European University Institute

MAX WEBER PROGRAMME

EUI Working Papers

MWP 2009/24
MAX WEBER PROGRAMME

ON THE STRATEGIC USE OF THE PRELIMINARY REFERENCE SYSTEM: PLAUSIBLE ASSUMPTIONS v. EMPIRICAL REALITY

Reinhard Slepcevic

EUROPEAN UNIVERSITY INSTITUTE, FLORENCE
MAX WEBER PROGRAMME

On the Strategic Use of the Preliminary Reference System: Plausible Assumptions v. Empirical Reality

REINHARD SLEPCEVIC

EUI Working Paper **MWP** 2009/24

ISSN 1830-7728

Printed in Italy
European University Institute
Badia Fiesolana
I – 50014 San Domenico di Fiesole (FI)
Italy
www.eui.eu
cadmus.eui.eu

Abstract

In this paper, I examine a central assumption of the neo-functionalist theory of European integration empirically: that interest groups use the preliminary reference system strategically in order to pursue their policy interests and to push European integration further. Focusing on EU environmental policy, I first analyse all preliminary references in this field and show that the pattern found cannot be explained by current theories. I then report the findings of expert interviews on the use of the preliminary reference system carried out with French, German and Dutch environmental organisations that have litigated before national courts to enforce the Natura 2000 Directives. I show that there is no evidence that environmental organisations use the preliminary reference system in a way suggested by neo-functionalist theory.

Keywords

European Court of Justice, preliminary references, strategic litigation, environment, national courts

Introduction

European civil society is actively and intentionally participating in deepening and widening the European Union (EU). This is one of the core claims of what is commonly called the "neo-functionalist" theory of European integration, one of the most prominent accounts in explaining the tremendous shift of competences from the national to the EU-level in recent decades. It is argued that national interest groups representing civil society are constantly pushing for more integration to achieve their policy goals. They do so by relying on different strategies, and probably the one that has attracted most attention is the judicial strategy. Interest groups representing civil society, it is argued, litigate repeatedly and strategically before their national courts, and in particular before the European Court of Justice (ECJ), to pursue their interests and push European integration further. The crucial hub linking the national and the European level is the preliminary reference system: according to ex-Article 234 TEC (now Article 267), whenever there is a question of interpretation a national court can decide to hold the ongoing proceeding and ask the ECJ for a preliminary ruling in order to clarify the issue at hand. The constant flow of interest group litigation combined with the willingness of the national courts to ask the ECJ for preliminary rulings creates a steady supply of cases that allows the ECJ to continuously develop and refine its mostly integration-friendly jurisprudence. This in turn serves the goals of the litigating interest groups, and leads to even more litigation and more integration. Depending on one's perspective, the result is a vicious or virtuous circle (Burley and Mattli 1993; Cichowski 1998, 2007; Mattli and Slaughter 1998; Mazey 1998; Stone Sweet 2004; Stone Sweet and Brunell 1998; Stone Sweet and Sandholtz 1997; Fligstein and Stone Sweet 2002: 1221-35; Alter 2000; Alter and Vargas 2000).

It is important to recognise that neo-functionalist literature has developed this explanation "backwards": observing the integration-friendly jurisprudence of the ECJ and the, at first sight, smooth cooperation between the latter and national courts via the preliminary reference procedure, Ernst Haas' neo-functionalist theory of integration (1968) was revived and the missing parts were filled in by putting interests groups representing civil society at the beginning of the dynamic process. However, the goals interest groups actually pursue in litigation and whether it is really them who are litigating have not been investigated empirically. The reason for this is the very fact that the explanation starts with the result, and not with the litigating actors who stand at the very beginning of the theory. And it is also true that the assumption that actors litigate for strategic reasons sounds prima facie plausible – in the end, why should they litigate otherwise? However, the fact that litigation occurs was interpreted solely in the light of the neo-functionalist theory – actors initiated preliminary references to push European integration further – without considering other possible reasons why interest groups might litigate and why preliminary references could occur.

In this paper, I present new empirical evidence on how national environmental organisations[1] have used the preliminary reference system. I focus on these interest groups because they have been repeatedly analysed in neo-functionalist research to develop and support its claims (see in particular Cichowski 1998, 2007; Stone Sweet 2004). First, I examine all preliminary references relating to environmental issues in order to see how often environmental organisations, directly or indirectly, have participated as litigating actors in preliminary references. Second, I report the results of qualitative expert interviews with French, German and Dutch environmental organisations on how they have (not) used the preliminary reference system in litigation aimed at the enforcement of the so-called Natura 2000 Directives. Throughout the discussion, I relate the patterns observed to existing explanations in the literature of why preliminary references involving environmental organisations should vary across countries. My main argument is that there is no convincing evidence that these organisations use the preliminary reference system strategically in order to push European integration

[1] I use the term "environmental organisations" as the generic term for all interest groups whose proclaimed goal is to protect the environment. For reasons of consistency, I use the term "organisation" throughout the paper, yet one could also use "group" or "NGO".

further. The available evidence suggests that preliminary references are the by-product of nationally-focused case-by-case litigation by environmental organisations and not the result of a grand strategy. This has important consequences for the neo-functionalist theory of European integration and the democratic foundation of the EU's legal order.

Environmental Organisations and the Preliminary Reference System

Before turning to the use of preliminary references by environmental organisations, one might ask why they should be interested in using the preliminary reference system in the first place. In order to answer this question, neo-functionalist writers refer to the environment-friendly jurisprudence of the ECJ. Indeed, the Court has repeatedly strengthened EU environmental law. Commenting on thirty years of environmental law, Krämer, one of the most renowned experts on the topic, states that the judgements of the EC "often enhance the legal status of the environment, in particular the integration of environmental requirements into other policy areas" (Krämer 2002b: 161). Given the far-reaching and consistently environment-friendly jurisprudence of the ECJ, it seems plausible that environmental organisations try to make use of the preliminary reference system in order to pursue their policy interests. In addition, Somsen also argues that environmental organisations might become "private enforcers" and use the preliminary reference system in order to remedy implementation problems with EU law (Somsen 2000: 312; for EU law enforcement through national litigation, see Slepcevic 2009).

