EUROPEAN COMMUNITY AND MEMBER STATES' POWERS IN THE FIELD OF ENVIRONMENTAL POLICY

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I. THE DISTRIBUTION OF POWERS BETWEEN THE EC AND MEMBER STATES

Although the European Community (EC or Community) exercises very broad powers, it is not endowed with general and unlimited powers. The Community's powers originate in the specific norms which establish the objectives, means of action, and powers entrusted to it by the Member States. Thus, the EC is endowed with enumerated powers (*compétences d'attribution*) and it must act within the limits of power provided by the Treaty of Rome, as

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can be inferred from Articles 3, 4, and 189.[1] Any power which remains is retained by the Member States.[2]

However, in practice the EC has not felt rigidly limited by the principle of enumerated powers. Instead, it has progressively tried to increase the scope of its authority through Articles 235 and 236 of the Treaty of Rome,[3] the so-called doctrine of "implied powers," and through the innovative, and generally pro-Community, rulings of the European Court of Justice.[4] This evolutionary increase of Community power has, of course, had a great impact upon the relationship between the EC and Member States' powers and furthered the cause of European integration.[5]

The relationship between Community power and Member State power has changed according to four guiding principles. First, the development of European integration has shown a tendency to expand the "material" powers of the Community and, correspondingly, to restrict the powers of the Member States.[6]

Second, Community powers, although usually initially concurrent with Member States' powers, tend to transform gradually into exclusive powers.[7] Therefore, the exercise of EC powers in a field eventually preempts the exercise of national powers in that field. In certain fields, this preemption of national

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1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 3, 4, 189(1).

2. *See, e.g.*, Manfred Zuleeg, *Les répartitions de compétences entre la Communauté et ses Etats membres*, *in* LA COMMUNAUTÉ ET SES ETATS MEMBRES, ACTES DU SIXIÈME COLLOQUE DE L'INSTITUT D'ETUDES JURIDIQUES EUROPÉENNES 26 (1973); Andrea Giardina, *The Rule of Law and Implied Powers in the European Communities*, 1975 ITAL. Y.B. INT'L L. 100; Antonio Tizzano, *Lo sviluppo delle competenze materiali delle Comunità Europee*, 21 RIVISTA DI DIRITTO EUROPEO 140 (1981) [hereinafter Tizzano I]; Antonio Tizzano, *The Powers of the Community*, *in* FORTY YEARS OF COMMUNITY LAW, OFFICE FOR OFFICIAL PUBLICATION OF THE E.C., 45 (1983) [hereinafter Tizzano II].

3. EEC TREATY, arts. 235, 236. Article 235 provides that the EC may take measures not provided for by the Treaty of Rome in furtherance of a goal of the Community. *Id.* art. 235. Article 236 allows Member States or the Commission to propose amendments to the Treaty. *Id.* art. 236.

4. *See, e.g.*, Thijmen Koopmans, *The Role of Law in the Next Stage of European Integration*, INT'L & COMP. L. Q. 925 (1986).

5. *See generally* Roland Bieber, *On the Mutual Completion of Overlapping Legal Systems: The Case of the European Communities and the National Legal Orders*, 13 EUR. L. REV. 147, 153 (1988); Paol Mengozzi, *Il diritto della Comunità Europea*, *in* 15 TRATTATO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL'ECONOMIA, DIRETTO DA GALGANO 76 (1990).

6. Bieber, *supra* note 5, at 148.

7. *Id.* at 153.

powers has already occurred. In other fields, the parallel concurrence of Community and national powers will continue until the Community has actually enacted final and complete legislation in these areas. Generally, when the Community enacts final legislation governing a field, its powers become exclusive. However, in certain cases, an express re-transfer of powers from the Community to the Member States may be decided.

