Information Disclosure as an Instrument of Environmental Governance

*Peter H. Sand**

Environmental governance is plagued by uncertainty, with regard both to bio-geophysical processes and to their socio-economic costs and benefits.[1] Some of those uncertainties are exogenous, often incalculable, and we simply have to cope with them as risks and unknowns.[2] Other information deficits, however, are manifestly endogenous, home-made – "manufactured uncertainty"[3] or "smokescreen uncertainty".[4] The sad reality is that we are all too often kept in the dark – through neglect or by design, by public officials or private stakeholders.[5]

---

* Institute of International Law, University of Munich; formerly Legal Adviser for Environmental Affairs, World Bank. Revised paper based on presentations to the Transatlantic Dialogue on the Reality of Precaution (Airlie House/VA, 15 June 2002) and to the Conference on Human Dimensions of Global Environmental Change: Knowledge for the Sustainability Transition (Berlin, 7 December 2002). Research assistance by Devyani Kar and Joe Monfort, and helpful comments by Aarti Gupta, Peter M. Haas, Kathryn Harrison, David Roe, Jeremy Wates, Jonathan B. Wiener and John Zimmer are gratefully acknowledged.

[1] K.J. Arrow/A.C. Fisher, Environmental Preservation, Uncertainty, and Irreversibility, Quarterly Journal of Economics 88 (1974), 312 et seq.; K. Iida, Analytic Uncertainty and International Cooperation: Theory and Application to International Economic Policy Considerations, International Studies Quarterly 37 (1993), 431 et seq.; P. Harremoës, Scientific Incertitude in Environmental Analysis and Decision Making, Royal Netherlands Academy of Arts and Sciences: Heineken Lecture (2000); and R.B. Stewart, Environmental Regulatory Decision Making Under Uncertainty, Research in Law and Economics 20 (2002), 71 et seq.

[2] F.H. Knight, Risk, Uncertainty and Profit (1921, reprinted 1985), 19; C.C. Jaeger/O. Renn/E.A. Rosa/T. Webler, Risk, Uncertainty, and Rational Action (2001); S.O. Funtowicz/J.R. Ravetz, Global Risk, Uncertainty, and Ignorance, in: J.X. Kasperson/R.E. Kasperson (eds.), Global Environmental Risk (2001), 173 et seq.; and C. Engel/J. Halfmann/M. Schulte (eds.), Wissen, Nichtwissen, unsicheres Wissen (2002). On the role of international negotiations and treaty regimes in reducing uncertainty, see G.R. Winham, Negotiation as a Management Process, World Politics 30 (1977), 96 et seq.; R.B. Mitchell, Sources of Transparency: Information Systems in International Regimes, International Studies Quarterly 42 (1998), 109 et seq.; and X. Dai, Information Systems in Treaty Regimes, World Politics 54 (2002), 405 et seq. Paradoxically, the "veil of uncertainty" (G. Brennan/J.M. Buchanan, The Reason of Rules: Constitutional Political Economy, 1985, at p. 30) may even facilitate collective decision-making: C. Helm, International Cooperation Behind the Veil of Uncertainty, Environmental and Resource Economics 12 (1998), 185 et seq.; and C.D. Kolstad, International Environmental Agreements and the Veil of Uncertainty, Paper presented at the Wageningen Conference on Risk and Uncertainty in Environmental and Resource Economics (2002).

[3] U. Beck, Politics of Risk Society, in: J. Franklin (ed.), The Politics of Risk Society (1998), 9.

[4] S.J. Lewis, The Precautionary Principle and Corporate Disclosure, Good Neighbor Project (1998).

[5] J. Stiglitz, On Liberty, the Right to Know, and Public Discourse: The Role of Transparency in Public Life, Oxford Amnesty Lecture (1999); and P. Eigen (ed.), Global Corruption Report: Access to Information, Transparency International (2003).

Starting from Principle 10 of the 1992 Rio Declaration on Environment and Development,[6] the "Plan of Implementation" adopted by the 2002 Johannesburg Summit re-affirmed the need "to ensure access, at the national level, to environmental information," and in particular, "to encourage development of coherent and integrated information on chemicals, such as through national pollutant release and transfer registers".[7] However, at the Nairobi session of the UNEP Governing Council in February 2003, a follow-up proposal for global guidelines on the application of Rio Principle 10 – including more specific rules on information access – ran into opposition from the United States in coalition with the Group of 77/China, and was deferred to the next (2005) session.[8] The present paper will look at instruments which different legal systems have developed to cope with the problem of undisclosed or concealed risk information; i.e., citizen access to publicly-held and privately-held data on environmental risks, knowledge of which is decisive for precautionary action.

I. Public Data Disclosure

Historically, there have been significant differences between and among national administrative laws with regard to government-held information. While most European countries (including Britain, France, and Germany) have had a notorious tradition of secrecy with regard to a broad range of data kept by public authorities[9] – partly out of a legitimate concern with effective governance,[10] – the

[6] ILM 31 (1992), 874: "... At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities ...".

[7] United Nations, Report of the World Summit on Sustainable Development (Johannesburg, South Africa, 26 August-4 September 2002), UN Doc. A/CONF.199/20 (2002), paras. 23(f) and 128; K. Gray, World Summit on Sustainable Development: Accomplishments and New Directions?, ICLQ 52 (2003), 256 et seq. See also the Johannesburg Declaration's call on private sector corporations "to enforce corporate accountability, which should take place within a transparent and stable regulatory environment" (Report p. 4, Article 29), and the call for "public access to relevant information" in the programme to implement the Johannesburg Principles on the Role of Law and Sustainable Development, as adopted by the Global Judges Symposium on 20 August 2002, EPL 32 (2002), 234 et seq.; E. Rehbinder, World Summit on Sustainable Development, ELNI Review No. 1 (2003), 1 et seq., at p. 3.

[8] "Enhancing the Application of Principle 10 of the Rio Declaration on Environment and Development", UN Doc. UNEP/GC.22/3/Add.2/B (2002), and decision UNEP/GC.22/L.3/Add.1 (2003) directing the Executive Director to submit a report for review in 2005; Earth Negotiations Bulletin 16 No. 30 (10 February 2003), 9.

[9] D.C Rowat, The Problem of Administrative Secrecy, International Review of Administrative Sciences 32 (1966), 99 et seq.; id. (ed.), Administrative Secrecy in Developed Countries (1979); E. Schwan, Amtsgeheimnis oder Aktenöffentlichkeit (1984); S. Rose-Ackerman, Controlling Environmental Policy: The Limits of Public Law in Germany and the United States (1995), at 114 et seq.; id. (= German translation by S. Deimann), Umweltrecht und -politik in den Vereinigten Staaten und der Bundesrepublik Deutschland (1995), 221 et seq.; and J. Vahle, Informationsrechte des Bürgers contra "Amtsgeheimnis", Deutsche Verwaltungspraxis 50 (1999), 102 et seq.

one major exception was Sweden: Starting with the Freedom of the Press Act of 1766, Swedish citizens have had a right of access to public data, unmatched in any other legal system.[11] Other Nordic countries followed much later: Finland's Publicity of Documents Act in 1951; Denmark's Public Access Act in 1970.[12] Even so, the Scandinavian approach to government-held information remained unusual among the prevailing pattern of "arcane administration" in Europe, where access to files by citizens was long viewed as incompatible with the principle of representative – as distinct from "direct" – democracy.[13]

Against that background, the US Freedom of Information Act of 1966 (FOIA)[14] – already foreshadowed by section 3 of the federal Administrative Procedure Act of 1946 (APA),[15] and at the state level by California's 1952 "Brown Act"[16] – and the avalanche of "sunshine statutes"[17] following in their wake all over North America and in other common law countries[18] radically changed the global map of

---

10 R.A. Dahl, A Democratic Dilemma: System Effectiveness versus Citizen Participation, Political Science Quarterly 109 (1994), 23 et seq.; see also J. Rowan-Robinson/A. Ross/W. Walton/J. Rothnie, Public Access to Environmental Information: A Means to What End?, Journal of Environmental Law 8 (1996), 19 et seq.

