

THE CONTENT OF THE AGREEMENTS ON THE PROTECTION OF THE RIVERS SCHELDT AND MEUSE

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I. — INTRODUCTION

On 26 April 1994, two Agreements on the protection of the rivers Scheldt and Meuse (1) were signed by France, the Netherlands and two of the three regional governments (Wallonia (2) and Brussels-Capital (3)) in Belgium. The third regional government (Flanders) signed the Agreements on 17 January 1995 (4), when it became clear that a long-standing Flemish demand concerning the deepening of the Western Scheldt was formally accepted by the Dutch government in a treaty concluded the same day (5). Flanders also concluded a treaty with the Netherlands concerning water drainage from the river Meuse (6). The signing of the river Agreements

(1) Belgium (Brussels-Capital, Flanders and Wallonia Regional Governments) France-Netherlands : Agreements on the Protection of the Rivers Meuse and Scheldt, done at Charleville-Mézières, France, 26 April 1994, in 34 *International Legal Materials (I.L.M.)* 851 (1995).

(2) Approved by Decree of 6 April 1995, *Belgian Official Journal (BOJ)* 22 June 1995.

(3) Approved by Ordinance of 15 May 1997, *BOJ* 10 September 1997 ; The parties to both Agreements are the same, although the Brussels-Capital Region has a different position in the Meuse Agreement. The territory of this Region lies outside the drainage area of the Meuse. Nevertheless the Meuse remains important for the production of drinking water to the Brussels Region. For this reason the voting rights of Brussels in the Meuse Commission are limited to decisions affecting its legitimate interests for the extraction of water of the Meuse for the production of drinking water (art. 6 (4), 2nd indent, Meuse Agreement). In the Scheldt Commission the Brussels-Capital Region is a member with full voting rights ; see on the participation of Brussels as a non-basin party in the Meuse Agreement : GOSSEKES, A., « The 1994 Agreements Concerning the Protection of the Scheldt and Meuse Rivers », 4 *European Environmental Law Review* 10 (1995).

(4) Approval Flemish Parliament by Decree of 16 April 1996, *BOJ* 29 May 1996.

(5) Treaty between the Kingdom of the Netherlands and the Flemish Region concerning the deepening of the sealane in the Western Scheldt, Antwerp, 17 January 1995 ; Approved by the Flemish Council by Decree of 22 December 1995, *BOJ* 6 maart 1996.

(6) Treaty between the Flemish Region and the Kingdom of the Netherlands concerning the drainage of water from the river Meuse and Annexes A, B and C, signed at Antwerp on 17 January 1995 ; approved by the Flemish Parliament by Decree of 22 December 1995, *BOJ* 6 March 1996 ; other draft agreements between Belgium and the Netherlands before 1993 dealt with an integrated approach on water quality and water drainage of the rivers Scheldt and Meuse : cf. draft bilateral treaty on cooperation in the management of the Meuse and Scheldt

between the Belgian Regions and two of their common neighbouring countries, without the Belgian federal state as a party, was an important diplomatic step for the recognition of the international treaty-making power of the Belgian Regions in matters which belong to their regional competences (7). Although the Flemish Community and French-speaking Community had already treaty-making powers for community matters, the Belgian Regions had to wait until 1993 to gain official treaty-making powers for regional matters (8), such as the protection of the environment. The signing of the two river Agreements put an end to several long lasting disputes between Belgium and the Netherlands. The Netherlands, as the last downstream country before the rivers Meuse and Scheldt flow into the North Sea, have been asking for an improvement of the water quality of both rivers for more than twenty-five years. In 1975 two draft agreements, in particular the Bath treaty (Scheldt) and the Meuse treaty introduced water quality standards and the installation of river commissions, one for the river Scheldt and one for the river Meuse (9). Those treaties have never been ratified by the Belgian Parliament. Other watercourse treaties between Belgium and its neighbouring countries do not foresee the installation of permanent commissions empowered to deal with transboundary pollution issues (10), although some of them make the collection and exchange of data between technical departments compulsory (11). Besides, France as the upstream country was not really involved in treaty negotia-

between the Kingdom of the Netherlands and the Kingdom of Belgium, 12 April 1991 ; trilateral draft agreement on the cooperation in the management of the Meuse and Scheldt, proposed by the Netherlands on 20 February 1992 ; see for an appeal to an integrated approach between the protection of the Meuse and the discharge of the Meuse water : BOUMAN, N., « A New Regime for the Meuse », 5 *Review of European Community & International Environmental Law (RECIEL)* 161-168 (1996).

(7) Representatives from Germany, Luxembourg as well as the Belgian federal government attended the negotiations. Germany and Luxembourg have territory in the Meuse basin and have chosen for an observer status in the Meuse Commission, with the possibility to adhere to the Meuse Agreement at a later stage.

(8) Cf. Special Act of 5 May 1993 concerning the international affairs of the Communities and Regions, *BOJ* 8 May 1993 and article 167 of the Constitution, as coordinated on 17 February 1994, *BOJ* 17 February 1994.

(9) See MAES, F., « De verdragen ter bescherming van de Maas en de Schelde in een diplomatieke en internationaal milieurechtelijke context », *Tijdschrift voor Milieurecht (TMR)* 329-331 (1996/5) ; D'ARGENT, P., « L'évolution du statut juridique de la Meuse et de l'Escant : Une mise en perspective des accords de Charleville-Mézières du 26 avril 1994 », 30, *Revue belge de droit international (R.B.D.I.)*, 133, 1997.

(10) E.g. Convention entre le Royaume de Belgique et le Grand-Duché de Luxembourg au sujet des eaux de la Sûre, *BOJ* 29 March 1984.

(11) E.g. article 31, Traité entre le Royaume de Belgique et le Royaume des Pays-Bas, au sujet de l'amélioration du canal de Terneuzen à Gand et du règlement de quelques questions connexes et des annexes, signé à Bruxelles le 20 juin 1960, *BOJ* 30 December 1961.

tions concerning the protection of both rivers before 1993 (12). The 1994 Meuse and Scheldt Agreements will enter into force after all contracting parties have fulfilled their domestic procedures necessary for the Agreements to enter into force (art. 9). The Belgian federal state is not a party to the Agreements, but has the option to adhere to the Scheldt and Meuse Agreements (art. 6 (4)). If the Belgian federal state adheres to the Agreements, the right to vote will be limited to decisions concerning matters within the constitutional jurisdiction of the federal government. The Federal environmental competences are restricted to : 1. the definition of product standards ; 2. the protection of the population against ionising radiation, including radioactive waste ; and 3. the transit of waste (13). Contrary to other environmental treaties concluded the last 20 years, the European Community is not a party to the Meuse and Scheldt Agreements. The European Community is explicitly excluded to become a party to the Agreements (art. 10 (1)), but may be admitted as an observer (art. 7 (1)(b)) (14).

