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REVIEW

Land degradation neutrality under the SDGs: National and international implementation of the land degradation neutral world target

Elizabeth Dooley, Ennid Roberts and Stephanie Wunder

Perspectives and actions to improve water quality in European Union Member States

Giuseppe Sgorbati and Nicoletta Dotti

Enforcement of the EU ETS in the Member States

Jonathan Verschuuren and Floor Fleurke

Access to the transposition of EU environmental law by Member States: Only if no infringement proceedings initiated

Anaïs Berthier

Recent Developments

Investor-to-state dispute settlement mechanisms: Five new questions and one old problem

Innovations for sustainability: The perception of chances and risks (Conference report)

Governing environmental impact assessment in Turkey

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Editorial

On 25 September 2015, in New York, 193 Heads of State and Government adopted a resolution entitled ‘Transforming our world: the 2030 Agenda for Sustainable Development’ in the United Nations General Assembly. This Resolution defines 17 Sustainable Development Goals as well as 169 targets and can be considered the final integration of ecological, economic and social Sustainable Development objectives, supported by a separately established financing framework, the Addis Ababa Action Agenda, as well as a transparent and inclusive reporting system to observe progress as to the achievement of its goals and targets.

elni Review puts the spotlight on the current state of play as regards legal arrangements and implementation in respect to some of the Resolution’s major objectives. Among these is the target to, “by 2030, combat desertification, restore degraded land and soil, including land affected by desertification, drought and floods, and strive to achieve a land degradation-neutral world”. Measured by this benchmark, and having in mind that 2015 was the “International Year of Soils”, researchers from the *Ecologic Institut* (Berlin) analyse the national and international implementation of the “land degradation neutral world” target.

The impact of water quality, as well as quantity of quality water, on Sustainability Development is inter

alia reflected in Goals 6 and 14 of the Agenda 2030. In addition, according to certain EU Water Framework Directive objectives, European waters have to achieve “good ecological and chemical status” by 2015. Against this background, experts from the *EU Network for Implementation and Enforcement of Environmental Law (IMPEL)* assess perspectives and actions to improve water quality in Europe.

Another sustainable development hotspot is the climate, which is addressed inter alia in the Resolution’s 13th Goal. Amongst the most prominent instruments to combat climate change are emissions trading systems (ETS). *Jonathan Verschuuren* and *Floor Fleurke* examine the enforcement of the EU ETS in the Member States.

Furthermore, *Anaïs Berthier* questions access to the transposition of EU environmental law by Member States by analysing a ruling of the EU General Court in case C-612/13P (*ClientEarth v Commission*).

This issue’s *Recent developments* section provides an update on the TTIP-related ISDS discussions, a conference report on how the perception of chances and risks affect innovations for sustainability as well as a statement on environmental impact assessment law in Turkey.

Julian Schenten/Gerhard Roller

October 2015

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Statement

Governing environmental impact assessment law in Turkey
and the latest EIA regulation

Ömer Aykul

1 Introduction

The concept of ‘environmental rights’ was introduced in Turkey in a legal text for the first time through Article (Art.) 56 of the 1982 Constitution¹. It was introduced in the world’s agenda through a conference on ‘Human Environment’ held by the United Nations in Stockholm in 1972. Later on, the concept started to take its place on the world’s regular agenda from the conference on ‘Environment and Development’ held by the United Nations in Rio de Janeiro in 1992. In the following years, work was carried out to safeguard the ecosystem by means of the signing of many international agreements.

‘Environment Law’ was adopted in Turkey in 1983² after the concept was included in the Constitution. Environmental affairs were carried out by an ‘Undersecretariat’ until the ‘Ministry of Environment’ was established in 1991. The Ministry was reorganised as the ‘Ministry of Environment and Forestry’ but following another structural change, it currently functions as ‘Ministry of Environment and Urbanisation’.

Environmental Impact Assessment (EIA) legislation was drafted in 1997. The regulation, which has been amended 20 times in total in the last 18 years, has deviated gradually from its purpose of preserving the ecosystem. In addition to this, another problem has been the tremendous increase in abstaining from the EIA process by means of specific decisions. The regulations drafted are far from realising the principle of ‘sustainable life’ and lack ‘watershed based and cumulative’ assessment capability in technical terms. The concepts of social, health and cultural impact assessment are not even mentioned.

