

Yearbook
of
International Environmental Law
Volume 12
2001

Geir Ulfstein
Jacob Werksman

Editors-in-Chief

Bharat Desai

Jeffrey L. Dunoff

Paolo Galizzi

Naomi Roht-Arriaza

Gregory Rose

Farhana Yamin

Associate Editors

Jonas Ebbesson

Book Review Editor

Kenneth Rudolf

Bibliography Editor

Stacy Belden

Assistant Editor

Cecilie Schjathvet

Administrative Secretary

OXFORD
UNIVERSITY PRESS

for packaging. Under this new system, all stores selling beer or soft drinks must be members of a new private company called the Danish Return-System Limited. The company has the obligation to collect the packaging from beer and soft drinks as well as a monopoly on this collection. The system is similar to the German "duales-system," although it differs from a legal perspective in at least two ways. First, it is limited to packaging waste from beer and soft drinks, which seem to reflect the strong interests of the Danish breweries. Second, under the new Danish legal framework, only one company is allowed to collect this part of the packaging. Thus, the Danish model is much more similar to a command-economy approach than it is to the German model.

It is not only the Danish can ban that has caused problems in Denmark with EC Directive 94/62 on Packaging and Packaging Waste (Waste Directive). In July, the Commission filed a reasoned opinion. The Commission claimed that Danish implementation was insufficient because the legal definitions of recovery, recycling, reuse, voluntary agreements, and some other concepts. Furthermore, the legal binding targets for recovery and recycling are not implemented in Danish law. The Danish government does not deny the fact, but it does question whether EC law requires the legal definitions and targets to be implemented into national legislation.

(B) Import and Export of Waste

In February, the Commission filed a letter with the Danish government claiming that the Danish waste law is in conflict with Article 29 of the EC Treaty and Council Regulation no. 259/93 on the Supervision and Control of Shipments of Waste within, into and out of the European Community. The opening letter challenges a substantial and principal part of Danish waste law, which in Denmark is known as the "Danish model."

The key principle in the Danish model is that 275 local councils are responsible for all waste treatment. Each local council has its own waste regulation, and the treatment of waste is based on the principle of self-sufficiency, even for the recovery of waste. According to the Danish Environmental Protection Agency (EPA), the export of waste for recovery in other member states can only be permitted by the agency when the local Danish Council has verified that the recovery process in the other member state complies with Danish requirements. Thus, the transboundary shipment of waste is subject to a double procedure: the approval of the local council and the approval of the Danish EPA. Furthermore, under the Danish system, licensed collectors of waste are only allowed to export waste on behalf of the waste producer—not on their own behalf—since the temporary storage of waste for recovery conflicts with the Waste Directive. Based on the ruling of the European Court of Justice in the Danish legal case known as the waste case (C 209/98), the Commission claims that the Danish system is in conflict with Treaty Article

29. The Danish government has rejected any conflict with EC law, and it is not yet known how the Commission will respond.

(C) Air Quality

The implementation of the EC directives on air quality into Danish law has not been an easy process. EC Directive 82/884 on a Limit Value for Lead in the Air (Lead Directive) has never been implemented into legal binding rules and is still not implemented. Following criticism from the Commission, Denmark finally designated the competent authorities under EC Directive 96/62 on Ambient Air Quality Assessment and Management by Statutory Order no. 671 of 9 July 2001 on Limit Values in Air of Sulphur-Dioxide and Other Pollutants. However, as a result of a misinterpretation of the new directive on air quality, the new statutory order cancelled the former Danish implementation of EC Directive 80/779 on Air Quality Limit Values and Guide Values for Sulphur Dioxide and Suspended Particulates and EC Directive 85/203 on Air Quality Standards for Nitrogen, ignoring the fact that these directives are in force until 2007. Thus, the new statutory order implementing the Lead Directive causes new offences to EC environmental laws.

(D) Implementation of Other EC Legislation

By Act no. 379 of 7 June 2001, the Parliament formally implemented EC Directive 1999/31 on the Landfill of Waste. By Statutory Order no. 637 of 25 June 2001, Denmark has formally implemented, for all land areas (but not for sea territory), the required protection of endangered and other protected species under Article 12 and 13 of EC Directive 92/43 on the Conservation of Natural Habitats and of Wild Fauna and Flora.