The Meuse and Scheldt Agreements establish a permanent forum for cooperation and consultation between the parties, respectively called the International Commission for the Protection of the Meuse against Pollution and the International Commission for the Protection of the Scheldt against Pollution. The Agreements have each 12, almost identical articles of which 7 articles have a more practical nature of organizing cooperation. Those latter articles deal with the composition and operation of the Commissions, the observers, the Commissions budget and some classical treaty clauses such as entry into force, accession, termination. The Scheldt Commission has been installed on 11 May 1995 in Antwerp and the Meuse Commission on 12 May 1995 in Luttich, and three working groups have been estab-

(12) In 1950 a Permanent Trilateral Commission between France, Belgium and Luxembourg has been installed to study the pollution of waters with detrimental effects on health in the territory of one of the parties. Although the Permanent Commission was able to create mixed technical Subcommissions for particular waters, as has been the case for the pollution of the river Spiere and the channels of the Hene, the Scheldt and the Lys between Belgium and France, the task of the Commission was restricted to the forementioned river and canals. The task of the Subcommission on the Spiere was to identify the sources of pollution and the responsibility of Belgium and France, and to report to the Permanent Trilateral Commission on measures to be taken : *Protocole franco-belge-luxembourgeois, portant création d'une Commission Tripartite Permanente des Eaux Polluées, signé à Bruxelles, le 8 avril 1950, BOJ 4 June 1950.*

(13) Article 6 § 1, 11, para 2 of the Institutional Special Act of 8 August 1980, as modified by the Special Act of 16 July 1993 ; see for Belgian environmental law in general : DEKETELAERE, K., MARTENS, B. and LEFEBURE, B., « Belgium », in CAMPBELL, D. and SWART, M. (Eds.), *International Environmental Laws and Regulations*, Vol. 1, Chichester, John Wiley & Sons, 1996, 17-43.

(14) According to articles 7 and 10, the Agreements are open to accession of any state whose territory is partly situated within the drainage area of the rivers (Germany and Luxembourg can adhere to the Meuse Agreement). Observers can participate in Commission meetings and may transmit any information or report regarding the purpose of the Agreements, but have no voting rights.

lished : « Emissions », « Water Quality » and « Cooperation and Joint Environmental Projects ».

2. — THE INTERNATIONAL LEGAL ENVIRONMENTAL CONTEXT : AN OVERVIEW

In the 1990's several environmental conventions have been concluded, influenced by the United Nations Conference on Environment and Development (1992) (15), either during the preparation of the Conference or afterwards. Some conventions affect the relations between states bordering international watercourses. The United Nations Convention on Environmental Impact Assessment in a Transboundary Context (Espoo-1991), introduces an environmental impact assessment for activities with a transboundary impact on inter alia water, although limited to major constructions or activities (16). The Convention on the Transboundary Effects of Industrial Accidents (Helsinki-1992) is a first step to prevent and control industrial accidents capable of causing transboundary effects (17). The Convention on Biological Diversity (Rio-1992) balances the sovereign rights of states over their biological resources and their responsibility for conserving their biological diversity and the use of their biological resources in a sustainable way (18). Especially the United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes (1992 Helsinki River Convention) (19) and the Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention) (20), which all riparian states of the Meuse and Scheldt signed,

(15) United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June, 1992, in 31 *I.L.M.* 814 (1992) ; see for the rivers in particular : Chapter 18 (C) of Agenda 21 : « Protection of water resources, water quality and aquatic ecosystems » : in JOHNSON, S.P., *The Earth Summit*, London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1993, 334-360 ; ROBINSON, N.A. (Ed.), *Agenda 21 : Earth's Action Plan*, New York, Oceana Publications, 1993, 376-384 ; see CAMPIGLIO, L., PINESCHI, L., SINISCALCO, D. and TREVES, T. (Eds.), *The Environment after Rio. International Law and Economics*, London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1994, 55-127.

(16) Article 1 (vii) and Annex I, United Nations Convention on Environmental Impact Assessment in a Transboundary Context, Espoo, 25 February 1991, in 30 *I.L.M.* 800 (1991).

(17) Convention on the Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, in 31 *I.L.M.* 1330 (1992).

(18) Convention on Biological Diversity, Rio de Janeiro, 5 June 1992, in 31 *I.L.M.* 818 (1992).

(19) United Nations Convention on the Protection and Use of Transboundary Watercourses and International Lakes, Helsinki, 17 March 1992, in 31 *I.L.M.* 1312 (1992) ; Council Decision 95/308/EEC of 24 July 1995, *O.J.* 1995 L 186/42 ; Approved by the Brussels Capital Council on 18 July 1996, *BOJ* 9 August 1996 ; Approved by the Flemish Parliament on 8 July 1996, *BOJ* 13 August 1996.

(20) Convention for the Protection of the Marine Environment of the North-East Atlantic, Paris, 22 September 1992, in 32 *I.L.M.* 1069 (1993) ; Approved by the Flemish Parliament on 19 April 1995, *BOJ* 4 October 1995 ; Approved by the Brussels Capital Council on 18 July 1996, *BOJ* 9 August 1996.

have inspired the content and the conclusion of the Scheldt and Meuse Agreements (21). Agreements concerning the protection of the Rhine (22) and the 1987 Rhine Action Programme (23), as well as the Third Ministerial North Sea Conference Declaration (1990) (24) have created a demand for an improved management of the Scheldt and Meuse river basins through a permanent cooperation forum between the riparian states. Several EC-directives provide water quality standards according to the uses of surface waters (for example drinking water supply (25); bathing water (26); fish water (27)), which the parties to the Scheldt and Meuse Agreements had to implement through implementation plans. The determination of the relevant uses of particular surface waters, and the water quality standards applicable to those waters or certain parts of them, remains however the responsibility of the member states. For transboundary watercourses the destination for the use of the water is left to the discretion of the riparians. The riparians of the Meuse proposed different quality standards, inter alia influenced by their location as a upstream or downstream country. The Netherlands for example demanded water quality for the abstraction of drinking water, while the Walloon Region proposed water quality to sup-

(21) Cf. preamble Scheldt and Meuse Agreements.

(22) Agreement on the International Commission for the Protection of the Rhine Against Pollution, Bern, 29 April 1963, in *UNTS* 994 :3; Convention on the Protection of the Rhine River Against Chemical Pollution, Bonn, 3 December 1976, in 16 *I.L.M.* 242 (1977); Convention on the Protection of the Rhine Against Pollution by Chlorides, Bonn, 3 December 1976, in 16 *I.L.M.* 265 (1977) and additional Protocol (1991); Rhine Action Programme drawn up by the International Commission for the Protection of the Rhine Against Pollution, Strasbourg 1987, in HOHMANN, H. (Ed.), *Basic Documents of International Environmental Law*, Vol. 2, London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1992, 1116; see also Protocol Concerning the Constitution of an International Commission for the Protection of the Mosel Against Pollution, Paris, 20 December 1961, in *UNTS* 940 :211; see for the Rhine: LAMMERS, J.G., « International Cooperation for the Protection of the Waters of the Rhine against Pollution », 5 *Netherlands Yearbook of International Law (NYIL)* 59-110 (1974); LAMMERS, J.G., « New International Legal Developments concerning the Pollution of the Rhine », XXVII *Netherlands International Law Review (NILR)* 171-193 (1980); LAMMERS, J.G., *Pollution of International Watercourses*, Boston/The Hague/Dordrecht/Lancaster, Martinus Nijhoff, 1984, 166-206.

(23) See NOLLEKAEMPER, A., « The Rhine Action Programme : A Turning Point in the Protection of the North Sea ? », in FREESTONE, D. and IJLSTRA, T. (Eds.), *The North Sea : Perspectives on Regional Environmental Co-operation*, London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1990, 123-138.

(24) Ministerial Declaration of the Third International Conference on the Protection of the North Sea, The Hague, 8 March 1990, Ministry of Transport and Public Works, The Hague, Netherlands. In the preamble of the Declaration : « The participants :... — invite states sharing the catchment area of major rivers entering the North Sea to establish mechanisms for the joint management of their waters, taking as an example the instruments developed for the river Rhine ;... ».

