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REVIEW

'New Age' Trade Agreements
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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Intellectual Property Rights, Genetical Resources
and Traditional Knowledge

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adopted by the Andean Community

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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/>

Integrated Environmental Permitting

Hanna D. Tolsma

1 Introduction

Citizens and businesses seeking a permit to carry out a certain activity are often confronted with a range of procedures containing a variety of different time limits, assessment criteria and legal remedies. The establishment of a new power station in the Netherlands, for example, will require a permit for construction, a permit for using or changing street access, a fire safety permit, an exemption from the land-use plan, a water permit and permits under the Dutch Environmental Management Act, the Dutch Flora and Fauna Act and the Dutch Nature Conservation Act. It is at present impossible for a person to obtain a quick and unambiguous answer from a public authority as to whether or not he may carry out a certain activity at a certain location.

Member States of the European Union such as Sweden, Germany and the Netherlands have undertaken initiatives to develop legal frameworks of integrated decision-making.¹ Sweden is the first Member State with integrated legislation on nature conservation, environment and water management (*Miljöbalken 1999*), but does not have a single environmental permit. Germany came close to being the first Member State with an integrated Environmental Code (*Umweltgesetzbuch*) including an integrated project authorisation model (*integrierte Vorhabengenehmigung, iVG*). However, in 2009 the Federal Government was ultimately unable to agree on a common draft.² Currently only parts of the German Federal Environment Ministry's draft Environmental Code have been inserted in various sector-specific laws.³ The proposed integrated project authorisation model is not included.⁴ The Netherlands is therefore the first Member State to introduce a single environmental permit with a broad scope in the field of environmental law. The Dutch General Act on Environmental Permitting (hereafter GAEP), to be introduced in October 2010, will radically alter the system of

permitting for activities affecting the environment.⁵ The single environmental permit that forms the centrepiece of the GAEP integrates 25 permits, including those for obtaining a building permit, an environmental permit, and a listed building permit.⁶ Steps towards an integrated approach to the environment have also been taken at the European level. The majority of European environmental legislation still has a sector-specific nature. However, a change occurred with the IPPC Directive.⁷ The IPPC Directive requires a coordinated approach to the various emissions into the air, water and soil from industrial plants covered by the directive. In the near future the IPPC Directive will be replaced by the Directive on Industrial Emissions.⁸ The IPPC Directive prescribes a system of integrated environmental permitting.

In this article the legal instrument of integrated environmental permitting is analysed.⁹ First, the concept of integration in the field of environmental law will be described (section 2). Secondly, the integrated approach under the IPPC Directive will be discussed (section 3). After that, attention will be given to the recent developments on integrated permitting in the Netherlands (section 4). Furthermore, comments will be made on substantive integrated environmental permitting (section 5). The article concludes with some final remarks (section 6).

2 The concept of integration in environmental law

The aim of this section is to gain a better insight into how the concept of integrated environmental permitting relates to other notions of integration used in the field of environmental law, such as the notions of

¹ M.G.G. Neven e.a., *Eurosites Insights. Image, implementation, interpretation and integration of Natura 2000 in European perspective*, Alterra Rapport 2005. This research contains an overview of the level of integration in EU Member States.

² Press report of 2 February 2009, available at www.bmu.de. See Scheidler, *Die anstehende Neuordnung des Umweltrechts nach dem Scheitern des Umweltgesetzbuch*, UPR 2009, 173-176; L. Knopp, *Umweltgesetzbuch - ein Trauerspiel ohne ende?*, UPR 2009, 121-125.

³ The amendments were realized especially in the new *Bundesnaturschutzgesetz* and the new *Wasserhaushaltgesetz*. The amendments focus on reforming the competences between Federation and Länder. Both Acts entered into force on 1 March 2010.

⁴ However, it should be noted that permits for industrial facilities under the *Bundes-Immissionsschutzgesetz* and infrastructure projects under various laws in Germany have a concentrating effect.

⁵ In Dutch 'Wet algemene bepalingen omgevingsrecht', in short 'Wabo'.

