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SUSTAINABLE DEVELOPMENT AND THE USE OF COVENANTS IN ENVIRONMENTAL LEGISLATION

*B. JOHN OVINK**

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I. INTRODUCTION

Governments, industry, ordinary citizens and environmental organizations all recognize the existence of environmental problems. However, this realization has not led to practical results necessary to protect the environment. It is imperative that the nations of the world, individually and collectively, take measures to ensure that environmental world stability is maintained.

This article discusses the use of negotiated agreements and covenants as a primary tool to achieve realistic solutions to environmental problems. Such solutions may not always be highly beneficial in the short run but may at least be a solid basis for further discussion and an incentive for cooperation in the long run. Part One discusses the need for sustainable development. Part Two provides an overview of international developments that have led to a current awareness of the need to take measures to manage our environment to ensure both industrial development and environmental sustainability. Part Three will take a closer look at how the Netherlands attempts to solve the problem of environmental desecration through the unique use of covenants to secure industrial compliance with the government's goals of achieving sustainable development. Finally, Part Four investigates how the United States can achieve a balance between negotiated agreements and governmentally conceived rules, and suggests ways covenants could be used in the future, both nationally and internationally.

II. THE NEED FOR SUSTAINABLE DEVELOPMENT

Most national environmental laws have been influenced by

international agreements and (in)direct pressure from the international community through Conventions and Treaties.¹ It was not until the second half of this century that a concern for the environment began gaining clout, and nongovernmental organizations and citizen groups began fueling a general awareness for protecting the environment. Historically, unconditional industrial development had been good for the country, and anyone who raised environmental concerns was accused of crying wolf. The need to protect one's immediate environment was effected largely through local nuisance actions, seeking enforcement against neighbors or neighboring polluting industries.² The term "sustainable development" is therefore not new. What is new is that a workable compromise between industry and the general public is being generated, whereby both hope to benefit, provided a common interpretation of the concept can be found. But good intentions, as displayed at the U.N. Conference in Rio de Janeiro,³ are not enough—legal environmental principles which are enforceable in a court of law are needed.

These principles, or covenants, must be adhered to by all countries to further a plan designed to achieve a clean and healthy environment, yet still maintain room for industrial development. Industries, in complying with enforceable principles such as emission standards, will need to invest vast sums of money, and thus require strict guidelines in order to calculate cost and enable long-term planning. It, therefore, follows that in promulgating such standards, governments need to take into account the technical and economic capability of industries to ultimately comply with such

1. See generally VERZIJL, J.H.W., *INTERNATIONAL LAW IN HISTORICAL PERSPECTIVE*, (M. Bos, ed., 1968). This is specifically the case in the Netherlands, where the precedence of international law is assured by the constitution and automatically superior to conflicting national law.

2. See, e.g., *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870 (N.Y. 1970) (judgment allowing permanent damages to landowners alleging injury to property from neighboring cement plant).

3. United Nations Conference on Environment and Development, Rio de Janeiro, June 1992.

standards. If standards are promoted in a vacuum or without adequate regard for industry, unnecessary litigation would likely ensue.⁴ On the other hand, if industries will necessarily err on the side of caution as to what is achievable, the need for experts outside the industrial sphere will be required. Finally, necessary parties in the negotiations will have to be professional environmental groups, if only to supply a reasonable balance. In an ideal world, these parties can reach a compromise that would not even require legal enforcement. In a realistic world, however, such compromises will need the backup of either legislation, or the security of a contract, enforceable in a court of law or equity.

The realization that the environment needs to be managed carefully will require a change in economic thinking. This may entail the practical realization that natural resources represent economic and financial values beyond the mere cost of harvesting and production; that such natural resources are depletable; and that we cannot continue to spend the capital of this world without usurping the right of future generations to enjoy the use of such capital.⁵ Such realization will necessitate international resource management through integrated legal and administrative systems. It is unrealistic to expect industries to voluntarily promote measures that will, at least initially, lead to higher cost and lower profits.⁶

4. See, e.g., *International Harvester Co. v. Ruckelshaus*, 478 F.2d 615 (D.C.Cir. 1973) (remand for further proceedings where automobile manufacturers established that technology for compliance was not available within the meaning of the Clean Air Act).

5. For two recent and extensive studies in this field, see MICHAEL CARLEY and IAN CHRISTIE, *MANAGING SUSTAINABLE DEVELOPMENT* (1992) and MICHAEL REDCLIFT, *SUSTAINABLE DEVELOPMENT, EXPLORING THE CONTRADICTIONS*, (1992). For an early study, see WOUTER VAN DIEREN and MARIUS G. W. HUMMELINCK, *NATUUR IS DUUR, OVER DE WAARDE VAN DE NATUUR* (NATURE IS DEAR, ABOUT THE VALUE OF NATURE) (1977).

6. See MINISTERIE VAN VOLKSHUISVESTING, RUIMTELIJKE ORDERING EN MILIEUBEHEER, MINISTERIE VAN LANDBOUW EN VISSERIJ [MINISTRY OF LAND, HOUSING AND ENVIRONMENT, MINISTRY OF AGRICULTURE], Ch. 5, *Paving the*

Consequently, governmental action is required to force an industry to comply with measures that will ensure a cleaner and healthier environment. This does not mean that industrial interests should be sideswiped, or that we should protect the environment regardless of the cost. As Kenneth T. Derr, Chairman and Chief Executive Officer of Chevron Corp., notes:

[i]ncreasingly, we're spending vast sums for negligible--or in some cases negative--environmental gains. In such cases, the economic benefits of the pollution control business are extremely dubious . . . We're learning that energy, environment, and economic development are three basic human needs. Our policy should aim not for a tradeoff among them but for a synthesis among them.⁷

International cooperation is necessary to achieve unity in standards and to ensure that countries which do attempt to enforce strict environmental standards will not suffer financially. Interestingly, it seems that stringent regulations do not bother companies, provided they are imposed worldwide. Robert Bott emphasizes the necessity of incorporating sustainable development into the Canadian method of business:

By contrast, at least one major oil service and supply company has chosen Holland as the site for research and development of "green" drilling fluids, because the tidy Dutch have the toughest regulations in this area. The lesson seems to be that our rules

way to sustainable development, NATIONAL ENVIRONMENTAL POLICY PLAN: TO CHOOSE OR TO LOSE at 107 *et seq.*, Parliament, Second Chamber, Sess. 1988-1989, 21 137, nos. 1-2, for a discussion of various economic and environmental scenarios. [hereinafter NEPP].

7. Kenneth T. Derr, *Chevron's Derr: Beware the Cutting Edge*, OIL & GAS J., Sept. 7, 1992, at 28, 30-31.

have to be at least as stringent as any in the world if we want to keep the hi-tech, high-value-added industries here.⁸

The International Union for the Conservation of Nature's Commission on Environmental Law [hereinafter IUCN] is currently in the process of developing a world-covenant that furthers the integrative framework,⁹ as recommended by the United Nations Conference on Environment and Development assembled in Rio de Janeiro in June 1992.¹⁰ The IUCN published a draft version in 1995. This covenant should at least include a chapter on the settlement of disputes, preferably in an International (or Environmental) Court of Justice.¹¹ The question of which parties would have access to such a court might spawn lengthy

8. Robert Bott, *Don't Drop the Ball; There is Ample Evidence That Shows Sustainable Development Must be Incorporated Into Our Way of Doing Business*. OILWEEK, Feb. 15, 1993, at 38.

9. Letter to the author, dated Oct. 6, 1993, and accompanying documents.

10. *Overview of Agenda 21 and Implementation Mechanisms: Report of the Secretary-General of the Conference*, U.N. GAOR Preparatory Comm. for U.N. Conference on Environment and Development, 4th Plen. Sess., U.N. Doc. A/Conf.151/PC/100/Add.1 (1992) [hereinafter Agenda Item 21].

