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Regulating the European Environment:  
The EC Experience

Rolf Wägenbaur†

I welcome the initiative of the University of Chicago Legal Forum to put environmental regulation on the agenda of its 1992 Symposium. The problems which arise from environmental neglect are the same for America and for Europe. I feel extremely honored to have been invited to discuss these “common problems” from the European perspective.

The European Community (“EC” or “Community”) is playing an increasingly large role in regulating the European environment. The EC is not a state, nor is it a federation of states. Nonetheless, it is certainly more than the term “Regional Economic Integration Organization,” which is usually applied to it on an international level, suggests. The Community’s present ambition is to establish a “European Union” as envisaged in the Single European Act (“SEA”) which modified and completed the Treaty of Rome (“EEC Treaty”) as of July 1, 1987.¹ The Maastricht summit that took place in December of 1991 brought the Community considerably nearer to this goal. A new treaty focusing on monetary and economic union—and going beyond the “internal market” which will be realized by the end of 1992²—will be the end result of this meeting.³ Provisions in the draft Maastricht Treaty strengthen the position of the environment in the Community.

This paper presents a brief outline of the EC’s progress in the field of environmental policy. This experience, now more or less twenty-one years old, is unique worldwide. I was tempted to seize this opportunity to describe the development of EC environmental policy in depth, to give a summary of all Community activities in

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² See SEA, Art 13.
the field of the environment. But such a summary would have been far too ambitious, so I have decided to restrict myself to a more modest overview. Part I of this paper sets out the legal framework for Community action in the environmental field. Part II offers a short analysis of the methodological approach of the Community in the field of the environment. Finally, Part III takes a closer look at some of the latest developments and achievements in EC environmental policy.

I. THE LEGAL FRAMEWORK

A. Institutions and Legal Instruments

When the EC was created in 1957, through a classic international treaty, its aims were mainly—and still are—to harmonize development of economic activities and to promote a continuous and balanced economic expansion by establishing a common market and progressively approximating the economic policies of the Member States. For this purpose, the EC was given an original structure. The Treaty provided a set of rules granting four “freedoms” (free movement of goods, of persons, of services, and of capital) and regarding three “common policies” to be pursued (in the fields of agriculture, transport, and commercial policy). To implement these basic rules and policies, and to develop new policies and initiatives, the Treaty created four institutions: the European Parliament, the Commission, the Council, and the Court of Justice (“ECJ”).

These institutions cover most, but not all, of the classic activities of state authorities in the field of economic policy, but these activities are distributed in a different—and certainly, for the time
being, less democratic—manner. The Commission drafts and proposes legislation; the Council of Ministers then decides whether to adopt the proposed legislation.\(^\text{17}\) The directly-elected European Parliament remains limited to a consultative role, despite the fact that under the SEA a so-called cooperation procedure replaced the original consultative procedure in a number of cases and strengthened the rights of Parliament by introducing a second reading.\(^\text{18}\) The draft treaty agreed at Maastricht will further increase the role of the European Parliament. Only the ECJ resembles the classic national paradigm. It has jurisdiction over litigation between the institutions or between the institutions and Member States,\(^\text{19}\) and it alone wields the power to quash Community legislation.\(^\text{20}\)

From the outset, the EEC Treaty meant the transfer of certain competences—and therefore a shift of sovereignty—from Member States to the Community and its institutions. Community legislation is binding upon Member States and can preclude individual Member State action in the area it covers.

Community legislation comes in three different forms: Council regulations, directives, and decisions.\(^\text{21}\) Regulations have the same characteristics as traditional national laws: they “have general application” and are “binding in [their] entirety and directly applicable in all Member States.”\(^\text{22}\) They are published in the Community Official Journal\(^\text{23}\) and do not require any incorporation or even publication in the Member States. Directives, on the other hand, are binding upon the Member States only “as to the result to be achieved,” leaving “to the national authorities the choice of form and methods” of implementation.\(^\text{24}\) Directives, therefore, mean legislation in two stages because they normally need to be implemented by Member States. Member States must bring their law into line with Community directives, if necessary by new legislation, during the time limits established by the directive. Once the implementation period has expired, the provisions of a directive can have “direct effect” in the national legal order if they are suffi-
ciently clear and leave no discretion to the national legislature.\footnote{Case 41/74, Van Duyn v Home Office, 1974 ECR 1337, 1348-49, 1975:1 CMLR 1; Case 148/78, Pubblico Ministero v Ratti, 1979 ECR 1629, 1642, 1980:1 CMLR 96; Case 102/79, Commission v Belgium, 1980 ECR 1473, 1487, 1981:1 CMLR 282.} Finally, decisions are binding upon Member States in their entirety, leaving no discretion to Member States.