(25) Council Directive 75/440/EEC of 16 June 1975 concerning the Quality required of Surface Water intended for the Abstraction of Drinking Water in the Member States, as amended, *O.J.* 1975 L 194/26.

(26) Council Directive 76/160/EEC of 8 December 1975 concerning the Quality of Bathing Water, as amended, *O.J.* 1976 L 31.

(27) Council Directive 78/659/EEC of 18 July 1978 on the Quality of Fresh Waters needing Protection or Improvement in order to support Fish Life, as amended, *O.J.* 1978 L 222.

port life of certain fish species. Council Directive 76/464/EEC (28), intended to lay down emission standards (29) for dangerous substances, is essentially a framework directive requiring further Community implementation (30) by determining emission standards for list I substances. This has proved to be an extremely difficult task. Emission standards and water quality standards have been accepted in seven directives for 18 substances only (31). More important and from a later date is Directive 91/271/EEC concerning the purification of communal waste water (32). Directive 91/271 aims to limit the adverse effects of urban waste water and waste water from certain industrial sectors (33). It is already clear that the Belgian Regions will not be able to meet most of the deadlines in the urban waste water Directive. Directive 91/676/EEC aims to protect waters against pollution caused by nitrates from agriculture (34). The Directive does not lay down compulsory uniform emission standards, which is more difficult for diffuse sources, and relies fully on permissive instruments such as codes of good practice and action programs for sensitive zones identified by the member states themselves (35). Directive 96/61/EC concerning integrated pollution prevention control (IPPC Directive) lays down measures designed to prevent or, where that is practicable, to reduce emissions in the air, water and land from activities listed in Annex I, including measures concerning waste, in order to achieve a high level of protection of the environment as

(28) Council Directive 76/464/EEC of 4 May 1976 on Pollution caused by Certain Dangerous Substances discharged into the Aquatic Environment of the Community, as amended, *O.J.* 1976 L 129.

(29) The option of water quality standards is only used by the UK.

(30) The Directive established two lists of hazardous substances, the « black » list or list I and the « grey » list or list II. The list of pollutants established under the Directive are comparable to those established under the Convention for prevention of chemical pollution of the Rhine, as well as several conventions on marine pollution to which several member states were parties.

(31) See on the implementation of the « black list » substances : JOHNSON, S.P. and CORCELLE, G., *The Environmental Policy of the European Communities*, London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1989, 72-90.

(32) Council Directive 91/271/EEC of 21 May 1991 concerning Urban Waste Water Treatment, *O.J.* 1991 L 135/40.

(33) All urban areas must be provided with collection systems for urban waste water by 31 December 2000 where there is a population equivalent (p.e.) of more than 15,000 people, and by 31 December 2005 where the p.e. is between 2,000 and 15,000. Where urban waste waters are discharged into « sensitive » receiving waters, collection systems must be provided by 31 December 1998 for agglomerations of more than 10,000 p.e. Urban waste water entering collection systems must be subject to « secondary treatment » or an equivalent treatment before discharge, by 31 December 2000 for all discharges from agglomerations of more than 15,000 p.e., and by 31 December 2005 for all discharges from agglomerations between 10,000 and 15,000 p.e. All discharges from agglomerations of over 10,000 p.e. into sensitive areas must be subject to even more stringent treatment by 31 December 1998.

(34) Council Directive 91/676/EEC of 12 December 1991 concerning the Protection of Waters against Pollution caused by Nitrates from Agricultural Sources, *O.J.* 1991 L 375/1.

(35) See for an evaluation : ULF-HENNING MÖKER, « The EC Directive on Nitrates and its Relevance to the Reduction of Nitrogen Compounds in European Surface Waters caused by Agriculture », in VAN DUNNÉ, J.M. (Ed.), *Non-Point Source River Pollution : The Case of the River Meuse*, London, Kluwer Law International Ltd, 1996, 141-144.

a whole (36). The IPPC Directive shall reform inter alia the sectorial regimes under Directive 76/464/EEC and integrate them in one permit system for pollution from individual or diffuse sources in installations into the air, water or land (37) and replaces the BATNEEC (Best Available Technology/Techniques Not Entailing Excessive Costs) by BAT (Best Available Techniques), although the « availability » in the latter concept shall take into account the economic and technical conditions in the relevant industrial sector (38). A proposed water framework directive shall focus on water as it flows naturally through river basins towards the sea (39). Both quality and quantity aspects are addressed, requiring the coordination of all measures to achieve the environmental objectives for a sustainable protection and use of water, their effects and monitoring within river basins. The proposed directive shall confirm and formalize the so called « combined approach », which controls pollution at source combined with the setting of objectives for the environment. The Fish Water Directive (78/659/EEC) will be replaced and the Dangerous Substances Directive (76/464/EEC) will become redundant in the next century (40). Finally the UN General Assembly adopted the Convention on the Law of the Non-Navigational Uses of International Watercourses on 21 May 1997 (1997 UN Convention) (41), for which Belgium and France abstained from voting (42). This short overview of some relevant environmental conventions and EC-directives demonstrates that the Meuse and Scheldt Agreements are not to be situated in an international legal vacuum.

3. — TERRITORIAL AND MATERIAL APPLICATION

The preservation and improvement of the quality of the Meuse and Scheldt rivers (art. 2 (1)), from the source to their outlets to the sea, is the main purpose of both Agreements. To attain this objective, measures have

(36) Article 1, Council Directive 96/61/EC of 24 September 1996 concerning Integrated Pollution Prevention and Control, *O.J.* 1996 L 257/26.

(37) See for a comparison between the IPPC Directive and Directive 76/464/EC : PALLEMAERTS, M., « IPPC : Re-Regulation or De-Regulation ? », *European Environmental Law Review* 174-179 (1996).

(38) See on BATNEEC and BAT : CARETTE, A., « Op zoek naar de inhoud en draagwijdte van BAT(NEEC) », *TMR* 310-328 (1996/5).

(39) Proposal for a Council Directive establishing a framework for Community action in the field of water policy, *COM(97) 49 final*, 26 February 1997.

(40) The proposal envisages transposal of the new framework directive by member states by December 1999, and implementation of its provisions in stages, up to December 2013.

(41) Resolution 51/229 in 36 *I.L.M.* 700 (1997); the draft resolution has been prepared by the International Law Commission, whose work on watercourses started in 1974; see commentary : NOLLKAEMPER, A., « The contribution of the International Law Commission to international water law : does it reverse the flight from substance ? », *XXVII NYIL* 39-73 (1996).

(42) The Convention has been adopted by 103 votes in favour, 3 against (Burundi, China and Turkey) and 27 abstentions (including 3 European countries : Belgium, France and Spain). The Convention remains open to signature until 20 May 2000.

to be taken relating to that part of the drainage area of the contracting parties which is situated within their territories (art. 3 (1)). The drainage area is the area of which the waters run into the rivers Meuse and Scheldt or their tributaries (art. 1 (c)). Besides a definition of the Meuse (43) and Scheldt (44) and the concept of the drainage area, the concept of a river basin is also used. A river basin includes the rivers Meuse and Scheldt, as well as all the waterways and canals which directly or indirectly run into the rivers and are situated on the territory of the contracting parties. The concept of a river basin is only used once and is limited to transboundary rivers and canals (45). The concept of a drainage area is very much similar to the concept of « drainage basin » proposed by the International Law Association in article 2 of the Helsinki Resolution of 1966 (46). This drainage concept includes groundwaters (47). Groundwaters are also part of the definition of « watercourse » in the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses (48) and of the definition of « transboundary waters » in the 1992 Helsinki River Convention (49). The concept of drainage area includes the groundwaters (50) running into the rivers Scheldt and Meuse and their tributaries, including canals normally flowing into the rivers. Contrary to the 1997 UN Convention and the 1992 Helsinki Convention, the groundwaters in the Meuse and Scheldt Agreements do not have to be transboundary. Although groundwaters form part of the measures to be taken to protect the rivers against pollution (art. 3 (1)), those measures have to be taken by the contracting parties individually and are not explicitly part of the tasks of the Commissions. According to article 3 (4) each of the contracting parties « *shall endeavor to take appropriate measures to achieve an integrated management* » of the rivers drainage areas, nevertheless the contracting parties

(43) The Meuse is the Meuse river from the source to its outlet to the sea, including the Bergsche Maas, the Amer, the Hollands Diep and the Haringvliet (art. 1 (a), Meuse Agreement).