⁶ It should be noted that in the Dutch language the term environment is used in a narrow and a broad sense. The Dutch term *milieu* is used to express environment in the narrow sense, referring only to the industrial effects on the environment (such as waste, air pollution and noise). The Dutch term *omgeving* is used to express the broad sense of the environment and refers to the industrial effects on the environment as well as to spatial planning, water, nature conservation, etc. The terms *milieu* en *omgeving* are both translated as 'environment'.

⁷ Integrated Pollution Prevention and Control Directive, 2008/1/EC (original 96/61/EC). 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.

⁸ COM (2007) 844 def. Existing pieces of legislation (seven in number) will be recast into this Directive on Industrial Emissions.

⁹ The author would like to thank, J.H. Jans, K.J. de Graaf & L. Squintani, for their helpful comments and suggestions on a prior draft of this article..

internal and external integration and the concept of integrated pollution prevention and control.

The notion of integration in the field of environmental law refers in general to the holistic idea that the environment should be seen and protected as a whole. This idea is expressed in the concept of Integrated Pollution Prevention and Control (hereafter: IPPC) that is to be found in a Recommendation adopted by the OECD in 1991.¹⁰ The expression IPPC is used in a broad and a narrow sense.¹¹ The broad sense reflects a general hypothesis that pollution problems should be addressed by taking into account all three environmental media (air, land and water) in an integrated manner. This broad perspective can be put into practice through controls applied to pollution sources (such as products, industrial processes or economics sectors as a whole, like transport) polluting substances or geographical areas which are experiencing pollution. The IPPC Directive, centred on source-based control through the regulation of industrial processes, is an example of IPPC used in a narrow sense.

A general distinction with regard to the concept of integration is that between internal and external integration.¹² External integration is the integration of environmental concerns into other policies. The notion of external integration can be found in the integration principle, which is one of the most important principles of EU law relevant to environmental protection.¹³ The integration principle leads to a general obligation on European institutions to reach an integrated and balanced assessment of all the relevant environmental aspects when adopting other policies, such as in transport, agriculture and development. External integration is not directly related to integrated environmental permitting permits and therefore will not be considered at this point.¹⁴ Internal integration concerns the integration within the field of environmental law. Faure defines the notion of internal integration as follows:

“meaning the ecological goal that, in the decision-making and balancing of interests with respect to the permitted amounts and quality of pollutants, the total effects of pollution emanating from the li-

censed activity on the various components of the environment are taken into account.”¹⁵

The term ‘horizontal legislation’ is also used in respect to this type of integration. Horizontal legislation is legislation that does not relate to a single sphere of the environment but rather examines a given activity from a variety of environmental viewpoints.¹⁶ In order to achieve internal integration, legal instruments should be shaped in such a way that integrated environmental decision-making is possible, e.g. by combining sector-specific legislation, policies or permits. There are a few examples from the Netherlands, in particular the recent Dutch Water Act which integrates eight sectoral acts in the field of protection, improvement and management of water systems.¹⁷ This Water Act also combines the former sectoral permits into a single water permit. Secondly, some provincial authorities have integrated sectoral policy plans on water, environment, spatial planning and transport in one single provincial environmental plan. Another way to make internal integration possible is coordination when separate environmental legal acts and permitting systems remain in existence.¹⁸ What is meant by coordination in this context is the legislature’s introduction of legal rules which force the various authorities to take into account the separate procedures or permits.

3 Integrated environmental permitting at EU level

At a European level the IPPC Directive prescribes an integrated approach to issuing permits. Strangely enough the concept of the integrated approach is not defined in any of the environment action programmes, nor is a definition included in the IPPC Directive. The concept of integrated approach under the IPPC Directive is extensively analysed by Bohne.¹⁹ He derives four basic characteristics of the integrated approach from several provisions of the IPPC Directive.

In the first place there’s the notion of holism which is expressed in the directive by the words ‘protection for the environment as a whole’. The notion of holism refers to the consideration of interrelationships between different environmental media (air, land and water). Secondly, the integrated approach has a substantive and a procedural dimension. Bohne derives these two dimensions from Art. 7 of the IPPC Direc-

¹⁰ OECD (1991), *Integrated pollution prevention and control*, Environmental Monograph No. 37.

