

Resolution of the Avosetta Conference October 11/12, 2002, Amsterdam

Preamble

The Avosetta Group is a small informal group of lawyers whose main purpose is to further the development of environmental law in the European Union and Member States. "Avosetta" is the Latin name of a rare bird which caused the European Court of Justice to establish far reaching principles of European Nature Protection Law in the German Leybucht-Case. The group held its inaugural meeting at Bremen University in January 2001.

Those participating in Avosetta are invited out of recognition of their outstanding distinction in European environmental law, and take part in a personal and independent capacity. Nevertheless, Avosetta discussions aim to reflect a comprehensive cross-section of legal cultures within Europe, and will generally include up to two participants from each Member and accession States.

At its meeting of October 11 and 12, 2002, held in Amsterdam it adopted a resolution on 'The European Convention and the Future of European Environmental Law'. In view of the draft 'Constitutional Treaty' presented by the Praesidium of the Convention on October 28, 2002 the final text of the Avosetta Conference has been approved on November 2, 2002.

1. The Integration Principle of Article 6 EC should be maintained in the new Constitutional Treaty under Title III 'Union Competences and Actions'.
2. The objectives and principles in the current Treaties (Art. 2 EU; Art. 2, 6, 174 EC) on environmental protection and sustainable development do not need any major changes, but should be maintained in the new Constitutional Treaty. The following amendments would however be advisable:
 - a. to include in Art. 174 (1) fourth indent a reference to possible 'unilateral' measures. The text of Art. 174 (1) fourth indent will then read as follows: 'promoting measures at international level to deal with regional or worldwide environmental problems. Such measures may include unilateral ones, without prejudice to other international obligations'.
 - b. to include in Art. 174 (2) the principle of 'sustainable development'.
 - c. to include in Art. 174 (2) the principle of 'inter-generational equity'. The text of Art. 174 (2, second sentence) should then read as follows: 'It shall be based on the principle of sustainable development, the principle of inter-generational equity, the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
3. All decisions on environmental affairs (Art. 174-176 EC) should be taken by co-decision. We suggest to delete Art. 175 (2).
 - (1) As to provisions of a fiscal nature taxes in general (including the "greening" of general taxes) are anyway to be founded on Articles 90 to 93. Art. 175 can only be the basis for special environmental charges which are not taxes in the proper understanding of the term, such as e.g. a charge on aircraft emissions, on the discharge of waste water, etc. The same is true for the selling of emission rights. As these measures are environmental protection instruments complementing or replacing more traditional "direct and supervise" measures, there is no reason why they should be decided by special procedures.
 - (2) As to measures concerning town and country planning, land use and management of water resources, these should indeed remain the primary competence of the Member States. This can however best be secured if they are not mentioned at all as a Community competence. The directives given by Art. 175 paragraph 1 EC provide sufficient guidance not to allow intrusion into these competences if they are not specially required by environmental concerns.
 - (3) As to energy policy measures "significantly affecting a Member States' choice" will in

most cases anyway be based on Art. 155 and/or Art. 86. Should there be specific environmental goals to be attained in the energy policy field these measures do not significantly differ from other environmental protection measures. Therefore they should be decided according to the same procedures.

4. The group has discussed whether the participation of environmental associations should be strengthened along the lines provided for management and labour according to Art. 138 and 139 EC. It is however of the opinion that the legislative procedure and the rules on access to information provide sufficient opportunities for public participation. Nevertheless and in order to ensure effective and balanced representation of environmental interests in the making of secondary legislation and executive rules Art. 174 should be amended by a paragraph 3a which may read as follows: "Before submitting proposals in the environmental policy field, the Commission shall consult environmental protection associations ensuring balanced participation".

Dialogue and consultation between with NGOs and the Commission have to be seen in the framework of the decision making procedures of Art. 175 EC. In other words: dialogue and consultation to enhance the quality of the Commission right of initiative. Of course this is not only relevant to environmental policy making, but in general one can say that timely consultations with all stakeholders concerned could improve the quality of the Commission's proposals (Aarhus!). There are other means to enhance a European wide public debate on environmental affairs. The Commission could organise – in the pre-proposal stage – things like public hearings, society-wide-discussion. Not on all, but on the important issues (Water-framework; EIA, Habitat-directive and so on).

5. The following provision should be inserted in the new Constitutional Treaty: 'Subject to imperative reasons of overriding public interests, significantly impairing the environment or human health shall be prohibited'. We suggest that this provision should be part of the environment paragraph of the new Constitutional Treaty (Part II, A3, V).