(44) The Scheldt is the Scheldt river, from its source to its mouth, including the coastal and Western Scheldt (art. 1 (a), Scheldt Agreement).

(45) Article 5 (j) : « To serve as a forum to discuss actions to be taken regarding the transboundary rivers and canals of the Meuse's/Scheldt's river basin ».

(46) ILA, Report of the Committee on the Uses of the Waters of International Rivers, *Report of the Fifty-Second Conference*, Helsinki 1966, ILA, London, 1966, 478-533.

(47) Article 2 : « An international drainage basin is a geographical area extending over two or more States determined by the watershed limits of the system of waters, including surface and groundwaters, flowing into a common terminus » : see on the concept of international drainage basin : VITÁNYI, B., *The International Regime of River Navigation*, Alphen aan den Rijn, Sijthoff & Noordhoff, 1979, 203-210.

(48) Article 2 (a) : « 'Watercourse' means a system of surface waters and groundwaters constituting by virtue of their physical relationship a unitary whole and normally flowing into a common terminus ».

(49) Article 1 (1) : « 'Transboundary waters' means any surface or ground waters which mark, cross or are located on boundaries between two or more States, wherever transboundary waters flow directly into the sea, these transboundary waters end at a straight line across their respective mouths between points on the low-water line of their banks ».

(50) Cf. GOSSERIES, A., *l.c.* 11 (1995).

« *shall work together to ensure sustainable development* » for the rivers and their drainage area (art. 3 (5)). In any case the groundwaters must have an influence on the quality of the main riverwater. The measures to be taken are measures to protect the water quality of both rivers against pollution. Those measures do not apply to the quantitative use of the water of the rivers or the quantitative use of groundwater. Canals, indirectly running into the main rivers form part of the drainage area, but only actions towards transboundary canals can be discussed within the Commissions.

Another matter of concern, as far as it has an influence on the quality of the water, seems to be the quality of the riverbed. According to article 4, the parties « *shall keep each other informed, within the framework of the Commission's activities, of their respective policies regarding the management of the riversediments and shall coordinate these policies as they deem necessary* ». The parties shall limit the dumping and discharge of dredged material and its movement downstream, as far as possible. Nowhere the Agreements oblige the parties to dump dredged materials originating from harbours and locks on land.

4. — MAIN OBJECTIVE :

COOPERATION THROUGH RIVER COMMISSIONS

The obligation to cooperate in order to prevent, control and reduce transboundary pollution is a well established principle of international law, reflected in case law and environmental conventions (51). The duty to cooperate includes the duty to exchange relevant and reasonable available information and to consult in cases of activities with transboundary effects, preferably through the establishment of joint mechanisms or permanent commissions to facilitate that cooperation. These obligations are towards international watercourses universally codified in article 8 (general obliga-

(51) Cf. Experts Group on Environmental Law of the World Commission on the Environment and Development (Experts Group WCED), *Environmental Protection and the Sustainable Development. Legal Principles and Recommendations*, London, Graham & Trotman, 1987, 68-72; LAMMERS, J.G., « International and European Community Law Aspect of International Watercourses », in LANG, W., NEUHOLD, H. and ZEMANEK, K. (Eds.), *Environmental Protection and International Law*, London/Dordrecht/Boston, Graham & Trotman/Martinus Nijhoff, 1991, 126-137; FRANCONI, F., « International Co-operation for the Protection of the Environment : The Procedural Dimension », in LANG, W., NEUHOLD, H. and ZEMANEK, K. (Eds.), o.c., 203-221; NOLLKAEMPER, A., *The Legal Regime for Transboundary Pollution : Between Discretion and Constraint*, Dordrecht/Boston/London, Martinus Nijhoff/Graham & Trotman, 1993, 152-164; BIRNIE, P.W. and BOYLE, A.E., *International Law and the Environment*, Oxford, Clarendon Press, 1992, 102-109; BOYLE, A., *The Principle of Co-operation : the Environment*, in LOWE, V. and WARBRICK, C. (Eds.), *The United Nations and the Principles of International Law. Essays in Memory of Michael Akehurst*, London, Routledge, 1994, 120-133 ; In EC-directives member states have the obligation to cooperate with the Commission on the exchange of information concerning the implementation of the directives : JOHNSON, S.P. and CORCELLE, G., o.c., 338-341 ; see in general : KRÄMER, L., « The Implementation of Environmental Laws by the European Economic Community », 34 *German Yearbook of International Law (GYIL)* 9-53 (1991).

tion to cooperate), article 9 (regular exchange of data and information) and part III (planned measures) of the 1977 UN Convention on the Law of the Non-Navigational Uses of International Watercourses. On a regional level (North-East Atlantic) article 9 (1) of the Convention for the Prevention of Marine Pollution from Land-Based Sources (Paris-1974) already explicitly mentioned a duty to enter into consultation, if pollution from land-based sources originated from the territory of a contracting party by substances not listed in the « black » list was likely to prejudice the interest of one or more of the other parties to the convention (52). Consultation should take place in order to negotiate a cooperation agreement. This article has never been used. The same duty has been taken over in article 20 (1) of the OSPAR Convention, replacing the 1974 Paris Convention. This duty is not limited to pollution from « black » list substances (53), but applicable towards transboundary pollution in general. It was however the 1992 Helsinki River Convention, signed by inter alia France, Belgium and the Netherlands, that provided the impetus for the conclusion of the Scheldt and Meuse Agreements and the installation of the Commissions (54). It is in the « spirit » of the 1992 Helsinki Convention that the Contracting Parties « shall cooperate in a neighborly spirit, keeping in mind their common interests as well as each other's special interest, in order to preserve and improve the quality of » (55) the Meuse and the Scheldt.

4.1. — *Tasks of the Commissions*

The tasks of the Commissions are described in article 5 and the most important task is : « *To prepare objectives and a program of action for implementation of the Contracting Parties, which should include measures aimed at all types of pollution sources, point or diffuse, in order to maintain and improve the quality of the water and of the ecosystem generally* » (art 5 (d)). The Commissions will mainly rely on action plans, since coordinated evaluations of the efficacy of those action plans will be carried out at regular intervals (art. 5 (e)). According to article 9 (2) of the 1992 Helsinki

(52) Convention for the Prevention of Marine Pollution from Land-Based Sources, Paris, 21 February 1974, 13 *I.L.M.* 352 (1974).

(53) The OSPAR Convention has no list with hazardous substances anymore.

