Environmental Policy: A Comparison of German and United States Efforts

by Professor Hermann Soll
translated by Patricia F. Linderman

March 1985
The University of Georgia, School of Law

Volume 2, Number 2
R. Dale Hughes, Editor

I.

The following comparative report which discusses selected results from research done during my stay at the Dean Rusk Center for International and Comparative Law of The University of Georgia School of Law should be understood as an expression of thanks for the invitation of the Dean Rusk Center, the help and guidance, the excellent research opportunities afforded me, and, last but not least, the many productive conversations that I was able to have at the Center and at the Law School. I am also grateful for an unforgettable conversation with Dean Rusk and for his lecture “Constitution: Comity or Confrontation” where the spirit of separation of powers governing the relationship between the President and Congress was skillfully made to come alive.

II.

Today in Germany there is lively discussion as to the extent to which economic incentives can supplement air pollution control efforts and add to their effectiveness. The essential question, in the United States, as well as in the Federal Republic of Germany, is how industrial sources of pollution can be introduced or expanded in areas already having high emission levels while at the same time raising or, at the least, not harming the ambient air quality. Likewise, the chances for future economic development of industrial areas, which are as a rule heavy pollution zones, are also an important topic of current discussion.

One looks across the Atlantic to the United States where since 1976, new strategies for air pollution control grouped together under the general heading “offset policy” are being tried. Unfortunately, presentations of this topic in German publications have often tended to be imprecise and relatively uncritical. The two main instruments of the offset policy are the “bubble concept” and “offset trading.”

Under the bubble concept, which is also known as “intra-plant offset,” the entire plant, not simply an individual pollution-emitting installation, is considered as the source of the emissions (Section 173(1)A of the Clean Air Act). This permits the management of the plant to compensate for higher emissions due to expansion or to the raising of production capacity with the lowering of emissions levels elsewhere in the plant by, for example, modernizing or shutting down antiquated installations.

The result is that the plant management, where such possibilities for shifting the emissions balance within the plant are present, is not forced to incorporate the most advanced emissions control technology into a new source of pollution, and can in many cases save a considerable amount of investment capital. In the United States, the admissibility of the bubble concept remains controversial. Critics maintain that the term “stationary source” should be construed to refer to the individual polluting installation, not to the entire plant with its many separate sources of emissions. Further, the law should be interpreted so as to require all new emissions sources to meet a pollution control standard that represents the “best adequately demonstrated system of technology for reducing emissions.” This requirement is being sidestepped, however, through shifting within the plant, since such shifting is permitted when the net emissions output does not rise. That too, it is claimed, contradicts the law. In heavily polluted areas in which the target am-

Continued
bient air quality standards have not yet been reached, the introduction of new emissions sources is permitted only where the net result is a tangible reduction in overall emissions. For that reason, some observers hold that the Environmental Protection Association’s bubble concept should be considered only in clean air areas.

There exists in the United States a further possibility: compensation between different plants. The limitations are stricter. This “offset trading” is permitted only when the air quality in the affected area is significantly improved thereby; also, specific pollutants must all be shown to decrease, whereas under the bubble concept, compensation within a pollutant group is permitted.

To a very limited extent, German management over the past 20 years has been exposed to the option of “emissions vouchers;” that is, the possibility for the management to satisfy legal requirements by considering emissions reductions elsewhere in the plant or by a third party as compensation. Two major instances can be distinguished. The compensation can bring about a situation where the ambient air quality tolerance limits are not crossed within the area surrounding the installation. In this the German authorizing and monitoring officials have been more generous than their American counterparts. Under certain conditions, they could be satisfied when a third company would do nothing more than change the transmission characteristics of its emissions by, for example, building a higher chimney without lowering the real output level. In overloaded areas in which the air quality tolerance limits have already been crossed, however, offset trading may be considered only when the additional pollution from the new installation lies under the significance limit of one percent and an overall improvement of the ambient air quality is achieved.

Certainly, economic advantages can be seen in the bubble concept and offset trading. The advantages lie in the fact that these policies keep open long-term possibilities for growth in industrial areas and create new jobs in the short term, while insofar as a net decrease in emissions is achieved, as with offset trading, this is accomplished at the lowest possible cost.