11 S.V. Andersen, Public Access to Government Files in Sweden, American Journal of Comparative Law 21 (1973), 419 et seq.; S. Holstad, Sweden, in: Rowat 1979, *supra* note 9, 29 et seq.; and G. Petrén, Access to Government-Held Information in Sweden, in: N.S. Marsh (ed.), Public Access to Government-Held Information (1987), 35 et seq.

12 Act No. 280 on Public Access to Documents in Administrative Files (*Offentlighedslov*), of 10 June 1970, in force 1 January 1971; see N.E. Holm, The Danish System of Open Files in Public Administration, Scandinavian Studies in Law 19 (1975), 153 et seq.

13 M. Bullinger, Western Germany, in: Rowat 1979, *supra* note 9, 217. See also R. Engel, Akteneinsicht und Recht auf Informationen über umweltbezogene Daten: die Informationsrichtlinie der EG im Vergleich zur bundesdeutschen Rechtslage (1993); J. Fluck (ed.), Freier Zugang zu Umweltinformationen (1993); and R. Breuer/M. Kloepfer/P. Marburger/M. Schröder (eds.), Freier Zugang zu Umweltinformationen: Rechtsfragen im Schnittpunkt umweltpolitischer, administrativer und wirtschaftlicher Interessen (1993).

14 Freedom of Information Act, U.S. Code 5, §552 (4 July 1966, as amended/supplemented to date, e.g. by the 1996 Electronic Freedom of Information Act); see H.N. Foerstel, Freedom of Information and the Right to Know: The Origins and Applications of the Freedom of Information Act (1999).

15 Administrative Procedure Act, U.S. Code 5, §501 (1946); see H.L. Cross, The People's Right to Know: Legal Access to Public Records and Proceedings (1953).

16 See M.J. Singer, USA, in: Rowat 1979, *supra* note 9, 310.

17 Government in the Sunshine Act, U.S. Public Law 94-409 (1976); U.S. Code 5, §552b (1977). The term goes back to U.S. Supreme Court Justice Louis D. Brandeis, who recommended "publicity ... as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants"; see L.D. Brandeis, Other People's Money (2nd ed. 1932), 92. On "sunshine methods" in international environmental law, see *infra* note 63.

18 J. Wallace, The Canadian Access to Information Act 1982, in: Marsh 1987, *supra* note 11, 122 et seq.; L.F. Duncan (ed.), Public Access to Government-Held Environmental Information: Report on North American Law, Policy and Practice, in: Commission for Environmental Cooperation, North American Environmental Law and Policy (1999), 57 et seq.; M. McDonagh, Freedom of Information in Common Law Jurisdictions: The Experience and the Challenge, Multimedia und Recht 3 (2000), 251 et seq.; G. Smyth, Freedom of Information: Changing the Culture of Official Secrecy in Ireland, Law Librarian 31 (2000), 140 et seq.; and A. Roberts, New Strategies for Enforcement of the Access to Information Act, Queen's Law Journal 27 (2002), 647 et seq.

comparative administrative law, and may actually have changed the universal catalogue of constitutional rights.[19]

Initially, European countries other than those in Scandinavia were slow to follow suit. Among the first examples in continental Europe was the Netherlands Administrative Transparency Act of 1978.[20] More than ten years later, after considerable debate in the European Commission and Parliament, Council Directive No. 313 of 1990 on Freedom of Access to Information on the Environment mandated the enactment of transparency legislation in all EU member countries.[21]

Even though "green" politicians and academics in Europe had hailed FOIA as "the new Magna Carta of ecological democracy"[22] and as evidence of a new "structural pluralism",[23] reactions at the governmental level were anything but enthusiastic. Several member states missed the prescribed deadline for the new statutory enactments and administrative reforms required, and the Commission had to resort to judicial actions to make Germany comply.[24] Implementation of the 1990 Direc-

---

[19] E.g., see Article 32(1)(b) of the Constitution of the Republic of South Africa (1996), as implemented by section 3 of South Africa's Promotion of Access to Information Act (2000); R. Calland/A. Tilley (eds.), The Right to Know, the Right to Live: Access to Information and Socio-Economic Justice (2002); and D. Banisar (ed.), Freedom of Information and Access to Government Records Around the World, Privacy International (2002). See also M. Bullinger, Freedom of Expression and Information: An Essential Element of Democracy, GYIL 28 (1985), 88 et seq., at p. 106; and notes 40 and 77 below.

[20] *Wet openbarheid van bestuur* (9 November 1978, in force 1 May 1980), Staatsblad 1978, 581; see G. Luebbe-Wolff, Das niederländische Gesetz über die Verwaltungsöffentlichkeit, Die Verwaltung 13 (1980), 339 et seq.; and J. Rutteman, The Netherlands, in: European Eco-Forum, Implementing Rio Principles in Europe: Participation and Precaution (2001), 68 et seq.

[21] Council Directive 90/313/EEC (7 June 1990), OJEC 1990 L 158, 56; see L. Krämer, La directive 90/313/CEE sur l'accès à l'information en matière d'environnement: genèse et perspectives d'application, Revue du Marché Commun (1991), 866 et seq. See also G. Winter (ed.), Öffentlichkeit von Umweltinformationen: Europäische und nordamerikanische Rechte und Erfahrungen (1990); id. (ed.), European Environmental Law: A Comparative Perspective (1996), 81 et seq.; M. von Schwanenflügel, Das Öffentlichkeitsprinzip des EG-Umweltrechts, Deutsches Verwaltungsblatt 106 (1991), 93 et seq.; M. Pallemaerts (ed.), Het recht op informatie inzake leefmilieu/Le droit à l'information en matière d'environnement/The Right to Environmental Information (1991); M. Prieur (ed.), Le droit à l'information en matière d'environnement dans les pays de l'Union européenne: étude de droit comparé de l'environnement (1997); and the loose-leaf collection of texts by J. Fluck/A. Theuer (eds.), Informationsfreiheitsrecht mit Umweltinformations- und Verbraucherinformationsrecht (1994-).

[22] J. Fischer, Der Umbau der Industriegesellschaft: Plädoyer wider die herrschende Umweltlüge (1989), 152; English translation in: U. Beck (ed.), Ecological Enlightenment: Essays on the Politics of Risk Society (1995). [Joschka Fischer is now Germany's Federal Minister of Foreign Affairs.]