(54) Especially part II (art. 9) of the 1992 Helsinki River Convention, where riparian parties have the obligation to enter into multilateral agreements where these do not yet exist. According to article 9 : « 1. The Riparian Parties shall on the basis of equality and reciprocity enter into bilateral or multilateral agreements or other agreements, where these do not yet exist, or adapt existing ones, where necessary to eliminate the contradictions with the basic principles of this Convention, in order to define their mutual relations and conduct regarding the prevention, control and reduction of transboundary impact. The Riparian Parties shall specify the catchment area, or part(s) thereof, subject to cooperation. These agreements or arrangements shall embrace relevant issues covered by this Convention, as well as any other issues on which the Riparian Parties may deem it necessary to cooperate ».

(55) Article 2 (1), Meuse and Scheldt Agreements.

River Convention : « *the tasks of these joint bodies shall be, inter alia... : (d) to elaborate emission limits for waste water and evaluate the effectiveness of control programmes ; (e) to elaborate joint water quality objectives and criteria... and to propose relevant measures for maintaining and, when necessary improving the existing water quality ;... »*. The parties to the Meuse and Scheldt Agreements could not agree on emission standards and (basic) water quality standards in the text of the Agreements (56). Those standards have still to be worked out by the Commissions. Although the riparian parties have already accepted emission standards and water quality objectives implementing EC-directives, those directives allow member states to agree on and implement more stringent emission standards and water quality objectives. The tasks of the Meuse and Scheldt Commission seems not restricted to define water quality objectives alone, but may embrace all measures relating to all types of pollution sources (point or diffuse) in order to maintain and improve the quality of the water and of the ecosystem (57), including the use of best available technology for point sources, best environmental practices for diffuse sources and clean technology (art. 3 (2)(b)(c)). A careful reading however reveals several drawbacks. Firstly, it is unclear if the setting of joint emissions standards belongs to the tasks of the Commissions. Contrary to the tasks of joint bodies in the 1992 Helsinki Convention, the Agreements do not explicitly mention the elaboration of joint emission standards. Secondly, the use of best available technologies, best environmental practices and clean technologies are « guiding » principles, and no hard (joint) legal commitments, very much depending on the economically acceptable conditions of every riparian party. These tasks of the Commissions are restricted to the promotion of cooperation and the exchange of information on the best available technologies (art. 5 (h)). For the use of best environmental practices and the use of clean technologies there is no such commitment. Furthermore the use of best environmental practices is, according to articles 3 (2)(c) of the Agreements, restricted to the discharge of dangerous substances and does not include the discharge of nutrients, although the use of for example nitrogen in European agriculture is highest in the Netherlands and Belgium (58). Thirdly, as long as the Belgian federal state is not a contracting party to the Agreements, the Commissions can not have the com-

(56) See for example : Annex A with basic water quality standards for both rivers in : *Ontwerpverdrag tussen het Koninkrijk der Nederlanden en het Koninkrijk België betreffende de samenwerking bij het beheer van de Maas en van de Schelde*, 12 april 1991.

(57) Article 5 (d) : « To prepare objectives and a program of action for implementation of the Contracting Parties, which should include measures aimed at all types of pollution sources, point of diffuse, in order to maintain and improve the quality of the water and of the ecosystem generally ».

(58) BALTUSSEN, W.H.M., « Non-point Source River Pollution : the Use of Nitrogen in Agriculture », in VAN DUNNÉ, J.M. (Ed.), *Non-Point Source River Pollution : The Case of the River Meuse*, London/The Hague/Boston, Kluwer Law International, 1996, 173.

petence to agree on common product standards. Product standards are to be considered as important tools in implementing the best environmental practices in order to reduce aquatic discharges of dangerous/hazardous substances from diffuse sources (59). Belgium and the Netherlands have the highest use of pesticides per hectare in the European Union (60). Although pollution by pesticides is a serious problem for both river systems, the Commissions can not propose common product standards to tackle this pollution problem.

The other tasks of the Commissions are related to the exchange of data and information, such as : 1. the collection and evaluation of data in order to identify the sources of pollution with a significant impact on the quality of the rivers and to draw up inventories and promote the exchange of information on sources of pollution ; 2. the coordination of the water quality monitoring programs to establish a homogenous network ; 3. the exchange of information on the water management policies of the parties ; 4. the exchange of information on projects having a significant transboundary impact on the quality of the rivers and subjected to an impact assessment ; 5. the promotion of cooperation and the exchange of information on best available technologies ; 6. the cooperation in scientific research programs concerning physical, chemical, ecological and fish management research ; 7. the organization of cooperation between national and regional warning and alert networks with a view to prevent and to combat accidental pollution ; 8. the drawing up of annual activity reports which will be available to the public (art. 5 (a)(b)(c)(f)(g)(h)(i)(j)(l)). The Commissions will organize cooperation with other international commissions having similar tasks with respect to neighbouring aquatic systems (art. 5 (m)). Finally, the Commissions have two open ended tasks : 1. to draw up any other type of report deemed necessary ; and 2. to deal with any other matter which the contracting parties shall in common accord entrust to the Commissions, lying within the scope of the Agreements (art. 5 (n)(o)). On best environmental practices there seems to be no need to cooperate. As long as the Belgian federal state is not a party, competences of the Commissions in all cases of pollution accidents will be restricted to the exchange of information concerning observation and alerting systems. The Commissions have no competences to deal with matters of material cooperation to combat transfrontier accidental pollution, which are matters of civil protection belonging to the competences of the Belgian federal state (61).

(59) See Appendix 1, OSPAR and Annex II, 1992 Helsinki River Convention.

(60) Cf. VAN DUNNÉ, J.M., « Legal Aspect of Non-point Source Pollution of the River Meuse : A Comparative Analysis of Issues of Liability in Tort and Multiple Causation », in VAN DUNNÉ, J.M. (Ed.), *o.c.*, 42.

(61) Advice Council of State L.23.944/9 & L.24.213/9, in *Gedr.St.*, Cons.Reg.W., 1994-95, nr. 330/1, 7 ; Advice Council of State L.24.561/8 & L.24.562/8, in *Gedr.St.*, VI.R., 1995-96, nr. 162/1 en 163/1, 17.

The signatory parties agreed that all aspects related to nuclear energy are not within the scope of these Agreements and fall within the competences of the EURATOM Treaty. According to article 38 of EURATOM, every plan relating to the discharge of radioactive waste which may result in transboundary pollution, has to be submitted to the European Commission for approval. An environmental impact assessment for nuclear projects, having a significant transboundary impact on the quality of the rivers do not fall within the scope of the tasks of the Commissions. The Flemish and Walloon region however argue that waste from nuclear plants which is not radioactive waste, is within the scope of the regional competences and the Agreements, as well as the environmental impact assessments for the release of those wastes (e.g. thermal wastes) (62).

4.2. — *Principles of cooperation*

The Meuse and Scheldt Agreements follow some trends in international environmental law (63), in the sense that general principles form part of the Agreements, while more substantive obligations will have to be decided by the Commissions, eventually in a « soft law » form. The articles on the principles of cooperation are however drafted in the same permissive way as is the case in the 1992 Helsinki River Convention, leaving the implementation of those principles to the discretion of the individual parties. The parties « *shall be guided* » by : the precautionary principle (64), the principle of prevention, the principle of reduction at source and the polluter pays principle. Those principles are already part of the European Community policy on the environment (65). With the principle of prevention, the use of clean

(62) Advice Council of State L.23.944/9 & L.24.213/9, in *Gedr.St.*, Cons.Reg.W, 1994-95, nr. 330/1, 7 ; Advice Council of State L.24.561/8 & L.24.562/8, in *Gedr.St.*, Vl.R., 1995-96, nr. 162/1 en 163/1, 16.