2 Legislation on environmental impact assessment

The Environmental Impact Assessment (EIA) Regulation³ was finally published for the first time in 1997, 14 years after the adoption of the Environment Law in 1983. The regulation was revised and amended in its entirety and published again in 2000, 2003, 2008, 2013 and 2014. The latest regulation, which was published on 25.11.2014, is the sixth one published after being revised and amended in its entirety. If the interim amendments are to be included, the total number will reach twenty. The EU EIA Directive, which is the equivalent of EIA Regulation, was published in 1985 and, if we are not mistaken, has been amended only four times (1985-1997-2011-2014) since then. The Turkish EIA Regulation published in November 2014 has immediately become a matter of dispute as is the case with those previously published⁴.

3 Assessment regarding the latest regulation

Art. 56 of the Constitution of the Republic of Turkey stipulates that “[e]veryone has the right to live in a healthy and balanced environment. It is the duty of the State and citizens to improve the natural environment, to protect the environmental health and to prevent environmental pollution”.

Art. 10 of the Environment Law which constitutes the basis of EIA Regulation of Turkey stipulates that “[t]he institutions, agencies and establishments that can lead to environmental issues due to their planned activities shall be obliged to prepare an ‘Environmental Impact Assessment Report’ or project description file. No approval, permission, incentive, construction and usage license can be given, no investment can be initiated, nor any tender be awarded for projects subject to this regulation unless ‘Environmental Impact Assessment Positive’ decision or ‘Environmental Impact Assessment not Required’ decision is delivered. Projects subject to

¹ Turkish Constitution-1982, Passed on 07.11.1982 (Official Gazette No.17863, Dated 09.11.1982).

² Environmental Law, Law Nr. 2872, Passed on 09.08.1983 (Official Gazette No.18132, Dated 11.08.1983).

³ Environmental Impact Assessment Regulation, (Official Gazette No. 29186, Dated 25.11.2014).

⁴ There is an on-going court case on the annulment of the Regulation that the author has filed on behalf of TEMA Foundation in 2015.

Environmental Impact Assessment and plans and programmes subject to Strategic Environmental Assessment and the relevant principles and procedures shall be identified through a regulation to be enacted by the Ministry.”

In conjunction with the article above, the ‘polluter pays’ principle, which is one of the principles of the EU Environment Law,⁵ is also inscribed in Art. 28 of Environment Law to read as follows: *“Parties polluting the environment and parties causing environmental destruction will be held responsible for the damage arising from pollution and degradation regardless of the existence of any misconduct. Indemnity responsibility of the polluting party due to the damage caused is reserved in conformity with general provisions.”*

In the light of these guiding norms, these superior law norms, EIA Regulation and compatibility of EIA phenomenon in general will be examined later.

The purpose of the regulation is to regulate administrative and technical principles and procedures to be complied with during the process of EIA. In order to better understand this sentence explaining the purpose in general terms, the EIA definition should be referred to. The definition included in both the Environment Law and the regulation, which is a matter of dispute, is as follows: *“Environmental impact assessment: Refers to the studies to be carried for determining the likely positive or negative impact that the planned projects will have on the environment; studying possible environmental protection measures relating to these projects in order to minimize negative effects so as not to damage environment; identifying and assessing selected technological alternatives and locations; and monitoring and controlling the implementation of such projects.”*

However, the purpose of the Environment Law, which constitutes the basis of the regulation, is to protect the environment which is the common asset for all living things in line with the principles of sustainable environment and sustainable development. In other words, the basic purpose is to protect the environment.

Under these circumstances, the definition of ‘environment’ inscribed in the Turkish Environment Law should be referred to. As per the law, the definition is as follows: *“[E]nvironment; refers to the biological, physical, social, economic, and cultural environment in which living creatures maintain their relations and are in interaction with each other throughout their life.”*

Now let’s take a glance at the definitions of ‘ecosystem’ and ‘ecological balance’ inscribed in Envi-

ronment Law. Ecosystem is a biological, physical and chemical system within which living organisms carry out their relationships with each other and their non-living surroundings. Ecological balance refers to the entire conditions enabling individuals and other living organisms to sustain their existence and development in conformity with their natural characteristics⁶.

The EIA definition and process concentrate on “human” and “investment” while the Turkish Environment Law is based on definitions of the “environment” and the “ecosystem” that are essentially same. The Turkish Environment Law aims to protect the environment and nature. In other words EIA regulation, in focusing mainly on the human, has excluded all other components of the ecosystem (all flora and fauna). This regulation, based on the development concept, discounts the eco-system but highlights economic development whereas the Turkish Environment Law uses the definitions of ‘sustainable environment’ and ‘sustainable development’ as it is legally based upon Constitution Art. 56 and cannot be otherwise. Considering the ecological viewpoint, ‘environment’ is centred on the ‘human and development’ while ‘ecosystem/ecology’ is based upon ‘life’, substantiated by the unity of soil and water including all the flora, fauna and people within.