Third, Community powers may also encroach into fields left to the residual power of the Member States. If the Community fears that Member State regulation of a field that is not within the scope of the Community's authority potentially could interfere with fields which are within Community authority, then the Community may exercise authority over these fields. The European Court of Justice has affirmed that the Community's jurisdiction may "impinge on national sovereignty in cases where, because of the power retained by the Member States, this is necessary to prevent the effectiveness of the Treaty from being considerably weakened and its purpose from being seriously compromised."[8]

Finally, even in fields where Community level regulation has not yet been created, the Member States are limited to regulatory action that is enacted with respect for the fundamental principles of the Community and that will not jeopardize the objectives of the Community.[9]

Consequently, the general picture of the relationship between Community and national powers is very complex; moreover, the picture is not rigid and unitary, but varies from one field to another. For these reasons, theories that purport definitively to resolve the appropriate balance of Community and national powers or the problem of preemption are now obsolete and unacceptable.[10] However, several of these views remain widely circulated.

According to the so-called Internationalist View, it is not possible to transfer sovereignty, even partially, from a Member State to the EC, because Member State sovereignty is an inalienable attribute of the state and is not a sum of powers.[11] Therefore, according to this theory, states can confer on the EC only specific and enumerated powers. States may also, acting collectively, retake possession of all or some of these conferred powers. Moreover, Member States

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8. Case 30/59, De Gezamenlijke Steenkolenmijnen in Limburg v. High Authority of the ECSC, 1 E.C.R. 24 (1961).

9. *See* Bieber, *supra* note 5, at 157-158.

10. For a comprehensive analysis of these theories, *see* Tizzano I, *supra* note 2, at 199.

11. *See, e.g.*, Zuleeg, *supra* note 2, at 29, 56.

always retain the power to implement Community powers, which therefore can never be considered as exclusive.

A second theory, the so-called Federalist View, reaches opposite conclusions.[12] According to this view, state sovereignty is a sum of powers and is divisible. Therefore, it is possible to have a partial transfer of sovereignty from Member States to the EC to reach the goal of European integration. Moreover, once the powers have been drawn into the jurisdiction of the Community, they may never again come under the jurisdiction of the Member States. Therefore, once transferred, Community powers must be considered as irrevocable and exclusive.

In practice, neither of these extreme perspectives accurately explains the history of European integration. The Internationalist View explains some limits of the process of European integration, but tends to see them as unchangeable. The Community will never be more than an extension of its members under the Internationalist View. The Federalist View, on the other hand, explains the trend towards European integration, but assumes that the Community has a greater ability to exercise authority over the Member States than is realistically possible at this point. Moreover, both of these radical views offer only theoretical and aprioristic solutions to the problem of the relationship between Community and national powers; they lose touch with the complexity of the process of European integration in its practical application and with the diversification existing among the different fields.[13] In conclusion, the problem cannot be resolved by means of general and unitary criteria; instead, a pragmatic and sectorial approach must be used to evaluate European integration.

Consequently, the historical development of the legal foundations of EC environmental policy and the relationship between Community and national powers in the environmental area must be examined carefully. As shall be shown, the EC's environmental policy is a very interesting study because of the original way in which integration has progressed in this field.

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12. *See, e.g.*, Pierre Pescatore, *Les répartitions de compétences entre la Communauté et ses Etats membres*, *in* LA COMMUNAUTÉ ET SES ETATS MEMBRES, ACTES DU SIXIÈME COLLOQUE DE L'INSTITUT D'ETUDES JURIDIQUES EUROPÉENNES 63, 79 (1973); Jean-Victor Louis, *Quelques réflexions sur la répartition des compétences entre la Communauté Européenne et ses Etats membres*, 1979 REVUE D'INTÉGRATION EUROPÉENNE 335, 357.