In the field of environmental policy, the Community uses directives extensively.\footnote{For a statement of EC activity in the environmental field, see The Environmental Policy of the European Community, Report to the United Nations Conference on the Environment and Development (1992).} The Member States and, to a lesser extent, the Commission share the view that using directives is more convenient because Member States can implement them in accordance with their own particular circumstances. Implementation by Member States, however, often gives rise to difficulties, which may require a Commission response in the form of infringement proceedings.\footnote{See Rolf Wagenbaur, The European Community's Policy on Implementation of Environmental Directives, 14 Fordham Intl L J 455 (1990-91).} The use of Council regulations would avoid these problems, and thus, this instrument should be used in the future whenever appropriate. At present, implementation of international agreements on the Community level often takes place by Council regulations.\footnote{See, for example, Council Reg 594/91, 1991 OJ L67:1 (on substances that deplete the ozone layer), implementing the Montreal Protocol.} Decisions are generally used for the purpose of ratifying international conventions on behalf of the Community.\footnote{See, for example, Council Dec 88/540, 1988 OJ L297:8 (concerning the conclusion of the Vienna Convention for the protection of the ozone layer and the Montreal Protocol on substances that deplete the ozone layer).}

The ECJ has clarified the relationship between Community law and national law on several occasions: Community legislation (the Treaty as well as directly applicable secondary legislation) is supreme over national law.\footnote{Case 6/64, Costa v Ente Nazionale Per L'Energia Elettrica (ENEL), 1964 ECR 585, 1964 CMLR 425; Case 106/77, Amministrazione Delle Finanze dello Stato v Simmenthal SpA, 1978 ECR 629, 643, 1978:3 CMLR 263.}

B. Legal Foundations of Environmental Legislation

When the Treaty establishing the European Community came into force in 1958, it did not mention environmental policy. The drafters gave the EC no specific competence in this field, because they considered environmental problems the sole responsibility of the Member States. Gradually this view changed. Major oil-tanker
accidents, acid rain, and dying forests led to growing awareness of the need for joint action to combat common problems.

The Treaty proved flexible enough to enable the EC to take a series of first steps. Article 100 offered a convenient legal basis for this purpose, because some environmental directives could be justified as an approximation of national laws to avoid distortion of competition in the common market and to ensure free circulation of goods among the Member States. Article 235 provided additional legal support, allowing the Council to adopt appropriate measures “[i]f action by the Community” proves necessary “to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers.”

These general provisions, however, soon proved to be inadequate. They did not provide any particular commitment to environmental policy, and they gave no substantive guidance to the institutions regarding the principles which ought to inspire environmental policy. Moreover, the requirement of unanimity became increasingly obsolete. Therefore, the Member States inserted several specific provisions affecting the environment into the Treaty when they adopted the SEA.

The first of the new provisions is Article 100A. Under the heading “Approximation of Laws,” this article allows measures for the approximation of national legislation, including rules on environmental protection, which have as their objective the establishment and functioning of the internal market. The second new pro-

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31 EEC, Art 100 states:

The Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market.

The Assembly and the Economic and Social Committee shall be consulted in the case of directives whose implementation would, in one or more Member States, involve the amendment of legislation.

32 EEC, Art 235.

33 EEC, Art 100A, ¶ 1 provides, in part:

1. By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8a. The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
vision is Article 130S, which is available for all environmental issues not directly related to the functioning of the internal market.

The difference between the two Articles is quite substantial. Council voting under Article 130S requires unanimous consent, while Article 100A requires only a qualified (that is, weighted) majority in the Council. The role attributed to the European Parliament is also different: under Article 130S, the simple consultative procedure applies; under Article 100A, the cooperation procedure—which gives a stronger position to Parliament—applies. These practical differences have already led to considerable dispute over the interpretation of the two provisions.

The ECJ has, to some extent, clarified the relationship between the two provisions. In the "titanium-dioxide" case, the Commission objected when the Council based a directive on Article 130S instead of Article 100A. The Commission considered 100A appropriate, because the subject matter was related to the establishment of the internal market. The ECJ found in favor of the Commission. Hopefully, in two other cases pending, the court will confirm that Article 100A is lex specialis and must be applied whenever its criteria are fulfilled.

At the recent Maastricht summit, representatives of the Member States agreed to modify Article 130S. Except for a few subjects, the draft treaty will allow for qualified majority voting instead of unanimity in the Council. This modification should take

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44 EEC, Art 130S states:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community.

The Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by qualified majority.

