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Organizing Technical Knowledge in Environmental and Planning Law Disputes in the Netherlands – the Foundation of Independent Court Experts in Environmental and Planning Law

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Abstract

In the Netherlands, the technical knowledge needed by judges to decide on environmental and planning law is organized in an atypical way. The Stichting Adviesering Bestuursrechtspraak (STAB, Foundation of Independent Court Experts in Environmental and Planning Law) has the sole purpose of supplying the technical expertise needed by the administrative judges. One might question the need for such a, at first sight, relatively costly system. Furthermore, there may be concerns about the independence and impartiality of the STAB. This paper will explore the functioning of the STAB and discuss these possible concerns, mainly on the basis of the existing evaluation reports. It will be seen that the concerns are largely ill-founded and that the STAB is highly appreciated by its customers, the courts and by third parties. Although the existence of the STAB is due to specific historical circumstances, it could become a role model for other countries.

I. Introduction

Effective judicial protection in environmental law cases, especially before the administrative courts, often requires that the courts be able to at least understand complex technical issues. How could they otherwise judge whether the permit requirements for an installation reflect the standards of the Best Available Techniques or whether the proposed measures in an air quality plan may have the effect that the desired air quality limit values are met? The more intensely the courts review the facts and the technical assessments made by the administration, the more the courts depend on assistance in order to be able to understand those very facts and assessments. There does not seem to be any explicit reference in either international law or in EU law concerning the requirements with regard to the scientific knowledge of the judge in environmental matters. However, such requirements could perhaps be read into Article 9(2) Aarhus Convention that provides for the possibility of a review of "substantive and procedural legality", as well as into the requirement of "effective judicial protection" in EU law. The CJEU has stressed that national courts have to be able to assess all aspects of the legality of the technical assessment on which a challenged decision was based.[1]

Organizing the technical knowledge of the courts is done very differently throughout the EU and beyond. Some countries appoint technically educated and skilled judges or lay judges; other countries require that applicants first apply to tribunals or other institutions staffed by technicians before they lodge a judicial review claim at a court. The question whether there are similarities, best practices and whether mutual learning from different approaches would be possible, as well as the question of what the above-mentioned requirements of EU law and the Aarhus Convention may entail in more detail, has not yet attracted much attention in legal scholarship. To fill this gap, academic research is needed.

In the Netherlands, the technical knowledge needed by judges to decide cases in the area of environmental and planning law is organized in an atypical way. A special institution, the *Stichting Adviesering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening,* in short and hereafter: STAB (the Foundation of Independent Court Experts in Environmental and Planning Law)[2] exists for the sole purpose of supplying the technical expertise needed by administrative judges to thoroughly scrutinize environmental and planning law cases submitted to them. All administrative courts may ask the STAB to provide advice, limited to certain issues arising in a case pending before them, or to write a comprehensive report on the technical aspects of such a case. Although, strictly speaking, according to the statutes of the STAB, this institution does not serve civil courts and criminal courts, in practice such courts sometimes also seek and receive advice in court cases dealing with environmental and planning law. As far as is known, an institution comparable to the STAB is not known in any other member state. From a comparative law perspective, it is therefore of special interest to reflect on the way that the technical knowledge of the courts in environmental cases is organized in the Netherlands. This article explains the Dutch approach to this topic in order to enable a comparison with the solutions chosen in other countries. It aims to inform about and critically analyse this Dutch procedural law facility.

Because of its peculiar nature, the Dutch system

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[1] Case C-72/12, *Gemeinde Altrip and Others v. Land Rheinland-Pfalz* ECLI:EU:C:2013:712, para 37; case C-137/14, Commission v. Germany ECLI:EU:C:2015:683, para 48. See M. Eliantonio in this Special Issue.

[2] See http://www.STAB.nl.

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raises important questions. First of all, one might be tempted to see a very costly system compared to the ability of the courts to appoint *ad hoc* experts whenever needed. Secondly, there may be concerns about the independence and impartiality of the STAB.

The existence of the STAB enables judges to deal with the merits of the often technically complicated questions brought before them and to scrutinize fairly extensively and in detail whether the requirements of European and national environmental and planning law have been met, without having to rely on information brought (and paid for) by one of the parties. The emergence and existence of the STAB can only be explained by the specific history of the Dutch judicial review system in this area of the law. In other areas of administrative law, such as social security law or asylum law, there is no institution comparable to the STAB. Only in criminal law could the *Nederlands Forensisch Intituut, NFI* (the Netherlands Forensic Institute) be compared with the STAB, as it provides the courts with the ''technical'', i.e. psychological, information they need to decide in cases pending before them.

