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## REVIEW

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'New Age' Trade Agreements  
and their Possible Contribution to Toxic Trade

*Richard Gutierrez*

WTO Compatibility of Border Tax Adjustments  
as a Means for Promoting Environmental Protection

*Rike U. Krämer*

Intellectual Property Rights, Genetical Resources  
and Traditional Knowledge

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The Legal Nature of the Biodiversity Provisions  
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:

**19<sup>th</sup> and 20<sup>th</sup> 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/>

## The Phase-Out of Hazardous Substances in Troubled Waters

Stefan Scheuer

### 1 Introduction

*The Water Framework Directive (WFD)<sup>1</sup> of 2000 is the EU's first law establishing legal obligations to move towards eliminating the emission of hazardous substances into EU's waters within 20 years. This recognises that the safe way to deal with substances which can cause long-term or irreversible damage is to aim at zero or background concentrations rather than setting tolerable limits as favoured by conventional chemical risk assessment methods.*

*There is a long way to go from the WFD's respective legal obligations to ultimately achieving zero emissions for selected hazardous substances. In 2010 Greenpeace undertook a first spot check of the quality of implementing those obligations for the pollutant nonylphenol (NP)<sup>2</sup>, a hazardous water pollutant which has been severely restricted in the EU since 2003.*

*Based on these findings this paper analyses the repercussions from a broader perspective of the legal situation, including whether and when legal breaches are likely to occur and what the consequences are for the political objectives of chemical safety management.*

*To this end, the shared obligations between the EU and its Member States and the links to the new EU chemical safety management rules under REACH<sup>3</sup> will be examined.*

### 2 Overview of objectives, obligations and procedures for a phase-out

In 1998 the ministerial meeting to the OSPAR Convention<sup>4</sup> in Sintra, Portugal, agreed to reduce the emission of hazardous substances with the aim of achieving close to zero or background concentrations and stated their commitment to achieve a cessation of emissions. The subsequent OSPAR *Hazardous Substances Strategy* began by identifying substances and measures but stopped partly its work due to new EU legislation, namely the WFD and REACH.

In 2000 the WFD established that the “ultimate aim [...] is to achieve the elimination of priority hazardous substances” (PHS) (Recital (27)). According to WFD Art. 16, a list of priority substances (PS), with priority hazardous ones identified, are to be proposed by the Commission and adopted by the EU legislator. Two years following the adoption the Commission must

propose EU wide emission controls and environmental quality standards (EQS). The emission controls are to be set in a way that ends all emission of PHS within 20 years (Art. 16(6)). In case the EU fails to adopt such laws, Member States are obliged to act within five years after the list of priority substances are adopted (Art. 16(8)). This includes setting EQS and “measures to eliminate pollution of surface waters by those substances” (WFD Art. 11(3k)), which as a minimum have to include controls for the principle sources of emissions in consideration of all technical options (WFD Art. 16.8). As a result, if the EU does not act, Member States have to act. It is clearly a lever for Member States to come to a common agreement, which will be preferable for achieving a phase-out of emissions in an internal market system.

In 2001 a list of 33 PS including 11 PHS was adopted<sup>5</sup>. The number increased to 13 PHS with the EQS Directive<sup>6</sup> in 2008.

In 2006 the E-PRTR<sup>7</sup> was adopted and includes the obligation for operators of installations to report releases of pollutants including all PS of the WFD above a certain threshold in a way that allows Member States to report to the Commission the emission data for 2007 by mid-2009 at the latest, for 2008 within 15 months after the reporting year and so on. The emission data are made publicly available by the European Commission at <http://prtr.ec.europa.eu/>. This means that detailed data of point source emissions from 2007 onwards should be available for all PHS.

In 2006 REACH took the WFD objective and obligations one step further by making the progressive substitution of all *substances of very high concern* (SVHC) with safer alternatives a central objective of chemicals safety management according to Art. 55 of the REACH regulation which sets out the aim of authorisation requirements. The identification of SVHC and PHS are based on similar criteria. REACH adds a further emission control instrument to the EU tool box, the Authorisation procedure, whereby any use of

<sup>1</sup> Directive 2000/60/EC of the European Parliament and Council establishing a framework for Community action in the area of water policy.

<sup>2</sup> Heads in the sand over Europe's most dangerous chemicals. Governments ignoring legal obligations in the phasing out of Nonylphenol water pollution. Greenpeace 12 May 2010.