Both Somsen (2000: 331) and Cichowski (2007: 209-10) have already reported that the number of preliminary references where environmental organisations appear as plaintiffs is low. However, it could be that focusing only on who appears officially as plaintiff underestimates the number of cases that have actually been initiated by environmental organisations. It could be that the latter try to circumvent restrictive national standing rules by relying on a 'straw person' to file the case in order to achieve a preliminary reference. This person would then appear as the official plaintiff, but the resources and expertise for litigation would be supplied by an environmental organisation. Ignoring this possibility and focusing only on who appears as plaintiff in an ECJ ruling thus risks underestimating the number of times that environmental organisations have actually used the preliminary reference system to pursue their policy objectives. Obviously, in order to examine both the total number and variation of preliminary references this data problem needs to be tackled first.

I used the Stone Sweet/Brunell data set on preliminary references as the basis for my analysis, analyzing all rulings categorized as "environment" (Stone Sweet and Brunell 1999).[2] After updating the data set to April 2008 with the help of the EUR-Lex database (http://eur-lex.europa.eu), there are a total of 75 preliminary rulings labelled "environment". I then added two new categories to the ones in the Stone Sweet/Brunell data set. The first category contains information about the plaintiff in the given case. Was it a firm, an environmental organisation, an individual person or a community? There were only two cases where it was not possible to code the plaintiff according to this categorisation scheme.[3] The second category captures the "interest" that was pursued in the case. The question here is what was the plaintiff's reason for undertaking a long and potentially costly judicial proceeding? Was it for financial interests, e.g. if EU environmental legislation was prohibiting the extension of a harbour that a company wanted to build in order to expand;[4] or if national environmental legislation interpreted what constitutes "waste" more strictly than EU legislation and thus restricted waste companies in trading and making money out of it?[5] Financial interests are likely to be most often pursued by firms, but this is not necessarily always so. Also individuals who are confronted with potential economic losses might be ready to go to the courts, e.g. if their property would become more difficult to sell if it were to become a European nature protection site. Another reason for going to the

[2] I decided to use all rulings and not all decisions given by the ECJ. If several cases are joined together, each of them counts as a decision of the ECJ, yet this would arbitrarily inflate the number of rulings.

[3] C-14/86 [1987], Pretore di Salò v Persons unknown, ECR 2545, C-228/87 [1988], Pretura unificata di Torino v X, ECR 5099.

[4] See e.g. C-371/98 [2000], The Queen v Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd, ECR I-9235.

[5] C-192/96 [1998] Beside BV and I.M. Besselsen v Minister van Volkshuisvesting, Ruimtelijke Ordening en Milieubeheer, ECR *I-04029*.

ECJ could be to avoid penalties during a criminal proceeding. If an individual has committed an offence according to national environmental legislation and is threatened with severe penalties, he or she may try to evoke less strict EU environmental legislation or general EU law, such as the principle of free trade, in order to nullify the very basis of the criminal proceeding he or she is facing.[6] Finally, the plaintiff may actually try to enforce EU environmental legislation that has not or only incorrectly been implemented. If this is the case, it is likely that an environmental organisation will support the case with finance and expertise. Of course, it could also be that an idealistic individual is ready to invest considerable amounts of money and time in order to pursue an altruistic goal of protecting the environment. This possibility cannot be ruled out, yet it is arguably not very likely.

Before turning to the results, two remarks are necessary. First, as shown by the examples given above, it needs to be stressed that the category "environment" should not be regarded as automatically meaning "environmental protection". This is due to the fact that the Stone Sweet/Brunell data set relies on the initial categorisation used by the ECJ (Stone Sweet and Brunell 1999: Appendix D). It appears that the ECJ has adopted an all-encompassing definition of the category "environment" and has put all cases that deal with some aspect of the "environment" into it, regardless of whether the goal is the protection of the environment or not. In the understanding of the Court, "environment" just means that the case is about the environment, but not environmental protection per se. This is the very reason why it is indispensable to introduce an additional category – the "interest" behind a case – if one wants to analyse whether a given preliminary ruling is really about environmental protection or not. Second, the examples given above should also have made it clear that the goal of a preliminary reference as pursued by the litigant need not necessarily be the enforcement of stricter EU environmental legislation. The very opposite might be true: a litigant may try to remove stricter national environmental legislation by referring to EU rules, e.g. the principle of free trade that should also cover the shipment of waste. Or alternatively, a litigant may try to convince the ECJ that the national authorities are applying a European environmental rule too strictly. Obviously, neither case would be motivated by the goal of environmental protection.

Table 1 gives information on the users of the preliminary reference system and whether environmental organisations are trying to circumvent restricted legal standing by supporting individuals. It clearly shows that firms and individuals are the most important litigants in preliminary rulings related to the environment. Together, they account for about 80% of the total number. Environmental organisations, by contrast, only appear as plaintiffs in 17.3% of the cases. There are only two cases where individuals appeared as plaintiffs trying to enforce EU environmental law. Most often when individuals go to the ECJ they do so during criminal proceedings to try to avoid penalties foreseen by national environmental law. This goal is also sometimes pursued by firms, but their main goal when litigating is clearly of an economic nature. Assuming that legal standing is indeed a problem in obtaining preliminary references, these results allow us to rule out environmental organisations simply relying on "straw persons" in order to effectively circumvent restricted legal standing.

[6] C-37/92 [1993] Criminal proceedings against José Vanacker and André Lesage and SA Baudoux combustibles, ECR I-04947.

Table 1: Cross tabulation of "Type of Litigant" and "Interest pursued"

Type of Litigant	INTEREST				Total
	Financial Interest	Criminal Proceeding	Environmental Protection	Unclear	
Firm	25	4	0	0	29 (38.7%)
Environmental Organisation	0	0	13	0	13 (17.3%)
Individual	8	17	1	3	29 (38.7%)
Community	1	0	0	1	2 (2.7%)
Unclear	1	0	0	1	2 (2.7%)
Total	35	21	14	5	75 (100%)

Source: own categorisation based on Stone Sweet/Brunell (1999) and EUR-Lex (April 2008).