This paper will first provide an overview of the scope of STAB's activities (section 2). It will then explain how this institution originated within the context of Dutch law on judicial review and why it developed into what it is now (section 3). Section 4 concentrates on the embedding of the STAB reports in court proceedings. After having analysed what the STAB is, how it developed, what it does and how its reports are dealt with by the judges, it is possible to deal with the question of whether the STAB functions well, mainly in the eyes of its main customers, the courts, but also in the perception of the other parties of judicial proceedings in environmental law cases (section 5). Finally, some suggested structural changes will be reflected upon.

II. Some Facts

The STAB has its seat in The Hague. It is an independent and impartial institution which is mainly financed by the Dutch Ministry of Infrastructure and Water Management (*Ministerie van Infrastructuur en Waterstaat)*. The legal basis for the STAB is laid down in the three main acts dealing with environmental and planning law, the Environmental Management Act *(Wet milieubeheer, Wm)*,[3] the Planning Act *(Wet ruimtelijke ordening, Wro)*[4] and the General Provisions of Environmental and Planning Law Act *(Wet algemene bepalingen omgevingsrecht, Wabo*).[5] In the future, its legal basis is expected to be found in Article 17.10 of the Environmental and Planning Act (*Omgevingswet, Ow*).[6] This act will replace 26 acts dealing with different aspects of the environment, such as water, nature protection, environmental protection, and planning. The Ow is expected to come into force in 2021 or 2022.[7]

The STAB employs between forty and fifty people. Drafting an advice for a judge may take up to three months,[8] or two months if the Crisis and Recovery Act (*Crisis-en herstelwet*) applies to the case.[9] In reality, this maximum period cannot always be met, but delays are not substantial, as the figures hereafter demonstrate. The budget of the STAB is approximately 5.3 million euros per year.[10]

Table 1: Time needed for the STAB to submit an advice[11]

	2007	2008	2009	2010	2011	2012
Average time needed (in months)	2.85	3.06	3.2	3.41	3.1	2.5
Percentage of reports delivered on time	No data available	39%	68%	48%	31%	96%

Each of the advisors produces 4.7 reports on average per year.[12] In 2012, the STAB delivered around 200 reports. In previous years, a larger number of reports were produced, e.g. almost 500 in 2007.[13] Therefore, it can be concluded that the courts currently ask the STAB for advice less frequently than in the past. However, the cases in which the courts require advice on technical aspects have become more complicated.

Although the number of reports delivered has decreased significantly, the total workload, according to calculations made by the STAB itself,[14] has not

[3] Articles 20.14 (1), 20.15 and 20.17 (1) Wm.
[4] Articles 8.5 ,8.6, 8.7 and 8.8 Wro.
[5] Article 6.5b Wabo.
[6] The way in which this legal basis will be drafted in the Ow is not without discussion; see L. van Klink *et al.*, n. 10 below, p. 13.
[7] For more information see http://www.omgevingswet.nl.
[8] This period is not determined in binding law, but was set by the Council of State, a most important client, the Ministry of Infrastructure and Environment and the STAB itself.
[9] Art. 1.6 (3) Crisis and Recovery Act.
[10] More exactly €5,227 million in 2015.
[11] See L. van Klink *et al.*, *Eindrapportage subsidie-evaluatie STAB 2007-2013*, p. 28.
[12] *Ibid.*, p. 27.
[13] *Ibid.*, p. 15.
[14] *Ibid.*, p. 16.

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Table 2: Production in estimated hours of workload[15]

	2007	2008	2009	2010	2011	2012
Judicial Division Council of State	23,610	28,296	30,668	38,369	31,272	16,729
District Courts, Administrative Law	1,442	2,916	2,167	2,645	4,216	10,444
District Court, Criminal and Civil Law	43	794	646	372	696	573
In total	25,095	31,862	33,481	42,489	36,184	27,746

decreased.[16] One reason for this is the growing complexity of all of its environmental and planning law cases, due to the fact that the legislature has merged several acts and several permit requirements into one. Hence, when in former times there were separate permits and in many cases separate judicial review procedures, for example with regard to the effects of a project on a Natura 2000 site, the effects on protected species, air quality issues and planning permits, all these aspects are now dealt with in one decision and, therefore, in one judicial review case. Some judges who were interviewed pointed at the fact that the technical aspects of environmental cases have become more and more complex.[17] Computer programs and algorithms increasingly influence permits and other decisions.