11. At the biennial International Bar Association meeting on September 21, 1993 in Cannes, France, several legal experts argued for a separate Environmental Court. Lord Chief Justice Harry Woolf of the Court of Appeal in London recommended that authorities look at the example of the New South Wales Land and Environmental Court in Australia as a model for both the United Kingdom and Europe. The specialized court, which has been in existence for 10 years, has been able to hear cases "within a time scale of three months" and provides expert assessments through the technical expertise of its judges, he argued. Mr. Judson Starr of the law firm of Venable Baetjer Howard & Civiletti in Washington, D.C. thought that the establishment of a separate environmental court system was also a "good idea," adding that it now takes up to two years to hear environmental pollution cases in the United States. 15 INT'L ENVTL. REP. (BNA) 594 (Sept. 23, 1992).

negotiations, as most governments would be wary of being sued by any third-country citizen. Strict guidelines defining interested parties will need to be developed as well as strict rules regarding which parts of such a covenant should be enforceable by those parties. At the same time it would be necessary to actually enforce those judgments, which would require nations to surrender their sovereignty. This process is not as unreal as it sounds, as demonstrated by several sovereign European nations, members of the European Community [hereinafter EC], which submit themselves to the jurisdiction of the European Courts.¹²

However, before one can even think of enforcing worldwide environmental measures, individual states will need to have practical measures in place, by legislation or otherwise, to ensure that their populations enjoy the right to an environment and level of development adequate for their health, well-being, and dignity. Such measures will need to include effective access to judicial and administrative proceedings, including redress and remedy. As such, it seems inevitable that effective promulgation of such measures requires an agreement to be reached as to exact definitions. The working group of the IUCN has proposed the following definition of sustainable development:

Management of the human use, development, conservation, protection, maintenance and enhancement of natural, physical and cultural resources in a way or at a rate which enables people and communities to provide for their social,

12. See, e.g., Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585. The European Court of Justice ruled that although there is no supremacy clause in the E.C. treaties, Community Law is supreme. The Court reasoned that the whole structure of the Common Market would be at risk if national laws at variance with EC law could be enacted: "The transfer by the states from their domestic legal systems to the Community legal system of the rights and obligations arising under the Treaty carries with it a permanent limitation of their sovereign rights, against which a subsequent unilateral act incompatible with the concept of the Community cannot prevail." *Id.* at 586.

economic and cultural well-being and for their health and safety while:

- (a) sustaining the potential of natural and physical resources to meet the needs of future generations;
- (b) using, developing or protecting renewable natural and physical resources so that their ability to yield long-term benefits is not endangered;
- (c) using, developing or protecting non-renewable natural resources so as to lead to an orderly and practical transition to adequate substitutes including renewable resources;
- (d) safeguarding the life-supporting capacity of air, water, soil and ecosystems; and
- (e) avoiding, remedying or mitigating any adverse effects of developments on the environment.¹³

III. EARLY DEVELOPMENTS

A. *Stockholm 1972*

After the rapid, industrial development of the post-World War II era, the Sixties saw a growing concern for the environment and the human role in this economic society. These concerns eventually culminated in the 1972 UN Conference on the Human Environment at Stockholm which brought industrialized and developing nations together to delineate the rights of the human family to a healthy and productive environment.¹⁴ Unfortunately,

13. Letter to the author, dated Oct. 6, 1993.

14. Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14 and corr. 1 (1972), U.N. Sales No. E.73.II.A.14 and corr., reprinted in 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration]. The objective of the Convention was to enumerate common principles to inspire and guide the people of the world in the preservation and enhancement of the human environment. The Stockholm Declaration is generally seen as standing at the

from the very beginning, the conference was divided between those who saw the problem as pollution control versus those who believed the problem was the practices of industrialized nations. The developed world saw the primary concern of the conference as "the human impact on the biophysical environment with emphasis on control of pollution and conservation of resources."¹⁵ Olaf Palme, then Prime Minister of Sweden, stressed this concern in his opening address, and explained that his government attached "the greatest importance to the stress laid in the declaration upon the need for development."¹⁶ Indira Ghandi, representing the other viewpoint, believed poverty was the greatest polluter, and that it was caused almost wholly by the exploitative practices of developed nations. In an attempt to bridge these differences, the concept was advanced that environmental protection was an essential element of social and economic development:

Questioning development itself is taboo. For a start, that would be suicide for the huge fraternity of officials, experts, engineers, contractors, seed merchants, purveyors of pesticides and fertilizers, researchers, businessmen and politicians of north and south who thrive on the industry. Besides, development is part of our paradigm of unspoken assumptions. We need to feel we have progressed from our pre-industrial days and that the

basis of the development of international environmental law during the decades which followed.

15. LYNTON KEITH CALDWELL, *INTERNATIONAL ENVIRONMENTAL POLICY*, at 56 (2d ed. 1990). [hereinafter CALDWELL].

16. R. Stephen Berry et al., *What Happened at Stockholm: A Special Report*, 28 *SCIENCE AND PUBLIC AFFAIRS: BULLETIN OF THE ATOMIC SCIENTISTS*, Sept. 1972, at 44.

non-industrial world 'needs' to go the same way."¹⁷

Nevertheless, the 114 governments represented at Stockholm agreed generally on a declaration of principles and an action plan.¹⁸ Judged in terms of actual accomplishments and immediate influence on the policies of world governments the Conference was not very impressive. However, four factors made this Conference different from previous U.N. Conferences: (1) the Conference, from its preparatory stage on, was action-oriented and was meant to lead to results rather than statements; (2) parties aimed to work out differences rather than let them disrupt the Conference; (3) there was active participation and interest by Non-Governmental Organizations [hereinafter NGOs] (even though their influence may not have been great, the fact that the Swedish Government provided accommodations for the non-governmental "Environmental Forum" to convene at the same time gave many NGOs from different countries a chance to meet, address common concerns, and, through the media, make their concerns heard);¹⁹ (4) perhaps most important, the United Nations Environment Program [hereinafter UNEP] was established.²⁰

The result was that for the first time the environment was

17. Walter Schwarz, *BEWARE THE RICH BEARING GIFTS: Wealthy countries destroy far more than they create. . .*, THE GUARDIAN, July 12, 1992, (Features), at 27.

18. See Stockholm Declaration, *supra* note 14.

19. See CALDWELL, *supra* note 15, at 56 *et seq.*

20. Implementing the recommendations of Stockholm for a United Nations Environment Program, the U.N. General Assembly established the necessary institutional and financial arrangement on December 15, 1972, *reprinted in* U.N. GAOR, 27th Sess., U.N. Doc. A/PV.2112, (1972), adopting Draft Res. A/C.2/SR.1469 (A/8703/Add.1 (pt. II)). The purpose of UNEP was to serve as a focal point for environment-related activities within the United Nations system. The location of the UNEP secretariat was to be in Nairobi, Kenya.

recognized as a subject of general international concern.

B. *The Aftermath*

A string of meetings followed regarding the rights of people to adequate food, sound housing, safe water and access to means of choosing the size of their families. In the wake of Stockholm, a variety of treaties were negotiated, and, primarily through the work of the UNEP, opened for ratification.²¹

It took ten years to act upon the growing concept of the right of people's children to live in a healthy environment and to acknowledge that the world's natural resources (the "environment") needed to be sustained. This could only be realized through global, governmental measures. The U.N. General Assembly commemorated the tenth anniversary of Stockholm by asking the UNEP to convene a special session in Nairobi to make recommendations with respect to future environmental trends, perspectives, action, and international cooperation. This is all to be addressed by UNEP during the next decade.²²

One of the practical results of these previous efforts was the World Charter for Nature²³ which was accepted by the General Assembly. This Charter illustrates the international recognition of the principles of Stockholm, as well as the practical difficulty of making these principles operational in a world of sovereign states.

21. See generally CALDWELL, *supra* note 15, at 83-86.

22. *Id.* at 75-6.