13. For similar criticism of these views, *see* Tizzano I, *supra* note 2, at 201; Tizzano II, *supra* note 2, at 63.

II. The Legal Foundations of EC Environmental Policy

A. *Pre-Single European Act*

The Treaty of Rome, prior to the modifications brought about by the Single European Act (SEA), did not expressly regulate the environmental policy; in fact, it did not even mention it.[14] However, the increasing awareness about environmental problems, that began to develop in the early Seventies, led to a recognition of the necessity of developing a Community policy in the field of the environment. The heads of government of the Member States, meeting at the Paris Summit in 1972, acknowledged that the economic development of Europe should be accompanied by improved environmental conditions.[15] Additionally, the Summit concluded that differing and uncoordinated national environmental regulation could have an adverse impact on trade between Member States.[16]

After the Paris Summit of 1972, developments followed quickly. In 1973, the Council of Ministers adopted the First Action Program for the Environment.[17] This program has been followed by four other programs;[18] the fifth program was announced to the press on March 18, 1992 and takes effect in 1993.[19] These programs contain the general principles underlying the

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14. Christian Zacker, *Environmental Law of the European Economic Community: New Powers Under the Single European Act*, 14 B.C. INT'L & COMP. L. REV. 249 (1991).

15. BULL. EUR. COMMUNITY 10/1972, at 9, 20.

16. *Id.*

17. Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the Program of Action of the European Communities on the Environment, 1973 O.J. (C 112) 1 (First Environmental Action Program).

18. Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 17 May 1977 on the Continuation and Implementation of a European Community Policy and Action Program on the Environment, 1977 O.J. (C 139) 1 (Second Environmental Action Program); Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 7 February 1983 on the Continuation and Implementation of a European Community Policy and Action Program on the Environment, 1983 O.J. (C 46) 1 (Third Environmental Action Program); Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting in the Council of 19 October 1987 on the Continuation and Implementation of a European Community Policy and Action Program on the Environment, 1987 O.J. (C 328) 1 (Fourth Environmental Action Program).

19. *The Environment and Energy Saving*, EUR. REP. (Eur. Info. Serv.) No. 1691, at 7 (Jan. 17, 1992).

Community's environmental policy. Each program has been more complex than the preceding ones and, in each program, the EC has taken a more important role in the protection of the environment.[20] Beyond the Environmental Action Programs, and since the late 1960's, the Community has adopted numerous directives in the field of the environment.[21]

In spite of the breadth of the action programs and the numerous measures taken by the EC, the legal foundations of the Community's powers in the environmental field remained uncertain. The Community Institutions attempted to surmount these uncertainties, however, by resorting to Article 100, and, failing that, to Articles 2 and 235 of the Treaty of Rome. Article 100 allows the Council to issue directives to harmonize Member State laws, regulations and administrative decision in matters which directly effect the operation of the Common Market.[22] However, Article 100 is limited to actions that are expressly provided for in the Treaty.[23] Article 235 allows the Council to take appropriate action when the necessary powers are not expressly provided for in the Treaty, if the action is necessary to attain an objective of the Community.[24] Article 2, which states the general objectives of the EC, provides that one of the Community objectives is to further the approximation of Member State policies to provide "a harmonious development of economic activities."[25]

The theory that environmental measures could be founded on Article 100 was affirmed for the first time by the European Court of Justice in 1980 in cases brought by the Commission against Member States for failing to implement environmental directives.[26] The states defended themselves by challenging the Community power to regulate in the field of the environment. The European Court of Justice affirmed that the directives concerning the environment could be founded on Article 100 of the Treaty of Rome because diverging environmental measures could create barriers to trade, hamper free competition

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20. Michael S. Feeley and Peter M. Gilhuly, *Green Law-Making: A Primer on the European Community's Environmental Legislative Process*, 24 VAND. J. TRANSNAT'L L. 653, 677 (1991).

21. Dirk Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 EUR. L. REV. 407, 409 (1987).

22. EEC TREATY art. 100.

23. *Id.*

24. *Id.* art. 235.

25. *Id.* art. 2.