On the other hand, the character and structure of the requests of the courts have also changed. Whilst the courts, mainly the Judicial Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State)* and its predecessors, used to ask the STAB to draft a comprehensive report on all factual elements of a case pending before them, they now more often submit specific questions concerning technical issues that are still unclear or disputed after the materials submitted by the parties have been considered. In complex cases, a general and open request is still made. In these cases, the judges take advantage of the comprehensive report to structure the complicated facts of the case.[18] This change is due to changes in procedural law and practice during the last few decades. Whilst judicial review in administrative law once primarily followed a "*recours objectif*' model and it was mainly the courts that had to investigate the facts of the case, the process can now be characterized more as "*recours subjectif*'. First and foremost, the parties have to provide the facts of the case. Only when the court, on the basis of the information given by the parties, is still unsure about the facts or their interpretation will it (still) investigate these on their own.[19] This is often the case when the parties deliver different, contradictory reports on some factual issues of the case.

In 2007, the requests from the Judicial Division of the Council of State accounted for almost 95 per cent of STAB's workload. In 2012, however, this was only a little over 60 per cent. In recent years, the Judicial Division has asked for the advice of the STAB in approximately 3 per cent of all environmental and planning law cases.[20] The figures above demonstrate that the number of requests from the district courts has risen significantly. A reason for this may be that the STAB actively informs the district courts of the services which are available. [21] Is some important areas of environmental and planning law,[22] the district courts were only given competence to decide cases at first instance on 1 October 2010.[23] Before then, the Judicial Division of the Council of State was the court of first instance in this kind of cases without any possibility of an appeal. After the district courts were given the competence to decide in these areas, they first had to familiarise themselves with the possibility to ask the STAB for advice, as such an instrument was

[15] *Ibid*., p. 28.
[16] *Ibid*., p. 28.
[17] Interview with Judge 2 from the Judicial Division of the Council of State, 29 March 2017 and interview with Judge 2 from one of the district courts 5 April 2017.
[18] Interviews with Judge 1 and Judge 3 from the Judicial Division of the Council of State, 29 and 30 March 2017. See on the change in functions, Ch.W. Backes and M. Eliantonio, *Judicial Review of Administrative Action*, Ius Commune Casebook, (Hart Publishing, Oxford, 2018), Chapter 1, Section 5.2.
[19] Interview with Judge 1 from the Judicial Division of the Council of State, 29 March 2017.
[20] Interview with Judge 1 from the Judicial Division of the Council of State, 29 March 2017. The percentage relates to admissible cases. Therefore, in calculating the percentage the cases which were not admissible were not counted.
[21] L. van Klink *et al*., n.11 above, p.19.
[22] This mainly concerns environmental permits on the basis of the Environmental Management Act. For other permits, like derogations on the basis of the Species Protection Act, the district courts have been competent all along (and therefore asked the STAB for advice from time to time).
[23] The Council of State was the first and last instance court for disputes on permits on the basis of the former Nature Protection Act 1998 until 1 January 2017 and is still the first and last instance court with regard to disputes concerning municipal land use plans.

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and is unknown in other areas of administrative law.[24] There are huge differences between the district courts. Between 2007 and 2012, the (former) district court of Groningen asked for advice only once, whilst the (former) district court of Assen requested and received advice in 36 cases. These differences are most probably due to different cultures and traditions within the district courts and by different attitudes among the judges themselves.[25]

The figures above also demonstrate that a small part of the requests to the STAB come from the civil and criminal law divisions of the district courts. This is remarkable as, strictly speaking, in such cases the STAB is acting outside its field of competence. According to e.g. Article 6.5b *Wabo*,[26] and also according to the statute of the STAB,[27] it is the task of the STAB to advise the administrative courts (*de bestuursrechter*). However, the STAB also accepts requests from criminal and civil courts dealing with environmental and planning law cases. When the STAB works on requests by the criminal or civil courts, the courts have to pay for this service. No one has yet protested against this practice, as in these cases the knowledge and experience of the STAB is of added value and it enables the courts to enhance the quality of their judgments.

III. Some History

The existence of the STAB can only be understood in its historical context. In former times, until the judgment of the ECtHR in the *Benthem* case in 1986,[28] the main review procedure against decisions of public authorities was an appeal to the Crown. This applied especially to the area of environmental and planning law. The Crown comprises the government and the King. Basically, in the end the decisions were taken by the minister responsible for planning and environmental issues. However, in this procedure, the Crown, hence in fact the minister, was advised by the Administrative Litigation Division of the Council of State (*Afdeling geschillen van de Raad van State*). The advice had no binding force, although in practice it was followed by the Crown in the great majority of cases. However, the Crown could deviate and decide differently. Regarding technical questions, the Council of State requested the advice of the Ministry of Planning and the Environment. The ministry had two special units that exclusively provided advice requested by the Council of State, one for environmental law cases and one for planning law cases. The Council asked for comprehensive advice on all technical aspects of a case in almost all pending environmental and planning law court cases.