23. *Consideration and Adoption of the Revised World Charter for Nature, Agenda Item 21, Provisional Verbatim Record of the Forty-eighth Meeting . . .*, U.N. Doc. A/37/PV.48. See; *Charter for Nature*, A/Res/37/19 reprinted in 22 I.L.M. 455 (1983). Texts reprinted in 10 ENVL. POL'Y & L. 30-31 (January 1983).

The Charter was adopted by a 146-1 vote.²⁴ Among the eighteen Nations which abstained were the eight most notorious signatory states to the Treaty of Amazonian Co-operation,²⁵ under the leadership of Brazil.²⁶

C. *World Commission on Environment and Development*

The other significant achievement was the World Commission on Environment and Development, officially established by the UN in 1983 [hereinafter The Brundtland Commission]. Then Labor Party Leader Gro Harlem Brundtland of Norway was asked to chair a special, independent commission to address a global agenda for change. Her Agenda was four-fold:

- to propose long-term environmental strategies for achieving sustainable development by the year 2000 and beyond;
- to recommend international co-operation between developed and developing countries promoting interrelationships between people, resources, environment, and development;
- to consider ways and means by which the international community could deal more effectively with environmental concerns; and
- to define an action agenda, suggesting the appropriate measures needed to deal successfully

24. The United States, which had experienced a major reversal of political priorities with the election of Ronald Reagan, was the lone objector.

25. Treaty for Amazonian Co-operation, July 3, 1978, 49 I.L.M. 978. (entered into force Feb. 2, 1980). The purpose of the treaty is to promote the harmonious development of the Amazon region and permit equitable distribution of the benefits of such development among the parties.

26. See CALDWELL, *supra* note 15, at 79, for a discussion of the possible political motives behind the votes.

with the problems of protecting and enhancing the environment.²⁷

The Brundtland Commission was assisted in its review of legal rights and principles by a group of international legal experts under the Chairmanship of R.D. Munro. This group prepared a report on legal principles for environmental protection and sustainable development, as well as proposals for accelerating the development of relevant international law.²⁸

The Brundtland Commission realized from the beginning that the problems related to the environment could no longer be solved by isolated patchwork, but because most environmental problems are linked across national boundaries, they could no longer be addressed by "topical" solutions.²⁹ Any attempt to preserve the environment for the future must realize that "environment" can no longer be seen as limited to "environmental issues." However, ". . . the 'environment' is where we all live; 'development' is what we all do in attempting to improve our lot within that abode. The two are inseparable."³⁰

The Commission selected eight key issues for analysis, stressing that governments must begin "to make the key national, economic, and sectoral agencies directly responsible and accountable for ensuring that their policies, programs, and budgets support development that is economically and ecologically

27. See *Chairman's Foreword to THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE*, (2d ed. 1991). [hereinafter *OUR COMMON FUTURE*].

28. ENVIRONMENTAL PROTECTION AND SUSTAINABLE DEVELOPMENT, LEGAL PRINCIPLES AND RECOMMENDATIONS, AS ADOPTED BY THE EXPERTS GROUP ON ENVIRONMENTAL LAW OF THE WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT (1987). [hereinafter *EXPERTS GROUP*].

29. See *OUR COMMON FUTURE*, *supra* note 27.

30. *Id.* at XI.

sustainable."³¹ Addressing the legal implications of an environmental program, encouraging and supporting sustainable development, the Commission reported:

Governments now need to fill major gaps in existing national and international law related to the environment, to find ways to recognize and project the right of present and future generations to an environment adequate for their health and well being, to prepare under UN auspices a universal Declaration on environmental protection and sustainable development and a subsequent Convention, and to strengthen procedures for avoiding or resolving disputes on environment and resource management issues.³²

D. *Rio 1992*

In its final report, the Brundtland Commission advocated an international convention on sustainable development. From June 3-14, 1992, more than 170 countries met in Rio de Janeiro for the United Nations Conference on Environment and Development. The focus of this convention, held on the 20th anniversary of the Stockholm Conference,³³ was clearly on sustainable development, as this concept had evolved from, among others, the Brundtland Report. It is one thing, however, to publicly profess adherence to the sustainability of our planet; it is quite another to actually promulgate measures at home that will implement that principle. Since 1972, nearly every country has adopted one or more pieces of environmental legislation. In addition, there are more than 870

31. *Id.* at 20.

32. *Id.* at 21.

33. See Stockholm Declaration, *supra* note 14.

legal instruments in which at least some provisions are concerned with environmental issues. The Rio Conference added an 800 page Agenda 21, and several Declarations, Conventions, and Statements.³⁴ Important for international furtherance of sustainable development was the fact that the participants agreed to establish a new Commission for Sustainable Development to monitor and review the implementation of Agenda 21. The Commission will be an intergovernmental commission at the ministerial level and will report to the United Nations Economic and Social Council. NGOs will also have a role in the Commission.

One of the countries that has adopted the report of the Brundtland Commission is the Netherlands. Currently the Dutch government is in the process of promulgating measures for complying with the international requirements. In doing so, the government uses the unique concept of the covenant to secure compliance by industries with the ultimate goal of an environmentally clean and industrial nation.

IV. THE NETHERLANDS

As did most countries, by the time the Brundtland report was published, the Netherlands had in place a variety of acts, largely sectorial, which were usually applicable to specific target areas and were mostly characterized by their total lack of coordination and enforcement. Since the early eighties, attempts had been made to remedy this confusion. These attempts culminated in the 1989 NATIONAL ENVIRONMENTAL POLICY PLAN³⁵ [hereinafter NEPP] and the Environmental Management Act (Wet Milieubeheer)

34. For an excellent discussion of the Rio Conference, see Edith Brown Weiss, *Introductory Note* in UNITED NATIONS CONFERENCE ON ENVIRONMENT AND DEVELOPMENT, Rio de Janeiro, June 13, 1992, 31 I.L.M. 814 (1992).

35. See NEPP, *supra* note 6.

[hereinafter EMA],³⁶ as promulgated in March 1993. The immediate base of the NEPP was the Brundtland report:

Both the report of the Brundtland Commission and 'Concern for Tomorrow'³⁷ led to the conclusion that, on the one hand, intensification and broadening of environmental policy are urgently needed and, on the other hand safeguarding environmental quality on behalf of sustainable development will be a process that will last several decades. The long-term objectives in this NEPP are intended to provide tentative direction to this process.³⁸

Since environmental legislation is mainly implemented at a provincial level, the "Provincial Commissions for Environmental and Water Management," to be formed under the new legislation, will become ever more important.³⁹

Both the ministries and the provinces are required to set environmental plans to be revised every four years.⁴⁰ These plans may be extended for a maximum of two years. Municipalities may

36. *Wet Milieubeheer* [ENVIRONMENTAL MANAGEMENT ACT], Stb. 1988, nr. 133 (current version at Stb. 1992, nr 317 (1992)) [hereinafter EMA].

37. CONCERN FOR TOMORROW, RIJKSINSTITUUT VOOR VOLKSGEZONDHEID EN MILIEUHYGIENE, RIVM, [NATIONAL INSTITUTE OF PUBLIC HEALTH AND ENVIRONMENTAL PROTECTION] (1988).

