Germany

Eckard REHBINDER
Professor of Law
University of Frankfurt/Main

I- ENVIRONMENTAL LAW EVOLUTION SINCE 1992

Many developments in German environmental law which have occurred since 1992 are not or not exclusively based on autonomous national decisions but, rather, are wholly or partly initiated by legislation of the European Community which-to an ever increasing extent-influences policy development in the member states. Nevertheless, Germany has maintained its position of being among the member states who are known for progressive environmental policy. This is reflected by various new laws that were adopted since 1992.

Progress since 1992

In the framework of the constitutional reform which was brought about in 1994 on the occasion of German unification, environmental protection was inserted into the Federal Constitution as a state objective. Under article 20a Federal Constitution, the state protects the natural bases of life in the framework of the constitutional order by legislation and, subject to statute and law, by the executive and judiciary. This provision does not confer subjective rights on individuals. Rather, it obliges the state, primarily the legislature, and also serves as a standard for interpretation, application and development of environmental law. What is important to note is that article 20 Federal Constitution also refers to the "responsibility for future generations"; this is commonly understood to the extent that the principle of sustainability has been recognised by the Constitution as a component of the state obligation to protect the environment. On the other hand, due to the lack of a subjective entitlement and also the restrictive language built into article 20a Federal Constitution, especially as regards the executive and the

judiciary, it is safe to say that article 20a does not provide a strong basis for protecting the environment.

Since the Rio Declaration, the principle of sustainable development has been recognised at political level as a fundamental political principle which has to guide all future efforts in this field. A legal expression of this new orientation is the fact that sustainability clauses have been inserted into various new laws, normally enriching the provisions describing the statutory objective or setting forth basic principles rather than defining operative obligations. This is true of the Federal Land Use Act and the Federal Building Code as well as various statutes which regulate energy or promote environmentally friendly sources of energy. Moreover, the recent draft for a new Protection of Nature Act refers to the interests of future generations as a standard of nature conservation. Finally in this context, during the last legislative term the previous Minister for the Environment undertook an ambitious effort to set forth, by consensus or at last participation of major stakeholders ("cooperation principle"), a German strategy for sustainable development; a draft was produced which, however, did not meet with the agreement of other (mission-oriented) ministries. The present government has not yet resumed this process. However, in February 2001 it set up the German Council on Sustainable Development composed of representatives of major stakeholders which is designed to focus on the sustainability strategy. Of course, there are already governmental programs regarding special aspects of sustainability, such as climate change.

As regards instruments of environmental protection, while traditional command-and-control regulation still is the basis even of modern German environmental policy and law, there has been a growing use of state-initiated self-commitments by industry or agreements between industry and the state in order to reach consented solutions for complex environmental problems. An important example is the Declaration of German Industry for Protecting Global Climate of 1996, which was converted into an agreement between industry and the Federal Government at the end of 2000; industry commits itself to reduce specific CO_2 emissions (based on the reference year of 1990) by 20 percent, some branches also assuming absolute reduction obligations.

Moreover, subsidisation plays an increasing role especially in the field of energy.

Important new laws have been enacted in Germany since the Rio Conference.

a) In 1994 the Recycling Economy and Waste Act was adopted. Apart from effectuating a certain liberalisation of waste management and strengthening the private sector, the new act, for the purpose of protecting the environment and saving non-renewable natural resources, sets priorities with respect to the various waste management options – prevention, material recovery, recovery for generation of energy, incineration and disposal on land – and emphasizes the producer's responsibility for the design of products and recovery of

product-related waste. The basic obligations set forth by the new act have been concretised for certain product groups such as packagings, batteries, and end-of-life cars by regulation. The emphasis is clearly laid on material recovery. A major problem inherent in this approach seems to be that, since recovery nowadays is attractive from an economic point of view as compared to the favoured disposal option of incineration, there is a strong incentive to go into dirty forms of recovery.

b) In 1998 the Federal Soil Protection Act was adopted. While focussing on historic contamination, the new act also contains important provisions which are designed to prevent or at least reduce risks of future contamination and other forms of degradation of soil, among others providing for the setting of preventive and precautionary soil contamination standards. A central weakness of the act is that it largely exempts agriculture, a major source of soil degradation, from its scope of application.

c) With the - belated - implementation of the EC Directive on Integration Pollution Prevention and Control by an amendment of the Federal Emission Control Act in this year, Germany now has a comprehensive legal framework for integrated pollution control at facility level. However, the implementation of the directive is rather timid; neither is there a fully integrated substantive approach because the problem of trade-offs between different environmental loads is shifted to the definition of best available technology and standard setting, nor does the new act provide for a unified permit but rather for a mere coordination of the pollution and the water permits.

d) Various new acts provide for the promotion of regenerative sources of energy by obliging the operators of electricity generation plants and transmission networks to accept such energy at a preferential price.

e) Based on an agreement between the Federal Government and the nuclear power industry, a draft act provides that Germany will gradually phase out nuclear energy within the next thirty years. The abandonment of nuclear power is justified by safety and sustainability (waste disposal) arguments. However, it remains to be seen whether the electricity needs of Germany can be fulfilled by recourse to other sources of energy without compromising the equally important environmental policy goal of protecting global climate.