In the aftermath of the *Benthem* judgment, in which the appeal to the Crown without the opportunity to challenge the decision of the Crown before a court was found to infringe Art. 6 ECHR, the appeal to the Crown was replaced by the ability to bring a claim for judicial review before the Judicial Division of the Council of State. Most of the members of the former Administrative Litigation Division of the Council of State became judges in the new Judicial Division of the Council of State.[29] They were used to examining appeals (which now became judicial review cases) on the basis of the reports of "their" technical advisory units in what at that time was called the Ministry of Housing, Planning and the Environment,[30] and did not want to lose this support. As a consequence, the units of the Ministry of Housing, Planning and the Environment were hived off, merged and made an independent foundation, the STAB.

IV. Procedural Aspects

The legal provisions concerning the STAB do not lay down any procedural rules on the functioning of the STAB or on the use of the expertise of the STAB in judicial proceedings. In practice, the way in which the STAB is asked to advise and how the reports of the STAB are discussed in the proceedings differ. First, I will deal with the practice of the Judicial Division of the Council of State and then move on to the practice of (some) district courts.

4.1 Judicial Division of the Council of State

Usually, the chamber of the Judicial Division dealing with a case takes the decision to ask the STAB for advice within the (first) written part of the proceedings or after the written part of the proceedings is finished. The legal basis for this request can be found in Article 8:47 General Administrative Law Act (*Algemene wet bestuursrecht, AWB*). Sometimes the parties suggest that advice should be sought, but the court does not usually discuss with the parties whether to request advice or what questions should be put forward. In some cases, the need to request advice only becomes clear at the hearing or even after the hearing, when the

[24] The reasons why it took some time before a substantial number of environmental law cases were dealt with by district courts and before they began to ask the STAB for advice are analysed in M.J.H.M. Verhoeven, "Drie jaar milieurechtspraak in eerste aanleg" (2014) 18 *Tijdschrift voor Milieu en Recht*.

[25] L. van Klink *et al.*, n.11 above, p. 25.

[26] The same is true for the other legal bases of the STAB, mentioned above.

[27] The statute is not publicly available.

[28] ECtHR 23 October 1985, ECLI:CE:ECHR:1985:1023-JUD000884880, *AB Rechtspraak Bestuursrecht* 1986, 1.

[29] See website Council of State, https://www.raadvanstate.nl/over-de-raad-van-state/geschiedenis.htm, last visited on 8 February 2018.

[30] *Ministerie van Volkshuisvesting, Ruimtelijke Ordening en Milieu*, in short *VROM*.

judges discuss the decision they want to take. However, such late submissions lead to a substantial prolongation of the proceedings and, in general, to the need for a second hearing. These disadvantages are taken into account in deciding on the need to request advice at such a late stage of the proceedings.[31]

After the STAB has delivered its advice, the report is sent to the parties. The parties may then react to the report within four weeks, according to Article 8:47(5) AWB. The STAB is usually not invited to the hearing itself[32] and therefore cannot be (cross-)examined by the parties. Recently, the Judicial Division has deviated from this practice in some very complex cases.[33]

4.2 District Courts (in particular the District Court of Eastern Brabant)

As there are neither rules on how to ask the STAB for advice, nor on how to use the reports of the STAB in the proceedings, the practice of the district courts differs and not all details are known. The practice of the district court of Eastern Brabant (*Oost-Brabant*)[34] has been described in more detail in a scholarly paper[35] and in the latest evaluation report.[36] This court strives to organize a pre-hearing with the parties within 13 weeks after the case has been brought to court. During the meeting, the court informs the parties of what elements of the case will be discussed at the hearing and on what points they could still try to provide extra information or evidence within a certain period. This meeting has the function of structuring and focusing the proceedings. The district court also discusses with the parties whether there is a relevant question in the case, and whether the STAB should be asked for advice and, if so, what questions should be submitted. With this procedure, the parties have some influence on the decision whether to ask the STAB for advice. Deciding to request the STAB for advice at such an early stage of the procedure has two other advantages. The total amount of time for the proceedings is shortened as the STAB can do its work partly within the period during which the parties have to further prepare for the hearing after the early pre-hearing. Furthermore, asking the STAB for advice before the hearing ensures that all information is available and can be discussed at the hearing.[37]

Unlike the practice of the Judicial Division, the STAB is regularly invited by the district courts to join the hearing. The parties are not therefore restricted to reacting to the report in a written fashion, but they can also discuss it with the STAB expert.[38]

