

STUDENT COMMENTARY

THE EUROPEAN COMMUNITY'S DEVELOPMENT OF AN ENVIRONMENTAL POLICY: THE TREATY OF EUROPEAN UNION

This commentary is intended as a historical outline summarizing the changes in the main environmental provisions from the Treaty of Rome to the Treaty of European Union. Additionally, this commentary traces the development of the European Community's Environmental Action Programmes through the negotiations of the Treaty of European Union. The Treaty of European Union has currently been ratified by all the member-states. German ratification is contingent on a constitutional issue pending in the German courts.

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I. INTRODUCTION

On December 11, 1991, the twelve member-states of the European Economic Community (EC or Community)¹ met in Maastricht to undertake negotiations within the Intergovernmental Conferences on the European Monetary Union and the Political Union. The convening Ministers probably realized that the December 1992 deadline for the formation of the European Community was quickly approaching and the Community was hardly equipped to handle the ensuing merger. As originally drafted in 1957, the Treaty of Rome² was to lay the foundations for a Western European merger in economics and commercial policies. An increasing concern has emerged, however, over the necessity to develop accompanying political and social policies necessary for the completion of an economic merger. The Treaty on European Union (TEU)³ drafted at the Maastricht conference establishes a European Union and significantly amends the Treaty of Rome. The TEU goes much further than creating a common economic policy among the signing parties. In addition, it strives to unify the member-states on a political and social level.⁴

1. The member-states include: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and Great Britain.

2. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC TREATY].

3. Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 253 [hereinafter TEU].

4. Included in the TEU's resolutory introduction:
DETERMINED to promote economic and social progress for their peoples, within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection, and to implement policies ensuring that advances in economic integration are accompanied by parallel progress in

The change in the internal structure of Western Europe is accompanied by the political changes in Eastern Europe and creates vast alterations in modern geographical and political terms. Welcomed changes, however, are combined with many negative changes: a disproportional population surge in certain regions, heavy increases in construction and reconstruction and escalation of industrial activity. Changes in the European frontier add to an already long history of severe environmental problems. Subsequently, environmental concerns are being pushed to the forefront of European interests.⁵

II. ENVIRONMENTAL AFFAIRS IN THE EC

A. *The Treaty of Rome*

When the Treaty of Rome was established in 1957, environmental degradation was not a significant issue in the forefront of concern for the European nations. As originally established, the primary purpose for creating the EC was to "facilitate the free circulation of goods, services, people and capital."⁶ Because of these objectives, establishing a common environmental policy was not considered a necessary part in the creation of the Common Market.⁷ During the 1960s an

other fields.

Id. at 253.

5. See, e.g., Sara Lewis, et al. 1992: *The European Community Prepares for Environmental Unification*, HAZMAT WORLD, Jan. 1990, at 26 (indicating that increasing environmental concern among EC citizens has caused environmental problems to be placed at the forefront of political issues); Nigel Haigh, *Impact of the EEC Environmental Programme: The British Example*, 4 CONN. J. INT'L L. 453, 454 (1989) (noting that environmental laws are reflecting concerns for pro-environment policies).

6. Susan Polizotto & Patricia L. LaTulippe, Comment, *The European Community in 1992: An Integrated Approach to Economy and Ecology*, 1990 B.Y.U. L. REV. 1759, 1761; see EEC TREATY, *supra* note 2, pmbl. 298 U.N.T.S. at 14-15.

7. Eckard Reh binder & Richard Stewart, 2 INTEGRATION THROUGH LAW: ENVIRONMENTAL PROTECTION POLICY 15 (1985); Polizotto & LaTulippe, *supra* note 6, at 1761 (citing Reh binder *supra*).

increase in environmental concerns surfaced within the Community. In order to effectively deal with the implementation of new environmental policies throughout the EC, the Community adopted a broad reading of the general principles and purposes established in the Treaty of Rome. It was argued that promotion of economic growth included both the qualitative elements of an environmental policy as well as specific economic provisions.⁸ To implement these environmental programs, the Community used articles 2, 36, and 235 of the Treaty of Rome. Article 2 expresses a general Community concern for the quality of life and the need to develop "harmonious" economic activities including environmental protection in the member-states.⁹ Article 36 authorized member-states to limit imports and exports to protect the health and life of persons, animals, and plants.¹⁰ Lastly, article 235 is equivalent to the United States' "necessary and proper clause" and provides that the Council may take appropriate measures to attain "in the functioning of the Common Market, one of the aims of the Community" when the "Treaty has not provided for the requisite powers" to do so.¹¹ Under this rationale it was understood that the development of an environmental policy was a necessary part of the creation of an efficient common market.

B. The First Three Action Programmes

In response to the 1972 United Nations Conference on the Human Environment in Stockholm,¹² the Community

8. See generally Malcolm Grant, *Implementation of the EC Directive on Environmental Impact Assessment*, 4 CONN. J. INT'L L. 463 (1989) (discussing impact of 1980 E.C. Directive on the British Planning System).