Peter Pagh

B. Finland

(1) Signature of International Agreements

Finland has been very active in international environmental negotiations in its role as chair of the Arctic Council, a high-level inter-governmental forum comprising the eight Arctic states (the Nordic states, the Russian Federation, the United States, and Canada) and the Arctic indigenous peoples. A particularly noteworthy development in 2001 was the conclusion, on 22–3 May in Stockholm, of the Stockholm Convention on Persistent Organic Pollutants (Stockholm Convention), which includes Arctic interests in its preamble (para. 3). Finland is a signatory to the Stockholm Convention.

(2) Ratification

The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) entered into force on 30 October. Finland is in the final stages of ratifying the convention, but ratification will most likely not be completed until the beginning of 2002.

(3) Major Policy Statements Concerning Environmental Issues

In June, Finland adopted a new program for the protection of the Baltic Sea in order to decrease eutrophication, which is the most serious maritime environmental problem in the region. Eutrophication is visible in the form of rich algal blooms in the summer and slime that accumulates along the shores and on fishing implements. It is caused when an excessive nutrient load is dispersed from settlements, municipal waste water, agriculture, traffic, and industry. Most of the program's financial resources will be used for nitrogen purification and investments to improve safety at sea and to decrease the risks from oil damage. Interestingly, a substantial component of Finnish environmental policy in combating eutrophication is focused on support for the construction of the Southwestern Treatment Plant in St. Petersburg, which will ensure the proper treatment of 85 per cent of the city's waste water.

(4) Court Decisions in International Environmental Law

Last year's country report from Finland provided a detailed description of the *Vuotos* case (see 11 YBIEL 389 (2000)). To summarize briefly, in 1992, Kemijoki Limited, a state-owned company, applied for a permit to construct a reservoir and dam on the upper course of the Kemijoki River. The Water Court of Northern Finland granted the permit in 2000. The present report focuses on how the potential transboundary impacts of the reservoir have been dealt with in Finnish national procedure—a process that was not analyzed in last year's report.

The Water Court of Northern Finland (the Water Court) decided, on 29 February 2000, that no significant transboundary impact would follow from the construction of the Vuotos reservoir and dam, and thus the applicable treaty, the Nordic Environment Protection Convention (NEPC), did not apply to the case. The court made a decision not to study the demands by the Swedish authorities and their private legal subjects. According to the NEPC,

if the activity may entail a nuisance of significance in another Contracting State, the examining authority shall . . . inform the supervisory authority of the other state of the proposed activity. According to the inspection proceedings, the effects of the project on the area of Sweden would be minor, an evaluation which was confirmed by the Ministry of the Environment in an oral hearing. Because of the insignificance of the

effects of the activity on the Swedish territory, the Water Court, as the examining authority, has not informed the supervisory authority of Sweden.

The potential effects on the Gulf of Bothnia were not taken into consideration in the licencing decision because the Water Court based its decision on the conclusion of the inspection proceedings and, significantly, also on an alleged statement by the Finnish Ministry of the Environment (FME) in an oral hearing. It was thus no wonder that the complainants, in the next stage of administrative judicial review, the Administrative Court of Vaasa, included the Swedish Environmental Protection Agency (SEPA).

The Water Court gave Kemijoki a licence to construct the Vuotos reservoir and dam in accordance with the proponent's application. Kemijoki had also applied for extensive rights to go ahead with the necessary work related to the construction of the reservoir. This right was revoked by the Administrative Court of Vaasa, to which several parties had appealed against the Water Court's decision, in an initial ruling pending its final decision on the matter. The court held an interesting public hearing in Pelkosenniemi on 6-8 February, which was attended by the representatives of SEPA, Norbotten's provincial government, and private legal subjects. The private and public actors from Sweden were of the opinion that the Vuotos project would have a variety of negative impacts.

Significantly, the FME argued that the Water Court had misunderstood its presentation when the Court concluded that the FME had determined that no significant impact on the area of Sweden would result. Another interesting aspect was that Kemijoki wanted to argue explicitly that Sweden and the Swedish authorities could not be considered injured parties but that they could only be heard during the process. Both the FME and SEPA demanded that the Swedish authorities be given the status of injured parties in the process. The chairman of the Administrative Court stated that, according to the law, the Swedish authorities could be given their say but that their status as injured parties would be decided when the matter was dealt with by the court. He also stated that the Swedes and Kemijoki could challenge the decision by making a complaint to the Supreme Administrative Court of Finland.

Quite unexpectedly, the Administrative Court of Vaasa, on 14 June, revoked the licencing decision made by the Water Court and rejected the permit application on the basis of Article 2(5) of the Finnish Water Law. Since Kemijoki has appealed against this decision to the Supreme Administrative Court, it will be useful to examine the parts of the decision by the Administrative Court that pertain to the transboundary process with Sweden. It is anticipated that the Supreme Administrative Court will hand down its decision by the end of the year 2002.