V. Evaluation of the Functioning of the STAB

Up until now, the performance of the STAB has been evaluated by independent research institutions. This has been done on three occasions: in 2001,[39] 2006[40] and 2013.[41] An evaluation of the predecessors of the STAB was published in 1994.[42] This relatively rich amount of material dealing with the functioning of the STAB allows one to carefully draw some conclusions about the functioning of this institution. In addition to these evaluation studies, the author carried out a brief survey. For this purpose, three judges of the Judicial Division of the Council of State and three judges of the administrative divisions of district courts were interviewed using semi-structured questions. Some of the evaluation reports not only assessed the opinion of the courts about the functioning of the STAB, but also examined what the (other) parties of the court proceedings, hence the applicants and the administrative authorities, thought about this institution.[43] However, the last two evaluations did not include this aspect. In the future, this issue should be rectified.

Overall, the conclusions on the functioning and the

[31] Interviews with judge 1 and judge 2 from the Judicial Division of the Council of State, 29 March 2017.

[32] A.A. Freriks, J. Robbe, *Vijf jaar STAB; een onderzoek naar de kwaliteit van de deskundigenadvisering door de Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening gedurende de eerste vijf jaar van haar bestaan*, (Boom Juridische Uitgevers, 2001), p. 104.

[33] ABRvS 17 May 2017, ECLI:NL:RVS:2017:1259. The Judicial Division submitted a preliminary question to the CJEU in this case.

[34] What is meant here is the eastern part of the Dutch province of North Brabant. In an international context, the term ''Eastern Brabant'' is usually restricted to the eastern part of the Flemish province of Brabant in Belgium. Historically, until 1795 the Dutch southern province of Brabant and the Belgian province of Brabant together formed the Duchy of Brabant.

[35] M.J.H.M. Verhoeven, ''Drie jaar milieurechtspraak in eerste aanleg'' (2014/18), *Tijdschrift voor Milieu en Recht*.

[36] L. van Klink *et al.*, n. 11 above, p. 41.

[37] M.J.H.M. Verhoeven, n. 35 above.

[38] L. van Klink *et al.*, n. 11 above, p. 41 ff.

[39] A.A. Freriks, J. Robbe, n. 32 above.

[40] G.M. van den Broek, A.A.J. de Gier, A.M.E. Veldkamp, *Tien jaar STAB. Een onderzoek naar het functioneren van de Stichting Advisering Bestuursrechtspraak in het recente verleden en haar rol in de recente toekomst*. (Boom Juridische Uitgevers, 2006).

[41] The evaluation in 2013 resulted in two reports: L. van Klink *et al.*, *Eindrapportage subsidie-evaluatie STAB 2007-2013*, RebelGroup Executives, Rotterdam; B.J. van Ettekoven *et al.*, *Toekomststudie STAB*, RebelGroup Executives, Rotterdam. Both studies are available at: https://www.rijksoverheid.nl/documenten/rapporten/2013/11/28/eindrapportage-subsidie-evaluatie-STAB and https://www.rijksoverheid.nl/documenten/rapporten/2013/11/28/eindrapportage-toekomststudie-STAB, both lastly reviewed 2 September 2017.

[42] Ch.W. Backes, J.E. Hoitink en N.M. Spelt, *Deskundigenadvisering in milieugeschillen: een onderzoek naar de kwaliteit van de advisering door de ABM*, (Tjeenk Willink, 1994).

[43] A.A. Freriks, J. Robbe, n. 32 above, p. 59 ff.

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function of the STAB in all the evaluations mentioned above have been positive or very positive. The most recent evaluation concluded:

> The administrative judges unanimously assessed the quality of the services delivered as being good or very good. They emphasize the value of and the need for a technical expert such as the STAB as a prerequisite for a good judiciary. The independent and impartial position of the STAB is deemed to be essential in this regard.[44]