9. See STANLEY P. JOHNSON & GUY CORCELLE, *THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES* 1 (1989).

10. EEC TREATY, *supra* note 2, art. 36, 298 U.N.T.S. at 29.

11. *Id.*, art. 235, 298 U.N.T.S. at 91.

12. See *U.N. Conference on the Human Environment: Final Documents*, U.N. Doc. A/CONF.48/14 and Corr.1 (June 16, 1972), reprinted in 11 I.L.M. 1416-69 (1972).

adopted its First Action Programme on the Environment in early 1973.¹³ The First Action Programme¹⁴ lasted until 1977 and defined the six basic principles and objectives of a Community environmental policy. These six principles included:

1. Prevention is more effective environmental policy than ex post facto cure of pollution.
2. Polluters are to be financially responsible for the costs of prevention and control of pollution (known as the "polluter pays" principle).
3. The most appropriate decision-making level must be sought for each type of action; therefore, the Community will only act where:
 - a. national action would be ineffective,
 - b. there is a common interest,
 - c. divergent national action would cause major economic or social problems.
4. The Community will make an environmental impact assessment.
5. Efforts will be made to prevent transboundary pollution.
6. Member states are given the power to enact more stringent national measures than those provided by the Community.¹⁵

Additionally, the action programme set out the intended developments for a variety of areas suffering from environmental damage.

The Second Action Programme¹⁶ was a continuation of

13. Phillippe Sands, *European Community Environmental Law: The Evolution of a Regional Regime of International Environmental Protection*, 100 YALE L.J. 2511, 2512 (1991).

14. *Council Declaration of 22 November, 1973 On the Programme of Action of European Communities on the Environment*, 1973 O.J. SPEC. ED. (C 112) 1 (hereinafter First Action Programme).

15. *Id.*

16. *Council Resolution of 17 May, 1977 on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment*, 1977 O.J. (C 139) 1 (hereinafter Second Action

policies begun under the auspicious framework of the First Action Programme. It lasted from 1977 to 1981 and added sections on waste management, noise control and nuclear energy. Additionally, it placed continued emphasis on the preventive aspects of pollution control, particularly in the areas of water and air pollution.¹⁷

The Third Action Programme¹⁸ extended from 1983 to 1986. This Programme focused mainly on the following four elements: 1) an emphasis on both the social and economic aspects of environmental policies; 2) the need to reinforce the preventive character of environment policies and the need to develop environmental impact assessments; 3) the continuation of pursuits outlined in the Second Action Programme; and 4) the necessity of cooperation to avoid any overlapping or economically inefficient proposals, including the importance of using cost-benefit analysis in analyzing programs and their effects on the different economic and ecological conditions and structures which exist in the Community.¹⁹

All of the Action Programmes were promulgated in the form of declarations or resolutions which are not binding on member-states. They gave the member-states a general guideline of the important practices and policies the EC thought needed to be pursued. Unfortunately, it is this general policy-oriented attitude which caused the Action Programmes to have little practical effect. Without enforcement and implementation mechanisms, the member-states did not seem to treat the proposals as anything more than suggestions.²⁰

Programme).

17. See JOHNSON & CORCELLE, *supra* note 9, at 17; Polizotto & LaTulippe, *supra* note 6, at 1765.

18. Council Resolution of February 17, 1983, on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment (1982 to 1986), 1983 O.J. (C 46) 1 (hereinafter Third Action Programme).

19. JOHNSON & CORCELLE, *supra* note 9, at 17-18.

20. Tamara R. Crockett & Cynthia B. Schultz, *The Integration of Environmental Policy and the European Community: Recent Problems of Implementation and Enforcement*, 29 COLUM. J. TRANSNAT'L L. 169, 174 (1991).

However, this did not mean that the increase in environmental concern dissipated throughout the Action Programmes' ten-year existence. On the contrary, from 1976 to 1987 the EC implemented more than one hundred environmental measures covering areas such as waste management, conservation of flora and fauna, radioactive waste, nuclear safety, and air, water, and noise pollution.²¹ The adoption of the Fourth Action Programme gave the EC increased authority for environmental matters by placing more enforcement and implementation power into the hands of the Community.

C. The Fourth Action Programme—The Single European Act

It was not until July 1987 that the first giant step towards developing an environmental policy was taken. In that year the first major amendment to the Treaty of Rome, known as the Single European Act (SEA), entered into force.²² The SEA created the phrase "internal market" and added to the previously accepted "common market."²³ This new creation was defined as comprising "an area without internal frontiers in which the free movement of goods, persons, services, and capital is ensured . . ."²⁴ The SEA also introduced a new chapter regarding the environment by adding articles 130R, 130S and 130T to the Treaty of Rome. These provisions set out the following Community objectives:

- (i) to preserve, protect and improve the quality of the environment;
- (ii) to contribute towards protecting human health; and
- (iii) to ensure a prudent and rational utilization of

21. Andrew Geddes, *1992 and the Environment - Sovereignty Well Lost?*, 138 NEW L.J. 826 (1988).

22. Single European Act, Feb. 16-28, 1986, 1986 Bull. Eur. Communities (Comm'n Eur. Communities), Supp. 2, 25 I.L.M. 506 [hereinafter SEA].