[23] A. Giddens, The Third Way and its Critics (2000), 55; see A. Roberts, Structural Pluralism and the Right to Information, University of Toronto Law Journal 51 (2001), 243 et seq.

[24] By judgment of 9 September 1999 (C-217/97, *Commission vs. Germany*, ECR 1999 I, 5087), the European Court of Justice declared the 1994 German Environmental Information Act (Umweltinformationsgesetz, BGBl 1994 I, 1490) inadequate for compliance with Directive 90/313/EEC. On 8 November 2000, the European Commission brought further action for financial penalties in view of Germany's non-compliance (C-408/00, *Commission vs. Germany*, OJEC 2001 L 28, 13). The case was removed from the Court's registry (on 22 February 2002) after Germany enacted new legislation on 23 August 2001 (BGBl 2001 I, 2218); see F.K. Schoch, Informationsfreiheitsgesetz für die Bundesrepublik Deutschland, Die Verwaltung 35 (2002), 149 et seq.

tive (now superseded by EU Council/Parliament Directive 2003/4/EC of 28 January 2003)[25] is still far from perfect.[26] It seems that old administrative habits, and especially the entrenched reluctance of civil service departments to conduct their business in the open, are hard to break indeed.

Things began to change in the wake of the Rio Conference – starting with the 1992 OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic,[27] opening public access to government-held information (Article 9)[28] regarding that particular maritime sub-region, which extends beyond the EU. Next was the Council of Europe, with the 1993 Lugano Convention on Environmental Liability[29] providing access to information held not only by governments but also by "bodies with public responsibilities for the environment and under the control of a public authority", and to specific information held by operators (Articles 15 and 16). Finally, the process of reform reached the still wider geographical framework of the United Nations Economic Commission for Europe (UN/ECE), which in addition to the EU includes not only all Nordic countries but also the United States and Canada, and especially the countries of Central and Eastern Europe. Freedom of access to environmental information – under the catchword of *glasnost* – had long been one of the political demands of civil-society opposition groups in the former socialist countries, preceding and indeed precipitating the fall of the Berlin Wall.[30] Not surprisingly therefore, it was an alliance of Northern and Eastern European NGOs which played a key role in the preparation and negotiation of the 1995 UN/ECE Sofia Guidelines on access to information and public participation in environmental decision-making.[31] They eventually led to the adoption of the Aarhus Convention on 25 June 1998,[32] one of whose "three pillars" now is access to environmental information – including so-called "passive access" (the right to seek information from public

---

25 OJEC 2003 L 41/26 (14 February 2003). See D. Wilsher, Freedom of Environmental Information: Recent Developments and Future Prospects, European Public Law 25 (2001), 671 et seq.; and M. Jahnke, Right to Environmental Information, EPL 33 (2003), 37.

26 Report by the European Commission on the Experience Gained in the Application of Council Directive 90/313/EEC, COM (2000) 400/final (26 June 2000). See also R.E. Hallo (ed.), Access to Environmental Information in Europe: The Implementation and Implications of Directive 90/313/EEC (1996); and C.J.M. Kimber/F. Ekardt, Zugang zu Umweltinformationen in Grossbritannien und Deutschland, Natur und Recht 21 (1999), 262 et seq.

27 Adopted at Paris on 22 September 1992 (revising and consolidating the former 1972 Oslo and 1974 Paris Conventions); ILM 32 (1993), 1068.

28 See P.J. Sands, Principles of International Environmental Law (1995), 619.

29 Convention on Civil Liability for Damage Resulting From Activities Dangerous to the Environment, adopted on 21 June 1993 (not yet in force), ILM 32 (1993), 1228; see J. Ebbeson, The Notion of Public Participation in International Environmental Law, Yearbook of International Environmental Law 8 (1997), 51 et seq., at pp. 89-94.

30 S. Stec, Ecological Rights Advancing the Rule of Law in Eastern Europe, Journal of Environmental Law and Litigation 13 (1998), 275 et seq.

31 Endorsed at the 3rd Ministerial Conference on Environment for Europe (Sofia/Bulgaria, 25 October 1995), UN Doc. ECE/CEP/24/Rev.1 (1995); see J. Wates, Access to Environmental Information and Public Participation in Environmental Decision-Making: UN/ECE Guidelines From Theory to Practice, European Environmental Bureau (1996).

authorities, under Article 4); and the duty of governments to collect, disclose and disseminate such information regardless of specific requests ("active access", under Article 5).[33]

From a comparative perspective, it is probably fair to say that Europe has begun to catch up with North America, but still has a lot to learn in this regard.[34] It would certainly be worthwhile to study both the trans-cultural and psychological implications of that learning process, and its impact on civic and administrative attitudes towards environmental risks[35] and the perceived balance of openness versus security.[36] Even though some information-based policies – such as environmental impact assessments, and prior-informed-consent procedures – are now globally accepted,[37] "context-related" instruments for information rights and duties are still far from mainstream in EU environmental governance.[38] One of the most difficult

---

[32] Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted at the 4th Ministerial Conference on Environment for Europe (Aarhus/Denmark, 25 June 1998, in force 30 October 2001), UN Doc. ECE/CEP/43 (1998), ILM 38 (1999), 517; M. Scheyli, Die Aarhus-Konvention über Informationszugang, Öffentlichkeitsbeteiligung und Rechtsschutz in Umweltbelangen, AVR 38 (2000), 217 et seq.; E. Petkova/P. Veit, Environmental Accountability Beyond the Nation State: The Implications of the Aarhus Convention, World Resources Institute (2000); S. Rose-Ackerman/A. Halpaap, The Aarhus Convention and the Politics of Process: The Political Economy of Procedural Environmental Rights, Research in Law and Economics 20 (2000), 27 et seq.; M. Zschiesche, Die Aarhus-Konvention: mehr Bürgerbeteiligung durch umweltrechtliche Standards?, Zeitschrift für Umweltrecht 12 (2001), 177 et seq.; id., The Aarhus Convention: More Citizens' Participation by Setting Out Environmental Standards?, ELNI Newsletter (2001-1), 21 et seq.; C. Bruch/R. Czebiniak, Globalizing Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation, and Accountability in Environmental Matters, Environmental Law Reporter 32 (2002), 10428 et seq.

[33] S. Stec/S. Casey-Lefkowitz/J. Jendroska, The Aarhus Convention: An Implementation Guide, UN Doc. ECE/CEP/72 (2000), 6.

[34] See S. Coliver/P. Hoffmann/J. Fitzpatrick/S. Bowen (eds.), Secrecy and Liberty: National Security, Freedom of Expression and Access to Information (1999); U. Öberg, EU Citizens' Right to Know: The Improbable Adoption of a European Freedom of Information Act, Cambridge Yearbook of European Legal Studies 2 (2000), 303 et seq.; W.A. Wilcox, Access to Environmental Information in the United States and the United Kingdom, Loyola of Los Angeles International and Comparative Law Review 23 (2001), 121 et seq.