All evaluations agree that the technical character of judicial review in environmental and planning law cases requires mechanisms to enable the courts to deal with the merits of the cases brought before them and to check not only the procedural, but also the substantive legality of decisions, as, for example, Article 9(2) Aarhus Convention requires. They also agree that the existence and functioning of the STAB effectively and efficiently provides the technical expertise needed for a substantially meaningful review.[45] The questions that the courts cannot answer themselves and that they refer to the STAB concern a great variety of issues. They may concern the amount of noise or odour produced by an installation, the risks involved in the transportation of certain substances or the effects of a new motorway on air pollution.[46] From the evaluations, it is clear that the STAB fulfils a range of other functions besides providing the courts with the technical knowledge that they need in order to decide a case. In complicated cases, the STAB can help the judges to structure the factual aspects of the case and the relevant questions.[47] As the former chair of the chamber for planning law cases of the Judicial Division stated: ''In complex cases, a well-composed report of the STAB substantially contributes to more efficient proceedings.''[48] The STAB provides maps, layouts, sketches, photos and other documents which help the judges to gain a better understanding of the arguments of the parties. For claimants who do not have the necessary financial resources to pay for their own expert, the STAB offers the option of having access to technical knowledge which is independent from the public authorities defending their decisions. Hence, the STAB can contribute extensively to the equality of arms between the parties. For the public authorities, the STAB's contribution can sometimes limit the scope of the discussion. If the STAB's report concludes that some of the claims of the appellants lack any actual basis, the discussion on these claims can easily be closed.

The STAB reports can speed up the remaining part of the proceedings. Discussing the facts quickly comes to an end in most cases once the report has been delivered. Finally, the advice from the STAB can contribute to a ''final settlement of the case''. According to Article 8.41a AWB, the court should, as far as possible, find a final settlement for the dispute brought before it. That means that the court's task is not (only) to decide whether the contested decision is legal or illegal, but that it should foster a final solution of the legal dispute and if possible also of the underlying actual conflict. The advice of the STAB can play an important facilitating role in providing technical guidance for the parties' search for solutions to the conflict.

An important question remains: What is the added value of the STAB compared to the courts' ability to appoint other experts on a case-by-case basis? Maintaining and financing such an institution only seems to be justifiable if it has substantial added value. According to the evaluations and also to the judges interviewed, the extra value of the STAB, compared with *ad hoc* experts, mainly comprises three elements as discussed below.

5.1 Guaranteed objectivity

The objectivity, impartiality and independence of the STAB is legally guaranteed by Article 20.16 Environmental Management Act and Article 8.5(3) and 8.7 Planning Act. This is elaborated in detail in the Code of Conduct of the STAB.[49] More important is that its objectivity and impartiality are undisputed and in almost all cases this is admitted by all parties.[50] If *ad hoc* experts have to be appointed, the courts have to check carefully and ensure that the experts not only have no formal or other relationships with one of the parties, but also that they are completely independent, free to speak and do not have to take other interests into account. In some sub-areas of environmental law, there are only very few technical experts, that is Dutch-speaking technical experts. These few experts have often worked for one of the parties in the past or are even already engaged by one of the parties to the current case. In such situations, it can be very difficult to find an impartial expert. And even if such an expert can be found, it is not natural that she or he would want to work for the limited tariffs that courts may spend.[51] Moreover, even if the courts could find independent and impartial experts, the parties might dispute the objectivity and impartiality of the experts.

[44] L. van Klink *et al.*, n. 11 above, p. 47, author's translation.
[45] G.M. van den Broek, A.A.J. de Gier, A.M.E. Veldkamp, n. 40 above, p. 135 ff; A.A. Freriks, J. Robbe, n. 32 above, p. 48 ff; L. van Klink *et al.*, n. 11 above, p. 43.
[46] P.J.J. van Buuren, ''Rechtspraak in twee instanties in het omgevingsrecht'' (2007/1), *Nederlands Tijdschrift voor Bestuursrecht*, p. 6.
[47] R. Uylenburg, *Omgevingsvergunning, Gevolgen van het invoeren van beroep in twee instanties*, (ACELS, Amsterdam, 2006), p. 18.
[48] P.J.J. van Buuren , n. 46 above, p. 6, author's translation.
[49] The Code of Conduct (*Gedragscode*) can be found (in Dutch) at http://www.STAB.nl/over-ons/Pages/gedragscode.aspx, last visited on 2 September 2017.
[50] M.J.H.M. Verhoeven, n. 34 above.
[51] On this last aspect see L. van Klink *et al.*, n. 11 above, p. 9.

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This can easily lead to a "battle of experts"[52] and create an extra workload that prolongs the procedure.[53]

That the STAB as an institution is independent as it only works for the judiciary does not of course automatically ensure that the experts employed by the STAB are independent and act independently. It has to be seen whether and to what extent the criteria for hiring experts and the requirements for their work ensure objectiveness. According to the STAB's code of conduct, employees of the STAB may not deal, amongst other things, with cases which concern the municipality in which they live or with which they have any kind of special relationship (requirement G.1). An employee may not participate in an advice which (partly) concerns his or her former employer or a case which he or she has dealt with at his or her former employer (requirement G.2). Experts employed by the STAB may not have additional occupations which may question their objectiveness. They have to divulge all extra-occupational activities to the director of the STAB. All additional occupations (both paid and unpaid) of all employees are registered. The register is publicly available and can be examined (requirement G.5). This is similar to how the issue of Dutch judges' additional occupations is dealt with.[54] A difference, however, is that all additional occupations of judges can be examined on the internet, whilst the occupations of court experts can only be examined in the publicly accessible list that the director of the STAB has drafted. The publication of this list on the internet could be recommended.