26. Case 91/79, Commission v. Italian Republic, 3 E.C.R. 1099 (1980); Case 92/79, Commission v. Italian Republic, 3 E.C.R. 1115 (1980).

and therefore obstruct the functioning of the common market.[27]

In 1985, in the well-known Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées*, concerning the free circulation of waste oils, the Court of Justice broadened the legal foundations of Community environmental policy.[28] The Court, in examining the validity of Directive 75/439,[29] stated that ". . . the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community."[30] The Court further found that the Directive ". . . must be seen in the perspective of environmental protection, which is one of the Community's essential objectives."[31] In this way, the Court of Justice implicitly established that the Community powers in the environmental field can be founded on Article 2 of the Treaty of Rome as an essential objective of the Community, part of the task of promoting "a continuous and balanced expansion," "an increase in stability," and "an accelerated raising of the standard of living."[32] The Court's acceptance of a broad interpretation of Article 2 allowed resort to Article 235 when environmental measures could not be justified by reason of approximation of laws under Article 100.

In conclusion, we can say that, even before the approval of the SEA, the EC had incorporated the protection of the environment within the objectives of Article 2 of the Treaty and that the Community, in order to attain those objectives, could use either Article 100 or Article 235 of the Treaty of Rome to justify actions. Prior to the SEA, most environmental measures were founded on a combination of Articles 100 and 235 of the Treaty.

B. *Provisions Established by the Single European Act*

The SEA broadened the objectives of the Treaty of Rome and introduced various modifications favoring European integration.[33] For the purpose of this

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27. Case 91/79, 3 E.C.R. (1980) at 1106; Case 92/79, 3 E.C.R. (1980) at 1122.

28. Case 240/83, Procureur de la République v. Association de défense des brûleurs d'huiles usagées, 2 E.C.R. 531 (1985).

29. Council Directive 75/439 on the Disposal of Waste Oils, 1975 O.J. (L 94) 23.

30. Case 240/83, 2 E.C.R. 549 (1985).

31. *Id.*

32. EEC TREATY art. 2.

33. Single European Act, Feb. 17, 1986, 1987 O.J. (L 169) 1, 25 I.L.M. 506 [hereinafter SEA].

article, the creation of Title VII, entitled "Environment", inserted in Part III of the Treaty of Rome, was the most significant.[34] Title VII includes protection of the environment among the objectives of the Community, although it does not formally amend Article 2 of the Treaty. Also important was the creation of a new Article 100a, concerning approximation of laws in view of the internal market.[35] The new article contained provisions that significantly influence the environmental policy of the Community.[36]

The new Title VII lists three new Treaty articles, numbered from Article 130r to Article 130t. Article 130r sets out the objectives of the Communities environmental policy, as well as, how the objectives should be achieved. The objectives are simply to improve the quality of the environment, protect human

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34. EEC TREATY Title VII.