Kemijoki claimed that SEPA cannot be considered an injured party in the procedure and that the latter's appeal to the Administrative Court should

therefore not be considered. However, the Administrative Court opined that the construction of the Vuotos reservoir may entail damaging effects on the Swedish side of the Gulf of Bothnia, and, accordingly, SEPA, as a supervisory authority in the meaning of Article 4 of the NEPC, could be considered an injured party in the procedure and thus have a right to make an appeal against the licencing decision of the Water Court. In its appeal, SEPA stated that the permit can only be given if heavy metal and phosphorus emissions can be controlled through the permit conditions in such a way that no danger is caused to Swedish territory and the Swedish environment. SEPA also noted that if the permit is given, a separate condition for the permit must be that Kemijoki is to regularly deliver monitoring information to the government of the Norrbottens District.

It is interesting to note that the Administrative Court approached the matter from a different angle than the Water Court. The Water Court did not study the comments made by the Swedish authorities nor the private legal subjects since: "[a]ccording to the inspection proceedings, the effects of the project on the area of Sweden would be minor, an evaluation which has been confirmed by the Ministry of the Environment in an oral hearing." Thus, in principle, the Water Court acted in accordance with the NEPC since it determined that no significant impacts on the area of Sweden would follow from the construction of the Vuotos and thus no notification on the basis of Article 5 of the NEPC was necessary. In addition, the private legal subjects from Sweden, who are guaranteed the same rights as their Finnish counterparts by Article 2 of the NEPC, could not be considered potential injured parties. However, the FME argues that it was misunderstood by the Water Court in an oral hearing and now maintains that the potential impact on Swedish territory may be significant. The same argument has been presented by the Swedish authorities and private parties.

The Administrative Court approached the matter from a different perspective. Since the Swedish parties were already involved in the procedure and certain evaluations existed about the potential impacts on the Swedish area, there was no need to initiate the procedure on the basis of Article 5 of the NEPC, that is, to determine whether the effects on the Swedish area may be significant. The court studied whether SEPA, as a supervisory authority, can be considered to have the right to participate in the licencing procedure as an injured party. Article 4 of the NEPC stipulates that the supervisory authority has a right to "appeal against the decision of the Court or the Administrative Authority" in accordance with the rules of the state of origin. The Administrative Court applied these rules to the Swedish parties and decided that SEPA can be considered an injured party and thus have a right to appeal against the decision. The northern local authorities of Sweden were not seen as independent injured parties, but their statements could be studied as part of SEPA's claims. This is an important decision since even though the

Administrative Court denied Kemijoki a permit to build the Vuotos reservoir and dam, the case will still be heard by the Supreme Administrative Court of Finland.

If the Supreme Administrative Court overturns the decision made by the Administrative Court, it will in all likelihood take note of the statements made by SEPA. As discussed above, SEPA demanded and will in all likelihood demand in the Supreme Administrative Court that if the permit is granted, two conditions are to be stipulated with respect to the Swedish areas: the first is that heavy metal and phosphorus emissions are kept under control through the permit conditions and, second, that monitoring arrangements be organized by Kemijoki in order to supervise the state of the waters lying on the Swedish side.

Another interesting aspect of the Vuotos case from the viewpoint of international environmental law is the emphasis on changed environmental values as one of the basis for denying the permit. The court argued that within the last thirty years, and especially in the last ten years, knowledge of the environment and environmental values have become increasingly important, as reflected, for example, by the changes that have taken place in Finnish environmental legislation as well as in the environmental law and policy of the European Community. In the court's view, this development makes it necessary to re-evaluate the permissibility of economic activities that have been allowable in the past.

Timo Koivurova

C. Norway

(1) Ratification of, and Accession to, Treaties

Norway acceded to Annex V of the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) and ratified the Protocol on Biosafety to the Convention on Biological Diversity. Norway did not find it necessary to adopt amendments to its legislation when accepting these instruments. Norway continued its policy of early acceptance of relevant instruments adopted by the International Maritime Organization.

(2) Signature of Treaties

Norway was among the countries that signed the Stockholm Convention on Persistent Organic Pollutants on 23 May.

(3) 1992 Agreement on the European Economic Area

The Agreement on the European Economic Area continues to play an essential role in the development of Norwegian environmental legislation and