[35] E.g., see J.B. Wiener/M.D. Rogers, Comparing Precaution in the United States and Europe, Journal of Risk Research 5 (2002), 317 et seq.

[36] See G. Geiger (ed.), Sicherheit der Informationsgesellschaft: Gefährdung und Schutz informationsabhängiger Infrastrukturen (2000); and U. Gassner/C. Pisani, Umweltinformationsanspruch und Geheimnisschutz: Zukunftsperspektiven, Natur und Recht 23 (2001), 506 et seq.; see also notes 89-94 below.

[37] See P.H. Sand, Lessons Learned in Global Environmental Governance, World Resources Institute (1990), 25 et seq.; K. Kern/H. Jörgens/M. Jänicke, Die Diffusion umweltpolitischer Innovationen: Ein Beitrag zur Globalisierung von Umweltpolitik, FFU-Report 99-11 (1999); D.A. Farber/F.L. Morrison, Access to Environmental Information, in: F.L. Morrison/R. Wolfrum (eds.), International, Regional and National Environmental Law (2000), 845 et seq.; and J.B. Wiener, Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law, Ecology Law Quarterly 27 (2001), 1295 et seq.

[38] E.g., see H. Burkert, Informationszugang als Element einer europäischen Informationsrechtsordnung? Gegenwärtige und zukünftige Entwicklungen, in: S. Lamnek/M.T. Tinnefeld (eds.), Globalisierung und informationelle Rechtskultur in Europa: informationelle Teilhabe und weltweite Solidar-

sub-tasks was to persuade the European Union itself (i.e., the bureaucracy in Brussels) that it, too, had a problem with information disclosure: It took years of litigation[39] to establish public access to EU Parliament, Council and Commission documents,[40] now guaranteed by the "Transparency Regulation" of 30 May 2001.[41] If that is any consolation – some other inter-governmental bureaucracies such as the World Bank had to go through a similar learning curve as regards information disclosure to the public.[42]

---

ität (1998), 113 et seq.; and K. Holzinger/C. Knill/A. Schäfer, Steuerungswechsel in der europäischen Umweltpolitik?/European Environmental Governance in Transition?, Max Planck Project Group on Common Goods: Preprint 29 (2002).

[39] Judgments by the European Court of First Instance on 5 March 1997 (T-105/95, *WWF UK vs. Commission*, ECR 1997 II, 313); on 6 February 1998 (T-124/96, *Interporc II vs. Commission*, ECR 1998 II, 231); and on 14 October 1999 (T-309/97, *Bavarian Lager Co. Ltd. vs. Commission*, ECR 1999 II, 3217); and by the ECJ on 6 December 2001 (C-353/99 P, *Council vs. Heidi Hautala et al.*, OJEC 2002 C 84, 8), case comment by P. Leino, in: CML Rev. 39 (2002), 621 et seq.

[40] P. Kunzlik, Access to the Commission's Documents in Environmental Cases: Confidentiality and Public Confidence, Journal of Environmental Law 9 (1997), 321 et seq.; M. O'Neill, The Right of Access to Community-Held Documentation as a General Principle of EC Law, European Public Law 4 (1998), 403 et seq.; G. Monediaire, Les droits à l'information et à la participation du public auprès de l'Union européenne, Revue Européenne de Droit de l'Environnement 3 (1999), 129 et seq.; N. Travers, Access to Documents in Community Law: On the Road to a European Participatory Democracy, Irish Jurist 35 (2000), 164 et seq.; B. Wägenbaur, Der Zugang zu EU-Dokumenten: Transparenz zum Anfassen, Europäische Zeitschrift für Wirtschaftsrecht 12 (2001), 680 et seq.; and M. Broberg, Access to Documents: A General Principle of Community Law?, European Law Review 27 (2002), 194 et seq. See also Article 42 (access to documents) of the Charter of Fundamental Rights of the European Union (Nice, 7 December 2000), OJEC 2001 C 80, 1; Lord Goldsmith, A Charter of Rights, Freedoms and Principles, CML Rev. 38 (2001), 1201 et seq.

[41] Regulation (EC) 1049/2001 (effective 31 December 2001), OJEC 2001 L 145, 43; prior to the Regulation, the matter had been covered by a "code of conduct" implemented by Council Decision 93/731 and Commission Decision 94/90. Given that the EU also is a signatory to the Aarhus Convention, see *supra* note 32, its own institutions will, upon ratification, become "public authorities" subject to the Convention's disclosure requirements; see P. Davies, Public Participation, the Aarhus Convention and the European Community, Human Rights in Natural Resource Development (2001), 155 et seq.; and V. Rodenhoff, The Aarhus Convention and its Implications for the "Institutions" of the European Community, RECIEL 11 (2002), 343 et seq., at p. 350.

[42] World Bank Procedures BP 17.50 on Disclosure of Operational Information (1993, revised 2002), <http://www1.worldbank.org/operations/disclosure/policy.html>; see I.F.I. Shihata, The World Bank Inspection Panel (1994), 28 et seq.; and L. Udall, The World Bank and Public Accountability: Has Anything Changed?, in: J.A. Fox/L.D. Brown (eds.), The Struggle for Accountability: The World Bank, NGOs, and Grassroots Movements (1998), 391 et seq., at p. 404. On similar initiatives in the African, Asian and Inter-American Development Banks, the European Bank for Reconstruction and Development, the International Finance Corporation and the Multilateral Investment Guarantee Agency, see Yearbook of International Environmental Law 5 (1994), 296; 7 (1996), 262; 9 (1998), 340; G. Handl, Multilateral Development Banking: Environmental Principles and Concepts Reflecting General International Law and Public Policy (2001), 47 et seq.; G. Saul, Transparency and Accountability in International Financial Institutions, in: Calland/Tilley, *supra* note 19, 127 et seq.; and the website of the NGO Bank Information Center, <http://www.bicusa.org>.

II. Private Data Disclosure

The Atlantic divide looms larger still when it comes to questions of access to privately-held environmental data, especially information on environmental and health-related risks. The turning point for North American regulatory history was the Bhopal accident in December 1984, which occurred at the local affiliate of a US chemical company in India and killed more than 2,400 people.[43] In the face of the magnitude of that tragedy – and also because it was followed in 1985 by another, albeit less catastrophic, accident in West Virginia (in a plant owned by the same corporation) which illustrated the risk of similar disasters at home – legislative reaction in the United States was swift, and truly innovative.

The Toxics Release Inventory (TRI) established in 1986 by the federal Emergency Planning and Community Right-to-Know Act[44] requires mandatory reporting of toxic industrial emissions. The information is then made publicly available (on-line) via a computerized database operated by the U.S. Environmental Protection Agency (EPA)[45], and also via nation-wide non-governmental networks and special NGO websites, such as the "Chemical Scorecard" operated by Environmental Defense[46] and the "Right-to-Know Network" operated by OMB Watch.[47] As a result, anybody can download standardized, site-specific, up-to-date and user-friendly data on specified toxic emissions from all facilities covered by TRI. At the state level, California's 1986 Safe Drinking Water and Toxic Enforcement Act (known as "Proposition 65")[48] imposed additional warning and disclosure requirements for toxic chemicals – unless emitters can show that the level of exposure is low enough to pose "no significant risk".[49]

---

[43] See R. Abrams/D.H. Ward, Prospects for Safer Communities: Emergency Response, Community Right-to-Know, and Prevention of Chemical Accidents, Harvard Environmental Law Review 14 (1990), 135 et seq.; B. Desai, The Bhopal Gas Leak Disaster Litigation: An Overview, Asian Yearbook of International Law 3 (1993), 163 et seq.; and D. Lapierre/J. Moro, Il était minuit cinq à Bhopal: récit (2001); English transl.: Five Past Midnight in Bhopal (2002).