23. Nigel Haigh, *The Environmental Policy of the European Community and 1992*, 12 INT'L ENVLT. REP. (BNA) 617 (Dec. 13, 1989).

24. *Id.* art. 13 (supplementing EEC TREATY with art. 8A).

natural resources.²⁵

Additionally, article 130S established the Community's implementation and decision-making process.²⁶ According to the SEA, the Council must act *unanimously* in deciding what action to take on a proposal (whether a Directive, Regulation, or Decision) made by the Commission.²⁷ The second paragraph of 130S allows the Council to unanimously decide that certain categories of environmental measures may be determined by a mere *qualified majority* instead of the required unanimity.²⁸ The necessity for unanimity in adopting environmental policies has created tremendous tension in the Community.²⁹ The SEA also enhanced the role of the European Parliament in the decision making process.³⁰ This measure was beneficial for environmental policies because the Parliament is traditionally progressive in the environmental arena.³¹ The SEA's environmental program outlines a policy based on preventative action, the "polluter pays" principle, treating environmental problems at their source and integrating environmental standards with the economic policies pursued by the Community.³² Although the SEA expands the role and responsibilities of the Community, it also allows and encourages the member-states to pursue their own environmental policies, goals and protective devices.

25. *Id.* art. 25 (adding art. 130S to EEC Treaty) 25 I.L.M. at 515.

26. *Id.* (adding art. 130S), 25 I.L.M. at 515-16.

27. *Id.*

28. See Auke Haagsma, *The European Community's Environmental Policy: A Case-Study in Federalism*, 12 FORDHAM INT'L L.J. 311, 347 (1989).

29. See discussion *infra* part E.1.

30. EEC TREATY, *supra* note 2, arts. 137-144, 298 U.N.T.S. at 67-69.

31. 1991 Euroscope 1, *2.

32. SEA, *supra* note 22, art. 25 (new EEC TREATY) art. 130R, para. 2, 25 I.L.M. at 515. See also Crockett & Schultz, *supra* note 20, at 175-76.

D. *The Fifth Action Programme*

On February 1, 1993, the Council adopted the Fifth Environmental Action Programme.³³ Although the Fifth Action Programme is scheduled to run from 1993 to 2000, a revision of the Programme is already set for 1995.³⁴ The Programme's objective is:

[to] define action guidelines for the next decade involving all sectors of society from governments and local authorities to business and pressure groups as well as citizens and consumers; to share responsibility for the environment and to establish links by strengthening dialogue at the early drafting stage of the legislative process.³⁵

The Fifth Action Programme is set out in two Parts. Part I sets forth the current state of the environment in the Community and outlines certain strategies for achieving an improvement in environmental conditions. The Action Programme is designed to make Member States more attentive to their own environmental policies and the way in which their policies will meet the Community's environmental objectives. The Action Programme targets five sectors in which the Community plans to reduce pollution by implementing new pollution programs. These sectors include industry, transport, energy, tourism and agriculture.³⁶ To carry out new pollution programs under the Fifth Action Plan, the Commission has created three new agencies:

-- an environmental policy group

33. 1993 O.J. EUR. COMM. (C. 138) 1 (hereinafter Fifth Action Programme).

34. Coopers & Lybrand, *EC Commentaries*, at para. 2.4 available in LEXIS (Int'l. Law file, EURSCP database) (Sept. 2, 1993).

35. *Id.*

36. *European Update*, 1991 WL 11672 (D.R.T.) at para. 1.4.2 (June 9, 1993) (Environment file).

- an advisory forum of trade unions, non-governmental organizations, and representatives of consumer and local and regional authorities.
- a network of officials who are responsible for the implementation of legislation from the Member States and the Commission.³⁷

Part II of the Fifth Action Programme, sets out certain objectives to be undertaken by the Community in solving environmental issues which arise in developing countries, Central and Eastern Europe.³⁸

Similar to the other Action Programmes, this Programme has no legal force but rather, serves as a guideline for Community attainment of environmental objectives.³⁹

E. The European Environment Agency

Even though the SEA made the environment one of the Community's most important obligations,⁴⁰ action on environmental policies was not forthcoming. It was not until the end of 1989 that the Ministers of the member-states took an active step by agreeing to set up a new agency specifically for the environment.⁴¹ On May 7, 1990, the European Environment Agency (EEA) was formally established by Regulation No. 1210/90.⁴² The EEA was established in response to the Council's realization that in order to commence an effective environmental policy, more scientific information was necessary. The preamble to the EEA Regulation states:

37. *EC Commentaries*, *supra* note 34.

38. *Id.*

39. *European Update*, *supra* note 36.