Remaining difficulties

Apart from the weaknesses of the policies and new statutes just mentioned, one can identify a number of deficiencies of substantive law and implementation and enforcement mechanisms which somewhat blur the previous statement that Germany is among the more progressive states in Europe as regards environmental policy and law.

A project of codifying German environmental law had been started in the beginning of the nineties and resulted in a proposal of the Federal Ministry of the Environment to combine the implementation of the IPPC directive and the amendment of the EIA Directive of the EC with the introduction of a first book of the environmental code. This proposal was barred by constitutional and economic objections; for the time being, codification is not pursued further. Germany will therefore have to live with its existing highly fragmented body of environmental law.

The so-called acceleration legislation regarding infrastructure projects as well as judicial review of administrative decisions which had been initiated in the early nineties has been maintained by the new Federal Government. This means that public participation with respect to minor projects is reduced, the former automatic suspensive effect of applications for administrative review as well as judicial review is not applicable to building permits and permits for infrastructure projects, and in major environmental cases there are only two court instances. Compared to other countries, these deteriorations of participation and judicial review may appear of minor importance. However, together with the remaining limited access of environmental interests to judicial review – Germany limits standing to individuals who are affected in their legally protected interests such as property and health and in principle denies associations access to administrative tribunals (subject to some exceptions of statutory standing of nature conservation associations) – , this is an indication that vigorous surveillance of the implementation and enforcement of environmental law is more or less considered as an undesirable disturbance of the functioning of the administration. Germany signed the Aarhus convention at the very latest possible moment, and it has not yet made any efforts to ratify it. In this respect, it is among the stragglers in the EC.

Finally, the mechanisms provided by planning law and nature conservation law to reduce conversion of land from nature-like to settlement, infrastructure or industrial purposes and to protect biodiversity are still insufficient. Although the major reason for weak policies in these fields undoubtedly is the existence of sharp conflicts between environmental and development interests and the ensuing lack of political will, it appears that the instruments available for implementing protection of land and conservation goals are not adequate either.

II- SPECIFIC TOPICS

Land use

Problems of land use in developed countries are mostly problems of contamination and other degradation of soil as well as problems of conversion of land.

As regards the former problem area, too little attention has been given to the accumulation of dangerous substances in the soil (and groundwater) over time. Notable exceptions such as the critical loads concept regarding acidification and eutrophication which will be embodied in new EC directives confirm the rule. Prohibiting the use of sewage sludge and even compost as fertilizers, elaborating codes of good agricultural practice with a view to curtail soil erosion, and recourse to easily biodegradable pesticides present responses to these problems.

Protection of land against conversion to uses which engender sealing of soil and other forms of degradation is traditionally taken care of by planning law, which, however, due to its balancing paradigm is sensitive to the strong development interests. If land will be converted ("consumed") at the pace it is now being converted, in half a century there will not be much natural and nature-like land with its regulatory (sink etc.) as well as habitat functions left in Germany. Apart from more economical use of urban and suburban space, the use of economic instruments against conversion (e.g. transferable development rights and charges for sealing soil) appear most promising, but are politically difficult to introduce.

International trade, environment and biodiversity

The GATT/WTO regime to a certain extent responds to environmental concerns. However, it is biased in that it considers environmental problems as a mere restraint of trade policy and hence is structurally unable to strike an appropriate balance. There are several problem areas which require different answers: National precautionary product standards must meet the requirements of the TBT and the SPS agreements; national production-related environmental requirements have to be justified under article XXb and g GATT; the status of multilateral environmental agreements (MEA) within the GATT/WHO system is still largely unresolved, as evidenced by the recent Biosafety Protocol.

Possible responses to the problems posed by the conflict between international trade and environmental protection include: With respect to product requirements a clarification of the meaning of the relevant clauses of the TBT and SPS agreements which in admitting precautionary measures require a science-based risk assessment; a clarification that only new international rather than pre-existing standards have a binding force for the purposes of these agreements (reason: in adopting these standards, the

relevant bodies did not have in mind that they would have any relevance for GATT/WTO purposes). As regards production-based national import restrictions, the second Shrimp/Turtle holding of the Appellate Body has in principle already paved the way for recognizing such requirements if the regulating state pursues its conservation policy also at home. Beyond, national restrictions should be admissible for correcting transboundary pollution, enforcing environment-related human rights in the producing (exporting) country and protecting common or global environmental sources where MEAs provide for unilateral national measures; however, it would seem that the integration of GATT and MEAs requires that trade interests be given an opportunity to participate in negotiations on MEAs whenever trade restrictions are considered.