¹¹ See N. Emmot, *An overview of the IPPC Directive and its developments*, in: *Integrated Pollution Prevention and Control*, 24 (Ch. Backes & G. Bellem, eds. 1999); N. Emmot & N. Haigh, *Integrated pollution prevention and control: UK and EC approaches and possible next steps*, JEL 1996, 301-311.

¹² M.G. Faure, *Defining Harmonization, Codification and Integration*, EELR 2000, 177-178; Th. G. Drupsteen e.a., *De toekomst van de Wet milieubeheer*, Deventer: W.E.J. Tjeenk Willink 1998, chapter 4 and 5.

¹³ J.H. Jans & H.B. Vedder, *European Environmental Law*, Groningen: European Law Publishing 2008, at 16. This basic principle is laid down in Art. 11 TFEU.

¹⁴ For more on this topic, see D. Grimeaud, *The Integration of Environmental Concerns into EC policies: A genuine policy development?*, EELR 2000, 207-218.

¹⁵ Faure, *supra* note 12, 181.

¹⁶ J.H. Jans, *The relationship between the IPPC Directive and Other EC Environmental Law*, in *Integrated Pollution Prevention and Control*, 44 (Ch. Backes & G. Bellem, eds. 1999)

¹⁷ In force since 22 December 2009 (*Kamerstukken II 2006/07*, 30 818 nr. 3).

¹⁸ See Faure, *supra* note 12, 174-182. Faure discusses in great detail the use of notions like integration, coordination, harmonisation and codification.

¹⁹ E. Bohne, *The implementation of the IPPC Directive from a comparative perspective and lessons for its recast (Part 1)*, JEEPL 2008, 9; E. Bohne, *The Quest for Environmental Regulatory Integration in the European Union*, Alphen aan den Rijn: Kluwer Law International 2006, 27.

tive. This provision determines that Member States shall take the measures necessary to ensure that the conditions of, and procedure for the granting of the permit are fully coordinated when more than one competent authority is involved, in order to guarantee an effective integrated approach by all authorities competent for this procedure. The third characteristic concerns the substantive dimension of the integrated approach. Art. 9 paragraphs 3 and 4 of the IPPC Directive prescribe the application of emission limit values and/or equivalent parameters or technical measures based on Best Available Techniques (BAT) in combination with case-specific considerations which account for the technical characteristics of the installation concerned, its geographical location and the local environmental conditions. These requirements imply a process of weighing and balancing environmental interests in order to achieve an integrated decision. Bohne's definition of substantive integration comes close to the definition of internal integration by Faure that was quoted above.²⁰ The fourth and last characteristic is the notion of effectiveness. The integrated approach is only effective if a high level of protection of the environment can be reached. The environmental quality standards as set out by Community legislation are the lower limit of this high level of protection. The four characteristics described above give a brief view of the integrated approach under the IPPC Directive. The legal framework of the integrated approach in the IPPC Directive can be found in chapter two of the proposal for the Directive on Industrial Emissions. On the whole there are no major changes with regard to the integrated approach.

It is important to note that the IPPC Directive does not require that Member States combine sectoral environmental laws or integrate sectoral permits in a single permit. The IPPC Directive establishes a legal framework that requires Member States to have an integrated decision-making procedure with regard to industrial installations that fall under the directive. According to the IPPC Directive an integrated decision-making procedure can be achieved by the integration of sectoral permits in a single permit or by coordination of sectoral permits. However, most Member States have a system of integrated permitting (environment and water aspects) for industrial installations within the scope of the IPPC Directive.²¹

4 Integrated environmental permitting in the Netherlands

The General Act on Environmental Permitting, introduced in October 2010, radically changes the legal

framework of environmental permitting in the Netherlands. In this section the new system will be described.²²

4.1 Towards a single permit

A system of integrated permitting is not totally new in the Netherlands. With the adoption of the Dutch Environmental Management Act in 1993, five permits and two exemptions were already integrated into a single environmental management permit. Yet the scope of this Environmental Management Act was quite limited, as not all possible permits in the field of environmental law were integrated. The environmental permits were still split up over a variety of laws and regulations. Citizens and businesses seeking a permit were confronted with a range of procedures entailing a variety of different time limits, assessment criteria and legal remedies. The GAEP is intended to address these problems through the integration of permits, with special regard to the needs of individuals and businesses. The main goal is to make it easier for citizens and businesses. Other important aims are to reduce the administrative burden and promote cooperation between and within public authorities.²³ It has to be noted that the idea that the environment should be seen and protected as a whole is not mentioned in the legislative process as a reason for integrating permits.