35. EEC TREATY art. 100a.

36. Wide literature exists on the environmental policy of the Community after the SEA. *See* Ludwig Krämer, *The Single European Act and Environmental Protection: Reflections on Several New Provisions in Community Law*, 24 COMMON MKT. L. REV. 659 (1987) [hereinafter Krämer I]; Vandermeersch, *supra* note 21, at 407; André Nollkaemper, *The European Community and International Environmental Co-operation: Legal Aspects of External Community Powers*, 1987/2 LEGAL ISSUES OF EUR. INTEGRATION 55 (1987); François Roelants du Vivier and Jean-Pierre Hannequart, *Une nouvelle stratégie européenne pour l'environnement dans le cadre de l'Acte Unique*, 316 REVUE DU MARCHÉ COMMUN 225 (1988); Hans-Joachim Glaesner, *L'environnement come objet d'une politique communautaire*, *in* LA PROTECTION DE L'ENVIRONNEMENT PAR LES COMMUNAUTÉS EUROPÉENNES, SOUS LA DIRECTION DE J. CHARPENTIER 1 (1988); IDA JOHANNE KOPPEN, THE EUROPEAN COMMUNITY'S ENVIRONMENTAL POLICY: FROM THE SUMMIT IN PARIS, 1972 TO THE SINGLE EUROPEAN ACT 1987 (European University Institute Working Paper No.88/328, 1988); STANLEY P. JOHNSON AND GUY CORCELLE, THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITIES (1989); FORLATI PICCHIO, COMUNITA', STATI MEMBRI E STATI TERZI TRA POLITICA DELL'AMBIENTE E MERCATO, PAPER FOR THE A.A.A. CONFERENCE "LA TUTELA DELL'AMBIENTE NELL'AMBITO DELLE COMUNITA EUROPEE" (1989); Antonio Saggio, *Le basi giuridiche della politica ambientale nell'ordinamento comunitario dopo l'entrata in vigore dell'Atto Unico Europeo*, 30 RIVISTA DI DIRITTO EUROPEO 39 (1990); LUDWIG KRÄMER, EEC TREATY AND ENVIRONMENTAL PROTECTION (1990) [hereinafter KRÄMER II]; ROMI, L'EUROPE ET LA PROTECTION JURIDIQUE DE L'ENVIRONNEMENT (1990); Tamara R. Crockett and Cynthia B. Schultz, *The Integration of Environmental Policy and the European Community: Recent Problems of Implementation and Enforcement*, 29 COL. J. TRANSNAT'L L. 169 (1991); Feeley & Gilhuly, *supra* note 20, at 653; Zacker, *supra* note 14, at 249; Pillitu, *Sulla "base giuridica" degli atti comunitari in materia ambientale*, 114 IL FORO ITALIANO pt. 4, at 396 (1991); FRANCIONI, FROM SOVEREIGNTY TO COMMON GOVERNANCE: THE E.C. ENVIRONMENTAL POLICY, PAPER FOR THE "LEARNING FROM EUROPE" SEMINAR (1991); Bianchi, *Environmental Policy*, *in* ITALY AND EC MEMBERSHIP EVALUATED 71 (Francioni ed., 1992).

health and to promote prudent use of environmental resources.[37] The objectives are to be enforced based on several basic principles: preventative action should be taken; environmental damage should be rectified at its source; polluters should pay for any damage; and environmental protection should be a component part of the Community's other policies.[38] The last principle is the most important, because it makes the EC environmental policy a pervasive factor of all Community legislation. The Community is directed to consider several factors in preparing action including scientific data, the costs and benefits of the proposed action and the balanced regional development of the Community.[39] The Community is directed by the Article to take action when the objective sought can be more easily attained at a Community-wide level, rather than by individual Member State actions.[40] Article 130r also establishes that, in principle, it is up to the Member States to ensure the financing and implementation of environmental measures.[41] Finally, the Article allows for both Community and Member State competence in creating and dealing with international environmental agreements.[42]

Article 130s establishes the process for the adoption of Community measures relating to the environment.[43] It is up to the Council to decide what action is to be taken, acting unanimously on a proposal from the Commission and after consulting the European Parliament.[44] However, the Council can, by a unanimous declaration, establish types of measures that may be taken by a qualified majority.[45] Article 130s allows the Council to adopt either general programmatic actions or specific measures and to use directives, regulations or decisions as a legislative instrument.

Title VII ends with Article 130t, which establishes the freedom of Member States to maintain or introduce environmental measures more stringent than those adopted by the Community, provided that these measures are

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37. EEC TREATY art. 130r(1).

38. *Id.* art. 130r(2).

39. *Id.* art. 130r(3).

40. *Id.* art. 130r(4).

41. *Id.*

42. *Id.* art. 130r(5).

43. *Id.* art. 130s.

44. *Id.*

45. *Id.*

compatible with the rest of the Treaty of Rome.[46]

Under the new Article 100a, the SEA allows the Community to adopt measures to protect the environment, within the framework of approximating Member State laws to establish or improve the functioning of the internal market.[47] Paragraph 3 of Article 10 lists environmental protection among a list of categories in which the Commission is directed to assume a high level of protection as a base in creating new proposals.[48] The measures under Article 100a are taken by the Council, acting by qualified majority on a proposal from the Commission and in cooperation with the European Parliament. This is the so-called procedure of cooperation between the Council and the Parliament.