Furthermore, the concept of ‘sustainability’, which was introduced during 1992 Rio summit, is taken as a basis in Environment Law and the article indicating its purpose is inscribed as *“protection of environment in line with the principles of sustainable environment and sustainable development”*. Sustainability - namely the concept of a sustainable environment - may be scientifically defined as *“ability of natural assets to renew and improve themselves”*. Again, sustainable development inscribed in the same article is defined similarly and understood in general terms as *“the future impact of the investments not being higher than the level impeding the ability of natural assets to renew and improve themselves”* and *“pollution which can be retrieved, tolerated and eliminated”*.

Considering these short and brief explanations, it is clear that the real and accurate purpose of the EIA Regulation is to protect the ecosystem although the concept of environment is used. However, in reality, the latest regulation is very far away from this concept. The assessments within this respect are as follows:

Firstly, the latest Turkish EIA Regulation is not in line with the country’s Environment Law and Constitution in terms of its purpose. It is observed that

⁵ C.f. Art. 191(2) Treaty on the Functioning of the European Union.

⁶ Necmettin Cepel, Environment Protect and Ecologic Term Dictionary (Çevre Koruma ve Ekoloji Terimleri Sözlüğü) İstanbul, TEMA, 1996, pp. 64-73.

the basic purpose of the Environment Law is to protect the environment (ecosystem) whereas the purpose of the regulation is to prevent negative impacts or to reduce the impacts to a level so as not to damage the environment (ecosystem). In other words, the purpose is to avoid the rules for protecting the investment, environment (ecosystem) rather than protecting the environment (ecosystem) itself.

Secondly, another reason for the EIA Regulation's differing in terms of purpose is that it does not aim to protect the ecosystem as inscribed in Environment Law and approaches the ecosystem accordingly, i.e. it is not related to the concept of 'sustainable life'⁷.

Thirdly, another issue about the EIA Regulation having a different purpose is that 'strategic environmental assessment' is lacking and 'cumulative' and 'watershed'⁸ basis' assessment is not included. The assessments concerning the cumulative point of view are as follows:

This is sometimes observed in integrated facilities. In this case, the integration of the facility is not taken into consideration, and independent EIA processes are employed for each facility constituting the integrated facility. However, to truly assess the environmental impact, rather than assessing a stand-alone facility, cumulative and watershed-defined assessments should be in place. The last EIA Regulation partially takes a positive step forward in terms of the cumulative point of view.

- The problem is that when an additional facility is to be built near an existing facility, the EIA process is carried out for the additional facility as if it stands alone. However, a suitable approach would be to assess the cumulative pressure of the existing and additional facilities on the ecosystem through an EIA process.
- The criteria in cumulative assessment should be the watershed. There are 26 watersheds in Turkey. Nevertheless, watersheds include many micro watersheds and sometimes the micro watershed on which certain facilities are built may impact all macro watersheds, depending on their locations. For example, a macro watershed would be differently affected by a facility that is closer to a river source point than one that is far from it.
- Lastly, regarding cumulative assessment, the pressures of not only the integrated facilities

but also all other facilities, whose fields of activity in that micro watershed are different, on the ecosystem should be assessed using a cumulative approach.

Fourthly, the EIA process is currently considered by the administration as a 'bureaucratic obstacle' because of the investors and pressures applied by the investors.

Fifthly, 'location and technological alternatives' are absolutely not assessed during the EIA process although they are included in the EIA definition of the regulation, and this issue is almost deemed as a taboo. Furthermore, another negative aspect is that 'the application of on-site examination' is no longer mandatory.

Sixthly, the system mentioned in the Turkish EIA Regulation does not include health, social and cultural impact assessments in the EIA process.

Seventhly, during the EIA process, the cost-benefit calculation is carried out without any reference to the environmental pollution costs; only the facility's future profit is taken into account.

. Since superior public interests and superior ecosystem benefits are not analysed, correct results cannot be taken.

Eighthly, the validity periods for 'Environmental Impact Assessment not Required' and 'Environmental Impact Assessment Positive' decisions are 5 and 7 years, that is to say when an open-ended force majeure is attached to this period together with the construction period of the facility, the supervision in terms of EIA falls of the agenda for a long and indefinite period of time.