<sup>3</sup> Regulation (EC) No 1907/2006 of the European Parliament and Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

<sup>4</sup> The Convention for the Protection of the marine Environment of the North-East Atlantic (the 'OSPAR Convention') of 22 September 1992.

<sup>5</sup> Decision No 2455/2001/EC of the European Parliament and Council of 20 November 2001 establishing the list of priority substances in the field of water policy and amending Directive 2000/60/EC.

<sup>6</sup> Directive 2008/105/EC of the European Parliament and Council of 16 December 2008 on environmental quality standards in the field of water policy.

<sup>7</sup> Regulation (EC) No 166/2006 of the European Parliament and Council of 18 January 2006 concerning the establishment of a European Pollutant Release and Transfer Register and amending Council Directives 91/689/EEC and 96/61/EC.

a SVHC is banned by a given deadline unless specifically authorised or exempted from the procedure. With regard to substances with PBT and vPvB<sup>8</sup> properties, REACH specifies that exposure assessments are too uncertain to be used for a quantitative risk assessment (REACH Annex I chapter 4.0.1). REACH implementation guidance<sup>9</sup> specifies that for PBT and vPvB substances a “safe” concentration in the environment cannot be established using the methods currently available with sufficient reliability for an acceptable risk to be determined in a quantitative way. This means that the WFD approach, which also requires setting an environmental quality standard for the PHS with PBT or vPvB properties, needs to be revised accordingly.

### 3 Assessment of EU implementation measures

In 2008 the EU adopted the EQS Directive, which established EQS values for 33 substances including 13 PHS. These EQS are the main criteria for defining the chemical status for water bodies under the WFD. All 33 EQS have to be achieved, as well as any national relevant EQS, by 2015 in order to achieve the good chemical status and to mark the respective water body in the River Basin Management Plans (RBMP) under the WFD with the colour code 'blue'. They will otherwise be marked 'red'.

Several of the 13 PHS meet the PBT or vPvB criteria. For those substances, according to REACH, the exposure assessment should not have been used to simply set an EQS, which in the WFD context is understood to represent a safe level. Instead the focus should have been on the emission controls. But, aside from the questionable use of the EQS, the Commission did not propose any emission controls, arguing that sufficient measures are already in place. Finally the adopted EQS Directive requires Member States to establish emission inventories (Art. 5), which, according to the Commission's interpretation, are due by end of 2013 together with the WFD's Art. 5 review of the River Basin District characterisations. On the basis of the inventories the Commission has to check by 2018 whether emission controls by Member States are sufficient to achieve the WFD's phase-out objectives (EQS Directive Art. 5(5)).

Does this situation constitute the absence of an EU agreement for emission controls and thus requires Member States to control point sources to achieve a phase-out of emissions according to WFD Art. 16.8?

The EQS Directive states in its Recitals (7) and (8) that since 2000 several EU emission control measures have been adopted and that it is more cost-effective for Member States to use additional measures. Indeed several relevant measures have been adopted at EU level, but no specification for PHS on how a phase-out of all emissions can be achieved within 20 years. This means that in this case the EU has failed to achieve an adequate agreement and the obligation rests now with Member States. But from what date does the 20 years phase out deadline apply under this circumstance? There seems to be no clear answer. It could be the time a relevant EU measure was passed or from the adoption date of the EQS Directive. For example in the case of nonylphenol (NP), an identified PHS with PBT properties, a EU wide market ban was agreed in 2003<sup>10</sup> under the EU's chemical safety laws thus the emission phase-out should eventually be achieved by 2023. The representatives of some Member States argue that the 20 year period should only be counted from the date of adoption of the EQS Directive, making 2028 the deadline for the phase-out objective.

In conclusion, the EQS Directive marks a failure of the EU to implement the phase out obligations under the normal route foreseen by the WFD, i.e. adopting emission control measures at EU level. Instead the national route seems to be favoured. National inventories of emissions should provide the Commission with an instrument to control whether Member States are meeting their emission phase-out obligations. The deadline for this is 2018 (Art. 5(5) EQS Directive); thus it is probably too near to the deadline for achieving the phase-out objective for corrective actions to be possible.