Opposed to this, however, are weighty environmental disadvantages. The new strategy shifts emphasis from emissions to ambient air quality which is primarily measured locally. The problem of wide-range pollution is therefore seriously neglected. The equipping of new and modernization of old installations with the best technologically possible and economically feasible emissions control devices is not fully realized. Additionally, the danger has been pointed out in the United States that in interstate competition for industrial start-ups and relocations, the states with the most lenient plans of execution for the national air quality targets have an unearned advantage.

The applicability of an American-style offset policy to Germany, beyond the parameters described above, is not reconcilable with prevailing law. The inherent limitation of these devices to a specific area is difficult to reconcile with a policy of preventive action. This also applies to the German management practices mentioned. Preventive measures against harmful effects to the environment require as a top priority that measures reflecting the latest achievements in emissions control technology be taken. This duty to incorporate the latest technology demands more than simply a perceptible improvement in air quality in the measurement area surrounding the plant. Rather, preventive policy requires that regardless of the air quality, the emissions under consideration of the principle of proportionality be kept as low as possible. The satisfaction of this requirement not only a condition for the approval of a new installation, but a long-term duty that applies equally to the management of older plants.

This policy can be carried out through retroactively effective regulations or rules which, for example, set strict limits on the emission of sulfur dioxide from blast furnaces. Such demands are economically defensible when they can be met due to the particular economic strength of the company or by an average company of the particular type involved. In case of doubt, the company carries the burden of proof as to the economic hardship it claims is unreasonable. A policy of prevention which requires all reductions in emissions possible with the latest technology leads not only to better air quality in the affected zones, but is also directed against the problem of wide-range pollution.

As the destructive results of wide-range pollution become visible in the environment to all in the form of the deteriorating condition of our forests, understanding of the fundamental principles of a policy of prevention has been growing steadily in Germany. The noticeable shift toward an emphasis on emission control leaves little or no room for the strategies of the offset policy. All stationary instruments are excluded from the start.

III.

Environmental protection in the form of area conservation was the second target of my investigation. It has been said in relation to the German situation, with justification, that successful environmental protection is often possible only in situations where the state or conservation organizations remove certain areas worthy of protection from private use by buying them.

The United States is in a favorable situation in that a total area of approximately three million square kilometers, almost the size of the Indian subcontinent, is in the hands of the federal government. Of this land, some 410,000 square kilometers, more than one and a half times the area of West Germany, are under permanent or temporary protection as national parks, game preserves, wilderness areas, and “wilderness study areas.” Aside from the development of wilderness law, the national park system, this genuinely American creation with a history of over one hundred years, was of special interest to me. I was able to become more closely acquainted with the history, development, and legal foundation of this system during my stay.

The point of departure of the national park idea was the continuing protection of areas of particular natural beauty. The question of whether the protection of the biotypes and species of animals and plants living in the national parks was to be an integral part of this conservation project
The Georgia Society of International and Comparative Law

The Georgia Society of International and Comparative Law is well into another active and successful year. In addition to the planned speakers who were listed in the October 1984 newsletter, the Society has also sponsored lectures by Danish diplomat, Dr. Axel Seup, whose topic was “Scandinavia in the World of Today” and by Professor Richard V. Wellman, whose topic was “The International Will.”

Mr. William P. Bundy addressed the Society on the topic “Arms Limitations Negotiations in the ’80s” during the month of February. Currently, the Society is scheduling additional guest speakers for the spring.

The Society will administer The Georgian Rusk Award in International Law for law students attending Emory, Mercer, and Georgia and will announce the winner at the annual banquet of the Society and the Journal on April 12, 1985.

Society members have had an opportunity to have personal interactions with visiting scholars and practicing attorneys through receptions, escorting duties, and furnishing transportation.

For further information on future activities of the Society, contact: Miriam Hollar, President, Georgia Society of International and Comparative Law, The University of Georgia School of Law, Athens, Georgia 30602.
Environmental Policy (Cont.)

of the park's wilderness areas would be undermined. The legal difficulties in satisfactorily resolving this case rest in part upon the particular protection granted to the free use of private land in the United States, and also on the lack of local and regional planning authorities of the federal government through which the use of private land could be regulated.