[44] U.S. Code 42, §11001, enacted as Title III of the Superfund Amendments and Reauthorization Act, U.S. Public Law 99-499, as amended and supplemented (e.g., by the Pollution Prevention Act of 1990). See G.D. Bass/A. MacLean, Enhancing the Public's Right-to-Know About Environmental Issues, Villanova Environmental Law Journal 4 (1993), 287 et seq.; R.S. Weeks, The Bumpy Road to Community Preparedness: The Emergency Planning and Community Right-to-Know Act, Environmental Law 4 (1998), 827 et seq.; and M.A. Greenwood/A.K. Sachdev, A Regulatory History of the Emergency Planning and Community Right to Know Act of 1986: Toxics Release Inventory, Chemical Manufacturers Association (1999).

[45] <http://www.epa.gov/tri>; see M. Khanna/L.A. Damon/W.R.H. Quimio/D. Bojilova, Toxics Release Information: A Policy Tool for Environmental Protection, Journal of Environmental Economics and Management 36 (1998), 243 et seq.

[46] <http://www.scorecard.org>.

[47] <http://www.rtknet.org>.

[48] <http://www.oehha.ca.gov/prop65.html>.

[49] § 25249.10.c; see also the decision by the California Supreme Court in *People ex rel. Lungren vs. Superior Court (American Standard Inc.)*, California Reports: 4th Series 14 (1996), 294 et seq.; C. Rechtschaffen, The Warning Game: Evaluation Warnings Under California's Proposition 65, Ecology Law Quarterly 23 (1996), 303 et seq.; id., How to Reduce Lead Exposures with One Simple

Although there had been earlier toxic-emission disclosure laws at the state and local level since the 1970s – mainly in response to demands by labour leaders to alert employees to workplace risks[50] – the near-instant success of TRI and Proposition 65 seems to have taken everyone by surprise.[51] Both statutes began taking effect in 1988. The most recent data available – for the 10-year period from 1988 to 1997 – show that atmospheric emissions of some 260 known carcinogens and reproductive toxins from TRI-reporting facilities have been reduced by approximately 85% in the state of California, and by some 42% in the rest of the country (i.e., for all chemicals listed in California as known to cause either cancer or reproductive toxicity and reported as air emissions under TRI).[52]

Attempts at explaining this "accidental success story"[53] variously emphasize the innovative use made of (a) electronic communications via the Internet, by TRI;[54] (b) reversal of the burden of proof for exemptions, by Proposition 65;[55] (c) enforcement by citizen suits, under both schemes;[56] (d) standardized data, facilitating comparison and "performance benchmarking";[57] and (e) the "reputational" effects of such competitive ranking on a firm's behaviour.[58] While it will, of course, be im-

---

Statute: The Experience of Proposition 65, Environmental Law Reporter 29 (1999), 10581 et seq.; and M. Freund, Proposition 65 Enforcement: Reducing Lead Emissions in California, Tulane Environmental Law Journal 10 (1997), 333 et seq.

50 See T. McGarity/S. Shapiro, The Trade Secret Status of Health and Safety Testing Information: Reforming Agency Disclosure Policies, Harvard Law Review 93 (1980), 837 et seq.; C. Chess, Winning the Right to Know: A Handbook for Toxics Activists (1984); S.G. Hadden, A Citizen's Right-to-Know: Risk Communication and Public Policy (1989); and K. Silver, Getting Information, in: R. Gottlieb (ed.), Reducing Toxics: A New Approach to Policy and Industrial Decision Making (1995), 78 et seq.

51 S.M. Wolf, Fear and Loathing About the Public Right-to-Know: The Surprising Success of the Emergency Planning and Community Right-to-Know Act, Journal of Land Use and Environmental Law 11 (1996), 217 et seq.; S. Konar/M.A. Cohen, Information as Regulation: The Effect of Community Right-to-Know Laws on Toxic Emissions, Journal of Environmental Economics and Management 32 (1997), 109 et seq.; M. Stephan, Environmental Information Disclosure Programs: They Work, But Why?, Social Science Quarterly 83 (2002), 190 et seq.

52 D. Roe, Toxic Chemical Control Policy: Three Unabsorbed Facts, Environmental Law Reporter 32 (2002), 10232 et seq., at p. 10233 (figure 1).

53 A. Fung/D. O'Rourke, Reinventing Environmental Regulation from the Grassroots Up: Explaining and Expanding the Success of the Toxics Release Inventory, Environmental Management 25 (2000), 115 et seq.

54 M.M. Jobe, The Power of Information: The Example of the US Toxics Release Inventory, Journal of Government Information 26 (1999), 287 et seq.

55 M. Barsa, California's Proposition 65 and the Limits of Information Economics, Stanford Law Review 49 (1997), 1223 et seq.

56 D.S. Grant II, Allowing Citizen Participation in Environmental Regulation: An Empirical Analysis of the Effect of Right-to-Sue and Right-to-Know Provisions on Industry's Toxic Emissions, Social Science Quarterly 78 (1997), 859 et seq.; K. Green, An Analysis of the Supreme Court's Resolution of the Emergency Planning and Community Right-to-Know Act Citizen Suit Debate, Boston College Environmental Affairs Law Review 26 (1999), 387 et seq.; M.W. Graf, Regulating Pesticide Pollution in California Under the 1986 Safe Drinking Water and Toxic Exposure Act (Proposition 65), Ecology Law Quarterly 28 (2001), 663 et seq., at p. 669.

57 B.C. Karkkainen, Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?, Georgetown Law Journal 89 (2001), 257 et seq.

portant to learn the right lessons from all of this, the outcome is unlikely to be attributable to a set of isolated causes, let alone mono-causal. There certainly are a number of plausible external driving forces, and "success" more often than not rests on the right combination of information and regulation. Even so, a number of observers view the advent of "informational regulation",[59] "smart regulation",[60] or "regulation by revelation",[61] as a viable alternative to the stalemate of traditional environmental law-making and the kind of regulatory fatigue it seems to have spread.[62] International lawyers and political scientists refer to "sunshine methods" as effective new strategies to induce compliance with environmental treaties;[63] and economists hail disclosure strategies as the "third wave" in pollution control,[64] after command-and-control (emission standards and fines) and market-based approaches (emission charges, tradable permits).

"Right-to-know" laws have since been enacted in at least 25 U.S. states and in Canada.[65] Not surprisingly, the North American pilot experience had its ripple

---

[58] M. Graham, Information as Risk Regulation: Lessons From Experience, Harvard University: Innovations in American Government Program OPS-10-01 (2001); M. Graham/C. Miller, Disclosure of Toxic Releases in the United States, Environment 43 No. 8 (2001), 8 et seq. The effectiveness of "reputational sanctions" has also been noted in intergovernmental relations; see A.T. Guzman, A Compliance-Based Theory of International Law, California Law Review 90 (2002), 1823 et seq., at p. 1861.

