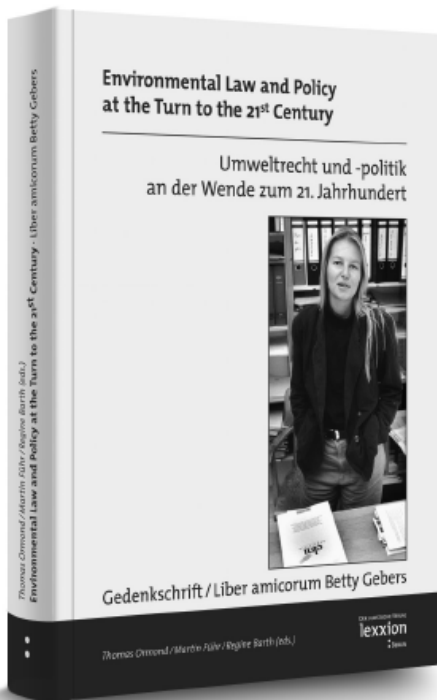
In summary, in view of the many river basins and regional seas shared among Member States and third countries, it remains important for the EU to send strong signals to its neighbours that convergence with the EU water sector requirements should be a priority.

²⁸ Water Governance in the Western EECCA Countries, Final Project Report to EuropeAid, 2010.

²⁹ ECBSa Project Final Report to EuropeAid, 2009.

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

Umweltrecht und -politik an der Wende zum 21. Jahrhundert



Gedenkschrift / Liber amicorum Betty Gebers

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

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

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The institute's mission is to analyse and evaluate current and future environmental problems, to point out risks, and to develop and implement problem-solving strategies and measures. In doing so, the Öko-Institut follows the guiding principle of sustainable development.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

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The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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The Society for Institutional Analysis was established in 1998. It is located at the University of Applied Sciences in Darmstadt and the University of Göttingen, both Germany.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

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elni

In many countries lawyers are working on aspects of environmental law, often as part of environmental initiatives and organisations or as legislators. However, they generally have limited contact with other lawyers abroad, in spite of the fact that such contact and communication is vital for the successful and effective implementation of environmental law.

Therefore, a group of lawyers from various countries decided to initiate the Environmental Law Network International (elni) in 1990 to promote international communication and cooperation worldwide. Since then, elni has grown to a network of about 350 individuals and organisations from all over the world.

Since 2005 elni is a registered non-profit association under German Law.

elni coordinates a number of different activities in order to facilitate the communication and connections of those interested in environmental law around the world.

Coordinating Bureau

The Coordinating Bureau was originally set up at and financed by Öko-Institut in Darmstadt, Germany, a non-governmental, non-profit research institute.

Three organisations currently share the organisational work of the network: Öko-Institut, IESAR at the University of Applied Sciences in Bingen and sofia, the Society for Institutional Analysis, located at the University of Darmstadt. The person of contact is Prof. Dr. Roller at IESAR, Bingen.

elni Review

The elni Review is a bi-annual, English language law review. It publishes articles on environmental law, focusing on European and international environmental law as well as recent developments in the EU Member States. It is published by Öko-Institut (the Institute for Applied Ecology), IESAR (the Institute for Environmental Studies and Applied Research, hosted by the University of Applied Sciences in Bingen) and sofia (the Society for Institutional Analysis, located at the University of Darmstadt). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

elni Conferences and Fora

elni conferences and fora are a core element of the network. They provide scientific input and the possibility for discussion on a relevant subject of environmental law and policy for international experts. The aim is to gather together scientists, policy makers and young researchers, providing them with the opportunity to exchange views and information as well as to develop new perspectives.

The aim of the elni fora initiative is to bring together, on a convivial basis and in a seminar-sized group, environmental lawyers living or working in

the Brussels area, who are interested in sharing and discussing views on specific topics related to environmental law and policies.

Publications series

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
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