C. *Choice of Legal Foundations for Community Action*

The entry into force of the SEA has thus significantly broadened the powers of the EC in the environmental field. These powers are founded mainly on Title VII of the Treaty, but also may be founded on Article 100a.[49]

It is important to distinguish the cases in which the EC adopts environmental measures relying on Title VII from the cases in which the EC intervenes relying on Article 100a for the following reasons. First, Article 130s requires, in principle, unanimity within the Council, while a qualified majority is enough, in principle, when the Community takes action pursuant to Article 100a. Second, Article 130s requires only the consultation of the European Parliament, while Article 100a requires use of the Cooperation Procedure which gives Parliament a more active role in formulating legislation. Third, the Community, when it is relying on Title VII, can take action only if the environmental objectives can be better attained at Community level than at the level of Member States. Finally, measures adopted on the basis of Title VII are subject to the Member State's explicit right to enact stricter standards,[50] while

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46. *Id.* art. 130t.

47. *Id.* art. 100a.

48. Article 100a, para. 3 provides that "The Commission, in its proposals laid down in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection." *Id.* art. 100a(3).

49. A legal foundation, although more limited, for Community measures concerning the environment can perhaps be found in other provisions of the Treaty, such as, for instance, Article 43 in the field of agriculture and Article 113 in the field of commercial policy. *See* Francioni, *supra* note 36, at 14-15.

50. EEC TREATY art. 130t.

measures taken on the basis of Article 100a must be implemented by the Member State unless the state can justify a stricter standard to the Commission.[51]

The Treaty, however, does not contain precise distinguishing criteria to clarify the proper use of the various legal foundations of Community action in the environmental field. This creates difficult problems because almost all potential environmental measures have economic implications and are therefore linked to concerns of the internal market, and thus to Article 100a. Various theories have been formulated in legal circles that attempt to establish whether the Community institutions must rely on Title VII or, conversely, on Article 100a when intervening in the environmental field.

Some writers have suggested that Community environmental measures should be evaluated by considering environmental policy as subsidiary to the completion of the internal market. These writers would therefore require the use of the procedures of Article 100a when a Community measure pursues the double goal of protecting the environment and of completing the internal market.[52] This analysis was recently adopted by the Court of Justice in the well-known *Titanium Dioxide* case.[53] However, this theory is not wholly convincing because it is not grounded on any textual element of the Treaty and, even more, because it is against the spirit of the SEA, which tends to elevate the protection of the environment to one of the autonomous objectives of the Community.[54]

Other writers maintain that measures concerning the protection of the environment must be founded exclusively on Title VII.[55] However, this view is also not convincing because it overly limits the scope of Article 100a, which expressly allows the adoption of Community measures in the field of the environment.

According to a third theory, the distinguishing criteria would be solely the

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51. *Id.* art. 100a(4). *See* Vandermeersch, *supra* note 21, at 418.

52. *See* Pernice, *Competenzordnung und Handlungs befugnisse der Europaischen Gemeinschaft auf dem Gebiet des Umwelt und Technikrechts*, DIE VERWALTUNG 34 (1989). *See also* Rossi, IL "BUON FUNZIONAMENTO DEL MERCATO COMUNE" DELIMITAZIONE DEI POTERI FRA CEE E STATI MEMBRI 48-52 (1990).

53. *See* Case C-300/89, Commission v. Council, June 11, 1991, E.C.R. 2867 (1991). For a criticism of this judgment, *see* Pillitu, *supra* note 36.

54. *See* Francioni, *supra* note 36, at 18.