[59] W.A. Magat/W.K. Viscusi, Informational Approaches to Regulation (1992), reprinted in: R.L. Revesz (ed.), Foundations for Environmental Law and Policy (1997), 149 et seq.; P. Kleindorfer/E.W. Orts, Informational Regulation of Environmental Risks, Risk Analysis 18 (1998), 155 et seq.; W.M. Sage, Regulating Through Information: Disclosure Laws and American Health Care, Columbia Law Review 99 (1999), 1701 et seq.; C.R. Sunstein, Informational Regulation and Informational Standing: *Akins* and Beyond, University of Pennsylvania Law Review 147 (1999), 613 et seq.; R.B. Stewart, A New Generation of Environmental Regulation?, Capital University Law Review 29 (2001), 21 et seq.; D. Case, The Law and Economics of Environmental Information as Regulation, Environmental Law Reporter 31 (2001), 10773 et seq.

[60] N. Gunningham/P. Grabosky/D. Sinclair, Smart Regulation: Designing Environmental Policy (1998), 63.

[61] A. Florini, The End of Secrecy, Foreign Pol'y 111 (1998), 50 et seq., at p. 59. See also the call for "mutual transparency as a useful means to ensure accountability", by D. Brin, The Transparent Society (1998), 149.

[62] M. Lyndon, Information Economics and Chemical Toxicity: Designing Laws to Produce and Use Data, Mich. L. Rev. 87 (1989), 1795 et seq.; W.F. Pedersen Jr., Regulation and Information Disclosure: Parallel Universes and Beyond, Harvard Environmental Law Review 25 (2001), 151 et seq.; M.A. Cohen, Information as a Policy Instrument in Protecting the Environment: What Have We Learned?, Environmental Law Reporter 31 (2001), 10425 et seq.

[63] E.B. Weiss/H.K. Jacobson, Engaging Countries: Strengthening Compliance with International Environmental Accords (2000), 543, 549 (on the sunshine metaphor, see *supra* note 17).

[64] T. Tietenberg, Disclosure Strategies for Pollution Control, Environmental and Resource Economics 11 (1998), 587 et seq.; and generally Stiglitz (Nobel Laureate in Economics), *supra* note 5.

[65] See N. Zimmermann/M. M'Gonigle/A. Day, Community Right to Know: Improving Public Information About Toxic Chemicals, Journal of Environmental Law and Practice 5 (1995), 95 et seq.; L.F. Duncan (ed.), Public Access to Government-Held Environmental Information: Report on North American Law, Policy and Practice, in: Commission for Environmental Cooperation (CEC), North American Environmental Law and Policy (1999), 57 et seq.; CEC, Taking Stock: North American Pollutant Releases and Transfers 1998 (2001); and K. Harrison/W. Antweiler,

effects elsewhere, the new buzz-word being "pollutant release and transfer registers" (PRTRs): in Australia and Japan, prompted in part by guidelines developed in the Organisation for Economic Cooperation and Development (OECD)[66] in response to a recommendation of the 1992 Rio Conference on Environment and Development;[67] in Brazil, Indonesia and a number of other developing countries, through technical assistance projects organized by the World Bank.[68] Further initiatives for worldwide dissemination of the concept have been launched by the UN Environment Programme (UNEP);[69] the UN Institute for Training and Research (UNITAR);[70] the "Inter-Organization Programme for the Sound Management of Chemicals" (IOMC);[71] and private-sector networks such as the "International Right-to-Know Campaign",[72] and the "Global Reporting Initiative".[73]

The European Union decided, in July 2000, to establish a mandatory European Pollutant Emission Register,[74] to be operated by the European Environment Agency (EEA) "on top" of national inventories currently under preparation in several member countries, with the first national data to be delivered to the EEA by 2003. The first operational system in Europe was introduced in 1974 by the Netherlands Ministry of Housing, Spatial Planning and the Environment (VROM), on a voluntary basis. A mandatory system followed in Norway, with data accessible to the public though not actively disseminated. Sweden has started mandatory reporting (after voluntary pilot studies since 1994) under a new PRTR system operated by the Environmental Protection Agency in cooperation with the Chemical Inspectorate. The United Kingdom currently has a multi-

---

Environmental Regulation vs. Environmental Information: Canada's National Pollutant Release Inventory, Journal of Policy Analysis and Management 22 (forthcoming 2003).

66 Pollutant Release and Transfer Registers (PRTRs): A Tool for Environmental Policy and Sustainable Development, Guidance Manual for Governments, Doc. OECD/GD(96)32 (1996); Proceedings of the OECD International Conference on PRTRs: National and Global Responsibility (Tokyo, 9-11 September 1998), OECD Environmental Health and Safety Series on PRTRs No.1 (1998); <http://www.oecd.org/ehs/ehsmono/#PRTRS>.

67 Agenda 21: §19.61(c), Report of the United Nations Conference on Environment and Development (UNCED, Rio de Janeiro, 3-14 June 1992), UN Doc. A/CONF.151/26/Rev.1, vol. I, 9.

68 See D. Wheeler, Information in Pollution Management: The New Model, in: World Bank Report 16513-BR, Brazil: Managing Pollution Problems (1997); S. Afsah/A. Blackman/D. Ratunanda, How Do Public Disclosure Pollution Control Programs Work? Evidence from Indonesia, Resources for the Future: Discussion Paper 00-44 (2000); World Bank, Greening Industry: New Roles for Communities, Markets, and Governments (2000).

69 <http://www.chem.unep.ch/prtr>.

70 Designing and Implementing National Pollutant Release and Transfer Registers: A Compilation of Resource Documents, UNITAR: CD-Rom (2000).

71 Summary record of the 7th meeting of the IOMC PRTR Coordinating Group, WHO (2001).

72 <http://www.irtk.org>; see S. Casey-Lefkowitz, International Right-to-Know: Strategies to Increase Corporate Accountability in the Midst of Globalization, Natural Resources Defense Council (2001).

73 <http://www.globalreporting.org>; Sustainability Reporting Guidelines, Global Reporting Initiative (2002).

74 Implementation of a European Pollutant Emission Register (EPER): Decision by the European Commission (2000/479/EC, 17 July 2000), OJEC 2000 L 192, 36.

register system operating in England and Wales only. Other countries planning to have integrated national systems in operation by 2003 include Austria, Belgium, the Czech Republic, Denmark, Finland, Germany, Hungary, and Ireland.[75]

Perhaps the most promising regional activity currently underway in Europe is the new Protocol on Pollutant Release and Transfer Registers, adopted within the framework of the Aarhus Convention at the Ministerial Conference on Environment for Europe in Kiev, on 21 May 2003.[76] Once ratified in the legal context of the convention, public access to emission data along TRI lines may become an actionable right – hence potentially subject to supranational judicial review by the European Court of Human Rights in Strasbourg[77] – well beyond the EU, and especially in the countries of Central and Eastern Europe. As mentioned before, people in those countries are acutely sensitive to information on environmental risks, which was denied to them in the past, and which they do not wish to see monopolized again, whether by public or by private knowledge-holders and "knowledge brokers".[78]

The Kiev Protocol is open to all UN member states (Article 26).[79] Its main purpose is to require all member countries to establish "publicly accessible national pollutant release and transfer registers" for pollutants and source categories to be listed in annexes, and expected to be expanded over time, possibly also including

---

[75] See UN/ECE Committee on Environmental Policy, Pollutant Release and Transfer Registers: Report on the First Meeting of the Task Force (Prague, 21-23 February 2000), UN Doc. CEP/WG.5/2000/5, Annex I.