Ninthly, EIA reports are drafted in a full market environment and licensed companies try to build a system with the lowest cost for their employer companies, rather than protecting the ecosystem.

Tenthly, through this regulation, certain projects are intended to be excluded from EIA process deliberately and despite various Supreme Court judgments. These projects are:

- 'intercity highways, railways and airports, tunnels, ferry docks' which are large transportation line projects leading to ecosystem fragmentations;
- 'underground railway lines, metros' which will lead to the destruction of archaeological heritage;
- 'deep sea discharge projects which destroy shore and sea ecosystem and their feeding areas, dredging projects aiming to remove materials from the bottom of seas, lakes and rivers, the depth of which are 3.000.000 m³ and over'. Water transfers between water-course basins, sundecks and recreational jetties, groundwater extraction or groundwater storage projects',

⁷ The concept of 'sustainable development', which was adopted in 1992 Rio summit, created the concept of 'sustainable life', which is its opposite and based on life (we prefer the concept of the ecosystem) embracing the human being since sustainable development is human- and development- oriented.

⁸ Watershed: An area formed by an imaginary line which is assumed to pass through the highest points of a topographical structure giving rise to water flows feeding a river or a lake.

- 'HPP (hydroelectric power plant) projects with a capacity of less than 1.000.000 million m³/year, groundwater extraction projects with a capacity of less than 1.000.000 m³/year' which are realised through diversion of different riverbeds;
 - 'activities carried out at salt extraction areas' which are also important habitats for birds;
 - 'mass housing projects, hospital campuses, education campuses, shopping malls' which are concrete examples of unplanned, point-based development;
 - 'urban transformations areas (by leaving them to the Ministry which decides on urban transformation and make a plan)' which destroy urban memory as well as natural areas, cause the inhabitants to leave the city by burdening them with debts through the implementations realised;
 - 'golf facilities, Olympic sports complexes' whose negative impacts on groundwater due to the destruction made to our natural forests are known;
 - 'projects aiming to change land usage characteristics' which will lead to the plundering of forests and destruction of agricultural lands in the broadest sense, in other words, 'projects for transformation of forest areas for other intended uses and water management projects with agricultural purposes';
 - 'activities such as dismantling of facilities like nuclear power plants, thermal power plants, lead production plants, dismantling of ceramic production facilities, domestic appliances dyeing facilities, industrial and energy facilities; environmental impacts of these are well known;
 - 'wind power plants which are subject to the criteria of installed capacity' for a decision to be rendered, although it is known that environmental impact increases in parallel with the number of turbines.
- Eleventhly, Annex 1 attached to the regulation indicates the list of facilities for which an environmental impact assessment report shall be drafted. The relevant assessments are as follows:
- EIA report threshold value has been increased to 300 megawatts for thermal power stations as inscribed in Art. 2(a); this figure was 150 MW in 1997 and 200 MW in 2002;
 - EIA report threshold value was an annual capacity of 50.000 tons until 2008 for metal industry but it has been increased by 5 (five) folds and became 250.000 tons/year, as inscribed in Art. 4;
 - EIA report threshold value for railway construction has suddenly increased to 100 km, as inscribed in Art. 8(a);
 - the limit for projects regarding the transfer of water resources, other than piped drinking water, between river basins has been increased by 10 (ten) folds and became '100 million m³/year and over' as inscribed in Art. 13; this figure was previously '10 million m³/year and over';
 - first published EIA regulation dated 1997 did not stipulate any lower limits in the EIA report threshold value for the mining projects referred to in Art. 27, but this limit has increased over the years and reached the levels indicated in this article;
 - EIA report threshold value was 5.000 m³ for the oil, natural gas and chemicals storage facilities inscribed in Art. 31 but this figure has increased by 10 (ten) folds and reached to 50.000 m³;
 - EIA report threshold value is 100.000 tons/year for glass, fiberglass and rock wool production facilities inscribed in Art. 39;
 - furthermore, harbour launches for yachts, dredging projects aiming to remove materials amounting to 3.000.000 m³ and over, mass housing projects, hospitals, golf facilities and shopping malls have been excluded from the list.
- Twelfthly, Annex 2 attached to the regulation indicates the list of facilities that can be built upon the delivery of 'EIA not Required' decision. The relevant assessments are as follows:
- The limit has been increased from '5.000 litre/year and over' to '1.000.000 litre/year and over' for facilities producing turnip juice or vinegar with fermentation facilities as inscribed in Art. 27(c);
 - the limit has been increased from '5 tons/year and over' to '1500 tons/year and over' for facilities processing olive as inscribed in Art. 27(e);
 - the limit has been increased from '5.000 litre/year and over' to '1.000.000 litre/year and over' for facilities producing fruit puree, concentrated fruit or fruit-derived beverages as inscribed in Art. 27(h);
 - projects leading to changes in land use have been excluded;
 - ferry docks have been excluded;
 - tunnel projects for transportation purposes which are 10 km long and over have been excluded;
 - the limit has been increased from '200 housings and more' to '500 housings and more' for mass housing projects inscribed in Art. 33;