5.2 More efficient and useful surveys

The STAB is very experienced in advising judges. The advisors of the STAB know what information the courts need in order to apply the respective legal norms and what language the judges understand. Wahlberg has referred to the epistemological and ontological differences between non-legal science and legal discourse. As she pointed out, "scientific conclusions about scientifically relevant entities, reached by means of scientific standards of proof, are not necessarily relevant in a legal context but need to be reassessed in the light of these differences."[55] The continuous relationship between the judiciary and the STAB seems to be an efficient solution to this problem, at least in the eyes of the judges.[56] Thus the STAB reports are deemed to be more useful and efficient than some of the reports of independent experts. This also reduces the time needed to provide the courts with technical expertise and the costs of that service.[57] Moreover, making use of the STAB seems to guarantee more consistency in the interpretation of facts.[58]

An additional advantage of the STAB is that it comprises and integrates all kinds of expertise. Usually, the impartial experts who could be consulted by the courts can only advise on some technical fields, or even just one. The STAB, however, has experts and expertise in almost all the technical fields that are relevant in environmental and planning law cases. These experts work in teams and provide an integrated report. It is thus the STAB that integrates diverse technical knowledge, whilst without the STAB this would be a difficult task for the judges to perform themselves.[59] And even if the STAB lacks expertise on a question submitted by a court, it usually knows who does have this expertise and therefore serves as a kind of knowledge broker.[60]

5.3 Practical advantages such as time saving

An important advantage that emerges from the evaluations and also from the interviews is the speed of engaging the STAB. If a court is in need of advice on a technical aspect of the case which is pending before it, it does not have to search for a suitable expert, to ask whether she or he is able and willing to advise and then conclude a contract. The court simply submits its request and knows that a report will be delivered, usually within three months. This gain in efficiency also means saving money.

VI. Points of Discussion and Prospects

6.1 Points of discussion

Occasionally, there is discussion about the queries that the Council of State puts forward to the STAB and about the procedures that the STAB applies. Some argue that the Council of State should refrain from asking the STAB to provide a general overview of the facts of the case, but should instead limit each query to a concrete question about certain facts or other technical issues, as the district courts do in most cases.[61] Other concerns are that the parties, at least in cases falling under the competence of the Judicial Division of the Council of State, usually do not have any influence on the questions put forward to the STAB and that the parties do not have an opportunity

[52] M.J.H.M. Verhoeven, n. 35 above.
[53] See for example ABRvS 30 March 2016, ECLI:NL:RVS:2016:855, especially no. 7.3.
[54] See in more detail https://www.rechtspraak.nl/Registers/Paginas/Nevenfuncties.aspx, lastly visited on 8 February 2018.
[55] Wahlberg, L., *Legal Questions and Scientific Answers: Ontological Differences and Epistemic Gaps in the Assessment of Causal Relations* Lund University 2010, p. 207; available at: http://portal.research.lu.se/ws/files/5495800/3990729.pdf, lastly visited on 12 September 2017.
[56] Interviews with judge 1 and judge 2 from the Judicial Division of the Council of State, 29 March 2017.
[57] See also T.C. Leemans, *De toetsing door de bestuursrechter in milieugeschillen* (Boom Juridische Uitgevers, 2008), p. 199 ff.
[58] B.J. van Ettekoven *et al.*, n. 41 above, p. 12.
[59] L. van Klink *et al.*, n. 11 above, p. 44.
[60] L. van Klink *et al.*, n. 11 above, p. 40.
[61] See e.g. G.M. van den Broek, A.A.J. de Gier, A.M.E. Veldkamp, n. 40 above, p. 30 with further references.

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to comment on the draft report of the STAB before it is delivered to the court. They may react to the advice of the STAB, but only after this advice has been delivered to the court. Some scholars argue that this may come into conflict with Article 6 ECHR, as interpreted in the *Mantovanelli* ruling of the ECtHR.[62] However, the Judicial Division of the Council of State has rejected these doubts.[63] There are no other substantial discussions about the functioning, positioning or authority of the STAB. A reason for this may be that the courts often rely on the reports of the STAB, but do not blindly follow them. If the parties introduce opinions which deviate from the opinions of the STAB experts and these convince the court, the court will not follow the STAB.[64] State agencies in particular, and also some private parties, often have substantial means and resources to introduce their own experts when they feel that a STAB report is one-sided or not comprehensive. Judges and the parties to the judicial review do not discuss the question of whether the STAB has too much power. As the STAB will only retain its right to exist if it strictly ensures its independence, it has to be seen as an important objective authority that counterbalances the inequality of arms between different parties regarding the means and resources to organize technical knowledge.