The environmental permit will apply to the demolition, construction, establishment or use of a physical facility. The activities that fall within the scope of the GAEP will typically be location-specific projects which have an impact on our physical environment (air, water, soil, wildlife, biodiversity, landscape and cultural-historical elements). It concerns permits such as exemptions from the land-use plan, planning permissions on the Dutch Spatial Planning Act and permits to modify or demolish a protected building under the Dutch Monuments and Historic Building Act 1988. Also, a number of permits required under provincial and municipal by-laws such as advertising display permits and permits for construction, using or changing street access are integrated in the GAEP. Not all the 25 integrated aspects have to be assessed if an application is filed. The scope of the assessment depends on the specific activities that the permit is applied for. Most of the environmental permits are included, but not all. The water permit for example is still not included.

4.2 The concept of integration under the GAEP

During the development of the GAEP the legislator had to choose between four models of decision-

²⁰ See E. Bohne & D. Dietze, *Pollution Prevention and Control in Europe Revisited*, EELR 2004, 199.

²¹ Bohne 2008, *supra* note 19, 24.

²² The focus is on aspects of the GAEP concerning integration. No attention will be given to other interesting issues like the enforcement, the decision-making process and the relationship between the public authorities involved.

²³ *Kamerstukken II 2006/07*, 30 844, nr. 3. p. 3 and further.

making.²⁴ Models 1 and 2 were based on *coordination* of different permits. Models 3 and 4 are directed at *integrating* various permit systems.²⁵ A model of coordination implies that separate permits are dealt with simultaneously, on the basis of separate applications to different competent public authorities. The main difference is that within a model of integration, one public authority is ultimately responsible. The legislator gave its preference to a model of integration. From the academic world there was some criticism of integration having been chosen. Why radically change the system of environmental law when the positive effects of a model of coordination are comparable?²⁶ The legislator however didn't change its mind and thus rejected the option of a model of procedural coordination of different permits.²⁷ Both models 3 and 4 contain a single permit system by one competent public authority.

At present, the GAEP provides a model 3 permitting system. The difference between the models 3 and 4 is the way the assessment framework is shaped. Model 3 has also been referred to as 'integration with partitions'. This means that the competent public authority evaluates an application for a single environmental permit on the basis of an assessment framework that consists of the sum of the individual, separate assessment frameworks in the various permitting systems that have been incorporated in the new permitting system. For example, a person wants to build a house and therefore needs a building permit and an exemption from the land-use plan. In this case, the assessment framework of the single environmental permit contains the sum of the two former assessment frameworks that are now incorporated in the GAEP.²⁸ This means that the assessment itself is the same as before. The modernisation of the permit system will not introduce new or different standards. This also means that there are no changes with regard to the legal framework implementing the IPPC Directive.

The characteristics of model 3 are described in the legislative process of the GAEP as procedural integration with substantive coordination.²⁹ In this context

procedural integration refers to the fact that different permit systems are replaced by a single permit system. With regard to the scope of procedural integration of permit systems in the GAEP, the legislator uses the terms full and incidental integration. Full integration means that a requirement for permission is fully absorbed in the GAEP. This is the case with activities that are location-specific and when other permissions are also likely to be required such as building permits, fire safety permits and demolition permits. Incidental integration applies to permit systems for activities which may or may not be location-specific. It concerns for example, permits under the Dutch Flora and Fauna Act and the Dutch Nature Conservation Act. These permits are only integrated when they relate to a location-specific activity. In that case the single environmental permit covers all the requirements. For example, if an outdoor café is to be built near a Natura 2000 area, the necessary permit under the Nature Conservation Act is required for a location-specific activity and therefore will be part of the single environmental permit. The second characteristic of model 3 is *substantive coordination* which means that the separate aspects of a project can be evaluated consistently and as a whole.