In West Germany, planned changes in the use of land in or near a protected area which endanger the conservation goals of the area can be prevented without compensation, as long as the previous use of the land can be maintained. Both the construction and the conservation authorities have the legal means to preserve the status quo in land use. The constitutionality of this power derives from the principle of social obligation in Article 14, Paragraph 2 GC. According to this principle, the use of private property must be consistent with the public good. Without the opportunity to solve land use conflicts in the manner indicated, our small country with its meager reserves of public land would find environmental protection in the form of area conservation almost a practical impossibility.

About The Author

Mr. Hermann Soell is a professor of law at Regensburg University in Germany. He is considered one of the leading authorities on environmental law in Germany. Prof. Soell is also a general practitioner working in the areas of tax, administrative, and public law. This transcript was originally prepared as a speech presented at the Rusk Center during Mr. Soell's participation in the Center's visiting scholar program from October 19 to November 29, 1983.

International Developments

In his state of the state address to the General Assembly, Governor Joe Frank Harris proposed 50,000 dollars in expenditures to establish a joint office of the Georgia Department of Industry and Trade and the Georgia Ports Authority in Seoul, Korea. The proposed office would be maintained by a native Korean who would promote Georgia's ports, industries and exports to Korea. If the trade office is opened, Georgia will become the first state in the nation to establish such a business connection in Korea.

The governor and other state officials initiated these business connections with Korea believing that one day Korea will rival Japan as one of the world's leading industrial powers. Currently, the United States is Korea's third largest trading partner. Thirty percent of Korean exports come to the United States, and later in 1985, Korea will begin exportation of an economy-sized Pony car to the United States.

A potential area of tension is the United States trade deficit with Korea which in recent years has grown to approximately three billion dollars. Presently, Korean businesses have little investment in Georgia although the Marietta-based Korea Trade Office was opened in 1975 to promote trade with the Southeast.

* * *

In the light of the proposed trade office in Korea, the Georgia Department of Industry and Trade along with the Georgia Ports Authority announced a new comprehensive program of "double coverage" at other foreign offices. The executive director of the Ports Authority and the commissioner of the Department of Industry and Trade recognize that each agency has a common purpose in promoting the state's economic development. This level of cooperation between the two agencies is seen as a step toward Georgia's maturation in the international trade arena to the extent that there will be a greater scale of cooperation among all state agencies.

If the joint office in Korea is successful, other offices may be opened in China and Latin America. Currently, the Department of Industry and Trade is expanding its European office in Brussels through a Department of Agriculture proposal to locate a person there who would specialize in promoting Georgia's agricultural products.

* * *

In late 1984, Atlanta Mayor Andrew Young was actively pursuing new international business connections for Atlanta with several Third World nations. In a controversial visit, leftist Nicaraguan leader Daniel Ortega was in Atlanta at the invitation of Young to discuss ties between the city and developing nations of the world. Young defended Ortega's visit, explaining that Atlanta is easily becoming America's gateway to the Third World and that this growing third world connection could pay off in such tangible benefits as economic development, investment, and new markets for businesses.

Young believes Atlanta clearly has the Third World contacts to become the literal "capital of the Third World." Several factors are usually cited as explanation for Atlanta's favorable position with developing countries. First, a large number of individuals from the Third World have and are receiving educations at various Atlanta institutions. Second, Atlanta is usually favorably connected with former President Carter and his efforts at human rights, and especially his proposed center for public policy. Finally, the Center for Disease Control in Atlanta contributes to the positive reputation through its work in combating smallpox in the Third World.

Young has also actively recruited investment from a group of Asian investors who could potentially spend one billion dollars to build an "international town" on the deserted south
side of Atlanta. Speculations for the development include 79 city blocks, one billion dollars, and enough residential units for 30,000 to 35,000 people. The proposal, however, has met much skepticism from Atlanta businessmen and officials. The Singapore-based investors include numerous respected Asian investors who are contemplating transferring current investments held in Hong Kong. Consideration of a possible move of current investments from Hong Kong was prompted when Great Britain recently agreed with the People's Republic of China to give control of Hong Kong, the world's third largest financial center, to the socialist economy of Peking.