Table 2 gives details of the origin of preliminary references that involved environmental organisations. There are no such rulings before the 1990s, which may be explained by the fact that before that decade there were very few EU provisions protecting the environment which could be evoked during national court proceedings (Cichowski 2007: 207-30). I return to the Table after having discussed the existing explanations for the variance in the number of preliminary references.

Table 2: Preliminary references involving environmental organisations by year and country

Country	Year of preliminary ruling								Total
	1992	1994	1995	1996	1997	1999	2002	2005	
Belgium	0	0	0	2	0	0	0	0	2
France	1	0	0	0	0	1	1	0	3
Germany	1	0	0	0	0	0	0	1	2
Italy	1	1	0	0	1	0	0	1	4
Netherlands	0	0	0	0	0	0	1	0	1
UK	0	0	1	0	0	0	0	0	1
Total	3	1	1	2	1	1	2	2	13

Source: own categorisation based on Stone Sweet/Brunell (1999) and EUR-Lex (April 2008).

Existing Explanations for the (Non-) Use of the Preliminary Reference System

Most existing research on the use of the preliminary reference system has simply considered the total numbers of preliminary references as provided by the ECJ, without categorizing them in more detail (Alter 2000; Alter and Vargas 2000; de la Mare 1999; Stone Sweet 2004; Schepel and Blankenburg 2001). This is the reason why the main focus of the literature has been on explaining variation in patterns of preliminary references rather than on why environmental organisations have not litigated more often. The exception to this is Stone Sweet and Cichowski: sticking to neo-functionalist theory, and independently of each other, they argue that the characteristics of EU environmental law itself explain the low number of preliminary references in the field of the environment. Compared to other areas such as gender equality or the free movement of goods, EU environmental law offers fewer points to draw on and rarely involves individual rights, which might be easier to enforce (Cichowski 2007: 231; Stone Sweet 2004: 211-12; see also Alter 2000). This is certainly true, but if the characteristics of EU law were the only decisive explanation, there should not be any variation in the distribution of preliminary references in the field of the environment.

The following explanations for the low number of preliminary references initiated by environmental organisations allow for variation across countries. They often overlap, but can be roughly grouped according to three independent variables. The first variable could be labelled 'organisational capacity': environmental organisations need to possess a certain amount of resources in terms of money and legal information in order to obtain preliminary references during national litigation. The stronger the organisational capacity, it is argued, the more information environmental organisations possess for exploiting legal venues, the more strategic is their use of the ECJ, and the more resources they have at their disposal for litigation (Stone Sweet 2004: 211; Cichowski 2007: 32-33; Alter and Vargas 2000: 462-64). The second variable relates to the access of environmental organisations to the courts. The more open their access is in terms of legal standing, issue areas open for litigation and costs of litigation, the more possibilities environmental organisations have of exploiting legal venues in general, and the preliminary reference system in particular (Alter 2000: 496-97; Cichowski 2007: 33-34). The importance of these two variables in explaining variation in litigation is widely agreed upon in the literature. It should also be noted that they are not only crucial for an explanation of the use of the preliminary reference system, but also of public interest group litigation in general (see e.g. Rose-Ackerman 1995; Rosenberg 1991).

These first two variables focus on environmental organisations themselves. The third variable shifts the attention to the willingness of national courts to refer a specific case to the ECJ. In principle, EU law is clear on the conditions under which a question must be referred to the court: as long as the issue concerned has not already been clarified by the ECJ, all lower courts or tribunals can refer. If there is no further judicial remedy against a decision given by a court, the latter is in principle under the obligation to refer to the ECJ (see e.g. Craig and De Búrca 2003: 432-73). However, there are repeated reports of national courts not referring to the ECJ even though they were obliged to do so (see e.g. Golub 1996: 368-71; Chalmers 2000; Micklitz 2005). Indeed, if a court decides – for whatever reason – not to refer a case to the ECJ, the plaintiff can do nothing but accept this decision. Despite this fact, there is no agreement in the literature on the actual importance of this variable. Of course, it is admitted that it is up to the individual judge to refer a case to the ECJ or not. Yet whether the reluctance of judges might be a problem has still not been debated. Cichowski takes the most extreme position and does not even discuss this as a potential source of variation in preliminary references (2007: 32-37). Stone Sweet argues that reticence to refer has been a problem, but it has diminished (Stone Sweet 2004: 211). However, for Alter (2000: 501-06), Alter and Vargas (2000: 460-62), de la Mare (1999: 221-24) and Golub (1996), national courts play a crucial role in the use of the preliminary reference system.

Finally, it should be emphasised that these three variables are not – nor should they be – considered as explaining the use of the preliminary reference system by environmental organisations independently. As Alter and de la Mare highlight, these variables are better perceived as "thresholds" (Alter 2000) or "valves" (de la Mare 1999) that together regulate the flow of preliminary references. The more conducive characteristics for obtaining preliminary references they all display, the more preliminary references will occur.

Is it possible to explain the cross-country variation reported in the number of preliminary references involving environmental organisations according to these independent variables? If this is the case, it would suggest that these independent variables do indeed have explanatory power, even of the low number itself of preliminary references. In order to capture the different independent variables, I use the existing literature to measure the organisational capacity of environmental organisations and their access to the courts. There are no systematic data available with regard to the willingness of a national judge to refer – and more importantly not to refer – a case to the ECJ. Therefore, I rely on the average annual number of preliminary rulings sent to the ECJ reported, adjusted for years of membership. However, given the fact that this indicator is calculated on the basis of all preliminary references and thus contains mostly rulings on economic issues, it might be biased. Nevertheless, it can be argued that it at least captures the general willingness of national judges to refer a case or not.