Forests and the prospects for an international convention

Deforestation of tropical forests which are the most important CO_2 sinks and sources of biodiversity is a major threat for the global environment. However, deforestation also occurs in boreal forests (Siberia) and even in forests in moderate climate zones (Canada). As yet, conflicts between producer and some importing countries and "environmental" countries have prevented the success of concluding a binding forest convention. It should be made clear that a strategy mix between protection against use and protection through use is the right answer to the intricate problem of conserving forests. The latter is the more relevant regarding a forest convention. Forest certification schemes such as the Forest Stewardship Certification and the Pan European Forest Council schemes occupy niche markets. However, they indicate that environmentally and economically sustainable management of forests, even of tropical forests, is possible at little additional cost. The lessons learned in implementing these and some other national schemes could be used as an argument for the feasibility of a forest convention which directs forestry into sustainability. In a mitigated form, these schemes could also form a basis for setting relevant management standards.

One should not disregard the problem that forestry is but one source of deforestation, the major problem at least in tropical countries being uncoordinated tree cutting for land development, i.e. for converting forest into agricultural and pastoral land. This is mostly due to the enormous population pressures found in these countries but also a consequence of unsustainable forestry itself (follow-up encroachments). Theoretically, a forest convention could establish obligations of signatory states to protect forests against encroachments. However, experience with parallel obligations set forth in the Biodiversity Convention show that as long as the sources of conversion are not removed or reduced, such obligations are bound to remain paper law. Land reform, agricultural programs and rural development are better answers to the problem.

Democracy, access to justice and environment

Parliamentary supervision over the functioning of all hierarchical levels of government does not ensure a sufficient degree of public involvement and control. The need for providing for adequate participation in decision-making on the environment is recognised by many international soft law declarations and especially by the Aarhus Convention which can serve as a model for future national improvements. While participation in the preparation of individual decisions is by and large satisfactory, in many countries participation with respect to more important generic decisions (other than land use plans), especially environmental standard setting, is not ensured; improvements are necessary. Moreover, participation rules should be designed so as to accord standing to everybody or, if they are limited to the public concerned, to environmental associations which defend the interests affected by the decision according to their charter and activities. Finally, an early and broad discussion of the project and not only the objections should be possible.

As for access to justice, the Aarhus Convention once again may serve as a model of desirable future developments. Following the lead of the ECHR, human rights conventions and national constitutions should be interpreted to the extent that they encompass environmental rights. There should be generous standing requirements which do not restrict access to administrative tribunals to holders of subjective rights and legally protected interests, but at least accord standing on the basis of legitimate interest and injury in fact, and extend it to environmental associations which bundle relevant individual interests or defend the public interest in environmental protection. Finally, in order to provide real access to judicial review, environmental plaintiffs should enjoy cost relief where necessary.

Legal conditions of the integrated management of the environment

Integration has many facets. The fragmentation of environmental protection in itself poses serious challenges to the effectiveness and coherence of relevant policies, programs and individual decisions. At horizontal level, in the EC the IPPC Directive has taken a first step towards achieving some sort of integration of pollution control, although it has foregone the chance of including land use and protection of nature. As regards integration of environmental, economic and social concerns, the consideration obligation set forth by article 6 EC Treaty and spatial planning present different models of integrated decision-making.

At the outset, one must admit that the fact that in eco-systems as well as in society everything is interrelated and the solution of one environmental problem has necessarily repercussions on other environmental media and other problems, is not a sufficient justification for comprehensive (horizontal) integration. Due to the complexity of problems, the increasing

data gathering and processing requirements, the increase of conflicts and associated acceptance problems, the problem-solving capacity of the state would be exceeded if full integration were the aim. What can realistically be advocated is the establishment of mechanisms of horizontal coordination whereby each decision-maker has to consult with other competent agencies and consider the consequences of his decision on other segments. Another response to horizontal fragmentation of environmental protection is the establishment of unified agencies which are competent for a multitude of environmental problems. As regards integration of environmental concerns into sectoral decision-making, joint commissions, programming and reporting obligations and environmental officers in mission-oriented ministries and agencies could be considered.

Problems of vertical integration are amenable to different solutions. Here, except for the hard core of municipal autonomy, where granted by law, hierarchical steering is in principle possible. However, soft coordination mechanisms are preferable in order to engage the lower levels of government and profit from local knowledge and problem-solving capacity. Even full decentralisation is an answer to many vertical integration problems.