[76] As finalized in January 2003 by the Working Group on Pollutant Release and Transfer Registers, UN/ECE Doc. MP.PP/2003/1 (3 March 2003); see UN/ECE press release of 23 May 2003 at <http://www.unece.org/cep>.

[77] Under Article 10 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (UNTS 213, 221); see the court's judgments of 29 February 1998 (App. No. 14967/89, *Guerra et al. vs. Italy*), European Human Rights Reports 26 (1998), 357; and of 9 June 1998 (App. No. 21825/93, 23414/94, *McGinley and Egan vs. United Kingdom*), European Human Rights Reports 27 (1998), 1. See G. Malinverni, Freedom of Information in the European Convention on Human Rights and in the International Covenant on Civil and Political Rights, HRLJ 3 (1983), 443 et seq.; S. Weber, Environmental Information and the European Convention on Human Rights, HRLJ 12 (1991), 177 et seq.; M. Déjeant-Pons, La Convention européenne des droits de l'homme et le droit à l'information en matière d'environnement, in: J.F. Flaus/M. de Salvia (eds.), La Convention européenne des droits de l'homme: développements récents et nouveaux défis (1997), 165 et seq.; S. Maljean-Dubois, La Convention européenne des droits de l'homme et le droit à l'information en matière de l'environnement, RGDIP 102 (1998), 995 et seq.; M. Gavouneli, Access to Environmental Information: Delimitation of a Right, Tulane Environmental Law Journal 13 (2000), 303 et seq.; and G. Fievet, Réflexions sur le concept de développement durable: Prétention économique, principes stratégiques et protection des droits fondamentaux, RBDI 34 (2001), 128 et seq., at p. 173.

[78] Term by K. Litfin, Ozone Discourse: Science and Politics in Global Environmental Cooperation (1994), 4.

[79] I.e., regardless of their membership in the UN/ECE or the Aarhus Convention; at the November 2002 session, however, the US delegation declared that it would not participate in a negotiating capacity but would "continue to follow this and other international processes dealing with the issue of PRTRs" (report of the meeting, UN/ECE Doc. MP.PP/AC.1/2002/2, para. 19).

"diffuse sources" such as agriculture and traffic (Article 2/11). A net effect therefore will be to bring important environmental data held by the private sector into the public domain.

III. Outlook

Let us remember, however, that this is only the tip of the iceberg. There is a huge mass of privately-held environmental and health risk information that is woefully "asymmetric" – to use a somewhat euphemistic term coined by Kenneth Arrow[80] – yet is not covered by the Aarhus Convention at all, and where Europe still lags years behind North America in terms of public access rules. A striking illustration is disclosure of the tobacco industry's "privileged" documents under the 1998 Minnesota settlement:[81] It is only now, after court-enforced electronic access to those corporate files, that a research team from the University of California was able to document the multinationals' well-planned and highly successful sabotage of EU tobacco advertising legislation,[82] culminating in the annulment of a 1998 Council Directive[83] by the European Court of Justice in October 2000.[84] The documenta-

---

[80] K. Arrow, Uncertainty and the Welfare Economics of Medical Care, American Economic Review 53 (1963), 941 et seq.; see also C. Cranor, Asymmetric Information, the Precautionary Principle, and Burdens of Proof, in: C. Raffensperger/J. Tickner (eds.), Protecting Public Health and the Environment: Implementing the Precautionary Principle (1999), 74 et seq.

[81] Settlement Agreement and Stipulation for Entry of Consent Judgment, *State of Minnesota ex rel. Humphrey vs. Philip Morris Inc.*, No. C1-94-8565, 1998 WL 394331 (Minnesota District Court, 8 May 1998); see M.V. Ciresi/R.B. Walburn/T.D. Sutton, Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation, William Mitchell Law Review 25 (1999), 477 et seq.; and M.A. Little, A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Government's Tobacco Litigation, Connecticut Law Review 33 (2001), 1143 et seq.

[82] A. Bitton/M.D. Neuman/S.A. Glantz, Tobacco Industry Attempts to Subvert European Union Tobacco Advertising Legislation (2002); and M.A. Neuman/A. Bitton/S.A. Glantz, Tobacco Industry Strategies for Influencing European Community Tobacco Advertising Legislation, Lancet 359 No. 9314 (13 April 2002), 1323 et seq.

[83] Council of the European Communities, Directive on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States relating to the Advertising and Sponsorship of Tobacco Products (98/43/EC, 6 July 1998), OJEC 1998 L 213, 9; see B. Simma/J.H.H. Weiler/M.C. Zöckler, Kompetenzen und Grundrechte: Beschränkungen der Tabakwerbung aus der Sicht des Europarechts (1999).

[84] Judgment by the European Court of Justice of 5 October 2000 (C-376/98, *Germany vs. European Parliament and Council: Tobacco Advertising*), ECR 2000 I, 8419; and Order of the Court of 3 April 2000 regarding removal of documents, ECR 2000 I, 2247. See W. Schroeder, Vom Brüsseler Kampf gegen den Tabakrauch: 2nd part, Europäische Zeitschrift für Wirtschaftsrecht 12 (2001), 489 et seq.; and G.T. Tridimas, The European Court of Justice and the Annulment of the Tobacco Advertisement Directive: Friend of National Sovereignty or Foe of Public Health?, European Journal of Law and Economics 14 (2002), 171 et seq. – The EU Commission has since proposed a new directive on the subject, COM (2001) 283/final (30 May 2001). At its meeting on 2 December 2002, the EU Council agreed – against German opposition – to adopt the directive as amended by the European Parliament on 20 November 2002. The German Government, under pressure from economic lobbyists and the conservative opposition party, plans to take the directive to the European Court in Luxembourg once again; see K. Lechner, CDU-Rechtsexperte kritisiert EU-Mitgliedsstaaten (2 Decem-

tion shows, in gruesome detail and transparency, how "captured" governments and top politicians (with Germany up-front)[85] were used and – to put it bluntly – corrupted in a game that will have massive and measurable negative effects on environmental health for years to come.[86]

More transparency might also help in some of the academic analysis concerned. For example, a recent collection of legal opinions on the EU ban on tobacco advertising, by a respectable German publisher,[87] demonstrated – according to the editors' preface – "striking conformity and unanimity" among the experts, to the effect that the ban had indeed been *ultra vires*. However, readers had to proceed as far as page 55 to discover that the learned book had been solicited and sponsored by the Confederation of European Community Cigarette Manufacturers (CECCM).[88] Given this abundance of "manufactured uncertainty" (and a good deal of pseudo-certainty, too), there clearly is a need for new disclosure rules – to be applied not only to government and industry, but also to scientific writers and law professors. Pending that, all I can recommend is a high degree of precaution when approaching German legal publications on this topic.