With regard to the distribution of preliminary references involving environmental organisations across the Member States, no clear pattern emerges following one or several of the independent variables identified in the literature. This becomes obvious if the total number of preliminary references is compared according to the characteristics of the three variables (see Table 3).

Table 3: Independent Variables and Number of Preliminary Rulings

Country	Number of preliminary rulings	Organisational capacity of NGOs	Access to the courts	Average annual number of preliminary references
Belgium	2	Medium	Rather restricted	12.26
France	3	Low	Open	16.18
Germany	2	High	Restricted	31.67
Italy	4	Low	Rather Restricted	13.59
Netherlands	1	High	Open	12.35
UK	1	Medium	Restricted	10.13

Sources: Regarding the organisational capacity of environmental NGOs, see Dalton (1994), Immerfall (1997) and Rootes (1997).With regard to their legal standing, see de Sadeleer et al. (2005), Ebbesson (2002); and the European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL Network 2002). Regarding the average annual number of preliminary references, adjusted by years of membership, see Stone Sweet/Brunell (2000).

As the total number of these references is only thirteen, it is difficult to assess the explanatory power of the three independent variables, let alone perform a statistical analysis. Nevertheless, the figures do not seem to give clear support for the explanatory power of these variables. Four preliminary rulings had their origin in Italy, even though the environmental movement there is rather weak (but see Koutalakis 2004), environmental organisations only have restricted access to the courts and the rate of preliminary references is only average. In the Netherlands, by contrast, where environmental organisations possess a comparatively strong organisational capacity as well as open access to the courts, there is 'only' one preliminary ruling dating from 2002. The annual rate of preliminary references is again average. In contrast to this, there are only two references emerging from Germany, even though it has by far the highest rate of preliminary references, and German environmental organisations possess a strong organisational capacity. However, it might be that these

conducive characteristics are counter-balanced by the limited access of German environmental organisations to their national courts. Besides this, it is puzzling why environmental organisations from countries that have a rather bad record of implementing EU environmental law (Börzel 2003) and where they do enjoy access to the courts, such as Greece, Portugal and Spain (IMPEL Network 2002), have so far not made use of the preliminary reference system to enforce EU law. Of course, this may be related to their weak organisational capacity, but then it is puzzling why French environmental organisations with comparatively few resources were able to obtain three preliminary rulings.

Preliminary References during National Court Proceedings

As an abstract analysis of the use of the preliminary reference system by environmental organisations does not yield clear results, I decided to trace the "story" of a subset of cases that led to preliminary references in some countries, but not in others, qualitatively. This makes it possible to assess the potential explanations for the low number of preliminary references in detail by focusing both on the actual actors that have to initiate preliminary references, i.e. environmental organisations, and the arenas where preliminary references emerge, i.e. national courts.

In the subsequent discussion, I focus on litigation by German, Dutch, and French environmental organisations aimed at the enforcement of the so-called Natura 2000 Directives[7]. In all these countries, national environmental organisations litigated against the incorrect implementation of these Directives. However, litigation only resulted in two preliminary references: one from the Netherlands in March 2002[8], and one from Germany in April 2005.[9] In France, no preliminary reference involving environmental organisations has occurred so far. Why is this so? In order to answer this question, I rely on 24 expert interviews carried out with national environmental organisations, legal experts and high-ranking civil servants in order to understand how environmental organisations evaluate the possibility of obtaining a preliminary ruling in general, and in particular with regard to the Natura 2000 Directives.[10] I also report briefly on how the national courts followed the requests to refer cases to the ECJ.

Regarding the selection of the case studies, I cannot claim that the three cases are more appropriate for study than any others where environmental organisations have litigated before national courts leading to a preliminary ruling or not. In order to do so, it would be necessary to show that the cases studied are representative of the universe of this sort of cases (see e.g. Gerring 2007). Given the current state of research on the litigation behaviour of environmental organisations, both in the national and European context, we simply lack sufficient information to select cases systematically.

Background Information on the Natura 2000 Directives and their Implementation

The Natura 2000 Directives, i.e. the Birds[11] and Habitats Directives[12], together create what is called the Natura 2000 Network, a coherent network of nature protection sites for endangered species in Europe. Today, the network contains about 26,000 protected areas in all the EU Member states and covers a total area of around 850,000 km2, representing more than 20% of the territory of the EU (European Commission 2007a, b). It is without doubt the cornerstone of the EU's nature conservation policy and so far the most significant attempt at the European level to fight the loss of biodiversity in Europe.

[7] The Natura 2000 Directives cover both species protection (hunting and trade regulation) and site protection. In this paper, I cover only the latter aspect.

[8] ECJ C-127/02 [2004] Landelijke Vereniging tot Behoud van de Waddenzee and Nederlandse Vereniging tot Bescherming van Vogels v Staatssecretaris van Landbouw, Natuurbeheer en Visserij, ECR I-07405.

[9] ECJ C-244/05 [2006] Bund Naturschutz in Bayern v others, ECR I-08445.

[10] In order to make my research more transparent, I have fully transcribed the interviews using Atlas.Ti. Whenever I refer to information obtained during an interview, I report the name of the environmental organisation interviewed and the automatically generated marginal number (e.g. Interview Manche Nature, 123-133). Sections of the interviews can be obtained from the author upon simple request.

[11] Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds.

[12] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

The Natura 2000 Network is composed of two different kinds of protection areas: those for birds, called "Special Protection Areas", as established by the Birds Directive of 1979, and those for endangered flora and fauna, called "Special Areas of Conservation" by the Habitats Directive. In cooperation with the European Commission, the Member States were obliged to identify and designate all those sites that satisfied the criteria of the Birds and Habitats Directives as Natura 2000 areas. Sites under both these two Directives are today regulated by the same set of protection mechanisms. In the beginning, however, the Birds Directive contained a distinct protection regime. However, after the ECJ had given a strict interpretation on the possibility of allowing the deterioration of protection areas for birds[13], the Member States used the negotiation process on the Habitats Directive to amend the Birds Directive (Freestone 1996: 237; Davies 2004: 132-33). Article 6 of the Habitats Directive, which they adopted, obliges the competent national authorities to assess the effects of any plan or project that could negatively affect a protected site. If the realisation of the plan or project will have negative consequences for the site, it can only be authorised if no alternatives exist and if it can be justified on the basis of imperative reasons of public interest, including economic and social interests.