46 See EEC, Art 148.

48 The rules of the cooperation procedure are provided in EEC, Art 149.

47 Case C-300/89, Commission v Council, decision of June 11, 1991 (not yet reported).

48 Id at points 7, 8.

49 Id at points 10 and following.


51 The new version of Art 130S, §§ 1, 2, as revised by Maastricht, will read (if ratified) as follows:

1. The Council, acting in accordance with the procedure referred to in Article 189c and after consulting the Economic and Social Committee, shall decide what action
out much of the steam driving the controversy over the interpretation of both Articles.

Both Article 100A and Article 130S give the Community the power to adopt internal measures for the protection of the environment. The Community can also act, however, in relation to third countries by becoming a contracting party to international agreements. Under Article 130R, paragraph 5, international cooperation has become a Community obligation. In the field of commercial policy (that is, trade with third countries), the Community has been given exclusive competence and acts alone. In all other fields, Member States remain competent, but the Community has been entrusted with a potential competence under Article 130S (so-called "mixed competence"). When Community legislation has been adopted in the field concerned, the ECJ has recognized that there is "exclusive" Community competence: Member States are no longer free to act on the international level and the Community is to become a contracting party. If no Community legislation has been adopted in an area which is to be covered by an international agreement, Member States can in principle conclude an agreement alone. However, since potential competence cannot be denied under Article 130S, the Community should be able to become a contracting party if it appears that this might help protect the environment. Article 130S removes any legal obstacle to such a result.

Indeed, the international arena, beyond the Community's boundaries, is of particular importance for a large variety of envi-

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is to be taken by the Community in order to achieve the objectives referred to in Article 130R.

2. By way of derogation from the previous paragraph 1 and without prejudice to Article 100A, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt

- provisions primarily of a fiscal nature;
- measures concerning town and country planning, land use with the exception of waste management and measures of a general nature, and management of water resources;
- measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply.

The Council may, under the conditions laid down in the preceding subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.


EEC, Art 113.


See, for example, the Antarctic Treaty, Washington, 1959, 12 UST 794, TIAS 4780, 402 UNTS 71.
ronmental issues such as waste, water protection, and more global problems (for example, ozone depletion, climate change, and forest destruction). More and more frequently, the Community, therefore, becomes a contracting party to international agreements for the protection of the environment.

C. Principles of Environmental Policy

Along with a new basis for environmental legislation, the SEA, specifically the new Title VII of the Treaty, provided guidelines for Community action in the environmental field. In particular, it provided a set of objectives and basic principles.

Article 130R fixes three objectives for Community action in the field of the environment: 1) "to preserve, protect, and improve the quality of the environment;" 2) "to contribute towards protecting human health;" and 3) "to ensure a prudent and rational utilization of natural resources." These objectives are guidelines for all Community institutions involved in establishing environmental policy. Because there is no hierarchy among these objectives, Community institutions may need to establish priorities if the objectives cannot all be pursued at the same time.

Article 130R also sets out five basic principles: 1) that effects on the environment, whenever possible, should be prevented rather than cured (the "prevention principle"); 2) that environmental damage should be rectified at the source; 3) that polluters should bear the cost of eliminating pollution, giving them a strong incentive to avoid polluting practices (the "polluter-pays principle"); 4) that environmental protection is to be a component of the Community's other policies; and 5) that the Member States and the Community share the responsibility for environmental policy (the "subsidiarity principle"). Very sensibly, the subsidiarity principle states that the Community should take action only when the Community can do better than individual Member States in a particular field. This principle is not easily put into practice, and one must assume that the Community institutions have a rather large degree of discretion when they try to apply it in a given situation.

45 This fourth principle may well become a major element of Community policy and is likely to have a wide effect when incorporated into Community policies such as agriculture, transport, energy, fiscal matters, and development. Moreover, the internal market, which the Community will have achieved by the end of 1992, will certainly generate increased pollution if appropriate measures are not taken.
II. The Environmental Challenge: The Methodology of the Community’s Response

A. European Summits

When the EC decided to establish a “common market”—or what was later called, under the SEA, the “internal market”—the necessary elements were already enshrined in the Treaty and it was relatively easy to imagine the steps the Community institutions had to take to achieve that goal. The same was largely true for the “common policies” which remained to be introduced. But there were no indications at all on how to proceed with Community-level environmental protection.

Decisive first impulses emanated from the “summits,” the regular meetings of Community Heads of State and of Government which began in 1972. At the Paris summit of 1972, the Heads of State agreed that economic expansion was not an end in itself, but that it should “result in an improvement of the quality of life as well as in standards of living and that particular attention should be given to intangible values and to protecting the environment.”

At the Rhodes summit of December 1988, in a “Declaration on the Environment,” the leaders agreed that “[s]ustainable development must be one of the overriding objectives of all Community Policies.”