Far more serious, however, are recent developments triggered by the tragic events of September 11, 2001. In the face of terrorist bombing threats against the most vulnerable targets – for example, major chemical factories, – a large part of industrial risk data in the United States is now in the process of being re-classified as "critical infrastructure information".[89] Not surprisingly, economic pressure groups which had always resisted the disclosure of environmental risks to the pub-

---

ber 2002), <http://www.kurt-lechner.de/tabakwerbeverbot.php>; and W. Didzoleit, Tabakwerbung: Nagel im Sarg, Der Spiegel (9 December 2002), 40.

[85] For background, see also D. Simpson, Germany: How Did It Get Like This?, Tobacco Control 11 (2002), 291 et seq. On 17 October 2002, Germany earned the infamous "Marlboro Man Award" from the NGO Network for Accountability of Tobacco Transnationals (NATT, <http://www.infact.org/101702mm.html>), for the country's stalwart diplomatic efforts to water down – in coalition with the USA and Japan – a global ban on tobacco advertising, promotion and sponsorship under Article 13 of the World Health Organization's Framework Convention on Tobacco Control, adopted in Geneva on 21 May 2003, WHO Doc. A/FCTC/INB6/5.

[86] Stochastic mortality estimates in the EU Commission's "Explanatory Memorandum" to its proposed new Directive of 30 May 2001, COM (2001) 283/final, see *supra* note 84, 9 §7.3.2. For legislative and economic background, see D. Kevekordes, Tabakwerbung und Tabaketikettierung im deutschen und europäischen Recht (1994); A. Donner, Tabakwerbung und Europa (1999); and F. Chaloupka/K. Warner, The Economics of Smoking, in: J. Newhouse/A. Culyer (eds.), The Handbook of Health Economics (2000), 1541 et seq.

[87] H.P. Schneider/T. Stein (eds.), The European Ban on Tobacco Advertising: Studies Concerning Its Compatibility with European Law (1999).

[88] M. Kleine, The European Ban on Tobacco Advertising (book review), ZaöRV 60 (2000), 277 et seq.

[89] See the press reports by A.E. Cha, Risks Prompt U.S. to Limit Access to Data, Washington Post (24 February 2002), A-1; and A. Davis, New Alarms Heat Up Debate on Publicizing Chemical Risks, Wall Street Journal (30 May 2002), A-1. See also the proposed Community Protection from Chemical Terrorism Act, U.S. Senate Bill S. 2569 (2002); and M.A. Cohen, Transparency after 9/11: Balancing the "Right-to-Know" with the Need for Security, Corporate Environmental Strategy 9 (2002), 368 et seq.

lic – such as the American Chemistry Council (ACC, formerly the Chemical Manufacturers Association, CMA), the Coalition for Effective Environmental Information (CEEI), and the Center for Regulatory Effectiveness (CRE) – are lending enthusiastic support to the Bush Administration's efforts at restricting access to such information.[90] They scored a first tactical victory with the "data quality rider" attached to the U.S. Treasury Department's annual appropriation bill in December 2001,[91] which directed the Office of Management and Budget (OMB) to develop new "guidelines for ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by federal agencies".[92] Substantive and procedural restrictions on environmental information disclosure have since been imposed by the "Homeland Security Act" of 25 November 2002.[93] Further setbacks for public access to chemical risk information are to be expected from section 202 of the "Domestic Security Enhancement Act of 2003" now under preparation.[94]

Right up to the 2002 Johannesburg Summit, the United States – no matter how much fault critics may have found with its environmental record in other areas – had remained the undisputed champion of citizen access to environmental data, public or private. Indeed, in his message to the Summit,[95] Secretary of State Colin Powell highlighted US support for the "access initiative" by 26 civil society organizations in nine countries to assess how well governments are providing access to environmental risk information.[96] The US position at the 2003 UNEP Governing Council, however, now points in the opposite direction.[97]

---

[90] M.A. Greenwood, White Paper from Industry Coalition to EPA on Concerns Over Information Program, CEEI (1999); reprinted in: Bureau of National Affairs, Daily Environment Reporter (4 May 1999), E-1.

[91] Fiscal Year 2001: Consolidated Appropriations Act, U.S. Public Law 106-554.

[92] U.S. Federal Register 67 (2002), §8452-8460. See also J. Adler, How EPA Helps Terrorists, National Review (27 September 2001); A. Logomasini, Toxic Road Map for Terrorists, Washington Post (4 September 2002); and J.W. Conrad Jr. (ACC), The Information Quality Act: Antiregulatory Costs of Mythic Proportions?, Kansas Journal of Law and Public Policy 12 (2002), 521 et seq.

[93] Homeland Security (Critical Infrastructure Information) Act of 2002, U.S. Public Law 107-296. See S. Gidiere/J. Forrester, Balancing Homeland Security and Freedom of Information, Natural Resources and Environment 16 (2002), 139 et seq.; T. Blanton, The World's Right to Know, Foreign Pol'y (July/August 2002), 50 et seq.; J.T. O'Reilly, "Access to Records" Versus "Access to Evil": Should Disclosure Laws Consider Motives as a Barrier to Records Release?; Kansas Journal of Law and Public Policy 12 (2002), 559 et seq.; J.D. Echeverria/J.B. Kaplan, Poisonous Procedural "Reform": In Defense of Environmental Right to Know, ibid., 579 et seq.; R. Steinzor, "Democracies Die Behind Closed Doors": The Homeland Security Act and Corporate Accountability, ibid., 641 et seq.; and P. McDermott, Withhold and Control: Information in the Bush Administration, ibid., 671 et seq.

[94] Restricting public access to the Environmental Protection Agency's "worst case scenarious" for chemical plants pursuant to section 112(r)(7)H of the U.S. Clean Air Act, U.S. Code 42, §7521. Draft by U.S. Department of Justice (9 January 2003), <http://www.publicintegrity.org/dtaweb/report.asp?ReportID=502&L1=10&L2=10&L3=0&L4=0&L5=0>; also known as "Patriot Act II", expanding "USA Patriot Act I" (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism) of 26 October 2001, U.S. Public Law 107-56.

[95] C.L. Powell, Only One Earth, Our Planet 13 No. 2 (2002), 8-10, at p. 10.

[96] E. Petkova/C. Maurer/N. Henninger/F. Irwin (eds.), Closing the Gap: Information, Participation, and Justice in Decision-Making for the Environment, World Resources Institute (2002);

Are we about to come full circle, then? The very principle of transparency, alas, will risk a severe backlash as the public's hard-won "right to know" suddenly confronts the ugly claw of a zombie, resurrected from the dark ages of European administrative law: Government's "hiding hand".

see also the website of the "Partnership for Principle 10" registered and presented at the Johannesburg Summit, <http://www.pp10.org>.

[97] *Supra* note 8; see also the U.S. State Department's current position on PRTRs, *supra* note 79.