Dangerous substances and activities

There are some substances whose dangerous properties are more or less well known, including new substances subject to notification and testing requirements, and for which effective regulation is more a matter of political will than of lack of adequate legal mechanisms of control. The POP and PIC conventions as well as the phase-out commitments under regional conventions on marine pollution show that appropriate solutions are in principle available for these categories of chemicals. The real problem are the many existing substances whose dangerous properties, dose-effect relationships, and exposure patterns are not yet well understood. The international (OECD) and European (EC) programs of division of labour in reviewing and, if necessary, testing priority substances, especially high volume substances, have been of limited success.

Therefore, new approaches making wider use of the precautionary principle are warranted. The proposals of the EC Commission's White Paper on Chemicals Policy of 2000 and the results of the follow-up discussion present a model of a two-pronged approach whereby certain suspected categories of substances (such as CMR, PBT, VPVB, endocrine-disruptive and allergenic) will be subject to an authorisation procedure while all other substances will undergo a limited risk assessment. In doing so, a dogmatic application of science-based risk assessment shall be avoided; in the absence of sufficient knowledge, a summary risk assessment can be carried out and, if warranted, precautionary prohibitions and restrictions adopted, provided that all available information (regarding properties, dose-effect relationship and exposure) is used.

As regards dangerous activities, prevention of major accidents should be paramount to mitigating their consequences. Comprehensive risk analyses as well as reducing the quantitative risk by reducing the size of facilities or volumes of dangerous substances handled there and increasing safety space between facilities and settlements could be considered.

The financing of the environment

Ideally, i.e. when one can assume an enlightened budgetary process, financing of environmental protection should come from the general budget. This allows the legislature to balance all tasks and their financial requirements with one another and provide, financially speaking, an adequate weight to each of them according to political preferences. As a consequence, the revenue needed for financing would be generated by the general taxpayer, thereby avoiding regressive effects associated with eco-taxes and charges. The current discussion in countries such as Germany which have introduced eco-taxes shows that a state which singles out particular activities for eco-taxation exposes itself to difficult justification requirements and does not make acceptance of environmental protection easier. Even if eco-taxes and charges are imposed, the model implies that the proceeds would go into the general budget.

In the absence of an ideal world, the weakness of environmental interests in day-to-day politics may suggest that these interests should be given a financial preference by establishing, beyond the general budget, special environmental funds which are fed by eco-taxes and charges or contributions from the general budget and can only be used for particular environmental purposes. An inherent problem is the instability of income from such financing mechanisms as well as the temptation to decrease appropriations for environmental protection in the general budget. Most frequently this technique is used in nature conservation which normally has politically weak advocates and strong opponents. The extent to which one can use the fund model largely depends, apart from possible constitutional constraints, on the political willingness to internalise environmental externalities, which, as stated, normally does not meet with great acceptance.

The local management of the environment

The division of power between central government and local governments and the kind of relations between these levels of government and administration in the field of environmental protection in the first place depends on the constitutional position of local government (autonomy vs. lower level of central government), the size of the relevant country and its administrative capacity and traditions. Therefore, generalisations are not easy to make, and there are quite a number of different approaches in the practice of states.

As a matter of policy, factors such as the local limitation of the relevant problem, the proximity of stakeholders, the need to seek acceptance, the superior knowledge of local politicians, administrators and stakeholders about the relevant problem and the consequences of solutions or non-solutions - all militate in favour of granting local government a major role in environmental protection. On the other hand, a higher hierarchical level of government may provide a more neutral forum for avoiding "capture" and accommodating for weaker interests such as environmental interests. Also, there is a certain conflict between local government and the need to achieve an appropriate degree of horizontal integration (unless all administrative tasks are decentralized). Therefore, regional government is often chosen as the appropriate level for more important environmental problems. This does not rule out that there are genuine functions of local governments such as sewage treatment, waste collection and even disposal, noise control, building permits, and of course local land use planning.

Legal mechanisms of control and follow-up of environmental measures

The traditional command-and-control regulation is supplemented by administrative surveillance. Due to manpower and budgetary constraints, this type of surveillance has not been as effective as could be expected. Hence, there is a certain tendency towards privatisation of surveillance, i.e. entrusting it to certified private experts or expert organisations, as well as towards auto-surveillance and reporting. Institutional arrangements such as the obligatory nomination of environmental officers in the firm and voluntary eco-audits (EC Directive and ISO 14001) support this reorientation of control of the firm's environmental behaviour. Although the degree to which one can rely on such private control mechanisms and the state can correspondingly reduce its control activities also depends on general attitudes towards law as such, it is submitted that they offer many prospects, not only alleviating the task of the administration, but also encouraging environmental advocates within the firm and promoting, beyond compliance, environmentally friendly behaviour.

An alternative control mechanism is publicity about the environmental behaviour of the firm, especially about its emissions and possible major accidents because, beyond enabling the neighbourhood to decide on relocation or behaviour in emergency situations, it fosters voluntary emission and risk reduction within the firm for the sake of acceptance by the local population.