The proposed amendment to the Treaty is inspired by the jurisprudence on the Treaty article 28-30 and has four functions. First, the intention is to ensure, that environmental interests/protection in the balance of interests has at least the same priority as free trade. Second, the intention is to give environmental protection direct effect, requiring EU-institutions as well as Member State and their citizens not to take decisions or undertake activities which significant impair the environment or human health, unless such impairment can be reasoned by overriding public interests. Third, the scope is limited to "significant impairment" to ensure, that focus in the court of law is on substantial issues, which leave some discretion for minor impairment. Fourth, when the impairing source (the polluter, the project, the use of natural resources and so on) or the effected part of the environment are covered by EC legislation - it is the EC legislation which defines what is acceptable and thereby, what is significant - in the same way as exhaustive harmonization pre-empt Member States from recalling the Treaty article 30. The Avosetta Group find, that the proposed amendment establish a fair and reasonable balance between environmental protection and the importance of leaving discretion for policy-makers.

6. The Charter of Fundamental Rights of the European Union should be integrated in the Treaty. In stead of Article 37 (a provision similar to the Integration Principle of Article 6 EC) of the Charter the following text should added:

'Everyone has the right to a clean natural environment. This right is subject to reasons of overriding public interests. It includes the right to participation in decision making, the right to access to courts and the right to information in environmental matters. A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development'.

Both the European Court of Human Rights (ECHR) and the European Court of Justice (ECJ) recognize a right or certain elements of such right of individuals to a clean environment. In various instances the Courts developed this jurisprudence in spite of the absence of legal provisions explicitly attributing rights in environmental matters to individuals. The basis for the respective findings of the ECHR are both the right to life and the right to respect for private and family life as set out in the Convention for the Protection of Human Rights and Fundamental Freedoms. The recognition of a violation of the said human right through the impairment of the environment is, however, limited to cases of immediate impact of environmental pollution, such as noise, smells and emissions, to individuals living in the vicinity of the respective polluter.

Most European constitutions expressly recognise a right to a clean environment in one form or another (Article 66 of the Portuguese Constitution, Article 45 of the Spanish Constitution, Article 24.1 of the Greek Constitution, Article 21 of the Dutch Constitution, Article 23 of the Belgian Constitution, Articles 2 and 73-80 of the Swiss Constitution, Article 20a of the German Constitution, Article 14A of the Finnish Constitution, Article 110B of the Norwegian Constitution). Even in those cases where the Constitution does not expressly recognise this right, it might be stipulated in framework laws (e.g. Article L-110-2 of the French Environmental Code.). All these constitutional and legal provisions give rise to both rights and obligations – rights to the extent that most of these Constitutional provisions recognise, either explicitly or implicitly, the right of citizens to be able to live in a healthy, balanced or protected environment. As we shall see below, procedural rights follow from this fundamental constitutional right, particularly as regards information, participation and access to justice.

Enshrining a proper right to a clean natural environment would allow individuals to take action against the impairment of environmental media, which would in many cases only indirectly, over a certain distance or after a certain time, lead to the actual prejudice of their well being. Such preventive action against impairment of the environment conforms with the basic principles of EC environmental law set out in Article 174 EC-Treaty and according to which precautionary and preventive action should be taken, environmental damage should as a priority be rectified at source and the polluter should pay. The cited environmental directing principles may strengthen constitutional provisions that recognise environmental protection by setting out markers for action by public authorities. In other words, recognition of a constitutional right to environment only has meaning if it is informed by principles whose function is, precisely, to guide the public authorities in taking action intended to protect the environment more effectively.