Finally, it has to be noted that the EQS Directive disregards the new risk assessment provisions for substances with PBT and vPvB properties established by REACH. This inconsistency causes practical and legal confusion about the appropriate actions.

### 4 Assessment of national implementation measures

Considering that the obligation for taking actions to achieve the emission phase-out objective rests now mainly with Member States, the RBMPs adopted this year should clearly demonstrate how this is going to be achieved.

In 2010 Greenpeace investigated some WFD River Basin Management Plans (RBMP) adopted by Member States, with a focus on one specific PHS: nonyl-

<sup>8</sup> PBT: persistent, bioaccumulative and toxic; vPvB: very persistent and very bioaccumulative.

<sup>9</sup> European Chemicals Agency (2008). Guidance on information requirements and chemical safety assessment. Chapter R.11: PBT Assessment - see p. 7.

<sup>10</sup> Directive 2003/53/EC of the European Parliament and Council of 18 June 2003 amending for the 26th time Council Directive 76/769/EEC relating to restrictions on the marketing and use of certain dangerous substances and preparations (nonylphenol, nonylphenol ethoxylates and cement).

phenol (NP). According to the WFD one could have expected the RBMPs to contain the following information:

- Evaluation of the risk of failing to achieve a phase out of emission of NP discharges and achieving the EQS;
- Identification of the emission sources using data made available by the EU PRTR; and
- Planned measures to achieve EQS and emission phase-out for NP.

But in the RBMPs and available background documents from five different countries no information relevant for the phase-out objective was found. The only information provided with regard to NP is water quality data and the statement that the EQS for NP will be met in 2015. This is then used to justify that there is no need for further action.

But the cross-check with available emission data for NP from EU and national PRTRs and further published studies showed that the major emissions to be expected from urban waste water treatment plants (UWWTP) are at high enough levels to get close to or surpass the EQS. This was to be expected as the 2003 EU market ban on NP does not tackle NP and its precursors in final products, like textiles which contain NP and which can be released during use, e.g. during the daily washing of textiles as demonstrated by a Swedish study<sup>11</sup>.

Estimations based on this study and others suggest that the per capita NP emissions via the urban waste water system into the surface water lie at between 0.3 and 2.5 g per year. This means that for a UWWTP, which collects waste water from more than 1,000 people, the threshold for reporting under the EU PRTR is likely to be passed. Despite this only the UK reported NP emission data for over 100 UWWTP; in Germany and other countries only a handful of plants are reported.

In conclusion, RBMPs show that Member States are not taking the necessary preparatory steps to achieving a phase-out of PHS emissions, like data collection and emission assessments. The investigated RBMPs provide no specific information on how to achieve a phase-out of these emissions. This suggests that specific legal obligations under the WFD's Art. 5 (Pressures and Impacts Assessment) and 11 (Programme of Measures) have not yet been met. But gathering proof of this is difficult due to the lack of data and the confusing EU legal situation arising from the EQS Directive. In any case it is clear that the reporting obligations established by the EU PRTR regulation have been breached by several countries for a specific pollutant.

## 5 Conclusions and outlook

The EU has to start tackling the specific implementation problems under the Water Framework Directive and the Pollutants Release Registers as well as to adapt the EQS setting approach for persistent and bioaccumulative substances under the WFD to the new REACH method. If not, the EU is set to fail in its overarching objective of phasing-out the emission of hazardous substances into its waters within 20 years.

First of all, the Commission has to ensure that the EQS Directive, which is to be revised next year, is aligned with the new risk assessment procedures established by REACH. In practice this could mean that an EQS for substances with PBT or vPvB properties is given a different meaning and lowered gradually towards zero to provide an indicator of progress. Such an approach could also be justified for the PHS, which are not PBT or vPvB but have properties leading to a similar level of concern (e.g. endocrine disruptors). This would help to strengthen the focus on the phase-out obligation for these substances and thus the application of the pollution prevention and precautionary principles.

In addition, the revised EQS Directive has to be accompanied by EU measures to ensure a phase-out of emissions within 20 years. The current national route, backed up only by EU obligations for emission inventories is likely to be insufficient, as shown by the nonylphenol case study conducted by Greenpeace. One possible solution would be that the Commission proposes restrictions under REACH for substances where the main sources of pollution are well understood and an authorisation procedure for substances where little use and emission information is available.