40. SEA, *supra* note 22, art. 25 (adding tit. VII to EEC TREATY) 25 I.L.M. 515-16.

41. *Environmental Ministers Agree on Plan to Set Up a European Environment Agency*, 12 Int'l Env't Rep. (BNA) 579 (Dec. 13, 1989).

42. Council Regulation No. 1210/90, art. 1, para. 1, 1990 O.J. (L 120) 1 [hereinafter EEA Regulation].

[C]ollection, processing, and analysis of environmental data at European level are necessary in order to provide the Community and the Member States with objective, reliable, and comparable information which will enable them to take the requisite measures to protect the environment, to assess the results of such measures and to ensure that the public is properly informed about the state of the environment.⁴³

The purpose of the EEA is to serve as an environment information and observation network among the member-states. Although the Agency has the power to *monitor* the implementation of Community environmental policies, there are no plans to make the agency an enforcer of Community environmental programs. However, many people feel that enforcement responsibility should be turned over to the EEA to relieve some of the burden on the Commission.⁴⁴

Currently, the EEA is a legal entity and has "in all the member states the most extensive legal capacity accorded to a legal person under their laws."⁴⁵ The administrative board of the EEA consists of one representative of each member-state, two representatives of the Commission, and two scientists chosen by the European Parliament.⁴⁶ The Board creates its

43. *Id.* See also David A. Westbrook, Comment, *Environmental Policy in the European Community: Observations on the European Environment Agency*, 15 HARV. ENVTL. L. REV. 257, 258 (1991).

44. See generally Westbrook, *supra* note 33, at 267 (discussing the possibility that the agency should at least be responsible for monitoring the implementation of Community environmental legislation); Haigh, *supra* note 23. (EEA should monitor implementation); *Parliament Calls for Stronger Role for Proposed European Environmental Agency*, 13 INT'L ENVTL. REP. (BNA) 43 (Feb. 14, 1990). But see *Plan for European Environment Agency, Other EC Proposals Criticized by Group*, 12 INT'L ENVTL. REP. (BNA) 423 (Sept. 13, 1989) (criticizing the Commission's proposed EEA).

45. EEA Regulation, *supra* note 35, art. 7, 1990 O.J. (L 120) at 3.

46. *Id.* art. 8, para. 1.

own internal proceedings,⁴⁷ elects a chair from its own members and passes its decisions with the required two-thirds majority.⁴⁸

F. Problems With The EC Environmental Program

1. Implementation

The passage of the SEA in 1987 caused significant problems in the implementation procedure of environmental policies. Under Title VII of the SEA, article 130S requires a unanimous decision from the Council before the resolution can become law.⁴⁹ This significantly slows down the legislative process, because achieving a unanimous decision from the twelve Council members regarding environmental regulations can be quite difficult.

Article 100A accompanied the adoption of the SEA and provided for the harmonization of EC laws to effectuate a Common Market by the December 1992 deadline. The most important feature of 100A is that it allows a qualified majority of the Council to pass a Commission proposal into law. Additionally, 100A specifically says that those proposals which relate to the environment "will take as a base a high level of [environmental] protection."⁵⁰ The two factors included in 100A create the possibility of passing environmental legislation under qualified majority and not the previously required unanimous vote. The confrontation between the implementation of procedures under the qualified majority provision of 100A or under the unanimity requirement of 130S is problematic. It has been argued that 100A only effects the *products* which circulate among member-states and the

47. *Id.* art. 8, para. 2.

48. *Id.* art. 8, para. 3.

49. See also Sands, *supra* note 13, at 2517 (analysing art. 100A); Crockett & Schultz, *supra* note 20, at 177.

50. SEA, *supra* note 22, art. 25 (new EEC TREATY) 25 I.L.M. at 515-46. 21 art. 100A, para. 3, 25 I.L.M. at 512.

harmonization of the products' standards.⁵¹ The harmonization of standards is necessary to ensure that product requirements are equal in all the member-states and maintain fair competition.⁵²

Articles 130R-130S were established to deal exclusively with the protection of environmental quality. For example, the articles are used by the Council to establish emission standards for stationary sources of pollution.⁵³ A problem arises in defining whether a new piece of legislation is essentially a harmonization measure or exclusively an environmental protection measure. This conflict faced the Community in September 1989 when the Commission proposed that a Directive on Civil Liability for Waste be implemented under 100A even though the Directive had clear environmental objectives.⁵⁴

The significance of this confrontation lies in the fact that if qualified majority voting is permissible (i.e. the proposed environmental legislation can be adopted under 100A), some member-states with a high level of protection could be out-voted in the Council, forcing them to lower their standards of protection in order to comply with Community competition requirements.⁵⁵ This obstacle exacerbates the already difficult problem of passing necessary environmental proposals by creating another problem which must be debated in the legislature.