(63) See for example the land-based annex of OSPAR ; the land-based annex of the Convention to Protect the Baltic Sea against Pollution (Helsinki, 1972) ; the IPPC-Directive.

(64) See on the precautionary principle/approach : FREESTONE, D., « The Precautionary Principle », in CHURCHILL, R. en FREESTONE, D. (Eds.), *International Law and Global Climate Change*, London, Graham & Trotman, 1991, 21-39 ; HEY, E., *The Precautionary Concept in Environmental Policy and Law : Institutionalizing Caution*, 4 *Georgetown International Environmental Law Review* 301-318 (1992) ; FREESTONE, D. en HEY, E. (Eds.), *The Precautionary Principle and International Law. The Challenge of Implementation*, The Hague/London/Boston, Kluwer Law International, 1996.

(65) Article 130r (2), Treaty on European Union, O.J. 1992 C 224/52 : « Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies ».

technologies (66) is introduced, although limited to situations where the economic conditions are acceptable for the use of clean technologies (67). The use of clean technologies, although not explicitly mentioned, is also part of the obligation to prevent, reduce and control emissions at source in the 1992 Helsinki River Convention (68).

The precautionary principle in the Agreements means that *« action to avoid the release of dangerous substances which could have a significant transboundary impact shall not be postponed on the grounds that scientific research has not fully proved the existence of a causal link between the discharge of those substances and a possible significant transboundary impact »* (art. 3 (2)(a)). The precautionary principle is, in contrast to the OSPAR Convention, limited to *« dangerous substances »*, having a *« possible significant transboundary impact »*. The Agreements do not define a *« significant transboundary impact »* (69). According to the 1992 Helsinki River Convention a *« transboundary impact »* means *« any significant adverse effect on the environment resulting from a change in the conditions of transboundary waters caused by a human activity, the physical origin of which is situated wholly or in part within the area under the jurisdiction of a Party, within an area under the jurisdiction of another Party. Such effects on the environment include effects on human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments or other physical structures or the interaction among these factors ; they also include effects on the cultural heritage or socio-economic conditions resulting from alterations to those factors »* (art. 1 (2)). The 1992 Helsinki River Convention also restricts the precautionary principle to *« hazardous substances »*, having a *« potential transboundary impact »* (art. 2 (5)(a)). In the OSPAR Convention reference is made to any

(66) See for example on clean production : Bamako Convention on the Ban of Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa, in 30 *I.L.M.* 773 (1991) : *« Clean production shall not include 'end-of-pipe' pollution controls such as filters and scrubbers, or chemical, physical or biological treatment. Measures which reduce the volume of waste by incineration or concentration, mask the hazard by dilution, or transfer pollutants from one environmental medium to another, are also excluded »* (art. 4, (g)) ; see also article 2 (3)(b), OSPAR.

(67) Article 3 (2)(b), Agreements : *« The principle of preventive action according to which, in particular, clean technologies shall be used, under economically acceptable conditions »*.

(68) Article 3 (a), 1992 Helsinki River Convention : *« The emission of pollutants is prevented, controlled and reduced at source through the application of, inter alia, low — and non-waste technology »*.

(69) See on the meaning of *« significant »* : LAMMERS, J., *o.c.*, 1984, 584 ; SACHARIEW, K., *« The Definition of Thresholds of Tolerance for Transboundary Environmental Injury under International Law : Development and Present Status »*, XXXVII *NILR* 193-206 (1990) ; NOLLKAEMPER, A., *o.c.* 1993, 35-40.

substance or to energy (70), implicitly including nutrients. The precautionary principle in the Scheldt and Meuse Agreements is not applicable in cases of pollution by energy, genetically modified organisms or nutrients and the introduction of alien species. The introduction of genetically modified organisms into the environment is subjected to EEC-directives (71). Pollution by nutrients can give rise to problems of eutrophication. For thermal pollution from nuclear plants located along the river systems (for example at Doel and Chooz), the precautionary principle shall not apply. Although the introduction of alien or new species is of particular concern in article 22 of the 1997 UN Convention, the Meuse and Scheldt Agreements are silent about a precautionary approach in cases of detrimental effects from those organisms to the river ecosystems.

Another environmental principle in the Agreements is the principle of containment and reduction of pollution at source, according to which the parties « *shall strive to use the best available technology and the best environmental practices, under economically acceptable conditions, in order to reduce the discharge of dangerous substances from point, as well as diffuse, sources* » (art. 3 (2)(c)). Also the use of best available technologies (BAT) and in particular best environmental practices (BEP) to reduce pollution at source, is restricted to dangerous substances and does not apply to nutrients or agriculture, although both sources are explicitly mentioned in the 1992 Helsinki River Convention. According to article 3 (1)(f)(g) of this Convention appropriate measures are to be taken, such as the application of the best available technology, in order to reduce nutrient inputs from industrial and municipal sources and best environmental practices are to be developed and implemented for the reduction of inputs of nutrients and hazardous substances from diffuse sources, especially where the main sources are from agriculture. The use of best available technology and best environmental practice to reduce pollution at source is in the Agreements not drafted in a prescriptive form (parties « *shall strive to use* »), and their use depends explicitly on the « *economically acceptable conditions* » of the parties. These limitations, either in content and in application, are not so

(70) Article 2 (2)(a), OSPAR : « the precautionary principle, by virtue of which preventive measures are to be taken when there are reasonable grounds for concern that substances or energy introduced, directly or indirectly, into the marine environment may bring about hazards to human health, harm living resources and marine ecosystems, damage amenities or interfere with other legitimate uses of the sea, even when there is no conclusive evidence of a causal relationship between the inputs and the effects ».

(71) Council Directive 90/219/EEC of 23 April 1990, *O.J.* 1990 L 117/1 and Disposal of the Commission 91/448/EEC of 29 Juli 1991, *O.J.* 1991 L 239/23 ; Council Directive 90/220/EEC of 23 April 1990, *O.J.* 1990 L 117/15 and Council Disposal 91/596/EEC of 4 November 1991, *O.J.* 1991 L 322/1 ; see also Council of Europe : Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, in 32 *I.L.M.* 1228 (1993) ; McGARRY, T.O., « International Regulation of Deliberate Release Biotechnologies », in *International Responsibility for Environmental Harm*, FRANCHIONI, F. en SCOVAZZI, T. (Eds.), London/Dordrecht/Boston, Graham & Trotman, 1991, 319-361.

predominant in the OSPAR Convention where the same parties « shall » apply BAT (in the meaning of best available techniques (72)) and BEP, depending on the latest state of development of processes, facilities or methods of operation in the case of BAT. Social and economic implications for measures constituting BAT and BEP are in the 1992 Helsinki River Convention, the OSPAR Convention and the IPPC-Directive amongst other arguments to which particular attention can be given to. The predominance of economically acceptable conditions is less clear and more restricted to the economic feasibility of BAT. In Annex I of the 1992 Helsinki River Convention, BAT is defined as « 1. ... to mean the latest stage of development of processes, facilities or methods of operation which indicate the practical suitability of a particular measure for limiting discharges, emissions and waste. In determining whether a set of processes, facilities and methods of operation constitute the best available technology in general or individual cases, special consideration is given to : (a) comparable processes, facilities or methods of operation which have recently been successfully tried out ; (b) technological advances and changes in scientific knowledge and understanding ; (c) the economic feasibility of such technology ; (d) time limits for installation in both new and existing plants ; (e) the nature and volume of the discharges and effluents concerned ; (f) low — and non-waste technology. 2. It therefore follows that what is 'best available technology' for a particular process will change with time in the light of technological advances, economic and social factors, as well as in the light of changes in scientific knowledge and understanding » (73). In Annex II of the 1992 Helsinki River Convention the guidelines for developing BEP are given : « 1. In selecting for individual cases the most appropriate combination of measures which may constitute the best environmental practice, the following graduate range of measures should be considered : (a) provision of information and education to the public and to users about the environmental consequences of the choice of particular activities and products, their use and ultimate disposal ; (b) the development and application of codes of good environmental practice which cover all aspects of the product's life ; (c) labels informing users of environmental risks related to a product, its use and ultimate disposal ; (d) collection and disposal systems available to the public ; (e) recycling, recovery and reuse ; (f) application of economic instruments to activities, products or groups of products ; (g) a system of licensing, which involves a range of restrictions or a ban. 2. In determining what combination of measures constitute best environmental practices, in general or in individual cases, particular consideration should be given to : (a) the