Member States have to revisit the RBMPs to provide a robust PHS emission assessment and to outline in the programme of measures for whether and how a phase-out of emissions will be achieved. The annual emission data, which should be available in the EU PRTR, would be an important starting point for this revision. It would allow identification of main pollution sources, the checking of whether emissions are gradually reduced, and consideration of additional EU control measures. But the reporting obligations are clearly not being met in the case of NP and possibly other pollutants, too. The Commission should urgently start enforcement actions in the most obvious cases, like the ones exposed by Greenpeace in May 2010.

<sup>11</sup> Report: T-shirts with a murky past, The Swedish Society for Nature Conservation (Naturskyddsforeningen) 2008.

# Environmental Law and Policy at the Turn to the 21<sup>st</sup> 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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*The views expressed in the articles are those of the authors and do not necessarily reflect those of elni.*

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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.

The institute's activities are organized in Divisions - Chemistry, Energy & Climate Protection, Genetic Engineering, Sustainable Products & Material Flows, Nuclear Engineering & Plant Safety, and Environmental Law.

#### **The Environmental Law Division of the Öko-Institut:**

The Environmental Law Division covers a broad spectrum of environmental law elaborating scientific studies for public and private clients, consulting governments and public authorities, participating in law drafting processes and mediating stakeholder dialogues. Lawyers of the Division work on international, EU and national environmental law, concentrating on waste management, emission control, energy and climate protection, nuclear, aviation and planning law.

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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.

The Institute fulfils its assignments particularly by:

- Undertaking projects in developing countries
- Realization of seminars in the areas of environment and development
- Research for European Institutions
- Advisory service for companies and know-how-transfer

#### **Main areas of research**

- **European environmental policy**
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  - Effectiveness of legal and economic instruments
  - European governance
- **Environmental advice in developing countries**
  - Advice for legislation and institution development
  - Know-how-transfer
- **Companies and environment**
  - Environmental management
  - Risk management

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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.

The sofia research group aims to support regulatory choice at every level of public legislative bodies (EC, national or regional). It also analyses and improves the strategy of public and private organizations.

The sofia team is multidisciplinary: Lawyers and economists are collaborating with engineers as well as social and natural scientists. The theoretical basis is the interdisciplinary behaviour model of homo oeconomicus institutionalis, considering the formal (e.g. laws and contracts) and informal (e.g. rules of fairness) institutional context of individual behaviour.

The areas of research cover

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- Water and energy management
- Electronic public participation
- Economic opportunities deriving from environmental legislation
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- German Federal Environmental Agency (UBA)
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## elni

*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.

### 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. It 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). The Coordinating Bureau is currently hosted by the University of Bingen. elni encourages its members to submit articles to the Review in order to support and further the exchange and sharing of experiences with other members.

### 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.

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

- Access to justice in Environmental Matters and the Role of NGOs, de Sadeleer/Roller/Dross, Europa Law Publishing, 2005.
- Environmental Law Principles in Practice, Sheridan/Lavrysen (eds.), Bruylant, 2002.
- Voluntary Agreements – The Role of Environmental Agreements, elni (ed.), Cameron May Ltd., London, 1998.
- Environmental Impact Assessment – European and Comparative; Law and Practical Experience, elni (ed.), Cameron May Ltd., London, 1997.
- Environmental Rights: Law, Litigation and Access to Justice, Deimann/Dysslis (eds.), Cameron May Ltd., London, 1995.
- Environmental Control of Products and Substances: Legal Concepts in Europe and the United States, Gebers/Jendroska (eds.), Peter Lang, 1994.
- Dynamic International Regimes: Institutions of International Environmental Governance, Thomas Gehring; Peter Lang, 1994.
- Environmentally Sound Waste Management? Current Legal Situation and Practical Experience in Europe, Sander/Küppers (eds.), P. Lang, 1993.
- Licensing Procedures for Industrial Plants and the Influence of EC Directives, Gebers/Robensin (eds.), P. Lang, 1993.
- Civil Liability for Waste, v. Wilimowsky/Roller, P. Lang, 1992.
- Participation and Litigation Rights of Environmental Associations in Europe, Führ/Roller (eds.), P. Lang, 1991.

### Elni Website: elni.org

On the elni website [www.elni.org](http://www.elni.org) one finds news of the network and an index of articles. It also indicates elni activities and informs about new publications. Internship possibilities are also published online.