51. *Lack of EC Environmental Progress 'Catastrophic,' IEEP Official Says*, 13 Int'l Envtl. Rep. (BNA) 10 (Jan 10, 1990) [hereinafter *Lack of EC Progress*]; *No Uniform Environmental Policy Will Exist After 1992, Official Says*, 13 Int'l Envtl. Rep. (BNA) 417 (Oct. 10, 1990) [hereinafter *No Uniform Policy*].

52. *No Uniform Policy*, *supra* note 44, at 417.

53. *Id.*

54. Commission Proposal for a Council Directive on Civil Liability for Damage Caused by Waste, COM (89) 282 final, 1989 O.J. (C 251) 3, 3-4. See also Sands, *supra* note 13, at 2517 (discussing implications of article 100A).

55. Haagsma, *supra* note 28, at 350 (noting that the German and Danish representatives had especially expressed such a fear).

2. Community vs. Member-State Action on Environmental Policies

Although the Community has adopted over 250 environmental programs or controls, most have had only limited effect due to the member-states failure to implement or enforce the Community suggested policies.⁵⁶ Because most environmental legislation is passed in the form of a Directive, the implementation, enforcement, and specifics of the legislative action are left to each member-state. Article 189 of the Treaty of Rome provides that "a directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods."⁵⁷ Although some European Court of Justice (ECJ) case law has extended the legal rights created by Directives to be directly effective upon member-states' private citizens, such actions can only be pursued if the member-state either fails to implement the Directive within the proper time constraints, fails to follow the Directive specifications or if national law conflicts with the Directive.⁵⁸ To date, these circumstances have not arisen with any environmental Directives.

Although the time delay is an available option to private citizens, by the time the citizen brings the action before the ECJ, more time has elapsed and therefore less can be done to prevent further environmental deterioration. Additionally, because member-states are permitted to implement their own version of the Directive, each state may accommodate it to their

56. Lewis, et al., *supra* note 5, at 28; Crockett & Shultz, *supra* note 20, at 181.

57. EEC TREATY, *supra* note 2, art. 189.

58. These cases are respectively: Case 148/78, *Pubblico Ministero v. Tullio Ratti*, 1979 E.C.R. 1629, 1642, Common Mkt. Rep. (CCH) para. 856 (1979); *Commission v. Belgium*, Case 102/79, 1980 E.C.R. 1473, 1487, Common Mkt. Rep. (CCH) para. 8673 (1980); Case 41/74, *Yvonne van Duyn v. Home Office*, 1974 E.C.R. 1337, 1349, Common Mkt Rep. (CCH) para. 8283 (1974). See also Rolf Wägenbaur, *The European Community's Policy on Implementation of Environmental Directives*, 14 FORDHAM INT'L L.J. 455, 457 (1990-91) (explaining the process and effects of implementing a directive).

own state's unique environmental problems which creates philosophical and functional differences among the various standards and proposals in each member-state. In order to avoid these impediments, environmental legislation should be adopted in the form of Regulations which are automatically binding on the individual member-states.⁵⁹ Alternatively, the Community may adopt Directives drafted clearly and unequivocally preventing member-states from implementing additional discretionary measures. Directives would directly effect the member-states and any legal right established by the Directive would automatically be assumed by private citizens.⁶⁰

The Community also faces the issue of whether action from the unified Community on environmental issues infringes upon member-state sovereignty. By forcing the Community to adopt environmental laws that can be implemented by all the member-states, the Community often adopts a baseline approach to legislation. Heavily developed countries like Germany, the Netherlands and Denmark have already implemented strict environmental standards that are dictated by the Community Directives. Countries in the southern regions of the EC, such as Portugal, Spain and Greece, are less developed and have lagged behind in the implementation of these Directives to allow their industries a competitive edge and catch up to the developed regions in the north.⁶¹ The Secretary of the European Environment Bureau, Raymond Van Ermen indicated that Community standards "will be considered

59. EEC TREATY, *supra* note 2, art. 189, 298 U.N.T.S. at 78-79. See Crockett & Schultz, *supra* note 20, at 186; *Lack of EC Environmental Progress*, *supra* note 44, at 10; Wägenbaur, *supra* note 51, at 468. These authors advocate the implementation of environmental legislation via Regulations and not Directives.

60. The policy of directly effective directives was established in *Commission v. Belgium*, *supra* note 58. See also Wägenbaur, *supra* note 58, at 456 for a complete discussion on directly effective directives.

61. See Crockett & Schultz, *supra* note 20, at 183; *Economic Growth, Varying Environment Laws May Mean Lax Air Pollution Control*, 12 Int'l Env'tl. Rep. (BNA) 482 (Oct. 11, 1989); *EEB Head Says Single European Market Could Have Adverse Effect on Environment*, 11 Int'l Env'tl. Rep. (BNA) 487 (Sept. 14, 1988) [hereinafter *EEB Head*].

a ceiling rather than a floor" by member-states. This policy will not provide incentive for member-states to go beyond the Community standards and develop their own, more stringent standards.⁶² On the contrary, Ludwig Kramer, legal adviser in the EC Commission's Environmental Directorate—DG XI, feels that the Treaty of Rome and SEA allow member-states to maintain or introduce more stringent environmental measures than those agreed upon at the EC level.⁶³ More stringent standards cannot constitute a means of discrimination or a trade restriction on other member-states' goods.⁶⁴ In either case, the issue requires a balancing act between the necessity of solving environmental problems on a large scale international level, and preventing less developed countries of the EC from "drowning" in industrial restrictions and forcing less competition within the market.