38. See NEPP, *supra* note 6.

39. See EMA, *supra* note 36, at ch. 2, § 2.3, art. 2.25 (1993).

40. See *id.* at ch. 4 (1993), PLANNEN (PLANS), § 4.2., HET NATIONALE MILIEUBELEIDSPLAN (THE NATIONAL ENVIRONMENTAL MANAGEMENT PLAN) and § 4.4 HET PROVINCIALE MILIEUBELEIDSPLAN (THE PROVINCIAL ENVIRONMENTAL MANAGEMENT PLAN).

draft their own plans but are not required to do so.⁴¹ In addition, each authority must annually draft an environmental program, which contains an assessment of the plan.⁴² There is no hierarchical relationship between the central, provincial, and municipal government plans, and each authority must take into account its own plan. But for strict coordination, it is obvious that such a variety of organizational plans could lead to chaos and conflicts with industry being left in limbo as to where to apply for which permit. The EMA has thus created a Central Advisory Body, in which representatives of environmental NGOs, employers' and workers' unions, provincial and municipal governments, and specialists advise the Coordinating Minister.⁴³

A. *Permits*

Engaging in industrial activity in the Netherlands without a permit is prohibited. Chapter 8 of the EMA explains in detail the rules to be followed by the authorities when granting an EMA permit, listing eleven criteria which the competent authority must either "adhere to", "take into account", or "observe".⁴⁴ In practice, acquisition of a permit is a complicated procedure. At a central level, several different ministries are involved in the planning, such as Transport and Public Works for water management, water pollution, and road building; Agriculture, Nature Management, and Fisheries for agricultural issues; Economic Affairs for energy and energy conservation issues; Social Affairs and Employment for protection of employees at industrial plants; Welfare, Public Health, and Culture for contaminants in

41. EMA, *supra* note 36, at ch. 4, § 4.6 HET GEMEENTELIJKE MILIEUBELEIDSPAN (THE MUNICIPAL ENVIRONMENTAL MANAGEMENT PLAN) (1993).

42. *Id.* at ch. 4, §§ 4.3, 5, 7 (1993).

43. *Id.* at ch. 2, § 2.1 (1993).

44. *Id.* at ch. 8, art. 8.8 (1993).

foodstuffs; and Foreign Affairs for international issues. Since most industrial activity will likely involve issues concerning more than one Department, in theory, one permit may require negotiations with several (competing) departments. In addition, if the permit is granted, its conditions must also meet the "ALARA" principle, which requires a company to take measures which keep emissions "as low as reasonably achievable."⁴⁵ If all conditions have been met, a permit may still be denied in the interest of protecting the environment.

All permit applications, together with the draft permit, must be made public. Often they are published in the local newspaper, and they may be published in the Official Gazette (*Staatscourant*). In addition they must be sent to the users of real property adjacent to the area for which a permit was requested. Upon request, a public hearing will be held, where anyone with an "environmental interest" can object.⁴⁶ Appeal can be taken by anyone who objected initially to the draft permit or the application to the Council of State (*Raad van State*).⁴⁷ No property damage or personal injuries are required--environmental interests are sufficient and give third parties standing. The objector's nationality and distance from the affected site are irrelevant for filing such an objection, but usually distance will be a factor to be weighed by the Council in arriving at a final decision. Distance, however, is irrelevant in the case of an official environmental organization, which only needs to file objections in conformity with their own objectives, as laid down in their articles of association.

The Dutch policy departs from earlier requirements where actual injury needed to be established before acquiring sufficient standing to object. In fact, it comes very close to the proposal of

45. THE LAW OFFICES OF NAUTA DUTILH, ASPECTS OF ENVIRONMENTAL LAW IN THE NETHERLANDS, 20 (March 1993). [hereinafter NAUTA DUTILH].

46. EMA, *supra* note 36, at ch. 13, § 13.2.3, Art. 13.17(1) ADVIEZEN EN BEZWAREN (ADVICE AND OBJECTIONS) (1993).

47. *Id.* at ch. 20. BEROEP (APPEAL), § 20.1, art. 20.6(2) (1993).

the Experts Group on Environmental Law as commissioned by the Brundtland Commission, which proposed that "States shall provide remedies for persons who have been or may be detrimentally affected by a transboundary interference with their use of a transboundary natural resource or by a transboundary environmental interference."⁴⁸

For persons to have transboundary access to the local court system, a legal system needs to be in place to provide internally affected persons such access. Treaties can later be put in place with neighboring countries, extending these rights to citizens of neighboring states. In an important case commenced by plaintiffs G.J. Bier and the Reinwater Foundation, the Dutch Supreme Court⁴⁹ ruled that French potassium mines discharging salted effluent into the Rhine, thereby causing damage to the nurseries in the Netherlands "Westland" area, were entitled to use the river just as the nurseries were, but that they had to take into account the downstream interests. The French defendant, Potassium Mines, objected that the courts of The Netherlands, including the *Arrondissementsrechtbank* (Court of First Instance), did not have jurisdiction in the matter. In a judgment delivered on May 12,

48. See EXPERTS GROUP, *supra* note 28, at art. 20; GENERAL PRINCIPLES CONCERNING NATURAL RESOURCES AND ENVIRONMENTAL INTERFERENCES. See also North American Agreement on Environmental Cooperation, 32 I.L.M. 1480 (1993) (Can.-Mex.-U.S.), art. 6, 22-26.

49. G. J. Bier B.V. et al. are engaged in the business of nursery gardening. Because of the high salinity of the Rhine, Bier was obliged to take expensive measures to limit it. The Reinwater Foundation exists in order to promote every possible improvement in the quality of the water in the Rhine basin, especially by opposing any deterioration in the natural quality of the water. The means whereby it seeks to achieve the purpose consist in particular in bringing legal actions so as to ensure the protection of the personal rights of all those whose environment is affected by the quality of the water of the Rhine and, in particular, of those whose livelihood is dependent upon it.

1975, the *Arrondissementsrechtbank* held that it had no jurisdiction⁵⁰ because the event that had caused the damage could only be the discharge of the residuary salts into the Rhine in France and, therefore, under the Brussels Convention,⁵¹ the case came under the jurisdiction of the French court.

On June 13, 1975, Bier and Reinwater lodged an appeal against that judgment with the *Gerechtshof* (Appeals Court) of the Hague, and requested a reconsideration of the lower court's decision. Bier and Reinwater relied on Article 5(3) of the Brussels Convention, which provides that a defendant domiciled in a Contracting State may be sued in the place where the harmful event occurred on matters relating to tort, delict, or quasi-delict. The *Gerechtshof*, Second Chamber, felt that the proper course was to apply Article 2(2) and Article 3(2) of the Protocol of 3 June 1971 on the Interpretation by the European Court of Justice of the Convention. Accordingly, by judgment of February 27, 1976, it stayed the proceedings until the Court of Justice had given a preliminary ruling on the interpretation of what is meant by, "the place where the harmful event occurred" as stated in Article 5 (3) of the Convention. In particular, it asked the Court to determine whether the meaning is the place where the damage took place or became apparent or rather the place where the act was or was not performed. The Court held that:

[w]here the place of the happening of the event which may give rise to liability in tort, delict or quasi delict and the place where that event results in damage are not identical, the expression 'place

50. Judgment of May 12, 1975 (*Handelskwekerij G.J. Bier & De Stichting Reinwater Foundation v. Mines de Potasse d'Alsace S.A.*), Rb., Case 4230/74 (Neth.).

51. Brussels Convention on Jurisdiction and the Enforcement of Civil and Commercial Judgments, Sept. 27, 1968, July 28, 1990, 29 I.L.M. 1413 (1990) reprinted in JOSEPH M. LOOKOFKY, TRANSNATIONAL LITIGATION AND COMMERCIAL ARBITRATION 673 (1992) [hereinafter Brussels Convention].

where the harmful event occurred', in Article 5(3) of the Convention of 27 September 1968 on jurisdiction and the enforcement of Judgments in Civil and Commercial Matters, must be understood as being intended to cover both the place where the damage occurred and the place of the event giving rise to it.

The result is that the defendant may be sued, at the option of the plaintiff, either in the courts for the place where the damage occurred or in the courts for the place of the event which gives rise to and is at the origin of that damage.⁵²

The importance of this action is that it opens the door for foreign plaintiffs to commence legal proceedings in the Netherlands (or any other Member State), should they wish to do so. The EMA seems not to exclude foreign plaintiffs from asserting standing in the Netherlands for environmental injuries.

B. *Covenants*

Even with a central coordinating agency in place, the permit system is not the easiest way of ascertaining whether the industry complies with all relevant current regulations or has in fact applied for all applicable permits. Consequently, the EMA creates a second option for allowing the government to achieve its environmental goals--the covenant.