55. *See* Glaesner, *supra* note 36, at 12-13. *See also* du Vivier and Hannequart, *supra* note 36, at 230.

goals of legislative policy that the Community institutions want to pursue by adopting a certain measure. The first criterion would be the main purpose of the measure.[56] In other words, if the Community institutions want to pursue only, or mainly, the goal of environmental protection, then Title VII would be the appropriate basis. If, instead, the institutions have the prevailing goal of completing the internal market, they will use Article 100a. The second criterion would be the type of protection that the institutions want to ensure for the environment: uniform protection throughout the Member States or allowing different Member State solutions.[57] If differing solutions are sought, the Community should operate relying on Title VII. If, instead, a uniform approach is desired, then the Community should rely on Article 100a. However, this theory is unsuitable, because being founded only on the subjective goal pursued by the institutions, too much discretionary power is left to them to define the goal according to the procedure which would allow the legislation to pass more easily. The Community institutions thus could act more on the basis of political criteria than on legal reasoning.

Perhaps the best theory offered in this dialogue is that the distinction between actions founded on Article 100a and actions founded on Article 130s must be made on the basis of the objective closeness of the measure, based on content, to either the goal of completion of the internal market or to the goal of protection of the environment.[58] In case of doubt, preference would be given to the application of Article 130s, since Article 130s is *lex specialis* for environmental legislation compared to Article 100a. This theory has several advantages over its rivals. First, the theory allows a role for both Title VII and Article 100a. Second, it is less subjective in nature than attempting to divine whether the Community was attempting more to create environmental legislation or to remove impediments to the internal market. Finally, the theory would remove the Community institution's motivation to phrase the legislation in terms which would make the measure easier to pass procedurally, in other words, to choose the procedure which would be used.

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56. *See* Saggio, *supra* note 36, at 50; Francioni, *supra* note 36, at 18-19.

57. *See* Saggio, *supra* note 36, at 50.

58. The European Court of Justice has often stated that the choice of the legal foundation for Community action must be based on objective factors which are amenable to judicial review. *See, e.g.*, Case 45/86, Commission v. Council, 3 E.C.R. 1493 (1987) (recital 11 of the decision); Case 131/86, United Kingdom v. Council, 2 E.C.R. 905 (1988) (recital 29 of the decision).

III. THE PRINCIPLES GOVERNING THE RELATIONSHIP BETWEEN EC AND MEMBER STATES' POWERS

Now that the Treaty foundations of the Community environmental policy have been examined, the distribution of powers between the Community and the Member States in the environmental field can be considered. According to the SEA, the distribution of powers is grounded on four principles: (1) subsidiarity of Community powers; (2) joint management of international environmental relations; (3) Member State implementation of environmental measures; and (4) Member States' freedom to adopt a higher level of protection of the environment. Each of these basic principles affect the balance of powers between the Community and the Member States in a somewhat different fashion and thus must be considered individually.

A. *Subsidiarity of Community Powers*

The most important treaty provision regulating the relationship between Community and national powers is the first clause of Article 130r(4) which states that "[t]he Community shall take action relating to the environment to the extent to which the objectives . . . can be attained better at Community level than at the level of the individual Member States."[59] This clause states the principle of subsidiarity, i.e., that Community powers exist only when the level of environmental protection granted by a Community regulation is superior to the level that Member States can achieve through national measures.

It is maintained that the SEA's subsidiarity principle represented a retreat from the virtually unlimited legislative competence that the Community exercised in the environmental field under Articles 100 and 235 of the Treaty of Rome.[60] Prior to the SEA, all that was required to exercise authority in the environmental field was the existence of a link, even a slender one, with the functioning of the common market. Though subsidiarity may place some limit on the Community's competence to regulate local environmental problems, the fact that environmental regulation is now an explicit Community goal should bring these problems more to the forefront of EC decision making. Moreover, it is clear that there is no need of Community measures to remedy environmental problems which have repercussions only at the national, regional, or local level. Even problems of transfrontier pollution or pollution of global commons are not always more

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59. EEC TREATY art. 130r(4).