Despite the fact that the Habitats Directive contained a clear timetable regarding the designation of Natura 2000 sites, the implementation of the Natura 2000 Directives, i.e. both the creation of the Natura 2000 network and the transposition and correct application of the protection mechanisms, progressed very slowly. In 1991, only 528 km² of the Netherlands, 2,909 km² of Germany and 5,197 km² of France had been designated as protection areas under the Birds Directive (European Commission 1993: 42). By June 2007, the size of these areas had increased to 10,109 km² in the Netherlands, 48,102 km² in Germany and 45,804 km² in France (European Commission 2007b). The designation of protection areas under the Habitats Directive took a similar course: in December 2000, 20,434 km² had been designated in Germany and 31,440 km² in France (European Commission 2003: 17), compared to 53,294 km² in Germany and 52,156 km² in France in June 2007 (European Commission 2007a). Although the Netherlands had already designated most of their protection areas under the Habitats Directive by the end of 2000, the legal transposition of the site protection measures of the Natura 2000 Directives lagged behind. This meant that until October 2005, when the legal measures finally entered into force, the sites already designated were unprotected under Dutch law. The transposition of Article 6 of the Habitats Directive was done more rapidly in France and Germany, yet on the one hand it was incorrect, and on the other hand without much relevance due to the fact that so few sites had yet been designated.

Environmental organisations in France, Germany and the Netherlands quickly realised the potential of the Natura 2000 Directives as a means of pursuing their policy goals.[14] This can be easily understood in view of the fact that the beginning of the 1990s was characterised by a retrenchment rather than an expansion of national environmental protection measures in order to foster economic growth. Thus, environmental organisations were particularly receptive to the EU initiative to create a Europe-wide network of protection sites enforced by substantial protection rules. Once they had realised that their national governments were trying to resist the implementation of the Natura 2000 Directives, they had basically three strategies at their disposal to promote compliance: lobbying, trying to involve the European Commission, and litigation before national courts. However, they quickly realised that litigation was the most promising strategy in this case.

First, French, German and Dutch environmental organisations lobbied at the national level in order to put pressure on their national and local governments to implement the Directives faithfully. They repeatedly held press conferences and tried to inform their members, the public and the competent authorities about the implementation problems. However, regardless of the different organisational capacities of German, French and Dutch environmental organisations in terms of members and resources, they all agreed during the interviews that the resistance to the implementation of the new far-reaching protection measures was simply too strong to be overcome by mere lobbying (Interviews Manche Nature, 596-659; Naturschutzbund, 1, 699-725, BUND 1, 76-92, WWF 2, 034-051, Natuur en Milieu, 42-48; Vogelbescherming, 170-178). Second, environmental organisations

[13] ECJ C-57/89 [1991] Commission v Germany, ECR I-883.
[14] For detailed empirical information about the implementation process, see Slepcevic (forthcoming).

repeatedly sent letters of complaint to the European Commission about the implementation problems so that the latter would put more pressure on the Member State governments (Interviews Manche Nature, 829-860; Alsace Nature, 790-799; France Nature Environnement [Réseau Juridique], 585-610, BUND 1, 598-610, Naturschutzbund 1, 367-378, 755-778, Waddenvereniging, 830-844; Vogelbescherming, 10.03.2006, 936-940; Faunabescherming, 417-432). Indeed, the Commission took its role as 'Guardian of the Treaties' very seriously and brought all three countries before the ECJ several times for not having transposed the Natura 2000 Directives.[15] In addition, it threatened to link the payment of money from the structural funds to the realisation of a complete national Natura 2000 network.[16] However, given the huge implementation problems in almost all Member States, the Commission made it clear quite early that it would focus predominantly on pursuing instances of non-transposition – such as the non-transposition of Article 6 or a *general* insufficient designation of Natura 2000 sites – or a few exemplary cases – such as the deterioration of one specific site. This "strategy" is easily understood in view of the very limited monitoring and enforcement resources at DG Environment's disposal (Krämer 2002a: 32; Jordan 1999: 80). However, it was completely unacceptable to national environmental organisations focused on the protection of each and every site in their area. They certainly appreciated the help of the Commission with the implementation of the Natura 2000 Directives, yet were fully aware that this help would be of little use.

In view of this situation, it becomes clear that the starting position for obtaining preliminary references was particularly "conducive": huge implementation problems existed in all three countries and environmental organisations had to litigate in order to enforce the site protection provisions of the Natura 2000 Directives. Therefore, one would expect a high potential for the occurrence of preliminary references.

Environmental Organisations and Preliminary References in the Case of the Natura 2000 Directives

Before turning to the question of how environmental organisations conceived the possibility of strategically using preliminary references in the case of the Natura 2000 Directives in order to pursue their policy preferences, it needs to be emphasised that French, German and Dutch environmental organisations did indeed have access to the courts. Of course, if they had not been granted legal standing, it is obvious that they would not have considered preliminary references, and more generally litigation, as a suitable instrument for their goals. It is true that the access to courts of environmental organisations differs significantly across the countries under study, both in terms of the legal requirements for litigation as well as the actual costs involved (see Prieur and Makowiak 2002; Schmidt, Zschiesche and Rosenbaum 2004; Backes 2002). However, in all three countries environmental organisations enjoyed access to their administrative courts and indeed used litigation to enforce the Natura 2000 Directives (for more details, see Slepcevic 2009). Thus, in principle, environmental organisations of all countries had the option of seeking a preliminary reference.