It is clear that the GAEP has a much broader scope than the IPPC Directive. The scope of the IPPC Directive is limited to the installations listed in Annex I of the directive and by the emissions released into air, water or land during normal operation or through accidents at the installation. The focus is on prevention and control of pollution from these major installations. This means that the construction of installations as well as environmental effects not resulting from emissions (e.g. interference with nature and landscape, impairing the functioning of eco-systems) are not subject to the integrated approach under the IPPC Directive.³⁰ In the Netherlands the IPPC Directive is implemented by the Environmental Management Act. The environmental management permit will be absorbed in the single permit of the GAEP.

4.3 Future plans for the GAEP

The government's intention is to incorporate a legal framework of integrated assessment criteria into the GAEP in the future. At the moment, the legislator does not consider the introduction of model 4 desirable. The reason being that, compared to model 3, it would mean an even more radical change in the field of environmental permitting. The introduction of model 4 will therefore depend on the experiences gathered with the new single environmental permit and the substantive coordination. One advantage of a single integrated assessment framework is that the competent authority will be able to consider various aspects of the law (such as the environment (*milieu*),

²⁴ *Kamerstukken II* 2004-2005, 29 383, nr. 18. Four models are described in this letter to the Lower House.

²⁵ It should be noted that in the legal and political debate in the Netherlands a system of coordination of different permits is not seen as a form of integrated decision-making. This means that the interpretation of the term "integrated decision-making" in the debate in Netherlands differs slightly from the interpretation given in the international literature with regard to the IPPC Directive.

²⁶ A.B. Blomberg, F.C.M.A. Michiels & A.G.A. Nijmeijer, *Vergunningverlening in het omgevingsrecht: naar stroomlijning of integratie?*, TO 2005, 3-11.

²⁷ *Kamerstukken II* 2006/07, 30 844, nr. 3, p. 10.

²⁸ Art. 2.1(1) a GAEP and Art. 2.1(1) c GAEP.

²⁹ Bohne & Dietze, *supra* note 20, 200. Bohne & Dietze apply different concepts. Bohne & Dietze use the term "full procedural integration" which refers to a single permit procedure. The term "full organisational integration" is used for a legal system where only one public authority is responsible for the permits.

³⁰ Bohne 2008, *supra* note 19, 9-10.

nature conservation and spatial planning) in their totality, unimpeded by the constraints of a variety of different assessment frameworks. Within model 3 the process of weighing and balancing the involved interest is still limited by the former assessment frameworks. The intention of the government to introduce one integrated assessment framework is welcomed by industry and even by environmental groups.³¹ Some authors have even argued in favour of a more far-reaching integration with other aspects, such as water.³² There is also support for a single integrated assessment framework in the Dutch Lower House. A motion has been adopted in which members of the Lower House have requested that the government present proposals on the substantive integration of assessment frameworks in a single assessment framework to the Parliament³³ It is not yet clear *how* a single substantive integrated assessment framework is to be regulated in the GAEP. There are no proposals as of yet.³⁴ In my opinion model 4 should be more than just a sum of the separate assessment frameworks as envisaged in model 3. Otherwise there is no added value in changing the assessment framework. Unlike model 3 there has to be some room for weighing and balancing the involved public interests. That's why these future plans can be qualified as highly ambitious and could logically engender a lot of opposition.

5 Comments on substantive integrated environmental permitting

The IPPC Directive and the GAEP are two examples of how a legal framework of an integrated permit system in the field of environmental law could be shaped. Interestingly, the IPPC Directive and the so-called model 4 of the GAEP (to be introduced in the future) both contain a substantive integrated assessment framework to evaluate an application for the integrated environmental permit. Although it is not yet clear how the GAEP with a model 4 could be implemented, the scope of substantive integration is much wider compared to the IPPC Directive because the assessment framework contains 25 former sectoral protected public interests. In this section a few problems with the substantive integrated assessment frameworks are addressed.

³¹ J.H.G. van den Broek & J. Rutteman, *Bedrijfsleven en milieubeweging steunen Wabo*, M en R 2005, 546-549.