It is well established that the Dutch government may conclude contracts in a civil capacity with regard to the exercise of

52. Case 21/76, *Handelskwekerij G. J. Bier B.V. v Mines de Potasse d'Alsace S.A.*, 1976 E.C.R. 1735 (preliminary ruling requested by the *Gerechtshof of The Hague*).

their discretionary powers under public law.⁵³ This power enables the government to enter into voluntary agreements with industries. The government cannot solve environmental problems on its own. Therefore a "target group" policy was chosen to assure that special attention was paid to priority target groups.⁵⁴ The main aim is to tackle environmental problems integrally by target group. Such groups may consist of consumers, NGOs, the retail trade sector and industrial sectors. In consultation with target groups, concrete agreements are made about ways to execute and implement the environmental targets. These agreements are called covenants. Once the target groups have been defined, individual industrial branches are invited to participate.⁵⁵ Following this, an attempt is made to determine an individual target plan for each participant. Sometimes such groups are homogenous, with similar environmental problems (e.g., gas stations), and a more or less standard covenant may be worked out for all participants. On the other hand, some groups, such as the primary metals industry, are far more heterogeneous. In those cases, the environmental problems of each company may vary enormously. The aim is to negotiate with each company within the group individually, having the companies themselves propose workable plans to achieve the goals as agreed with the target group as a whole and as laid out in

53. See NAUTA DUTILH, *supra* note 45, at 22.

54. WETENSCHAPPELIJKE RAAD VOOR HET REGERINGSBELEID, RAPPORTEN AAN DE REGERING: MILIEUBELEID, STRATEGIE, INSTRUMENTEN EN HANDHAAFBAARHEID, 41/1992 Ch. 4, at 121 *et seq.* (SCIENTIFIC COUNCIL FOR GOVERNMENT PLANNING, REPORTS TO THE GOVERNMENT: ENVIRONMENTAL PLANNING, STRATEGY, INSTRUMENTS AND REALIZATION) (1992).

55. Currently over 12,000 companies of more than 5 employees, comprising over 90 % of environmental accountability. See J.H.G. VAN DEN BROEK, DE ROL VAN MILIEUCOVENANTEN BIJ DE VERLENING VAN EEN MILIEUVERGUNNING (J.H.G. VAN DEN BROEK, ESQ., THE ROLE OF ENVIRONMENTAL COVENANTS IN ISSUING ENVIRONMENTAL PERMITS), in 5 Milieu en Recht 258 (mei 1992) (5 ENV'T & L. 258 [May 1992]).

the covenant.⁵⁶ Companies report annually to the government on progress. Compliance with the plan serves as a basis for the issuance of environmental permits, without which no company may operate. If the relevant authorities are not satisfied with the achieved results, then they may impose stricter conditions on the applicable licenses. The company may lodge an appeal against the decisions of the licensing authorities, and the issue will then be whether the decision of the relevant authorities is justified when judged against the background of the Declaration of Intent.⁵⁷

The added advantage of this process is that the government will obtain a direct insight of the viewpoints and opinions of an industry regarding its environmental goals before it enacts final legislation. Furthermore, the negotiated covenants may take the place of formal legislation. Since environmental standards are usually costly to implement, it may be taken for granted that an industry will only comply with restrictive regulations if they are ultimately beneficial to the industry or if they are imposed through legislation.⁵⁸

Nevertheless, in spite of the fact that an elaborate system is in place to implement and enforce environmental standards which require companies to comply upon penalty of law, several arguments can be made for voluntary compliance. The obvious advantages for an industry are the flexibility in negotiating targets

56. Certain covenants, such as the DECLARATION OF INTENT ON THE IMPLEMENTATION OF ENVIRONMENTAL POLICY FOR THE PRIMARY METALS INDUSTRY (1991), contain very specific emission levels, percentages of reduction, and allowable waste flow.

57. DECLARATION OF INTENT ON THE IMPLEMENTATION OF ENVIRONMENTAL POLICY FOR THE PRIMARY METALS INDUSTRY, Eng. trans., at 5 (1991).

58. Forty-five percent of the industries spontaneously name "legal obligations" as the most important reason for investing in environmental measures. Much lower score the social responsibility of the industry (20%), the reputation or environmental image (12%), avoidance of damage claims (4%), or pressure by NGOs (2%). In this same poll, 89% stated that legislative measures are at least of "some importance." MISSET'S MILIEU MAGAZINE, Oct. 1991, at 48.

and the absence of coercive legislation. The advantages for the government include a speedier achievement of required targets that may otherwise take years to legislate as well as the voluntary commitment of the industry. The negative aspects are voiced by the environmental organizations, such as the Netherlands Society for Nature and Environment (*Stichting Natuur en Milieu*),⁵⁹ who object to the use of covenants because of the lack of democratic process, the juridical confusion as to their legal status, and the impossibility of enforcing stricter measures once the covenant is in place--objections that do not exist with ordinary legislation. The strongest objections to the use of covenants may be the legitimization of the wishes and desires of industry and the subordination of the needs of the population in having the government strictly enforce environmental objectives. Environmental organizations recognize the greatest danger as the government's failure to enact stricter legislation in furtherance of their environmental plans once a covenant has been negotiated. For example, Article 3.14 of the Civil Code provides that "[a] power which is due someone according to civil law may not be exercised in violation of the codified or unwritten rules of public law."⁶⁰ Environmental organizations have interpreted this article to mean that the covenants would restrict government in enacting and enforcing stricter environmental goals because of the covenants.⁶¹

Nevertheless, the Dutch government has with success entered into several covenants with industrial sectors on a national

59. Letter to the author, dated Oct. 26, 1993.

60. See, e.g., Netherl.C.C., bk.3, art.14 (BW. Boek 3, Art.14): "*Een bevoegdheid die iemand krachtens het burgerlijk recht toekomt, mag niet worden uitgeoefend in strijd met geschreven of ongeschreven regels van publiekrecht.*"

61. A.J.M. van den Biggelaar, director Stichting Natuur en Milieu (Society for Nature and Environment), Address at Commission of Environmental Management of the Second Chamber, Feb. 20, 1992. [hereinafter Biggelaar].

basis.⁶² In addition to the three major, nation-wide covenants, the government has negotiated several individual covenants with many of the target groups listed in the NEPP. As explained above, covenants with nationwide participation are aimed at implementing governmental policy on a faster track than would be possible through legislation. Often such covenants are meant to be of a temporary nature to be replaced by later laws or regulations that would default the covenant. Provided this is true, covenants play an important role in implementing the environmental plans of the government, and the environmental organizations are merely "crying wolf." The use of covenants is expressed in the NEPP:

Consultation with target groups may result in conclusions being expressed in covenants. Future environmental policy will make use of this instrument particularly in the following cases:

- if the aim set cannot be reached easily or quickly enough by imposing regulations;
- where, in the exploratory phase of a particular problem and preceding regulation, covenants can allow preliminary agreements favorable to the environment to be made;
- where, prior to regulation, a covenant is made by which the content of the future regulations will be used as far as possible as a basis;
- where existing regulations are supplemented or tightened up in a covenant.⁶³

62. See, e.g., PACKAGING COVENANT (June 1991); PRIMARY METALS COVENANT (March 1992); CHEMICAL INDUSTRY COVENANT (March 1993). A covenant with greenhouse industry, concerning the discharge of effluent of 4500 farmers in the "Westland", or 40% of Dutch greenhouse industry, was repealed in October, 1992.

63. See NEPP, *supra* note 6, at ch. 6, § 6.4.3 (regarding cooperation with target groups).

The NEPP further provides that covenants can be set up between businesses and environmental or consumer organizations without government participation. If satisfactory results are reached by this method, further regulations may not be imposed.