6.2. Prospects: from STAB to StAR

Since the STAB was founded in 1996, the structure of administrative judicial review has been altered several times. Whilst in 1996, and even more before 1994, the Judicial Division of the Council of State was in many cases competent as the first and last instance court, most cases are now decided by the district courts at first instance with the possibility of an appeal to the Council of State (as the court of second instance). With the introduction of the future Environment and Planning Act (*Omgevingswet, Ow*), which is expected to enter into force in 2020 or 2021, this tendency will be continued. As the district courts ask the STAB for advice less often, and as their questions are more specific, the future of the STAB seems to be less certain. Furthermore, as the legal basis for the STAB had to be redrafted in the new *Ow*, the question was raised as to whether the Dutch government should continue to invest a few million euros every year in this unique institution. Nobody objected to this question being answered in the affirmative.[65] All evaluation reports published since 1996 have concluded that all participants in the process of administrative judicial review agree that the existence of the STAB is very valuable and a prerequisite for the high quality of judicial review in environmental and planning law cases. It should by no means be abandoned.

It is likely that the STAB will develop further and undergo some changes. Two potential issues may be worth discussing. As we have seen, the STAB also advises criminal and civil courts on occasion. A change of name could be discussed, from *Stichting Advisering Bestuursrechtspraak voor Milieu en Ruimtelijke Ordening* (Foundation of independent court experts in administrative and environmental law*)* to *Stichting Advisering Rechtspraak voor Milieu en Ruimtelijke Ordening,* in short *StAR* (Foundation of independent court experts for environmental and planning issues). At first sight, this appears to be a formality, codifying the existing practice rather than aiming at any change. This change of name, however, could lead to a more substantial question. Should STAB's field of activity not be broadened to other or even all areas of administrative law? At least in some other areas, like social security law and asylum and immigration law, the courts often have to rely on expert judgments. The advantages of the existence of the STAB in the area of environmental and planning law would also hold true for these other areas of law. Some of the judges interviewed indeed confirmed that, especially in social security law, the courts regularly have problems in quickly finding experts who are able and willing to advise. As far as I can see, such an enlargement has not yet been discussed publicly. From the interviews, the only arguments against such a development would be that a foundation with such a broad focus would become too large and that environmental and planning law do not have much in common with other areas such as social security law.[66]

As there is no discussion on the meaningfulness or any substantial discussion on the functioning of the STAB in more detail, the most likely development regarding the STAB is that there will be no developments. Only if the existence of the STAB comes under pressure because of external reasons will alternatives and substantial changes be discussed. The unique institution of the STAB is appreciated so much by all participants in the judicial review process that its future seems to be assured. This is good news. Interestingly enough, in Germany the introduction of a similar institution has been proposed. This "*staatliche Gutachtenstelle für Umweltschutz*' should, however, not only provide advice in cases of judicial review, but more generally in the decision-making process.[67]

[62] ECtHR 18 March 1997, AB 1997/112. See e.g. A.M.L. Jansen, "De deskundige en een fair trial" (2008), *Tijdschrift voor Milieu en Recht*, p. 223 ff; A.A. Freriks, J. Robbe, n. 31 above, p. 33 ff.

[63] ABRvS 9 May 2007, ECLI:NL:RVS:2007:BA4711, *AB Rechtspraak Bestuursrecht* 2007/359.

[64] See e.g. G.M. van den Broek, A.A.J. de Gier, A.M.E. Veldkamp, n. 40 above, p. 74; A.A. Freriks, J. Robbe, n. 32 above, p. 105 ff.

[65] B.J. van Ettekoven *et al*., n. 41 above, p. 31 ff.

[66] Interviews with judge 1 and judge 2 from the Judicial Division of the Council of State, 29 and 30 March 2017 and interviews with judge 1 and 3 of the district courts, 5 April 2017.

[67] Decisions of the 71. Deutscher Juristentag 2016, p. 21, sub 28; available at http://www.djt.de/nachrichtenarchiv/meldungen/artikel/beschluesse-des-71-deutschen-juristentages/, last reviewed 5 September 2017. See further on this point, Grashof in this special issue.