III. HOW THE TEU CHANGES THE EC'S ENVIRONMENTAL AGENDA

A. *The Implementation Procedure*

One of the most important contributions the TEU makes in the Community is an outline of new implementation procedures. As discussed above, environmental policies were implemented either through the qualified majority voting procedure outlined in article 100A or through the more cumbersome unanimous decision provision of article 130S. Under 100A the following procedure was used: the Commission proposed legislation, the Parliament adopted an opinion by a simple majority, and the Council adopted a "common position" by qualified majority. The Parliament, within three months, approved, amended or rejected the Council's common position. Amendment or rejection by the Parliament could only be done by absolute majority. The Commission could, within one

62. *EEB Head, supra* note 61, at 487. *See also* Crockett & Schultz, *supra* note 20, at 188.

63. *EEB Head, supra* note 61, at 487.

64. *Id.*

month, revise its proposal and take the Parliaments' amendments into account. If the Parliament proposed an amendment, the Council had three months to take one of the following four actions: adopt by qualified majority the Commission's revised proposal; adopt by unanimity Parliament's amendments not approved by the Commission; amend and adopt, by unanimous vote, the Commission's proposal; or fail to act. If the Parliament rejected the proposal the Council could only agree by unanimous vote.⁶⁵ The final decision always rested with the Council, although the Commission had the power to amend or withdraw its proposal. In addition, the Parliament could send a distinctive message about their approval or disapproval of the pending legislation.⁶⁶ When directives relating to the environment were adopted under article 130S, the following procedure was used: the Commission proposed legislation in Directive, Regulation or Decision form. The Parliament gave an opinion which could include suggested amendments leaving the ultimate form of any adopted legislation to the Council. The Council could only approve of the final draft by unanimous consent.⁶⁷

The twelve Ministers at Maastricht completely revamped the implementation procedures for both articles 100A and 130S.⁶⁸ According to the TEU, any directives for the approximation of laws which "directly affect the establishment or functioning of the common market"⁶⁹ must follow the implementation procedures referred to in article 189B.⁷⁰

65. EEC TREATY, *supra* note 2, art 149. Article 100A provides legislation which relates to the internal market. In these cases the "cooperation procedure" outlined in article 149 is used.

66. *Id.*

67. SEA, *supra* note 22, art. 130S, 21 I.L.M. at 515-16.

68. TEU, *supra* note 3, arts. 100A and 130S, 31 I.L.M. at 263 & 286. The new article 100A no longer refers to the implementation proceedings established by article 149. Instead it refers to the newly created article 189B. Similarly, article 130S refers to the implementation proceedings outlined in the new 189C. See text accompanying notes 65-75.

69. TEU, *supra* note 3, art. G (amending EEC TREATY) art. 100, 31 I.L.M. at 263.

70. *Id.* (amending art. 100A).

Article 189B calls for the following lengthy procedure: the Commission shall submit a proposal to the European Parliament and the Council. After hearing the Opinion of the European Parliament, the Council shall adopt by qualified majority, a *common position*, including a combination of the views by all three branches of the legislature. The Council presents the common position to the Parliament. The Parliament has three months to either 1) approve the common position—the Council shall adopt the act; 2) not make a decision—the Council can adopt the Common Position; 3) indicate to the Council by an absolute majority that it intends to reject the Common Position; or 4) the Parliament may propose amendments to the common position by an absolute majority.

The Council may bring the issue to a Conciliation Committee. At this point the Parliament may either confirm its rejection of the proposal by an absolute majority or propose amendments to the common position. If the Parliament officially rejects the proposal at this time, the proposed act is *not* considered adopted. If the Parliament proposes amendments, the amended text is forwarded to the Council and the Commission. Three months after this referral, the Council may approve all the amendments by a qualified majority and adopt the common position as law. However, if the Commission disapproves any of the Parliament's amendments, the Council must act unanimously on those amendments to incorporate them in the final version.