Dutch law does not provide any rules regulating environmental covenants. Essentially, a covenant is a contract, or a negotiated agreement between the government (or other party) and an industry. The Dutch Supreme Court has repeatedly affirmed that governments may conclude contracts in a civil capacity with regard to the exercise of their discretionary powers under public law.⁶⁴ In 1990, the Supreme Court held in the *Windmill* case that the government may only use civil law instruments for environmental purposes if such use does not unacceptably foil the effectiveness of the environmental public law instruments.⁶⁵ In other words, if the same result could have been reached under public law, the covenant would not be acceptable. Where, however, a covenant reaches results that have not been codified, and are in effect more stringent than the existing laws, such covenants should be given due effect.

A possible conflict may arise when permits are issued based upon covenants rather than existing law. The Supreme Court is not competent to hear appeals against environmental permits. Appeals should be heard by the Council of State (*Raad van State*), and in the *Hydro Agri* case this Council ruled that an environmental permit must be issued with due observance of the most recent environmental views available at the time of issue, disregarding undertakings by the government in covenants or earlier permits disregarded.⁶⁶ This leaves industry in a substantially uncertain position as to the enforcement of a covenant, because the

64. See NAUTA DUTILH, *supra* note 45, at 22.

65. Judgment of January 26, 1990, (*De Staat der Nederlanden v. Windmill Holland BV*), RvdW 1990.36, NJ 1990/408 (Neth.).

66. See NAUTA DUTILH, *supra* note 45, at 22.

government may decide to enact stricter legislation prior to the expiration of the covenant. The question arises whether the industry can enforce a covenant against the government, an issue which has not yet been decided. Should the government default due to a violation of public duties even as a result of unforeseen circumstances, it becomes liable for damages. Unanswered questions remain as to liability to industry where the government defaults because of restrictions imposed by EC directives or regulations.⁶⁷ It is unclear whether a regulation can be implemented through a covenant. This question may become an issue if the Dutch Packaging Covenant proves to be in conflict with the European eco-management and audit scheme.⁶⁸

C. *The European Eco-Audit Scheme*

On March 6, 1992, the European Commission proposed a Council Regulation allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme. This scheme was approved by the European Parliament on January 19, 1993.⁶⁹ It was established to evaluate and improve the environmental performance of industries and make this

67. The European Community has two primary types of legislative acts, directives and regulations. A regulation is directly applicable in all member states, and has immediate unconditional legal effect. It is law in the member states from the moment of issuance, binding upon all individuals, business organizations and governments. A directive establishes Community policy. It is then left to the member states to implement the directive in whatever way is appropriate to their national legal system. Only those directives that establish clear and unconditional legal norms and do not leave normative discretion to the member states are of direct effect. They can not be used to challenge private activities.

68. Council Regulation 1836/93, 1993 OJ (L 168) (allowing voluntary participation by companies in the industrial sector in a Community eco-management and audit scheme). [hereinafter Regulation 1836/93].

69. *Id.*

information available to the public. A participating company will be rewarded by an official listing and will be given permission to use the Eco-audit logo on company publications, letterheads, etc. Once an audit has been carried out, the company must issue an environmental statement, written in non-technical form so the general public can obtain a detailed assessment of all significant environmental issues, activities, programs and objectives. The Regulation came into force on July 13, 1993 and applies as of April 10, 1995.⁷⁰ EC countries are required to enact legislation effectuating the Regulation.⁷¹

The Netherlands as yet has no such legislation, but does have similar objectives in place. In 1989, the government issued a policy document on internal environmental care systems, which aimed at voluntary implementation by 1995 of an environmental management system for a group of about 10,000 companies with a high potential to pollute the environment. A further group of 250,000 companies, with a lesser potential to pollute, should have a partial system in place. Usually, these undertakings are contained in a covenant. As of February, 1993, sixty percent of companies with more than 500 employees had introduced such a system, as well as thirty-four percent of the food industry, and thirty percent of "services", such as waste removal and waste processing companies. The overall compliance stood at about twenty-one percent.⁷²

Although the government has conceded that its goal of having full compliance by 1995 will probably not be reached, the use of covenants does not seem to be an adverse factor. Since such a system will only work if it is integrated into a company's total management, there is no single system that will work for all

70. *Id.* at art. 21.

71. *Id.* at art. 16. Member States shall take appropriate legal or administrative measures in case of non-compliance with the provisions of this Regulation.

72. 16 INT'L ENV. REP. (BNA) 125, 126 (Feb. 24, 1993).

companies. Specifically, the use of a covenant seems to leave the industry free to tailor these systems to their own needs, whereas legislation would impose more rigid regulations.

D. *Enforcement*

The fact that Dutch law does not provide any rules, regulating covenants may ultimately render the use of the covenant in environmental law undemocratic and unchallengeable. Like most civil law countries, the Netherlands have two strictly separated legal systems, administrative and civil enforcement. The latter includes contract and tort actions for damages, the former criminal enforcement. Most covenants contain a clause which make them enforceable as a contract according to (Dutch) civil law.⁷³ They may also contain articles as to the settlement of disputes.⁷⁴

Challenges to the validity of a covenant may come from third parties, alleging that a covenant is unlawful or undemocratic on the grounds that the normal legislative process has been bypassed. Challenges could also come from excluded competitors in the same industrial branch. They may claim that pressure or an industrial boycott may ultimately force them into a position where they have no choice but to comply with the covenant, even when they were not part of the negotiations. As such, a covenant may be in conflict with European antitrust and competition law.⁷⁵

73. See, e.g., Packaging Covenant, art. 25 (1991).

74. See *id.* at art. 20, which provides for Arbitration in accordance with the regulations of the Dutch Arbitration Institute in case of a dispute. A dispute exists if "one of the Parties notifies the other by Registered Letter of that fact."

75. Treaty Establishing the European Economic Community, Jan 1, 1958, art. 85(1), 298 UNTS 11 (1957). This article deals with concerted business practices, business agreements and trade association decisions. When these have the potential to affect trade between member states and have the object or effect of preventing, restricting or distorting competition within the Community, such

Thus far, no attempts have been made to invoke EC competition law to limit the use of covenants, and a full discourse hereof is beyond the scope of this article.

Because industrial activity without a permit is prohibited in the Netherlands, when a company, individually or as part of a target group, has entered into a covenant agreement with the government, issuance of a permit depends on compliance with the terms of the covenant. It is thus necessary to discuss enforcement of permits before the legal status of covenants can be discussed.

Virtually every written decision ("*beschikking*") by public authorities may be appealed under the Administrative Decisions Appeals Act ("*Wet AROB*").⁷⁶ Appeal is open to every person or company having a direct interest in the matter. Hence, permits are open to court proceedings under the Act, where they have been challenged for violation. For instance, once an environmental organization has tested the permit against possible infringement with existing law, policy, or international treaty, or has evidence of the company violating the requirements of the permit, it may invite the responsible agency to issue enforcement orders. Under Art. 18.14 of the EMA, anyone may invite a competent agency to issue enforcement orders. Such orders (or the decision not to issue them) are a "*beschikking*," which is open to appeal under the Act. The importance of being able to institute proceedings under the Act is the short term of appeal and the inclination of the Council of State to substitute its judgment for that of the executive.

On the other hand, civil courts may offer legal recourse in matters where no administrative court is competent to hear the case. Accordingly, violations of permit conditions may be enforced criminally under the Economic Offenses Act ("*Wet Economische*

business activities are deemed incompatible with the Common Market and prohibited. Regulation 17 (1959-1962 O.J. Spec. Ed. 87) confers investigatory powers in the European Commission to conduct studies and to determine when violations of the competition law provisions of Articles 85 or 86 occur.