- educational campuses and hospitals have been excluded;
- the limit has been increased from '300.000 m³/year and over' to '1.000.000 m³/year and over' for groundwater extraction or groundwater storage projects as inscribed in Art. 47.
- ore preparation facilities and projects for salt extraction have been excluded;
- dismantling of industrial and energy facilities included in Annex I have been excluded.

This is not an acceptable result for a country that has been a democracy for over 60 years⁹.

4 Conclusion

The environmental impact assessment process, which has been incorporated in the domestic law system by Turkey, has unfortunately regressed from its starting point in the last years. Its positive aspect is that awareness is raised among public about EIA and many lawyers have gained experience in dealing with the actions filed regarding EIA decisions.

A system should be established to carry out Environment Plans and Strategic Environmental Impact Assessment simultaneously. Furthermore, both the administration and licensed companies drafting EIA reports should accept the criteria for 'basin' and 'cumulative impact' as a 'prerequisite' and implement them. The existence / absence of the concept of 'sustainability' depends on the existence of these two conditions, either in terms of 'sustainable development' or 'sustainable life'. This issue should be incorporated into the Turkish legal system in the shortest possible time, as is the case with the 'Strategic EIA'.

The significant deficiency of the EIA process is the lack of public participation. This process has turned into an informative one, discretion and management of which depends on the administration and the investor company due to the fact that Turkey has not signed AARHUS Convention; this leads to the breaks in social peace. As a result, people who can not participate in the process express their view by preventing EIA public participation meetings, closing roads and clashing with security forces due to the use of excessive force during peaceful demonstrations, etc. Gezi Park protests were one of the examples of the latter that garnered worldwide attention.

In accordance with the latest amendments in the laws, the period for filing a general administrative action is 60 days but this period is reduced to 30 days in the case of EIA decisions. It is very clear that this amendment is against the laws but more importantly this amendment is not democratic. Countries adopting laws restricting the rights will be at the lower positions in democracy ranking.

⁹ Even though the Republic of Turkey is over 90 years old, the history of multi-party democracy is only around 60 years old.

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The Öko-Institut (Institut für angewandte Ökologie - Institute for Applied Ecology, a registered non-profit-association) was founded in 1977. Its founding was closely connected to the conflict over the building of the nuclear power plant in Wyhl (on the Rhine near the city of Freiburg, the seat of the Institute). The objective of the Institute was and is environmental research independent of government and industry, for the benefit of society. The results of our research are made available of the public.

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.

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The University of Applied Sciences in Bingen was founded in 1897. It is a practiceorientated academic institution and runs courses in electrical engineering, computer science for engineering, mechanical engineering, business management for engineering, process engineering, biotechnology, agriculture, international agricultural trade and in environmental engineering.

The *Institute for Environmental Studies and Applied Research* (I.E.S.A.R.) was founded in 2003 as an integrated institution of the University of Applied Sciences of Bingen. I.E.S.A.R. carries out applied research projects and advisory services mainly in the areas of environmental law and economy, environmental management and international cooperation for development at the University of Applied Sciences and presents itself as an interdisciplinary institution.

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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.

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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. 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

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. elni encourages its members to submit articles to the elni Review in order to support and further the exchange and sharing of experiences with other members.

The first issue of the elni Review was published in 2001. It replaced the elni Newsletter, which was released in 1995 for the first time.

The elni Review 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).

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 researches, 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

elni publishes a series of books entitled "Publications of the Environmental Law Network International". Each volume contains papers by various authors on a particular theme in environmental law and in some cases is based on the proceedings of the annual conference.

elni Website: elni.org

The elni website www.elni.org contains news about the network. The members have the opportunity to submit information on interesting events and recent studies on environmental law issues. An index of articles provides an overview of the elni Review publications. Past issues are downloadable online free of charge.

elni Board of Directors

- Martin Führ - Society for Institutional Analysis (sofia), Darmstadt, Germany;
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