How did the French, German and Dutch activists actively involved in litigation on the Natura 2000 Directives evaluate the possibility of obtaining a preliminary reference in order to pursue their policy interests? In France, environmental organisations did not really take this option seriously. Although the activist from the French environmental organisation "Manche Nature" who was interviewed had litigated several times in order to enforce the site protection measures of the Natura 2000 Directives and openly acknowledged the importance of the jurisprudence of the ECJ, he clearly stated that trying to obtain a preliminary reference had not been an issue (Interview Manche Nature, 697-708). A lawyer interviewed who had repeatedly litigated in the name of France Nature Environnement, one of the main French environmental organisations, also made it clear during the

[15] See C-83/97 [1997] Commission v Germany, ECR I-7191, C-71/99 [2001] Commission v Germany, ECR I-5811, C-98/03 [2006] Commission v Germany, ECR I-53, C-166/97 [1999], Commission v France, ECR I-1719; C-96/98 [1999] Commission v France, ECR I-8531, C-256/98 [2000] Commission v France, ECR , I-2487, C-374/98 [2000] Commission v France, ECR I-799, C-220/99 [2001] Commission v France, ECR I-5831, C-202/1 [2002] Commission v France, ECR I-11019; and C-3/96 [1998] Commission v the Netherlands, ECRI-3031, C-441/03 [2005] Commission v the Netherlands, ECR I-3043.

[16] Europe Daily Bulletins, No. 7642 – 27/01/2000.

interview that he had not thought about this option so far. Yet he also emphasised that he considered the French supreme administrative court – the Conseil d'État – very sceptical vis-à-vis the ECJ and considered it rather improbable that the Conseil would ask the ECJ for a preliminary reference (Interview France Nature Environnement [Legal Expert], 568-608, 664-691).

In Germany, environmental organisations had a different attitude to preliminary references. Although it is true that there were examples where local environmental organisation activists simply ignored this possibility (Interview BUND, 1, 486-491), activists working at the regional and federal level, such as the legal expert from BUND interviewed, made it clear that they had repeatedly tried to obtain preliminary references during the court proceedings (Interview BUND, 2, 666-681). However, the administrative courts had always rejected the request to refer the case to the ECJ. The activist interviewed from the WWF, who cooperated closely with BUND in the case of the deepening of the river Ems, made it clear that their explicit goal in litigation was to circumvent the national courts because they considered them to be too involved in local politics (Interview WWF, 449-481). This needs to be put into perspective: in Germany, unlike the Netherlands, environmental organisations mostly litigated against large projects, such as the construction of motorways or the deepening of rivers, yet often with – from their view – little success. They criticized the local courts for interpreting the Natura 2000 Directives too laxly and for insufficiently scrutinising the administrative decisions authorising the projects. Regardless of whether this interpretation is correct or not, it helps to explain why the ECJ was considered a more neutral court, in the sense that it was more distant from local politics, and was hoped to render more environment-friendly rulings if it had the chance. However, it needs to be emphasised that there is no evidence that German environmental organisations adopted a strategic, more long-term-oriented policy in order to obtain a preliminary reference, such as identifying test cases or environment-friendly administrative judges who would be more likely to refer the case to the ECJ. Their litigation behaviour was very much driven case-by-case, without an overarching strategy.

In the Netherlands, even though environmental organisations repeatedly litigated in order to enforce the Natura 2000 Directives, the experts interviewed agreed that it was not their explicit goal to obtain preliminary references from the ECJ (Interview Waddenvereniging 426-433). The case of the mechanical fishing of cockles in the Wadden Sea that ultimately led to a preliminary ruling is a case in point: the lawyers involved clearly stated that the case was referred to the ECJ on the sole initiative of the supreme Dutch administrative court, the Raad van State. In the words of the lawyer involved, the possibility of asking for a preliminary reference "didn't cross my mind" (Interview Vogelbescherming, 982-1003). It is interesting to note in this respect that, in contrast to Germany, the environmental organisations interviewed were generally pleased with how the Dutch courts handled the Natura 2000 Directives, at least after 2000, and when large projects were involved. This might explain why they did not see the importance of involving the ECJ in the issue.

In contrast to what is often implicitly suggested in the political science literature on the use of the preliminary reference system by interest groups, there is no evidence that the French, German or Dutch environmental organisations tried to strategically exploit the potential opportunities offered by the EU legal system. Either the goal of obtaining a preliminary reference was considered unimportant, as in France and the Netherlands, or it was pursued on a case-by-case basis without an underlying strategic plan, as in Germany. Why is this so? It seems that much of the literature overlooks a crucial fact: European environmental organisations are still first and foremost national environmental organisations. It is true that some, such as Greenpeace and the WWF, have adopted an international perspective, but their focus is international, not European. It is also true that European environmental organisations cooperate on the European level, either through the European Environmental Bureau or through their partner organisations, such as BirdLife International in the case of the Dutch Vogelbescherming and the German Naturschutzbund, or Friends of the Earth in the case of the German BUND. However, this cooperation is mostly limited to the exchange of information and sometimes cross-border publicity campaigns. However, litigation is a different matter: here, national – or in the overwhelming majority of cases, local or regional – environmental organisations are confronted with specific projects in their region that they, for whatever reason, try to change or prevent from being realised. Whether the case could have Europe-wide consequences because of an

interpretation given by the ECJ is simply not their main concern. The German example is telling in this respect: it was only because environmental organisations were dissatisfied with their national courts that they tried to go to the ECJ, not because of any intentional long-term litigation strategy. If their attitude to their administrative courts had been the same as that of the Dutch environmental organisations they would have been satisfied. If environmental organisations go to their courts, they do so because of one single specific project that they are unhappy with. Whether it is a national court or the ECJ that helps them to achieve their policy objective is unimportant, as long as there is at least one court that does so.

For the sake of completeness, it should be also mentioned that neither the organisational capacity of environmental organisations nor their access to the courts provide decisive explanations of how they perceive preliminary references. Seen from a probabilistic perspective, it is certainly true that smaller environmental organisations facing restrictive access to their courts are less likely to litigate in general, and consequently will be less aware of the potential of preliminary rulings. Yet this does not overcome the fact that long-term developments in ECJ jurisprudence are currently of no concern to litigating environmental organisations, regardless of whether they display a high organisational capacity and enjoy open access to their courts.