76. See NAUTA DUTILH, *supra* note 45, at 27-29.

Delicten"), which gives the public prosecutor the right to obtain provisional court orders for the closure of a plant, the appointment of a supervisory manager, or the forfeiture of profits gained from the offense.⁷⁷ The public prosecutors are cooperating actively with the agencies, which is leading to an increased number of court cases and convictions. Criminal enforcement measures may be taken alongside enforcement measures under administrative law. If a permit condition is violated, no further proof of fault is needed. The reverse is not true: even if permit holders comply with environmental permit, their conduct may still give rise to liability.⁷⁸

In the case of covenants there is usually no administrative recourse available, leaving open a limited option of enforcement in the district courts. On the other hand, if a covenant is violated, the question remains how third parties can obtain standing.⁷⁹ A distinction must be made between so called "gentleman's agreements," which impose general obligations without indicating which action specific companies must take or identifying how compliance is to be measured, and specific covenants, which by their terms, impose contractual obligations. It seems the former lack concreteness, whereas the latter would only seem to bind the companies which are party to them. However, in the *Unidek* case, the Counsel of State decided that a covenant between the permit-issuing authority and a company regarding the termination of environmental problems caused by the company, cannot be called upon to stop third parties from requesting the use of legislation to

77. *Id.* at 30.

78. See, e.g., *Vermeulen v. Lekkerkerker*, NJ 1972/753, (H.R. 1972, nr. 278) (shipyard which operated dump with official permit liable for damages where waste attracted birds and destroyed neighboring orchard).

79. Pieter Winsemius, *Environmental Contracts and Covenants: New Instruments for a Realistic Environmental Policy?*, 4 *TJDSCHRIFT VOOR MILIEU AANSPRAKELIJKHEID* 89 [ENV'T L LIABILITY L. REV.] (1993).

enforce such termination.⁸⁰

This seems to open up a door to enforcement, however, only in cases where subsequent legislation has been passed. In particular, it is interesting to look at both the Primary Metals Covenant and the covenant with the chemical industry. These covenants were passed to ensure the implementation of internal environmental care systems and to reduce all emissions by substantial percentages. Both mention the need for long-term certainty of emission levels in order to enable the industry to determine the requisite investments. As a trade-off, the government has undertaken to refrain from passing laws and from the intermediate raising of standards.⁸¹ Indeed, these restrictions, combined with the fact that the process may be regarded as unlawful or undemocratic in that they bypass the normal legislative or regulatory process, may well doom the use of the covenant as a means of fast-track enforcement of environmental policies. Uncertainty on the part of the industry in enforcement of a covenant through the governmental escape hatch of unforeseen circumstances may well have the effect of shying the industry away from engaging in voluntary agreements. Since the use of covenants, at least on a temporary basis or if strictly enforceable against third parties, may well be more efficient in achieving reasonable results with the cooperation of industry, the government should be allowed sufficient leeway to proceed on this novel path.

V. THE UNITED STATES

Industries and government in the Netherlands are generally more accustomed to negotiation and cooperation than in the United States, where lobbying is a major form of communication. Whereas it is inherent in the character of the Netherlands to seek a negotiated compromise between extremes, in the United States

80. See Biggelaar, *supra* note 61, at 6.

81. See NAUTA DUTILH, *supra* note 45, at 21.

such adversarial viewpoints are decided primarily in courts of law.

Inherently, the American legal system allows both parties to conduct virtually unlimited discovery. Thereby environmental groups obtain a deeper insight into industrial motives than presumably achieved under a voluntary negotiation process. In the civil systems, the judge requests evidence as she finds necessary, and the parties are not necessarily informed of each other's evidence. Further, economical blocking statutes ensure that vital industrial information may not be disclosed. It is thus more advantageous for an environmental organization or a government agency to negotiate in a civil system and to file suit in the American system, to acquire a maximum of information. At the same time, the necessity to seek redress in a court also breeds widespread suspicion as to each other's motives.

Hence, the ensuing effect in the United States usually is that once an Act has been promulgated by Congress, very little room is left for negotiated agreements between potential adversarial parties. Accordingly, this section of the article will investigate the possibility of using the concept of negotiated covenants between the Environmental Protection Agency [hereinafter EPA] and the industry.

In early 1983, the EPA announced in the *Federal Register* that it was beginning a project to explore the extent to which negotiations among interested parties could serve as an alternative to its current rule making process, an alternative that would better conserve time and resources and minimize litigation.⁸² The first and (to the author's knowledge) only attempt the EPA has made to use negotiated standards as an alternative to rule making was under the Toxic Substances Control Act [hereinafter TSCA].⁸³

TSCA was enacted in response to what Congress had perceived as unreasonable risks associated with the increasing

82. Toxic Substances Control Act, 48 Fed. Reg. 7494-7495 (1983) (currently codified at 15 U.S.C.A. § 2601 *et seq.* (1995)).

83. Toxic Substances Control Act, U.S.C.A. § 2601 *et seq.* (1993).

marketing of untested chemical products. TSCA provides for EPA issuance of rules requiring testing of chemicals, to be carried out and financed by the manufacturers or processors of these chemicals.⁸⁴ In section 2603(e) of TSCA, Congress mandates an expert panel of government scientists, the Interagency Testing Committee [hereinafter ITC], which is to select and recommend to the EPA a list of those chemicals whose potential risks to health and the environment are determined to warrant "priority consideration by the agency for the promulgation of a rule."⁸⁵ Industrial representatives did not participate in this committee. According to TSCA, the EPA was required within 12 months after the first inclusion of the substances in the list to "either initiate a rulemaking proceeding under subsection(a) . . . or if such a proceeding is not initiated within such period, publish in the *Federal Register* the . . . reason for not initiating such a proceeding."⁸⁶

The controversy began when the EPA announced in the *Federal Register* that it would not consider accepting voluntary testing programs, to be negotiated by the industry.⁸⁷ The EPA announced that such negotiations were to replace the initiating of a rulemaking proceeding. The stated policy of the EPA was that such agreements would be more expeditious in achieving the required results than top-down promulgated measures. The whole program was strictly planned according to a weekly schedule, whereby at ten and sixteen weeks after the ITC designation, public meetings were scheduled. After week sixteen, if the EPA determined that testing was necessary, the Agency was to begin work on a test rule, and to simultaneously invite industries to

84. *Id.* at § 2603.

85. *Id.* at § 2603(e)(1)(A).

86. *Id.* at § 2603(e)(1)(B).

87. For the Agency's response to testing, see 46 Fed. Reg. 53775 (1981) and 47 Fed. Reg. 335 (1982).

initiate proceedings for the purpose of developing a negotiated testing program. Eight weeks after that, the ITC and industry were to reach a preliminary agreement on a testing program. The EPA was to publish acceptable proposals and resulting comments were to be reviewed before publication of the EPA's final decision to adopt a negotiated voluntary testing agreement. By 1984, the EPA had not initiated any rulemaking proceedings and had accepted the voluntary testing programs as negotiated with industry. On August 28, 1994, the Natural Resources Defense Council, Inc. [hereinafter NRDC] and other filed suit.⁸⁸ NRDC claimed, among other things, that the "EPA violated the TSCA by accepting negotiated voluntary testing programs instead of proposing formal test rules (Claims One to Four)."⁸⁹ Pursuant to 15 U.S.C. § 2619(a)(2), "any person may commence a civil action . . . against the Administrator to compel the Administrator to perform any act or duty under this chapter which is not discretionary."⁹⁰ The central issue in this case was whether the EPA's implementation of TSCA satisfied the statutory mandate to either initiate rulemaking or to publish the EPA's reasons for not initiating such proceedings. After an initial discussion concerning the background and the process of the negotiated agreements, the court held that TSCA compelled the EPA to promulgate rules, and that such rulemaking was therefore not discretionary. Furthermore, the court strongly disapproved of the agency's practice of pursuing negotiated consent agreements in lieu of formal test rules:

I can find no support for EPA's decision to utilize negotiated testing agreements instead of the statutorily-prescribed initiation of rulemaking proceedings either on the face of the statute or based on some vague

88. *Natural Resources Defense Council v. U.S. Environmental Protection Agency*, 595 F.Supp. 1255 (S.D.N.Y. 1984). [hereinafter "Natural Resources"].

89. *Id.* at 1259.