If the Council fails to approve the amended act, the President of the European Parliament and the President of the Council shall convene a meeting of the Conciliation Committee. This Committee is composed of an equal number of members from Parliament and the Council and its job is to reach an agreement on a joint text by a qualified majority of the Council members and by a majority of the Parliament representatives. If the Conciliation Committee approves a joint text, then the new version must be adopted by an absolute majority in the European Parliament and by a qualified majority in the Council. If the Conciliation Committee *does not* approve a joint text, the proposed act is *not* adopted, and the Council's

original common position (possibly with amendments) is passed, unless the Parliament rejects the text by an absolute majority.⁷¹ This provision is a last attempt to encourage negotiations when a stalemate has been reached. The Parliament is an important part of the legislative process with considerably more power than it had under the original Treaty of Rome. The effect of the new procedure is to give Parliament the power to completely reject the Commission's proposals. The implementation program will be used to enact Environment Action Programmes.⁷²

The new article 130S(1) directs the Council to act according to the procedure referred to in article 189C. The Council acts by a qualified majority on a proposal from the Commission. Like the procedure in 189C (outlined above), after the Council obtains an Opinion from the European Parliament, the Council and the Commission shall adopt a common position. The common position is communicated to the European Parliament, with each department (Council and Commission) fully outlining their reasons for adopting the common position. If within three months the Parliament adopts the common position, or if the Parliament does not act, the Council shall adopt the common position as a new law. However, the Parliament can, within three months and by absolute majority, also propose amendments to the common position or reject the common position. If rejected, the Council needs a unanimous vote to act on a second reading. The Commission shall re-examine the proposal from which the Council adopted a common position within one month, and at that time, it shall consider any amendments suggested by the Parliament. The Commission shall give the Council the re-examined proposal which will include reasons for the rejection of any Parliament amendments. The Council may adopt the rejected Parliament amendments only if they act unanimously. The Council can adopt the Commission's final version at this stage by a qualified majority vote. If the Council wants to

71. *Id.* at art. 189B, paras. 1-6, 31 I.L.M. 296-97.

72. See *supra* notes 12-21 and accompanying text regarding the EC's Environment Action Programmes.

amend the Commission's latest proposal, the vote requires unanimous consent. If the Council has not acted within three months, the Commission's proposal is not adopted.⁷³

The new implementation procedure will greatly relieve tension previously felt in the legislative branch regarding the adoption of environmental policies. As mentioned above, to avoid the difficulties of pursuing unanimous decisions under 130S, the Commission attempted to implement environmental policies through the harmonization mechanism outlined in 100A only requiring a simple qualified majority for approval.⁷⁴ The new implementation procedure outlined in 189C solves the problem by requiring the Council to act by a qualified majority on a proposal from the Commission. The only time unanimity is required is when the Parliament has completely rejected the proposal. If the Council wants to continue discussions and negotiations on the proposal, then the Council must unanimously decide to do so. However, this does not mean that the Parliament's suggested amendments are rejected. The Commission has the responsibility of reviewing the amendments and articulating their approval or disapproval.

The new procedure solves the problem of delays on environmental policies that the Community faced due to the strict unanimity requirement. Additionally, the problem of justification of any new environmental proposal as a harmonization mechanism in order to qualify for qualified majority voting is alleviated. Alleviation of this problem will relieve some of the tension surrounding the implementation of environmental legislation.

B. *The Environmental Program*

The adoption of the TEU has taken the EC beyond the original goal of a common economic and commercial union and includes the objectives of common social and political

73. TEU, *supra* note 3, art. G (EEC TREATY, art. 189C, paras. a-e), 31 I.L.M. at 298.

74. See *supra* notes 49-55 and accompanying text.

cohesion.⁷⁵ An example of this new emphasis on non-economic relations is apparent in the new environmental awareness provisions contained in Title XVI which includes articles 130R-130T. A surface comparison reveals the extensive differences in the addition and deletion of certain phrases. However, the most significant change these provisions provide is their effect on the Community's ability to respond to environmental deterioration.

1. Article 130R

The first notable change is contained in the Community objectives. An additional objective includes the idea of "promoting measures at an international level to deal with regional or worldwide environmental problems."⁷⁶ This is an important addition to the EC goals. The coordination of twelve different countries working toward one environmental policy might be able to establish a blueprint for the adoption of a world-wide response to the environmental crises.⁷⁷

The second paragraph in article 130R also contains notable changes. First, "the Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community."⁷⁸ Additionally, "harmonization measures . . . shall include . . . a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a Community inspection procedure."⁷⁹ The provisions taken together indicate the Community's willingness to respond to the different environmental goals and monetary

75. TEU, *supra* note 3, arts. A & B, 31 I.L.M. at 255.

76. TEU, *supra* note 3, art. G. (EEC TREATY art. 130R, para. 1), 31 I.L.M. at 285.

77. See generally Sands, *supra* note 13, at 2511; Phillipe Sands, *Environment, Community and International Law*, 30 HARV. INT'L L.J. 393 (1989).

78. TEU, *supra* note 3, art. G (EEC Treaty art. 130r, para. 2), 31 I.L.M. at 285.

79. *Id.*

capabilities of each member-state. As previously discussed, Germany and Denmark have taken a stance on formulating strict environmental protective measures, whereas Spain and Portugal are more concerned with trying to infiltrate the market of the EC and competing with their more developed neighbors.⁸⁰ The new provisions encourage the Community to consider these types of differences when negotiating new environmental proposals. The provisions allow temporary derogations from legislative provisions which the lesser developed member-states cannot afford to implement at the present time.