The Ninth Annual Southeast United States/Japan Association Meeting was held in Birmingham, Alabama at the end of 1984. The forum was a joint effort to bring Japanese businessmen and policymakers closer to their counterparts in seven southern states which include Alabama, Florida, South Carolina, Tennessee, North Carolina, Virginia, and Georgia. The Association alternates the yearly meetings between locations in the United States and in Japan.

Governors and developers attended the meeting seeking to attract Japanese investment and ease trade tensions. Florida Governor Robert Graham announced that its state legislature would repeal the controversial unitary tax which taxed multinational corporations on a percentage of worldwide profits. Governor Harris of Georgia lauded the international capabilities of Atlanta as creating the ideal place for foreign investment.

Despite the friendly efforts at developing business relationships, both sides expressed concern over several areas of growing tension. The Japanese criticized the large United States budget deficit while the southern leaders expressed a desire to have Japanese markets more open to United States products. Florida Governor Graham voiced displeasure over limitations on exports to Japan, particularly on citrus products and beef. Also discussed was Japan's growing trade surplus with the United States which has contributed significantly to a large trade deficit and consequently has created high levels of resentment between the two countries.

In attempts to ease trade tensions, several foreign countries recently completed extensive business transactions in Georgia. A group from Taiwan, the Republic of China, bought 22 million dollars worth of Georgia soybeans, increasing expected purchases by 60 percent. The 84,000 metric tons of soybeans purchased represented the first such agricultural deal with Georgia since 1978, although the United States supplies all of Taiwan's soybean needs. In a similar transaction, two dozen buyers and executives from major department store chains and manufacturing firms in Japan visited the Women's and Children's Apparel Market at the Atlanta Apparel Mart to purchase clothing for their stores in Japan. The group was sponsored by the Japan External Trade Organization as a gesture toward easing tension over the growing United States trade deficit with Japan.

The group made purchases in excess of 6.75 million dollars.

In an effort to attract international investors, the Kimberly-Clark Corporation donated 50,000 dollars toward the establishment of an Atlanta International School. The international school with a curriculum similar to hundreds of schools around the world would enable foreign businessmen who move to Atlanta to give their children a consistent and multilingual education. The school could begin as early as the Fall of 1985 with three beginning grades and teaching in three languages. During the first year, approximately 70 students could enroll and a new grade would be added each year thereafter. The curriculum would prepare the students for an international baccalaureate diploma, a highly esteemed diploma around the world. This proposed school would help corporations that must recruit from an international market to staff their positions. The proposed school would also serve as an investment in future generations of foreign business relations.

The most recent report from the Agriculture Department on foreign ownership of United States agricultural land indicates that Georgia leads the nation in total acreage sold to foreign investors. Georgia has more than one million foreign-owned acres. In 1983, Georgia led the nation in acreage sold to foreign investors, with almost 100,000 acres transferred. According to the new report, 10 states have more than 400,000 acres owned by foreigners. The southern states of Georgia, Florida, Alabama, South Carolina, and Texas constitute five of these 10 states.

Of 214 foreign companies with United States headquarters located in Georgia, more than two-thirds cited international air routes as a major reason for choosing the state, according to a recent survey by Peat, Marwick, Mitchell, & Co. The opening of foreign air routes from Atlanta has coincided directly with an increase in foreign investment in Georgia. Between 1978 and 1983, Atlanta has moved from 17th to ninth in passenger traffic into and out of the United States. Overseas air traffic through Atlanta has increased 32 percent a year, to more than 1.1 million passengers from fewer than 300,000. Simultaneously, the number of foreign-owned corporations in Georgia has grown from 150 in 1975, to almost 800 today.