90. Toxic Substances Control Act, *supra* note 82, at § 2619(a)(2).

assertion of agency discretion. 'The agency charged with implementing the statute is not free to evade the unambiguous directions of the law merely for administrative convenience'. . . [I]n the more than seven years since TSCA's enactment . . . EPA has yet to finalize a single test rule. Congress could not have intended or envisioned this result.⁹¹(citations omitted).

It seems that the major dilemma the court faced was the informality and uncertainty of whether the substance of negotiated testing agreements were judicially reviewable where the Act specifically provided for review in the Circuit Court of Appeals.⁹² The problem, aside from the lack of standards and reviewability, was that no specific rules had been formulated.

Whereas TSCA specifically provided for a "substantial evidence" standard,⁹³ presumably negotiated agreements could only be reviewed under the Administrative Procedure Act [hereinafter APA] using the "arbitrary and capricious" standard to review final agency action.⁹⁴

Review under the APA presumes that the negotiated agreements constitute "final action." Notably, the court addressed this problem by stating that, since the EPA motive for negotiating consent agreements in the first place was the expediency in providing the required data, it would be "a straightforward task to incorporate existing voluntary programs into statutory test rules."⁹⁵

It is important to note that neither the plaintiffs nor the court objected to the process of negotiated rules: "I agree that the

91. Natural Resources, *supra* note 88, at 1261.

92. See 15 U.S.C.A. § 2618.

93. *Id.* at § 2618(c)(1)(B)(i).

94. Natural Resources, *supra* note 88, at 1262.

95. *Id.*

negotiated programs without rulemaking cannot be sanctioned under TSCA, though negotiation to determine appropriate test protocols as well as other relevant criteria certainly is not only permissible but indeed preferable to blind, often impractical, bureaucratic blundering.⁹⁶ The court clearly sanctioned the negotiation process and left open the option of negotiated programs without rulemaking under other (Environmental) Acts such as those that do not specifically provide for review or, alternatively, provide for review under the same standard as the APA. In the latter case, where there is no difference in the standard, and where the negotiated consent agreements are designated as the equivalent of final rules, much can be said for the use of such covenants. In fact, the EPA has successfully negotiated several consent agreements, and has made them enforceable as "orders", issued under 15 U.S.C. § 2614(1). Thus, manufacturers and/or processors who violate consent agreements will be subject to criminal and/or civil liability under section 2615 of the Act; the EPA can invoke the remedies available under section 2616; and citizens can file civil actions to enforce consent agreements as prescribed in section 2619.⁹⁷

The EPA has cautiously continued to use the negotiation process as a basis for rule-making. In 1986, the EPA announced that it considered establishing a new advisory committee under the Federal Advisory Committee Act [hereinafter FACA]. Under the FACA, the EPA can only establish an advisory committee, if, after consultation with the Administrator of the General Services Administration [hereinafter GSA], the Agency determines that establishment of the committee is in the public interest in connection with the performance of duties imposed on the EPA by law. The Committee's purpose would be to negotiate issues leading to a notice of proposed rulemaking for regulations under

96. *Id.*

97. 3 WILLIAM H. ROGERS, JR., ENVIRONMENTAL LAW, PESTICIDES AND TOXIC SUBSTANCES, § 6.6 at 426 (West 1988 & Supp. 1992).

the Resource Conservation and Recovery Act.⁹⁸

The EPA established a four-point agenda which, if satisfied, would be appropriate for the use of negotiations as a regulatory process. To qualify under EPA's selection criteria, an item must: (a) be at pre-proposal stage of development; (b) have a relatively small number of identifiable parties, in an appropriate balance and mix, who have a good faith interest in negotiating a consensus; (c) present a limited number of related issues for which sufficient information is available for resolution; and (d) have a time factor that lends some urgency to the issuing of regulations.

Shortly after the EPA established their agenda, the Agency had successfully conducted three regulatory negotiations, with a fourth one pending, under the Clean Air Act and the Federal Insecticide, Fungicide, and Rodenticide Act. In 1990, Congress enacted the Negotiated Rulemaking Act [hereinafter NRA] which establishes a framework for the conduct of negotiated rulemaking and encourages agencies to use the process to enhance the informal rulemaking process.⁹⁹ The NRA codifies the four points the EPA had used during the 1980s, adding, among others that:

- there is a reasonable likelihood that a committee will reach a Consensus on the proposed rule within a fixed period of time; Consensus is defined as a unanimous concurrence among the interests represented on the committee. The committee may agree to define consensus to mean a general but not unanimous concurrence, or agree upon another definition.
- the negotiated rulemaking procedure will not unreasonably delay the notice of proposed rulemaking and the issuance of a final rule;
- the agency, to the maximum extent possible, consistent with the legal obligations of the agency, will use the

98. Resource Conservation and Recovery Act, 51 Fed. Reg. 25401 (1986).

99. Negotiated Rulemaking Act, 5 U.S.C.A. §§ 581-90 (1993).

consensus of the committee with respect to the proposed rule as the basis for the rule proposed by the agency for notice and comment.

Most recently, in 1992 and 1993, the EPA announced Advisory Committees on various sections of the Clean Air Act.¹⁰⁰ On February 1, 1993, the Sierra Club filed suit against the EPA for missing the November 1992 deadline for promulgating regulations for control of emissions from non-road sources. In settling the dispute, the EPA has agreed on a two phase plan, whereby phase two regulations will be conducted through regulatory negotiations.

VI. CONCLUSION

The use of negotiation to further environmental goals has certain major advantages. It allows the government to make an informed final decision, which is certainly preferable to blind, bureaucratic blundering. At the same time, it allows for traditionally adversarial groups such as industry and environmental organizations to negotiate beforehand on the necessity and desirability of achieving sustainable development. A further advantage is that public disclosure during the process makes possible close oversight by academics and other interested observers. Finally, participation in the negotiation process will alleviate at least some of the suspicion that ordinarily characterizes the process of rule-making. Yet, as discussion of the process in the United States has demonstrated, it is important to develop a strict time frame for establishing the final agreement, whether classified as a rule or a covenant. Both the time-frame and the final

100. See Clean Air Act, Tit. I, § 183(e), 57 Fed. Reg. 31473 (1992) (on emissions of VOC into the ambient air from consumer and commercial products, whether representatives from the Industry, the Consumers, Federal Agencies, State and Local Representatives of Air Pollution Agencies, and Environmental groups participated); Clean Air Act, Tit. I, § 213, 58 Fed. Reg. 34389 (1993) (on emissions from small nonroad spark-ignited engines 25 HP and below).

agreement must be made enforceable, if necessary, in a court of law. While broad participation will make it very unlikely that the final agreement will be challenged, the chances that negotiations will collapse in a seemingly endless discussion are very real, especially if one or more parties to the process become pressured in giving up too much of its own goals.

In the Netherlands, where the covenant seems to be established as an alternative for a government-promulgated final rule, such enforcement standards will need to be developed and be made accessible to all interested parties. In the United States, it may eventually be possible that the current process be partly replaced by the negotiated covenant. The importance of negotiated agreements is the realization that interested groups do have a positive contribution to make in the establishment of the various stages of sustainable development. The fact that all interested groups are encouraged to participate in this process will necessarily include people and industries from across our borders. This concept is, because of its size and geographical position, much more developed in the Netherlands than in the United States. As international environmental standards become recognized, which in turn influence national rule-making processes, the sooner "across-the-border participants" are invited to "our" negotiations, the better a country is equipped to address possible friction between industry and environmental groups. Such international negotiation may well require an international environmental court, accessible by interested parties, to enforce time frames and final agreements.

This planet cannot be cleaned overnight without giving up some of the current economic levels. Industry is central to the economies of modern societies and an indispensable motor of growth. It is essential to developing countries to widen their development base and meet growing needs. At the same time, both industry and governments are beginning to realize that better natural resource planning will, over time, allow us to produce more with less, conserving sufficient resources to allow humans to enjoy a healthy and productive life within nature.