At the June 1990 Dublin Council, the Heads of State agreed upon what they called “the environmental imperative,” announcing that “[c]ompletion of the internal market in 1992 will provide a major impetus to economic development in the Community. There must be a corresponding acceleration of the effort to ensure that this development is sustainable and environmentally sound.” Following the declaration adopted in Dublin, it was decided that “the traditional ‘command and control’ approach [to problem-solving] should be supplemented, where appropriate, by economic and fiscal measures if environmental considerations are to be fully integrated into other policy areas, if pollution is to be prevented at source, and if the polluter is to pay.”

Finally, at their December 1991 Maastricht summit, the Heads of State agreed upon a draft treaty to establish the European

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46 EEC, Art 2.
47 EEC, Art 8A.
51 Id.
Union which contained improved provisions on the protection of the environment.52

B. Environmental Action Programs

The agreements reached at these summits were a source of inspiration but required translation into practical guidelines. This translation took place—as urged for the first time by the Paris summit of 1972—through five-year environmental action programs drafted by the Commission and agreed to by the Council. The first such program began in 1973;53 the second in 1978;54 and the third in 1983.55 The fourth environmental action program began in 1987 and was accompanied by the Council Resolution of October 19, 1987, regarding the continuation and implementation of a European Community policy and action program on the environment (1987-1992).56 In this resolution, the Council insisted on pollution prevention; the improvement of resource management; increased international activities; the development of appropriate tools such as research programs; “efficient economic instruments such as taxes, levies, State aid;” and “increased efforts to promote environmental education and training at appropriate levels, and greater public awareness.”57 The fifth environmental action program, which is to begin in 1993, has very recently been adopted by the Commission and awaits discussion in the European Parliament and the Council.58

The legal value of these programs has always remained somewhat uncertain. Clearly they are not binding, as no one can sue to compel their implementation, or claim compensation for a lack of implementation. Nevertheless, these programs have value in that they are the expression of the political will of the Community to act following the lines and the priorities indicated. For this reason, the legal acts adopted by the Council usually refer to the action programs in the “recitals.” Interestingly, these action programs have long included principles (like prevention, “polluter pays,” or

52 At Maastricht, Heads of Member States achieved political agreement on the new treaty. The text will be signed later and needs ratification by all Member States. However, Denmark, the first Member State to consider the draft treaty, has refused to ratify.
57 Id at C328:4.
58 Not yet published.
early consideration of environmental impacts) later incorporated into the EEC Treaty itself.

C. Selected Examples

On the basis of the agreements reached at the summits and of the different environmental action programs, the Community’s response to the environmental challenge has been manifold. The following outlines some of the main features of this response.


Under the traditional “command-and-control” approach, Community legislation established prohibitions and required particular action which Member States must perform. For instance, the EC has adopted common emissions limits and quality objectives for the purpose of water protection, air pollution clean-up, and waste disposal.

In the field of water protection, the Community has adopted directives on the quality of surface water intended for the withdrawal of drinking water, and on drinking water standards. Drinking water must comply with a list of some 50 parameters, with which national legislation must comply. Other directives concern minimum standards for bathing waters, fresh waters for fish, and shellfish waters. Another directive deals with pollution caused by dangerous substances discharged into the aquatic environment.

A series of “daughter directives” regulate discharges of substances like mercury and cadmium. A different approach has been chosen for the urban waste-water treatment directive adopted

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in 1991. This directive provides that all major centers of population should have collecting systems for urban waste-water and secondary treatment for urban waste-water entering collecting systems, phased in between 1998 and 2005.

The EC battle against air pollution provides other examples. In the 1970s and 1980s, heavily polluted air and acid rain harmed European forests, lakes, and cities. The Community responded by setting up common air quality standards. The Council consequently adopted directives on the sulphur content of liquid fuels, on atmospheric sulphur dioxide, on nitrogen dioxide, on lead in the air, on the lead content of gasoline, and on emission values for exhaust-gases of cars and trucks. Other directives deal with the limitation of emissions from large combustion plants and from municipal incineration plants.

Waste disposal legislation was required in the very first Community Action Program because the disposal of household waste, as well as of industrial waste, and particularly of hazardous waste, poses problems for most if not all European countries. The Community initiated legislation for waste regulation in 1975 by adopting a framework directive, which was updated in 1991 and completed by other directives on toxic and dangerous waste and the control of transfrontier shipments of hazardous waste within the

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Community. The Community presently aims at minimizing the production of waste and regulating safe disposal; the Community intends to demonstrate self-sufficiency with regard to waste disposal. The Community is a signatory of the Basle Convention of 1989 on the Control of Transboundary Movements of Hazardous Wastes, and it is intended that Member States, individually, and the Community, as a whole, will ratify this convention in the near future.

2. Access to information.

By another set of rules, the EC intends to improve environmental protection by granting better access to environmental information held by public authorities.