Finally, the central role of national courts for preliminary references needs to be highlighted. This is obvious to any legal scholar, but as has been mentioned above, some political scientists still downplay the independent role of the courts. In the case of Germany, several administrative court judgements deal with environment organisation requests to refer a case to the ECJ, but all were ultimately denied.[17] That it eventually came to a preliminary reference in April 2005[18] cannot be explained by environmental organisations not actively seeking an environmental reference before. They did so repeatedly, but it is simply up to the court whether or not to refer a case to the ECJ.

Conclusion

In this paper, I have discussed the use of the preliminary reference system by environmental organisations. In a first step, I have shown that if one considers the existing "environmental" preliminary references in more detail, there are little more than a dozen cases where environmental organisations were actively involved. The distribution of these cases does not follow a clear pattern that can be explained by current accounts of cross-country variation in preliminary references. Therefore, in a second step, I have examined how environmental organisations used the preliminary reference system in a concrete instance of litigation. As the Natura 2000 Directives had not been implemented correctly, French, German and Dutch environmental organisations turned to their national courts to enforce the European site protection measures. Yet notwithstanding the "conducive" starting position for obtaining preliminary references, only two cases were ultimately sent to the ECJ. On the basis of qualitative expert interviews with activists from environmental organisations actively involved in litigation, I have shown that they do not pursue a long-term-oriented strategy to obtain preliminary references. If they care about them at all, which was only the case in Germany, they do so on a case-by-case basis. I argue that this is the result of the focus of environmental organisations on their national, and particularly local and regional, environment.

There are two consequences of these findings: first, more attention should be paid to whether interest groups actually play the role that the neo-functionalist theory of European integration predicts. It is certainly true that the ECJ has had an enormous influence on the development of the EU and that it would not have been able to do so without the preliminary reference system. Yet acknowledging this does not automatically support the neo-functionalist claim that interest groups representing civil society are intentionally pushing for European integration through litigation. They certainly do pursue

[17] See e.g. BVerwG, Urt. v. 24.5.1996 - 4 A 16.95, VGH München, Urt. v. 14.6.1996 - 8 A 94.40125/40129, BVerwG, Urt. v. 19.5.1998 - 4 A 9.97, BVerwG, Beschl. v. 24. 8. 2000 – 6 B 23/00, OVG Lüneburg, Urt. v. 18.11.1998 - 7 K 912/98.
[18] C-244/05 [2006] Bund Naturschutz in Bayern v others, ECR I-08445.

their policy interests and might also use European law if it serves their purposes, but the consequences of their actions are unintended, if important, side-effects rather than the result of intentional strategies.

The second implication of the paper relates to the democratic character of the European legal system. Micklitz argues that the preliminary reference system is indeed able to constitute the main democratic foundation of the EU's legal order if, among others, "public interest groups (…) turn themselves into professionalised legal players" (Micklitz 2005: 425). In his study of public interest group litigation in the UK, he concludes that "[t]he major deficiency evident in the strategies of public interest groups is their focus on the *national* aspect of the issue. By focusing on the national issue, they overstretch the boundaries of the judge-made EC law." (Micklitz 2005: 478, emphasis in original). The results of this paper clearly show that French, German and Dutch environmental organisations are still far from achieving this goal. Not only their focus, but their whole motivation to litigate is defined nationally. If they pursue their policy objectives through litigation, they do not care which court helps them to achieve their goals, as long as one does. More research in different policy areas and countries is certainly necessary, but existing evidence supports a rather pessimistic perspective.

Reinhard Slepcevic
Max Weber Programme, 2008-2009

Bibliography

Alter, K. J. (2000) 'The European Union's Legal System and Domestic Policy: Spillover or Backlash?' *International Organization* 54(3): 489-518.
Alter, K. J. and Vargas, J. (2000) 'Explaining Variation in the Use of European Litigation Strategies: European Community Law and British Gender Equality Policy', *Comparative Political Studies* 33(4): 452-82.
Backes, C. W. (2002) 'Netherlands', in: J. Ebbesson (ed.) *Access to Justice in Environmental Matters in the EU,* The Hague/London/Boston: Kluwer Law International, pp 379-98.
Börzel, T. A. (2003) *Environmental Leaders and Laggards in Europe: Why there is (not) a 'Southern Problem'*, Aldershot: Ashgate.
Burley, A.-M. and Mattli, W. (1993) 'Europe before the Court: A Political Theory of Legal Integration', *International Organization* 47: 41-76.
Chalmers, D. (2000) 'The Positioning of EU Judicial Politics within the United Kingdom', *West European Politics* 23(4): 169-210.
Cichowski, R. A. (1998) 'Integrating the environment: the European Court and the construction of supranational policy', *Journal of European Public Policy* 5(3): 387-405.
Cichowski, R. A. (2007) *The European Court and Civil Society*, Cambridge: Cambridge University Press.
Craig, P. and De Búrca, G. (2003) *EU Law*, Oxford: Oxford University Press.
Dalton, R. J. (1994) *The Green Rainbow: Environmental Groups in Western Europe*, New Haven/London: Yale University Press.
Davies, P. G. G. (2004) *European Union Environmental Law: An Introduction to Key Selected Issues*, Aldershot: Ashgate.
de la Mare, T. (1999) 'Article 177 in Social and Political Context', in: P. Craig and G. de Búrca (eds.) *The Evolution of EU Law,* Oxford: Oxford University Press, pp 215-60.
de Sadeleer, N., Roller, G. and Dross, M. (2005) *Access to Justice in Environmental Matters and the Role of NGOs*, Groningen: European Law Publishing.
Ebbesson, J. (ed.) (2002) *Access to Justice in Environmental Matters in the EU*, The Hague/London/Boston: Kluwer Law International.
European Commission (1993): 'Second report on the application of Directive No 79/409/EEC on the conservation of wild birds' (Brussels: European Commission).
European Commission (2003): 'Report from the Commission on the implementation of the Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora' (Brussels: European Commission)
(http://ec.europa.eu/environment/nature/nature_conservation/monitor_indic_reporting/monitoring_and_reporting/habitats/pdf/art_17/memberstates_summary_en.pdf).
European Commission (2007a) *Natura 2000 Barometer: Sites of Community Importance (Update of June 2007)* [Accessed on: 2007-09-02
(http://ec.europa.eu/environment/nature/nature_conservation/useful_info/barometer/pdf/sci.pdf).
European Commission (2007b) *Natura 2000 Barometer: Special Protection Areas (Update of 30 June 2007)* [Accessed on: 2007-09-02
(http://ec.europa.eu/environment/nature/nature_conservation/useful_info/barometer/pdf/spa.pdf).
Fligstein, N. and Stone Sweet, A. (2002) 'Constructing Polities and Markets: An Institutionalist Account of European Integration', *American Journal of Sociology* 107(5): 1206-43.
Freestone, D. (1996) 'The Enforcement of the Wild Birds Directive: A Case Study', in: H. Somsen (ed.) *Protecting the European Environment: Enforcing EC Environmental Law,* London: Blackstone Press, pp 229-50.
Gerring, J. (2007) *Case Study Research*, Cambridge: Cambridge University Press.
Golub, J. (1996) 'The Politics of Judicial Discretion: Rethinking the Interaction between National Courts and the European Court of Justice', *West European Politics* 19(2): 360-86.
Haas, E. B. (1968) *The Uniting of Europe*, Stanford: Stanford University Press.