³² J.H.G. van den Broek, *Kroonjuwelen met scherpe randjes*, TO 2006, 136-140; R. Uylenburg, *De omgevingsvergunning en het specialiteitsbeginsel*, in: *Op tegenspraak*, 155-166 (K.J. de Graaf, A.T. Marseille & H.B. Winter eds. 2006); R.J. van Dam, H.J.A.M. van Geest, S. Hillegers & T.E.P.A. Lam, *De wet algemene bepalingen omgevingsrecht (nader) beschouwd*, Gst. 2005, 597-605.

³³ *Handelingen II 2007-2008*, nr. 34, p. 2618; *Kamerstukken II 2007-2008*, 30 844, nr. 24 (motion members Koopmans en Vermeij).

³⁴ The proposals for model 4 will be part of the government's action programme on the modernisation of the set of instruments in the field of environmental and spatial planning (*Kamerstukken II 2009-10*, 30 844, nr. 47, p. 1-2).

5.1 The immeasurability of environmental goods

A substantive integrated assessment framework means that different aspects of the environment are involved in the process of weighing and balancing and that there is some room for public authority to compromise between these public interests. Clearly this weighing and balancing is getting more difficult as more different environmental interests are involved. By far the most difficult aspect of this is: how to weigh and value unequal environmental quantities?

With regard to the IPPC Directive Zöttl states: "The key to this whole problem must surely be to develop general criteria in order to combine both approaches, particularly taking into account that the weighing-up of media-specific indicators needs to be structured clearly."³⁵ The so-called BREF documents contain such criteria. BREF documents support public authorities in their decision-making process and are used to determine Best Available Techniques. Specific general criteria for making a cross-media assessment are laid down in the BREF Economic and Cross-Media Effects (July 2006).³⁶ This BREF document sets out a 'Cross-Media' methodology to help resolve these trade-offs and to determine which alternative offers the highest level of protection for the environment as a whole. One could make a distinction between a mathematical and a discursive method of weighing and balancing different environmental aspects. In this BREF both approaches have been combined.

It has already been mentioned that the scope of model 4 is much wider than that of the IPPC Directive aspects like spatial planning and nature conservation are also included in the assessment framework. Is it possible to develop general criteria to reach a compromise with regard to all the included environmental aspects? This seems rather difficult. The IPPC Directive is all about prevention and control of emissions. Model 4 has a much broader scope and there are many public interests with different natures that need to be protected by the permit. Some aspects are just not suited to compromise, like safety aspects of buildings or limit values based on European law. It is clear that some choices have to be made with regard to the possibilities for trade-offs between all these different environmental aspects.

5.2 Do we really need substantive integrated environmental permitting?

The idea behind substantive integrated assessment frameworks is the assumption that the process of weighing and balancing with room for trade-offs leads to better results for the environment as a whole. Looking at the experiences with the IPPC Directive it is

³⁵ J. Zöttl, *Towards integrated protection of the environment in Germany?*, JEL 2000, 285.

³⁶ Available at www.eippcb.jrc.es/.

questionable as to whether we really need these substantive integrated assessment frameworks. Although there is a lack of empirical data on the practical implementation of the IPPC Directive, there are signs that permits involving trade-offs between different environmental media are rare. Bohne's research shows that the potential of national permit systems for substantive integration is relatively low. He concludes that therefore substantive integration is likely to occur even less in actual permit decisions.³⁷ Another outcome of his research is that the problem of pollution shifting from one medium to another is not experienced often in the practice of decision-making. Public authorities deal with it only from time to time.³⁸ The same conclusions can be found in earlier research (1998) on the environmental permit of the Environmental Management Act in the Netherlands (this permit will be absorbed by the GAEP).³⁹ One possible explanation given at that time was that there were no general criteria available for public authorities to make a cross-medial assessment. Nowadays we have the BREF Economic and Cross-Media Effects, as mentioned above. Another possible explanation could be that the public authorities are just not capable of making an integrated assessment followed by a decision.⁴⁰

With regard to the realisation of model 4, the Dutch government could learn from these experiences with integrated assessment frameworks. However, the experiences gathered with the IPPC Directive and the Dutch Environmental Management Act cannot be easily translated to model 4 because the scope of model 4 is much wider. Aspects like spatial planning and nature conservation are also included. Especially in the national public debate on area development one could notice a call for integrated decision-making with room for compromise. In this field, some experts are of the opinion that sectoral environmental rules form an obstacle for the development of areas. There are those who argue that public authorities should have room to deviate from sectoral environmental rules for the benefit of the development of areas with a high environmental quality.⁴¹