In 1990, the Council adopted a directive on the freedom of access to information on the environment. Member States will have to comply with this directive by December 31, 1992, at the latest. To implement this directive, national public authorities must, upon request, make available information relating to the environment to any natural or legal person. Indeed, any natural or legal person will be entitled to demand such information without having to prove an interest. This entitlement goes far beyond the established rules in most of our Member States and enhances the fundamental rights of citizens wherever they live in the Community. Member States' environmental authorities will become transparent, as they will have to supply the requested information within two months at the latest and will be allowed to refuse disclosure only for reasons of confidentiality or public security. These exceptions may well lead to litigation and cause national courts to refer questions related to the interpretation of the directive to the ECJ under the Article 177 procedure.

The Council has also adopted directives to ensure that people potentially threatened by environmental problems receive the information they need. For example, the 1985 directive on environ-

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80 A draft regulation is under discussion in the Council. Its adoption will allow Member States and the Community to ratify the Convention.
81 Council Dir 90/313, 1990 OJ L158:56 (on the freedom of access to information on the environment).
82 Id, art 3, 1990 OJ at L158:57.
83 Id, art 3, ¶ 4, 1990 OJ at L158:57.
84 Id, art 3, ¶ 2, 1990 OJ at L158:57.
85 EEC, Art 177.
mental impact assessment requires that members of the public concerned by certain types of infrastructure projects be given the relevant information and an opportunity to express an opinion before the project is initiated. Depending on the location of the project, this obligation may be extended to persons living in another Member State. Similarly, the 1982 directive on the major-accident hazards of certain industrial activities ensures that persons at risk of harm from major industrial accidents are adequately informed of the safety measures and of the actions they should take in the event of an accident.

Very recently, the Council agreed upon a proposal prepared by the Commission, establishing an ECO logo to be awarded to the most environment-friendly products. This logo will provide consumers with better information, and presumably influence their purchases. In this way, the marketplace will reward manufacturers of environmentally safe industrial products, and encourage other manufacturers to follow their example. For the same reason, the Commission has recently put before the Council a proposed regulation providing for environmental auditing of industry on a voluntary basis. Under this proposal, companies that manufacture their products in an environmentally acceptable manner, following strict standards, will also be awarded a special logo.

3. Preliminary consultation and supervision procedures.

The EC has used consultation and supervision rules governing interaction between authorities in the Commission or Member States and handlers of dangerous substances to promote environmentally beneficial ends. Examples are easily found. The 1967 directive on classification, packaging, and labelling of dangerous substances—one of the oldest environmental directives—obliges any manufacturer or importer of dangerous substances to submit a notification dossier about the chemical to a competent national authority at least 45 days in advance. The directive establishes rules

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90 The Regulation was adopted on March 23, 1992 (not yet published).
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regulating the relationship between the competent authority and the notifier. It also establishes information procedures between the Commission and the Member State that received the notification dossiers, and between the Commission and all other Member States.

Another example is the 1984 directive on transfrontier shipment of hazardous waste. It requires the holder of toxic and dangerous waste who intends to move such waste across a national border to notify the authorities of the state of destination by means of a detailed consignment note. Member States must send the relevant information and reports to the Commission, which is required to prepare regular summary reports.

4. Taxes.

Taxes are the latest instruments to be integrated into the Community's environmental arsenal. For example, the 1975 directive on the disposal of waste oils allows Member States to impose a "charge" on products that, after use, are transformed into waste oils in order to finance indemnities for collection and disposal undertakings. The 1978 directive on toxic and dangerous waste contains a similar provision.

Recent taxation developments are aimed at the dangers of climate change caused by the increase in the amount of atmospheric carbon dioxide (CO₂). Concern about global warming led the Community, at the 1990 Dublin summit, to agree to take action aimed at reducing total CO₂ emissions. To achieve this goal, the Commission hopes to levy a special tax to reduce CO₂ output, in particular, a carbon/energy tax of perhaps $10 per ton. At its December meeting last year, the Council welcomed this idea, and the Commission is preparing concrete proposals.

5. Financial instruments.

The Community has also decided to use financial instruments for environmental ends. So far, the Community has provided most of its money for environment projects under the "European Re-

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93 Id.
The Commission administers this fund with the assistance of a committee of national experts/representatives. Between 1989 and 1993, some 3 billion ECU (about $3.5 billion) were earmarked for projects and programs for the poorer regions of the EC that are directly related to environmental purposes. This money is to be spent on efforts to treat waste water, control air pollution, dispose of household, industrial, and hazardous wastes, and combat soil erosion and desertification.