The Dutch-based Noro Group of Companies will celebrate its 10th year of business activity in the United States by starting construction on a new United States headquarters building in Atlanta. Since 1975, the Dutch firm has invested 550 million dollars in United States real estate, primarily in the Southeast. The Noro Group opened its first United States subsidiary in Atlanta in 1980, with a staff of two. The new corporate headquarters will house 30 staff members in a two-story structure with 36,000 square feet of space.
The Rusk Center is organizing a conference on Japanese Trade Law, together with Tokyo University, and the University of British Columbia, to be held in Vancouver, Canada in September of 1985.

A contract has been signed with Callahan and Company to produce a treatise on environmental law relating to the duties and liabilities of municipal governments.

The casebook authored by the director of the Center, Environmental Policy Law (1985 Edition), has become the largest selling casebook on the subject in the United States, used by approximately 80 colleges and universities. The director's book, Admiralty and Maritime Law, is also the most widely used casebook in that field.

The Rusk Center will hold a summer program on law and language in Mexico City in the summer of 1985. This program will consist of intensive Spanish language study followed by several courses in Mexican law. For further information, contact: Ms. Dorinda Dallmeyer; Dean Rusk Center; The University of Georgia; Athens, Georgia 30602.

The Rusk Center is sponsoring a course in comparative labor law, taught by Prof. Roger Blanpain of the University of Leuven, Belgium. The Center is also sponsoring a course in international commercial law taught by Prof. Charles Debbate of the University of Southampton, England.

The Rusk Center and the College of Agriculture cosponsored a Conference on International Trade in Agriculture in Athens on March 19, 1985. The program featured discussions among various authorities in agriculture and international trade. Many of the discussions were conducted as a live video telecast over satellite with telephone talk-back. The system connected numerous conference participants at separate national sites.

**Selected Recent Acquisitions**


The Georgia Journal of International and Comparative Law

The Georgia Journal anticipates publication of Volume 14, Issues 2 and 3 this spring. Volume 14, Issue 2 will include a special section on the law of foreign sovereign immunity in the United States, an article with advice on investment in mining in Mexico, Brazil, and Peru, and a note of the legality of President Reagan's proposed space-based ballistic missile defense system. The third issue of Volume 14 will be devoted entirely to trade law and will include selected papers presented at the Exporting in the 80s Conference which the Dean Rusk Center co-hosted last spring.

The Georgia Journal is currently soliciting manuscripts and subscriptions for Volume 15 of the Journal. Publication of the first issue of Volume 15 is anticipated this summer. The Georgia Journal would like to consider writings by scholars or practitioners on topics of either private or public international law for publication in Volume 15. Manuscripts should be mailed to: The Georgia Journal, The University of Georgia School of Law, Athens, Georgia 30602. Telephone: 404-542-7289.

If you are interested in subscribing to receive Volume 15, please fill out the form below and mail it to the Georgia Journal office. The Journal looks forward to including you among its subscribers.

Please tear off and mail to:

The Georgia Journal of International and Comparative Law
The University of Georgia School of Law
Athens, Georgia 30602

We Wish:

[ ] to subscribe to the Georgia Journal, Volume 15 at $13.00 per subscription.

Name

Address
American Bar Association
Section of International Law and Practice

The American Bar Association/Section of International Law and Practice is extending the deadline date for the Annual Student Scholarship to the Hague Academy of International Law until April 15, 1985. The Hague Academy, located in the Netherlands, has two summer sessions, one session on public international law and the other session on private international law. Each session, which runs for three weeks, is comprised of seven courses taught by renowned scholars and leaders in the field of international law. Participants represent over 80 different nations.

The annual scholarship consists of one thousand dollars which covers airfare, tuition, and room. Students applying for the scholarship must be members of the Section of International Law and Practice and the Law Student Division. Selection of the scholarship recipient will be based on the following requirements: a formal piece of writing in the international law area, a short statement of interest in international law not exceeding 500 words, two letters of recommendation, a résumé, and a law school transcript.

Applications must be received by April 15, 1985. The recipient will be announced in May. For further information or submission of an application, contact: Miriam A. Hollar, 215 Meadowview Road, Athens, Georgia 30606.

Dean Rusk Center
The University of Georgia
Athens, Georgia 30602