(72) « 5. 'Techniques' include both the technology used and the way in which the installation is designed, built, maintained, operated and dismantled » : Appendix 1, OSPAR ; see the same definition of techniques in article 2 (11), IPPC-Directive.

(73) The same definition is almost verbatim given in Appendix I, OSPAR, with the exception that « BAT » means best available techniques and the reference to low — and non-waste technology is part of clean technology in art. 2 (3)(b)(i)(ii), OSPAR.

environmental hazard of : (i) the product, (ii) the product's production, (iii) the product's use, (iv) the product's ultimate disposal ; (b) substitution by less polluting processes or substances ; (c) scale of use ; (d) potential environmental benefit or penalty of substitute materials or activities ; (e) advances and changes in scientific knowledge and understanding ; (f) time limits for implementation ; (g) social and economic implications. 3. It therefore follows that best environmental practices for a particular source will change with time in the light of technological advances, economic and social factors, as well as in the light of changes in scientific knowledge and understanding » (74).

The Agreements also introduce the polluter pays principle (PPP), according to which the costs of pollution prevention, control and reduction measures, shall be borne by the polluter (art. 3 (2)(d)). The same definition has been given in article 2 (5)(b), 1992 Helsinki River Convention. This principle has been developed by the OECD in 1972, meaning : « *the polluter should bear the expenses of carrying out pollution prevention and control measures decided by public authorities to ensure that the environment is in an acceptable state* » (75). The PPP has been accepted by several international organizations and in conventions (76). In some conventions the polluter pays principle is considered as a general principle of international environmental law (77). The PPP is still strongly related to the economic policy,

(74) The criteria for the definition of BEP in Appendix I, OSPAR, are comparable with the guidelines of the 1992 Helsinki River Convention.

(75) OECD Recommendation on Guiding Principles concerning Environmental Policies, 26 May 1972, 11 *I.L.M.* 1172 (1972) ; see also OECD Recommendation on the Implementation of the Polluter Pays Principle (14 November 1974), 14 *I.L.M.* 234 (1975).

(76) For example : OECD, Declaration on Environmental Policy, 14 November 1974, in RUSTER, B. and SIMMA, B., *International Protection of the Environment. Treaties and Related Documents*, Vol. I, New York, Oceana Publications, 1975, 293 ; Council Recommendation on the Application of the Polluter Pays Principle to Accidental Pollution (1989), in 28 *I.L.M.* 1320 (1989) ; Parliamentary Assembly of the Council of Europe, *Resolution 592 (24 April 1975) on the economic consequences of « the limits of growth »* ; WHO Doc. ICP/RUD 113/Conf.Doc./1, 12 oktober 1989, in 20 *Environmental Policy and Law (Envtl Pol. & Law)* 57 (1990) ; UNEP, *UNEP/CHW.2/1/3*, 12 December 1991, 9 : « *Polluter Pays Principle : The potential polluter pays for the avoidance of pollution and the polluter pays for the clean-up cost of any pollution* » ; Principle 16 Rio Declaration, 31 *I.L.M.* 879 (1992) ; Art. 130r2, Treaty on European Union ; Art. 2 (2)(b), OSPAR Convention ; Art. 3 (4), Convention on the Protection of the Marine Environment of the Baltic Sea Area, Helsinki, 9 April 1992 ; Preamble Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, Lugano, 21 June 1993, 32 *I.L.M.* 1230 (1993) ; see SANDS, P., *Principles of International Environmental Law I : Frameworks, Standards and Implementation*, Manchester/New York, Manchester University Press, 1995, 213-217.

(77) Preamble International Convention on Oil Pollution Preparedness, Response and Cooperation, London, 30 November 1990, 30 *I.L.M.* 733 (1991) ; Preamble Convention on Transboundary Effects of Industrial Accidents, Helsinki, 17 March 1992, 31 *I.L.M.* 1330 (1992) ; see SMETS, H., « The Polluter Pays Principle in the Early 1990s », in CAMPIGLIO, L., PINESCHI, L., SINISCALCO, D. and TREVES, T. (Eds.), *o.c.*, 131-144.

although mainly inspired by environmental considerations (78). The principle needs to be operationalized by taking measures, which on their turn can directly or indirectly contribute to the prevention and reduction of pollution. Those measures can be, inter alia the introduction of strict liability, the use of environmental levies to reach environmental standards or an ecotax policy towards hazardous products. Indirectly the PPP can contribute to the development of BAT and clean technologies, if levies to control and reduce pollution to be borne by the polluters are high enough to stimulate more environmental friendly production methods. Some resolutions and recommendations recognize the application of the PPP with retroactive force in interstate relations (79), which is not the case with the PPP in the Meuse and Scheldt Agreements. The Agreements and the PPP do not refer to any obligation to restore damaged parts of the river ecosystems.

The reference to «sustainable development» in the Meuse and Scheldt Agreements is restricted to «*common consultation in order to ensure the conditions for the sustainable development of the Meuse/Scheldt and the drainage area*» (art. 3 (5)) (80). The Agreements do not make clear what is meant by sustainable development and what the final goal of sustainable development may be. In the 1992 Helsinki River Convention sustainable development is clearly stated in its traditional meaning, in a sense that «*water resources shall be managed so that the needs of the present generation are met without compromising the ability of future generations to meet their own needs*»

(78) OECD, Joint Session of Trade and Environment Experts, *An Introduction to Concepts and Principles of International Environmental Law*, COM/ENV/TD(93)117, 29 November-1 December 1993, 23-24 : «*Instituting the polluter pays principle ensures that the prices of goods reflect the cost of producing that good — including costs associated with pollution, resource degradation, and environmental harm. Environmental costs are reflected (or 'internalized') in the price of every good. The result is that goods that pollute less will cost less, and consumers may switch to less polluting substitutes. This will result in a more efficient use of resources and less pollution*» ; cf. BIRNIE, P.W. and BOYLE, A.E., o.c., 109-111 (1992).

(79) The Council of Europe proposed : «*States, industry and all persons shall be liable to pay for the environmentally harmful consequences of their actions and development programmes, whether these consequences are limited to their own territory or property or whether they spread beyond their frontiers or property and with regard to states, this liability should occur even when the activities were not known to be harmful at the time they were undertaken*» ; Para. 17, Resolution 1130 (1990), Parliamentary Assembly of the Council of Europe on «*the formulation of a European charter and a European convention on environmental protection and sustainable development*» (28 September 1990), in 1 *Yearbook International Environmental Law (Yb. Int'l Env.L.)* 490 (1990) ; cf. para. 3d, Recommendations of The Hague on International Environmental Law (16 August 1991) : «*In developing environmental policies at the national and international level, states should apply inter alia : — ..., — Principle of internationalization of costs, including the costs for environmental preservation and restoration, taking into account the responsibilities of polluters and users of natural resources*», 2 *Yb. Int'l Env.L.* doc.15/disk (1991) ; see on the PPP and inter-state relations via inter-state subsidies : SMETS, H., l.c. 141-142.