Some time ago, the Community established a few small financial programs, such as the ACE (Community Action for the Environment) program, with a special component for supporting endangered natural or seminatural habitats. More recently, the Community established two regional financial instruments. Under the first, called MEDSPA, the Community will provide 37 million ECU (about $40 million) for the period 1991-1993 to protect and improve the environment of the Mediterranean region. Under the second, NORSPA, the Community will provide a modest 10 million ECU (about $11.5 million) for the period 1991-1993 to protect the EC northern coastal zones (the North and Baltic Seas). Even more recently, the Council adopted a new financial instrument, called LIFE, which will be analyzed in the last part of this paper.

6. International cooperation.

International cooperation deserves special mention because it covers a very broad variety of fields and is expanding rapidly. Article 130R, paragraph 5, requires that: “Within their respective spheres of competence, the Community and the Member States shall co-operate with third countries and with the relevant international organizations.”

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97 Council Reg 1872/84, 1984 OJ L176:1 (on action by the Community relating to the environment).

98 Council Reg 563/91, 1991 OJ L 63:1 (on action by the Community for the protection of the environment in the Mediterranean region (MEDSPA)).

99 Council Reg 3908/91, 1991 OJ L370:28 (on Community action to protect the environment in the coastal areas and coastal waters of the Irish Sea, North Sea, English Channel, Baltic Sea and Northeast Atlantic Ocean (NORSPA)).


101 EEC, Art 130R.
The Community takes part in environmental activities at the global or regional level undertaken by the United Nations, the OECD, and the Council of Europe. Increasingly, the Community has become a contracting party to international agreements on environmental issues. In the field of water protection policy, for example, the Community is a party to the 1974 Paris Convention concerning the North Sea,\textsuperscript{102} to the Barcelona Convention on the Mediterranean,\textsuperscript{103} and intends to become a party to the Helsinki Convention concerning the Baltic Sea. The Community also participates or intends to participate in agreements concerning four major European rivers (Rhine, Elbe, Oder, and Danube).\textsuperscript{104}

Of particular interest is the development of EC cooperation with Africa, the Caribbean, and the Pacific. The Lomé Convention\textsuperscript{105} includes important environmental policy provisions, for example: "Development shall be based on a sustainable balance between its economic objectives, the rational management of the environment and the enhancement of natural and human resources";\textsuperscript{106} and "priority must be given to environmental protection and conservation of natural resources, which are essential conditions for sustainable and balanced development from both the economic and human viewpoints."\textsuperscript{107}

Taking account of the political changes in Eastern Europe, the Community established special support programs (called PHARE programs) in order to help Poland, Hungary, Czechoslovakia, Bulgaria, Romania, and Yugoslavia.\textsuperscript{108} These programs have now been extended to Albania, Estonia, Latvia, and Lithuania\textsuperscript{109} and include the financing of environmental projects.

Finally, it should be mentioned that the EC played a major role at the United Nations Conference on Environment and Development (UNCED) which took place in Rio de Janeiro in June of

\textsuperscript{105} "Lomé IV" was signed on December 15, 1989 by 69 states and the Community. 1991 OJ L229:1.
\textsuperscript{106} Lomé IV, Art 4, 1991 OJ at L229:19.
\textsuperscript{107} Id, Art 6, 1991 OJ at L229:20.
\textsuperscript{109} Council Reg 3800/91, 1991 OJ L397:10 (amending Regulation EEC/3906/89 in order to extend economic aid to include other countries in Central and Eastern Europe).
1992. The EC was a full participant in the conference, as opposed to its traditional observer status, and remains actively engaged in the preparation of two conventions which were signed at UNCED: a Climate Change Convention and a Convention on Biological Diversity. The EC strives, at present, toward becoming a full member of the UN Commission on Sustainable Development, which is to monitor the implementation of the agreements reached in Rio.

III. RECENT DEVELOPMENTS IN THE COMMUNITY’S ENVIRONMENTAL POLICY

I would like to dedicate the last part of this Article to some recent developments and works in progress at the Community level.

A. European Environment Agency

The first notable recent development is the proposed establishment of a European Environment Agency ("EEA"). This agency draws on the model of the U.S. EPA as well as on the established national agencies of several Member States. At the Community level, the Commission originally undertook some of the tasks of the future agency under a special work program called CORINE (Coordinated Information on the Environment). Although limited to five years this experimental program achieved remarkable results, in particular the establishment of a European environmental information system. The EC believes that this work should now be continued by the European Agency as a central body and that a European information and observation network should be established in the Member States. For this purpose, the Council adopted a regulation in May 1990, the birth certificate of the EEA.