Immerfall, S. (1997) 'Soziale Integration in den westeuropäischen Gesellschaften: Werte, Mitgliedschaften und Netzwerke', in: S. Hradil and S. Immerfall (eds.) *Die westeuropäischen Gesellschaften im Vergleich,* Opladen: Leske + Budrich, pp 139-73.
IMPEL Network (2002): 'Complaint Procedures and Access to Justice for citizens and NGOs in the field of the environment within the European Union' (Brussels: The European Union Network for the Implementation and Enforcement of Environmental Law (IMPEL Network)).
Jordan, A. (1999) 'The implementation of EU environmental policy: a policy problem without a political solution', *Environment and Planning C: Government and Policy* 17: 69-90.
Koutalakis, C. (2004) 'Environmental Compliance in Italy and Greece: The Role of Non-state Actors', *Environmental Politics* 13(4): 754-74.
Krämer, L. (2002a) *Europäisches Umweltrecht in der Rechtsprechung des EuGH: dargestellt anhand von 50 Urteilen*, Wien: Verlag Österreich.
Krämer, L. (2002b) 'Thirty Years of EC Environmental Law: Perspectives and Prospectives', in: H. Somsen (ed.) *Yearbook of European Environmental Law,* Oxford: Oxford University Press, pp 155-82.
Mattli, W. and Slaughter, A.-M. (1998) 'Revisiting the European Court of Justice', *International Organization* 52(1): 177-209.
Mazey, S. (1998) 'The European Union and women's rights: from the Europeanization of national agendas to the nationalization of a European agenda?' *Journal of European Public Policy* 5(1): 131-52.
Micklitz, H.-W. (2005) *The Politics of Judicial Co-operation in the EU*, Cambridge: Cambridge University Press.
Prieur, M. and Makowiak, J. (2002) 'France', in: J. Ebbesson (ed.) *Access to Justice in Environmental Matters in the EU,* The Hague/London/Boston: Kluwer Law International, pp 203-30.
Rootes, C. A. (1997) 'Environmental movements and green parties in western and eastern Europe', in: M. Redclift and G. Woodgate (eds.) *The International Handbook of Environmental Sociology,* Cheltenham: Edward Elgar, pp 319-48.
Rose-Ackerman, S. (1995) *Umweltrecht und -politik in den Vereinigten Staaten und der Bundesrepublik Deutschland*, Baden-Baden: Nomos.
Rosenberg, G. N. (1991) *The Hollow Hope: Can Courts Bring About Social Change?*, Chicago: University of Chicago Press.
Schepel, H. and Blankenburg, E. (2001) 'Mobilizing the European Court of Justice', in: G. de Búrca and J. H. H. Weiler (eds.) *The European Court of Justice,* Oxford: Oxford University Press, pp 9-42.
Schmidt, A., Zschiesche, M. and Rosenbaum, M. (2004) *Die naturschutzrechtliche Verbandsklage in Deutschland: Praxis und Perspektiven*, Berlin: Springer.
Slepcevic, R. (2009) 'The judicial enforcement of EU law through national courts: possibilities and limits', *Journal of European Public Policy* 16(3): 378-94.
Slepcevic, R. (forthcoming) *Litigating for the Environment: EU Law, National Courts and Socio-Legal Reality*, Wiesbaden: VS Verlag für Sozialwissenschaften.
Somsen, H. (2000) 'The Private Enforcement of Member State Compliance with EC Environmental Law: an Unfulfilled Promise?' in: H. Somsen (ed.) *Yearbook of European Environmental Law,* Oxford: Oxford University Press, pp 311-60.
Stone Sweet, A. (2004) *The Judicial Construction of Europe*, Oxford/New York: Oxford University Press.
Stone Sweet, A. and Brunell, T. L. (1998) 'Constructing a Supranational Constitution: Dispute Resolution and Governance in the European Community', *American Political Science Review* 92(1): 63-81.
Stone Sweet, A. and Brunell, T. L. (1999) *Data Set on Preliminary References in EC Law*, San Domenico di Fiesole, Italy: Robert Schuman Centre, European University Institute.
Stone Sweet, A. and Brunell, T. L. (2000) 'The European Court, National Judges, and Legal Integration: A Researcher's Guide to the Data Set on Preliminary References in EC Law, 1958-98', *European Law Journal* 6(2): 117-27.
Stone Sweet, A. and Sandholtz, W. (1997) 'European Integration and Supranational Governance', *Journal of European Public Policy* 4(3): 297-317.