Article 130S(5) implements a Cohesion Fund to be set up to contribute financial support to the poorer member-states.⁸¹ These protective measures can assist the financially weaker member-states without jeopardizing the entire Community's environmental program.

Additionally, the new 130R does not incorporate an old provision which permitted the Community to take action relating to environmental objectives which could be met at the Community level better than at the member-state level. This change indicates the Community's intent to foster environmental protection at the Federal level, without the alternative of member-state cooperation. Although member-states may, according to article 130T, implement their own more stringent measures, the removal of this alternative provision from the Treaty of Rome indicates the Community's desire to implement protective measures at the Community level rather than relying on national action.

80. See *supra* text accompanying notes 56-64 for a discussion about disparities among the member-states.

81. TEU, *supra* note 3, (EEC TREATY, art. 130S, para. 5), 31 I.L.M. at 286.

2. Article 130S

As previously discussed, the most significant change article 130S brings to the environment objective, is the alteration of the implementation process from required unanimity to the new qualified majority procedure outlined in 189C. However, 130S does outline five areas which still require unanimous decisions. These five areas include 1) provisions of a "fiscal nature"—this will require any taxes on emissions to be adopted by unanimity; 2) energy supply—this includes any decision which affects a member-state's choice between different energy sources like nuclear power or electric; 3) land use measures except the proposal for waste management; 4) water protection; and 5) other "measures of a general nature."⁸² Because it is not clear what constitutes measures involving water protection or "general nature," it is possible that these undefined and vague areas could become problematic. Ultimately, it will come down to how controversial the issue is, and whether the possibility of achieving a unanimous vote in the Council is possible. If such unanimity is not possible, it is inevitable that heated discussions will occur concerning what "measures of a general nature" includes. Arguably, because the phrase is included in the same sentence as waste management, it might only apply to "measures of a general nature" relating to waste management, exempting other general measures from the unanimity requirement.

Article 130S also requires that any of the above listed provisions be adopted without prejudice to article 100A.⁸³ This provision offers an alternative method for obtaining the proposal by qualified majority. If the proposed legislation is something that needs to be developed to encourage harmonization or as a final step towards the internal market, it could arguably be pushed through via the qualified majority implementation procedure under 100A. Although the battle between using 130S and 100A might continue, the conflicts

82. *Id.*

83. *Id.*

should be less frequent because it is possible to enact environmental proposals using 130S and a qualified majority voting format. Additionally, the article does provide that any of the above exceptions which require unanimous decisions may, under unanimous determination by the Council, only require qualified majorities.

Paragraph 3 of article 130S indicates that all future action programmes shall be adopted by the Council in accordance with the procedures outlined in article 189B. Article 189B calls for a Conciliation Committee and more parliamentary participation. Paragraph 3 also requires the consultation of the Economic and Social Committee.

Paragraph 4 of article 130S indicates that member-states are responsible for the implementation and the financial backing of an environment policy. If costs are too excessive for member-states, they are permitted to derogate from the proposal temporarily or to seek funding from the Cohesion Fund established under article 130d. No specifics were included in the Treaty of Rome for funding. Now, much to the chagrin of the member-states, we know who is responsible for paying the bill for new environmental protection measures. However, if the environmental policy is of a Community nature, the Community is required to pay for its implementation.

3. Article 130T

The effect of this article remains the same. Member-states are permitted to implement more stringent environmental programs than those established at the Community level. However, the new article 130T requires member-states to notify the Commission if they enact more stringent standards. This provision allows the Commission to make sure the higher standards are not in conflict with any other provisions contained in the TEU. This provision enables the Commission to take a greater role in the member-state's environmental program, gives the Commission more notification of what is actually being done at the national level, and protects the other member-states from the threat that higher standards might have on competition.

IV. CONCLUSION

An EC task force has come to the conclusion that sulfur dioxide and nitrate emissions will climb 14% percent and 9% respectively with the ensuing increase in the gross national product and new jobs.⁸⁴ Additionally, it is predicted that the increasing economic activity in the areas of transport, agriculture, and energy, will add an extra burden to the already fragile European environment. Transboundary freight transports are predicted to increase by 30-50% and the generation of hazardous waste will amount to twenty-five million tons per year, far in excess of the two million tons the EC is equipped to handle.⁸⁵ The inevitable impact this change will have on the environment is obvious. What is also obvious is that the EC under the old Treaty of Rome was inefficiently and ineffectively handling the problem of environmental destruction. The TEU, employing the qualified majority implementation process, coupled with the restructured EC Environmental Objectives under Title XVI should over time be beneficial to the environmentally conscious EC nationals. The changes were designed to offer the world reassurance that countries working together as a collective entity can slow down the environmental devastation that faces the entire planet. Environmental problems will not go away by themselves; the EC's Treaty on European Union should offer a blueprint for an effective solution.

JULIE A. HARMS

84. *Lack of EC Progress*, *supra* note 51, at 10.

85. *No Uniform Environmental Policy*, *supra* note 51, at 417.