The aim of the EEA is to provide the Community and Member States with objective, reliable, and comparable information at the European level to enable them to take appropriate measures to protect the environment, to assess the results of such measures,

\footnote{Council Dec 85/338, 1985 OJ L176:14 (on the adoption of the Commission work program concerning an experimental project for gathering, coordinating, and ensuring the consistency of information on the state of the environment and natural resources in the Community (CORINE)). The CORINE program has run out, and its tasks have been taken over by the Commission services (as a provisional measure).}

\footnote{Council Reg 1210/90, 1990 OJ L120:1 (on the establishment of the European Environment Agency (EEA) and the European environment information and observation network).}
and to ensure that the public is properly informed about the state of the environment. To this end, it will provide the Community and the Member States with technical and scientific support. As this description of its aims and tasks reveals, this European Agency will have essentially subordinate functions. For practical reasons, it shall be given legal personality, but its functions shall in no way be comparable to those of, for example, the U.S. EPA. Under the institutional framework of the EEC Treaty, an agency with powers as broad as the EPA would be impossible to achieve, and the Member States are not prepared to accept it at this stage of integration. However, the regulation provides at least that the Community will consider at a later stage, no more than two years after the entry into force of the Regulation, whether to assign further tasks to the EEA.\textsuperscript{112}

The EEA could also assist the Commission with environmental policy. For example, the EEA could monitor the implementation of Community environmental legislation, an enormous workload hitherto the responsibility of the Commission alone. The EEA could become a kind of European inspectorate—with the understanding that only the Commission may initiate infringement proceedings against Member States considered to be in breach of the relevant directives. The EEA will be open to countries which are not members of the European Community,\textsuperscript{113} and some countries have already declared that they are interested in participating.

Unfortunately, the establishment of the Agency is presently caught up in political difficulties. Member States have been unable to agree upon the EEA’s seat because some, in particular France, have politically linked the EEA’s location with the disputed seat of the European Parliament. The goodwill of the environment ministers has been insufficient to overcome this political deadlock, preventing the Regulation creating the EEA from entering into force. The Maastricht summit was of no help in breaking the impasse, and this inability to decide on the seat of the EEA certainly does nothing to enhance the EC’s image in the world. Real progress may only be possible once the decision on the EEA location can be resolved by the Council through a majority vote instead of unanimous consent.

\textsuperscript{112} Id, art 20, 1990 OJ at L120:5.
\textsuperscript{113} Id, art 19, 1990 OJ at L120:5.
B. Environmental Liability

Environmental liability is currently a popular subject in Europe, both among the Member States and with international organizations. At the Community level, the EC is at a planning stage.

In 1989, the Commission presented the Council with a draft directive on civil liability for damage caused by waste. An important feature of the draft is the principle of strict liability: "The producer of waste shall be liable under civil law for the damage and injury to the environment caused by waste, irrespective of fault on his part." The working groups of the Council are presently discussing the draft directive. The outcome is uncertain, because the Commission has moved beyond the draft directive.

In its recently adopted Fifth Environmental Action Program, the Commission discusses environmental liability:

There is . . . the need to protect the common interest in the environment by making sure that, if damage to the environment does occur, it is properly remedied through restoration. Liability will be an essential tool of last resort to punish despoliation of the environment. In addition—and in line with the objective of prevention at source—it will provide a very clear economic incentive for management and control of risk, pollution and waste.

The Commission is about to conclude its deliberations and will present them to the other Community institutions and to the public as a "green paper," to generate discussion among all interested parties. This paper will raise a great number of issues and will set out the environmental experiences under national regimes. As to the essential question of fault-based versus strict liability (liability without fault), the draft green paper firmly favors strict liability.

The Commission is fully conscious of the difficulties surrounding the liability issue, particularly the question of "insurability." The U.S. experience in environmental liability will certainly be instructive, yet the Community is unlikely to establish an EC "Superfund" system with the same level of costs and litigation.

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117 Id at chapter 7.4.
The issue of environmental liability is complicated by the fact that the Council of Europe\textsuperscript{118} has established a draft convention on civil liability for environmentally damaging activities.\textsuperscript{119} This draft convention provides detailed rules on liability for environmental damage, also based on the principle of strict liability. The EC Commission is in an uncomfortable position because it took the view that this draft convention interferes with existing Community rules. Therefore, the Community would have to become a contracting party to this convention and, after ratification, would have to take appropriate steps to implement it. Not all Member States share this view, however, and therefore, the Council has not yet approved the negotiation mandate for which the Commission has applied.

In conclusion, Community rules on environmental liability have not yet been adopted, but are likely to incorporate the principle of strict liability. All details of this regulation are presently open and the timing is uncertain. In the meantime, Member States are free to proceed with their own liability legislation.