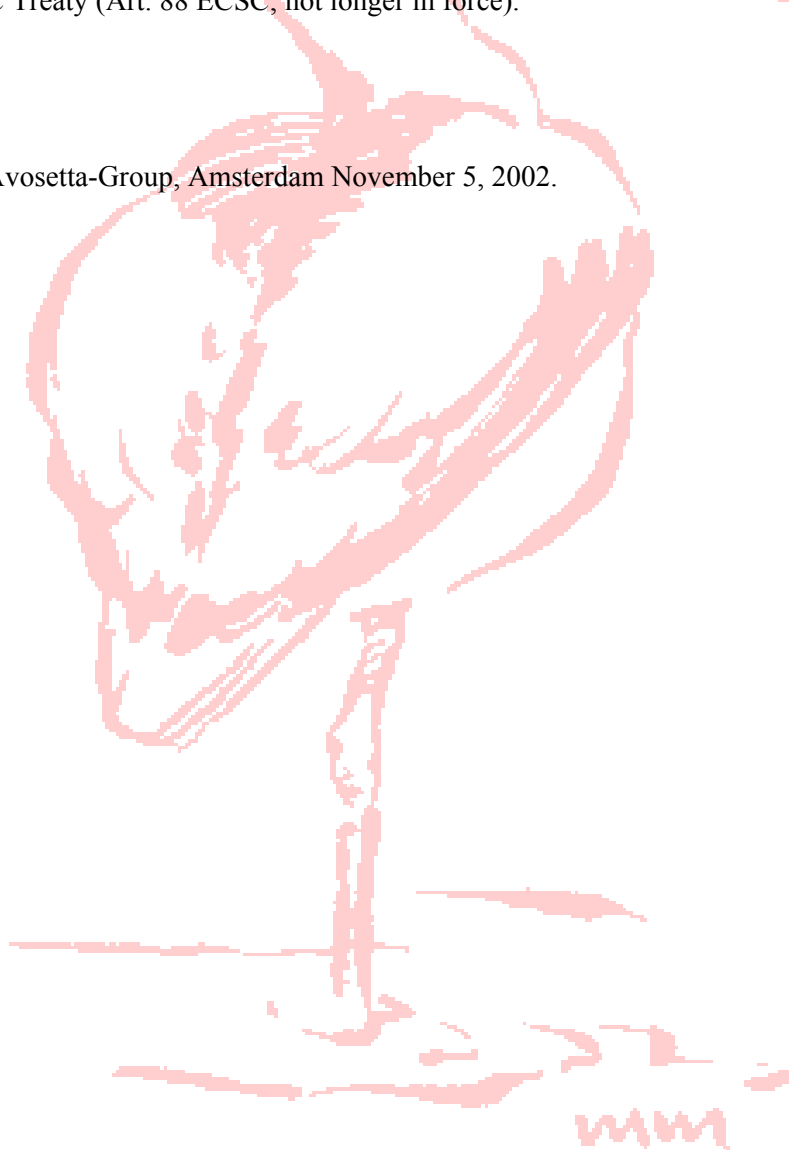
The right to a clean environment is not absolute. Public, including economic interests might limit the breadth of the right to a clean environment. Such interests need, however, to be of overriding importance for the public. For other cases, the proposed formulation ensures that – when balancing varying interests – the interest of environmental protection enjoys at least the same importance as economic rights, such as the right to property or the free movement of goods.

7. The right to participation in decision making, the right to access to courts and the right to information in environmental matters are integral part of the right to a clean environment. The explicit mentioning of these rights pays tribute to the UN/ECE Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), which needs to be implemented into Community law.
8. Art. 230 par. 4 EC should be redrafted in order to enhance the possibilities of NGO's and other parties concerned to bring to the ECJ an action for annulment of measures affecting the environment. We suggest either to delete the words 'and individual' or to replace the word 'individual' with 'significant' in the said paragraph.

In the light of the recent ECJ judgment of July 25, 2002, in case C-50/00P UPA, the conclusion must be that legal protection against measures of the EU institutions affecting the environment, remains unsatisfactorily. The ECJ itself concluded that the only way to change the current situation is to change the EC Treaty (Art. 230). We suggest this invitation of the ECJ is to be followed.

9. A system of division of powers between the EU institutions and the Member States on the basis of a so called '*Kompetenz-Katalog*' should be avoided. A further strengthening of the subsidiarity-principle could also impair the development of European Environmental Law and is therefore also to be rejected.
10. Member States must have the right to maintain and take more stringent environmental measures than the European ones. Articles 176 and 95 4-6 EC must be formulated in a more parallel way. In doing so, the following guidelines should be respected:
 - The distinction between existing and newly introduced measures should be abolished.
 - The Member State has to prove - in case the more stringent standards affect the functioning of the Internal Market that the measures meet the proportionality principle.
 - A review procedure by the Community should be maintained.
11. On the enforcement of European law in general and environmental in particular we suggest to amend the Treaty-infringement-procedure (Art. 226 EC) more similar to the procedure in the ECSC Treaty (Art. 88 ECSC; not longer in force).

The Avosetta-Group, Amsterdam November 5, 2002.



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