(80) The English translation in 34 *I.L.M.* 851 (1995) is slightly different and goes further than the authentic Dutch and French version : «*The Contracting Parties shall work together to ensure sustainable development for the Meuse (Scheldt) and its drainage area*». Although «*consultation*» is a form of working together, it is much more restricted to inform each other in good faith and does not imply common activities or to act according the supplied information.

(art. 2 (5)(c)). This reference is not restricted to the quality of the water, but also includes the use of water, which is not the case with the Meuse and Scheldt Agreements. Besides, the parties do not have the obligation to manage both rivers in a sustainable way. They only have the obligation to consult each other to define the conditions for a sustainable development and do not have the obligation to act in order to reach sustainable development of the rivers and their drainage area. The contracting parties shall only «*protect and, as far as possible, improve the quality of the aquatic ecosystem of the Meuse/Scheldt, by inter alia management measures and the way in which the environment is used*» (art. 3 (6)). Contrary to the 1992 Helsinki Convention where the parties have to take all appropriate measures «*to ensure conservation and, where necessary, restoration of ecosystems*» (art. 2 (2)(d)).

4.3. — *Decision-making within the Commissions*

The Commissions are composed of the delegations of the contracting parties and each contracting party has one vote in the decision-making process. The decisions of the Commission shall be taken in the presence of all the delegations of the contracting parties and by unanimous vote. The abstention of voting of a single delegation is not an obstacle to unanimity (art. 6 (4)). Although «*decisions*» may allude to a legal binding force (81), decisions by the Commissions have no legal binding force and are restricted to issue «*advisory opinions and recommendations to the Contracting Parties regarding cooperation under this Agreement*» (art. 5 (k)). Furthermore the main competences of the Commissions have a more informative and administrative nature. Since the Commissions can not take legally binding decisions, one can wonder why decisions have to be taken by unanimity. In some environmental conventions, legally binding decisions can be taken by majority vote (82), while the interests of minority votes can be protected by an «*opting-out*» clause. Important decisions of the Scheldt and Meuse Commissions can be upgraded from the administrative to the political level, since the Commission «*may hold some of its meetings at the ministerial level*» (art. 6 (3)). This situation is a mirror of the decision-making process in the case of the Rhine and has not proven to be very successful to protect the ecosystem of the Rhine (83). Furthermore the Commissions are not empowered to take decisions on action programs, containing time limits for their implementation. More and more environmental conventions contain time limits for the implementation of substantive objectives or empower commissions to take decisions with time limits to implement

(81) Cf. art. 13 (2), OSPAR Convention.

(82) See for example SZELL, P., «*Decision Making under Multilateral Environmental Agreements*», 26 *Env'tl Pol. & Law* 210-214 (1996).

(83) See GOSSERIES, A., *l.c.* 12-13 (1995).

them. Under the OSPAR Convention « *all decisions adopted by the Commission shall, where appropriate, contain provisions specifying the timetable by which the decision shall be implemented* » (art. 13 (4)). Also the Elbe Commission is empowered to propose specific action for the reduction of discharges of harmful materials from point and diffuse sources and further measures, including timetables (84).

4.4. — *Observers and public access to information*

Contrary to other environmental conventions (for e.g. art. 11, OSPAR Convention), environmental non-governmental organizations are not allowed as observers in the Scheldt and Meuse Commissions. This will further weaken the already weak public participation and public access to information concerning the Commissions' activities. The only public information obligation of the Commissions is restricted to an annual report concerning the activities of the Commissions, or any other report deemed necessary (art. 5 (n)). There is no explicit obligation, as is the case in article 16 of the 1992 Helsinki River Convention, to supply for example public information concerning the effectiveness of the measures taken, the permits issued and the conditions required to be met, the results of checking compliance with the water quality objectives or permit conditions (85). However, the riparian parties are already bound by Council Directive 90/313/EEC on the freedom of access to information on the environment (86), according to which public authorities have to respond to demands from the public concerning information related to the environment.

5. — CONCLUSION

The Meuse and Scheldt Agreements have the merit of stimulating permanent cooperation between the riparians of both rivers. The success of this cooperation depends on the political will of the parties. The textual content of the Agreements is rather weak in expressing the obligations. All impor-

(84) Article 2 (1)(f), Convention on the International Commission for the Protection of the Elbe, Magdeburg, 8 October 1990, in *O.J.* 1991 L 321/25.

(85) Article 16, 1992 Helsinki Convention : « 1. The Riparian Parties shall ensure that information on the conditions of transboundary waters, measures taken or planned to be taken to prevent, control and reduce transboundary impact, and the effectiveness of those measures, is made available to the public. For this purpose, the Riparian Parties shall ensure that the following information is made available to the public : (a) Water-quality objectives ; (b) Permits issued and the conditions required to be met ; (c) Results of water and effluent sampling carried out for the purpose of monitoring and assessment, as well as results of checking compliance with the water-quality objectives or the permit conditions. 2. The Riparian Parties shall ensure that this information shall be available to the public at all reasonable times for inspection free of charge, and shall provide members of the public with reasonable facilities for obtaining from the Riparian Parties, on payment of reasonable charges, copies of such information ».

(86) Council Directive 90/313/EEC of 7 June 1990, *O.J.* 1990 L 158/56.

tant obligations are obligations of conduct, most of them expressed in a permissive way. There are no real obligations of result, except the financial contributions of the different parties in the budget of the Commissions. Nowhere in the Agreements one finds more detailed objectives, such as common basic quality objectives, harmonized emission standards for dangerous substances, time limits to reach common objectives and standards or any other measures related to the use of the water for various purposes. All this is left to the discretion of the parties within the Commissions. Substantive measures have to be identified by the Commissions in an action plan. The Meuse and Scheldt Commissions are able to prepare objectives and programs of action to improve the quality of the water and the ecosystem, only if those objectives and programs are accepted by unanimous vote. The action plans will be able to tackle point and diffuse sources, but no source related product standards as long as the Belgian federal state is not a party to the Agreements. Furthermore the implementation of action plans remains fully within the competence of the individual contracting parties, leaving the Commissions powerless to stimulate the implementation in some kind of compulsory way.

It should be noted that parties to these Agreements which become parties to the 1992 Helsinki Convention will also be bound by the latter Convention. The 1992 Helsinki River Convention in article 3 on prevention, control and reduction of transboundary impacts, goes further than the Meuse and Scheldt Agreements. Firstly, the Meuse and Scheldt Agreements refer to pollution or the quality of the water and the riverbed, two concepts which are not defined in the Agreements. The objectives of the Helsinki River Convention are to prevent-control-reduce « *transboundary impacts* ». A transboundary impact is a much broader concept than pollution, which is normally restricted in treaties to the introduction of substances and energy into the aquatic environment. Secondly, the prevention-control-reduction obligations in the 1992 Helsinki River Convention are more precise. Parties for example have to set emission limits based on BAT and may inter alia prohibit totally or partially the production and use of hazardous substances. Thirdly, it is not clear at all if an integrated management or management measures for the Scheldt and the Meuse mean the restoration of ecosystems, as mentioned in the 1992 Helsinki River Convention.