5.3 Comments on the future plans of the GAEP

Is it possible to realise a substantive integrated assessment framework with a broad scope like model 4 in the GAEP? Apart from the problems addressed above, this is an interesting question from a legal

perspective. In academic debate a few legal points of interest have already been identified. An important aspect is of course the relationship with European environmental law. Dutch environmental law is significantly influenced by European environmental law, given that a large proportion of the new legislation in this field follows from implementation of European directives. The national legislator therefore needs to find out the extent to which European law sets limits to integration. Although there is a cautious tendency at European level in the direction of substantive integration (the IPPC Directive), European environmental law at present consists primarily of sector-specific legislation in the fields of conservation, soil, water, air, waste, noise, products and materials. Various authors therefore take the view that it will be hard to reconcile integrated environmental permitting at national level with a lack of integration at European level.⁴² It is argued that substantive integration of assessment frameworks should be realised at European level rather than at national level. However, not all environmental aspects that will be integrated in model 4 have a European background. The EU does not set rules with regard to local aspects like spatial planning, advertising display permits and permits for construction, using or changing street access.⁴³ In applying these rules that do not come from Europe, there might be some space for trade-off.

Other comments concern aspects such as judicial control, legal certainty and the risk that specific aspects of the environment will be less protected in the broad assessment framework. It is assumed that an integrated assessment framework will have undesirable consequences in terms of judicial control.⁴⁴ The integration of various aspects of environmental law in a single assessment framework will probably result in a fairly broad formulation of the factors, such as "protection of the physical living environment", in the light of which permit application will have to be evaluated. Such a vague general description of the public interest to be protected will give the courts much less to go on when reviewing decisions. If judicial control is reduced, there is the risk that permit granting will become more arbitrary. Public authorities will acquire more freedom to use their own discretion, and this could make it easier to ignore certain specific aspects that have been integrated in the broad

³⁷ Bohne 2008, *supra* note 19, 30-33.

³⁸ Bohne 2006, *supra* note 19, 550.

³⁹ A. Castelein e.a., Meer dan de som der delen? Een onderzoek naar de aard van de afwegingen bij de opstelling van milieuvergunningen, Achtergrondstudie ECW, nr. 34, Den Haag 1998.

⁴⁰ F.H. Oosterhuis, M.G.W.M. Peeters & R. Uylenburg, *Het beoordelingskader van de IPPC richtlijn. Implementatie, interpretatie en toepassing*, STEM 2007/1.

⁴¹ F. de Zeeuw, H. Puylaert & H. Werksma, *Doorbreek de impasse tussen milieu en gebiedsontwikkeling*, Delft 2009.

⁴² H.H.B. Vedder, *De Wabo en het Europees recht*, TO 2006, 145-146; H.E. Woldendorp, *De omgevingsvergunning in Europees perspectief*, M en R 2005, 572-573.

⁴³ There is a document entitled 'European Spatial Development Perspective' approved in 1999 by the informal Council of Ministers of Spatial Planning of the European Commission. However, the document forming a policy framework is legally non-binding. It is interesting to note is that 'an integrated approach' is one of the key ideas.

⁴⁴ R.J.N. Schlössels, *De ondraaglijke lichtheid van het specialiteitsbeginsel. Iets over integratie van bestuursbevoegdheden, coördinatie van besluiten en rechtsbescherming* in *Het bestuursrecht beschermd*, 153-169 (A.W. Heringa e.a. 2006).

assessment framework. Integrated permitting might also adversely affect legal certainty. If public authorities have more discretion when balancing interests, it becomes more difficult to determine in advance what weight will be given to which interests, and this is undesirable from a point of legal protection.