C. "LIFE"

A third recent development is the regulation agreed to during the Council's December 1991, session to establish a "financial instrument" for the environment called LIFE.\textsuperscript{20} This legislation is considered a major breakthrough, particularly because the Commission proposal was only sent to the Council in January 1991. LIFE will soon become the general tool for financing Community subsidies for national projects to restore and preserve environmental quality, and will rapidly absorb several other (much smaller) Community financial schemes, such as MEDSPA\textsuperscript{21} and NOR-SPA.\textsuperscript{122} The Commission will administer LIFE. However, a committee of representatives of Member States shall assist the Commission.

The LIFE regulation provides a list of activities which are eligible for funding. The bulk of the resources is earmarked for the promotion of sustainable development and environmental quality.

\textsuperscript{118} The Council of Europe is an international organization established shortly after the second World War. All Member States of the EC are members of the Council of Europe.
\textsuperscript{119} Not yet published.
(40 percent) and for the protection of natural habitats (45 percent). After long discussions, the Commission convinced Member States that 5 percent of the resources should be available for joint projects with third countries in the Mediterranean or Baltic regions.

The Council has agreed to make available 400 million ECU (about $460 million) for the years 1991-1995, of which 140 million is for 1991 and 1992. As the Community includes "rich" as well as "poor" Member States, it is not surprising that the financial commitment involved was one of the major issues to be discussed by ministers. There has been no discussion regarding the regional allocation of the funds, but it is clear that, in theory at least, the regulation would allow considerable transfers to the less wealthy Member States.

CONCLUSION

This Article has only been able to give a brief outline of the Community's response to the increasing problems resulting from environmental neglect. Of course, the Community's efforts must be evaluated together with the initiatives taken by the individual Member States. Under the EEC Treaty, environmental policy is a shared responsibility: the Member States remain free to take action so long as the Community has not legislated in an area, and the Member States have to implement the Community directives. The Member States remain free to go beyond what has been agreed at the Community level, provided that national measures are compatible with the Treaty rules on the free movement of goods.123

As a whole, the EC experience in the field of environment protection has been positive. It has been made possible and is supported by the increasing awareness of Europeans that a common environmental policy is urgently needed. While gradually establishing a common environmental policy as a common shield, the Community does not neglect the so-called "subsidiarity principle." If action at the Member State level permits achievement of the desired ends, the Community refrains from passing new legislation or restricts itself to framework legislation, with the freedom to expand the existing legal framework if it appears that the environ-

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123 The procedure to be observed depends on the legal basis. EEC, Art 100A, ¶ 4, and Art 130T.
mental objectives can be better attained by common action at the Community level.

In my view, this approach could be extended to international cooperation in the field of environment protection in at least three areas. First, the countries of Eastern Europe need western assistance not only with economic reform, but also with their environments, which were terribly neglected under the communist regimes. The Community’s PHARE program\(^\text{124}\) should be extended accordingly, and other Western countries should join with such Community efforts.

Second, the United Nations Conference on Environment and Development (UNCED), mentioned above, offered an opportunity for all participants to show their concern for global environmental issues. Following Resolution 44/228 of the United Nations General Assembly, UNCED was designed to “elaborate strategies and measures to halt and reverse the effects of environmental degradation in the context of strengthened national and international efforts to promote sustainable and environmentally sound development in all countries.”\(^\text{125}\) As the Community’s Heads of State indicated in the declaration on the environmental imperative adopted at the Dublin summit of June 1990, the EC was prepared to play a leading role at the conference.\(^\text{126}\) The Commission’s Fifth Action Program on the environment\(^\text{127}\) refers to this commitment.\(^\text{128}\)

Finally, focusing specifically on cooperation between the United States and the EC, I would like to stress that this cooperation has already been codified by way of an exchange of letters as early as 1974, shortly after the EC began its environment policy. This has now been completed on a very broad basis by the EC-US Transatlantic Declaration adopted on November 23, 1990. Though this cooperation works reasonably well and, I hope, for the benefit of both sides, I feel that this cooperation could be intensified and extended to all fields of common interest. If our environment poses common problems—and it certainly does—improved cooperation between the United States and the Community might help in finding common solutions.

\(\text{\textsuperscript{124}}\) See notes 108 and 109 and accompanying text.

\(\text{\textsuperscript{125}}\) UNCED adopted texts on an environmental agenda for the next century (“Agenda 21”), a framework convention on climate change, a convention on biological diversity, a statement on forest principles, principles of drawing up a convention on desertification, and the Rio Declaration on Environment and Development.

\(\text{\textsuperscript{126}}\) 23 Bull EEC at 6:17 (cited in note 50).

\(\text{\textsuperscript{127}}\) Discussed in Part II B of this Article.

\(\text{\textsuperscript{128}}\) Fifth Environmental Action Program, Chapter 13 (not yet published).