However, these legal points of interest don't have to stand in the way of realisation of model 4. Various solutions are conceivable. For example, an explicit, detailed assessment framework would clearly indicate which aspects should be taken into consideration, and to what extent, in a decision on an application for an environmental permit. This would make it easier to ensure that certain aspects are not ignored. An alternative to a strictly defined framework would be to incorporate certain "safety valves" in the process of balancing interests.⁴⁵ For example, the process could be subjected to certain predefined criteria, such as general principles (precautionary principle, the polluter pays, preventing pollution at source, and the compensation principle) and/or limit values. To ensure greater legal certainty and predictability, it would also be possible to lay down further criteria with which a public authority would have to comply when exercising its powers. These criteria could be put in place through national or regional planning systems, within whose framework the power to grant an integrated environmental permit would have to be exercised.

6 Final remarks

From an ecological viewpoint, the environment is just one entity, preferably not to be divided into separate media by legislation, planning and permitting. However, environmental law is not integrated easily. An integrated environmental permit system provides a legal framework for integrated decision-making and makes internal integration possible. At European level a system of integrated permitting is prescribed by the IPPC Directive. The scope of this integrated permit is rather limited. The IPPC Directive applies to major industrial installations and the focus is on prevention and control of emissions coming from these installations. From several provisions of the IPPC Directive a specific interpretation of the concept of integrated approach can be derived. The directive consists of an assessment framework that provides public authorities with the possibility of organising a trade-off between environmental media (air, land and water) in order to reach a decision with a high level of protection for the environment as a whole. This can be qualified as a substantive integrated assessment framework. The IPPC Directive and the integrated approach are an

example of how a legal framework of a system of integrated permitting could be shaped.

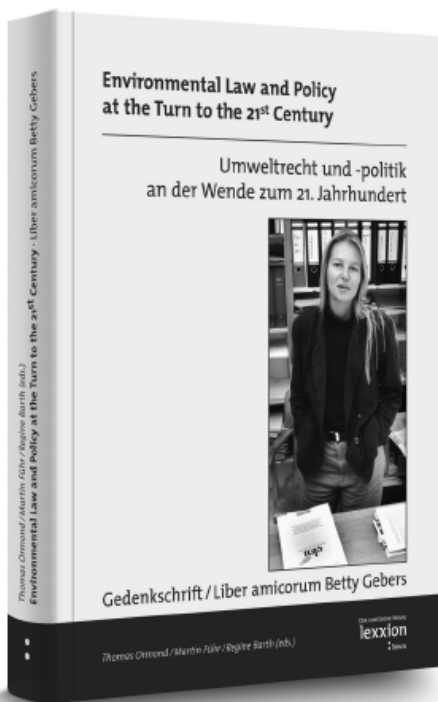
At national level the Netherlands is the first Member State to have succeeded in introducing an integrated environmental permit with a broad scope in its legal system of environmental law. In this single permit, the centrepiece of the General Act on Environmental Permitting, 25 permits are integrated. Including different environmental areas such as construction, spatial planning and nature conservation is innovative. The GAEP provides for so-called 'integration with partitions' which means that the competent public authority evaluates an application for a single environmental permit on the basis of an assessment framework that sums up the individual, separate assessment frameworks in the various permitting systems which have been incorporated in the new permit system (also known as model 3). This modernisation of the permit system will therefore not introduce new or different standards.

The government's plans on the future of the GAEP are (even) more ambitious. The government intends to integrate the separate assessment frameworks of the various permitting systems into one broad assessment framework (model 4). However a carefully thought-out plan has not yet been developed. The realisation of a model 4 is - to put it mildly - a major challenge. Is it possible to shape the assessment framework of model 4 in such a way as to have adequate safeguards for legal certainty, judicial control and protection of all public interests? Another question that needs to be answered is: Is there a problem that needs to be solved? At this point it is clear that an assessment framework with unlimited space for trade-offs between immeasurable environmental goods is not feasible for public authorities and undesirable from an environmental point of view. For now we have to wait and see what the experiences with model 3 will be. Anyhow, the experiences with the GAEP in the Netherlands will also give other Member States the opportunity to learn about integrated environmental permitting.

⁴⁵ A. Van Hall, *Belangenafweging in de wet op de fysieke omgeving*, in *Lex aquarum, Liber amicorum. Opstellen over waterstaat, waterstaatswetgeving en wetgeving*, opgedragen aan J.H.A. Teulings, 138-159 (A. Driesprong e.a. 2000).

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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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.

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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.

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