60. Vandermeersch, *supra* note 21, at 422.

soluble on a Community level, Member States action may be preferable to Community action in some of these circumstances.[61] Thus, the express creation of Community power in the environmental field required a complementary principle to properly apply this power. Seen in this light, the principle of subsidiarity is a sound guideline to choose among Community or Member State solutions.

Whether subsidiarity represents a step backwards or a proper limit on Community authority, the most difficult problem remains to define precisely the principle's content. Specific criteria must distinguish Community powers from national powers. Determining, in each case, whether a specific environmental objective can be better attained at the Community level or at national level is a difficult task.

A second issue is whether the Council has unlimited authority in the environmental field. Clearly, initial action must be taken by the Council, as the Council has competence according to Article 130s.[62] But can this decision by the Council be contested before the European Court of Justice for breach of the Treaty of Rome? This interpretation would give the Court the last word on the distribution of powers between the Community and the Member States in the field of the environment. There are different views in the literature on this issue. One group of legal scholars is dubious that the Court of Justice could intervene on a Community environmental measure especially considering that, in most cases, environmental measures would be adopted unanimously within the Council.[63]

On the other hand, some scholars have argued that Article 130r(4) is not meant to distribute powers between the Community and the Member States, but instead is merely a political guideline, without binding effect upon the Community institutions.[64] These scholars believe that Article 130(4) is vague, lacking specific criteria for determining the proper allocation of authority. Besides, a possible decision by the European Court on the invalidity of a measure would be useless, since the measure would be adopted before the Court could declare it to be invalid. These scholars therefore believe that the principle of subsidiarity would not act as a restraint on Council action on environmental

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61. For similar conclusions, *see* Francioni, *supra* note 36, at 22-23.

62. *See* Saggio, *supra* note 36, at 44.

63. Jean-Pierre Jacqué, *L'Acte unique européen*, 22 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 575, 606 (1986).

64. *See* Krämer I, supra note 36, at 665; Krämer II, *supra* note 36, at 71-77.

matters.

This theory is not convincing. First, in view of the goals of the SEA, which makes the subsidiarity principle the fundamental dividing point of power between the Community and the Member States, Article 130 cannot be considered merely a political guideline, without authority to control the institutions of the Community.[65] Second, although Article 130r(4) does not contain precise criteria, the content of the subsidiarity principle can be precisely defined by the practice of the institutions and, more importantly, the case law of the Court of Justice. Finally, the tardiness of intervention by the Court of Justice is not a defect peculiar to the field of the environment, but instead is an inescapable feature of judicial control, which must always occur after the breach of the norm.[66]

Thus, the principle of subsidiarity of Article 130r(4) has binding legal force. It follows, therefore, that the Court of Justice can review interpretation of the principle by Community institutions. As some writers have suggested, the Court must be able to exercise review at least in the clearest cases of manifest error, abuse of power or misuse of power on the part of the Community.[67] Indeed, given the importance of the principle of subsidiarity to the division of power between the Community and the Member States, it would be inappropriate to leave the interpretation of this principle to either the discretionary power of the Community institutions or of the Member States.

B. *Joint Management of International Relations*

The problem of determining the appropriate balance between Community and national powers is not limited to the exercise of authority over internal EC environmental matters. The problem exists as well in the field of international relations and is part of the general issue of the scope of the external powers of the Community. As the power to make international agreements is connected to the relative power of the Community and the Member States in the environmental field, it is necessary to address this issue briefly.

Prior to 1971, the Community was believed to have power to make international agreements only when that power was expressly provided for in the

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65. *See* Saggio, *supra* note 36, at 45.

66. *Id.*

67. Francioni, *supra* note 36, at 25.

Treaty of Rome.[68] In 1971, the Court of Justice, in the *AETR* case, declared that in addition to the areas in which the Treaty granted explicit power to negotiate international agreements, the Community had implied power to negotiate in areas of Community internal competence.[69] The Court's ruling created the concept of parallelism of internal and external powers. The Court viewed parallelism as granting external power to the Community equal to the Member States' own power to act, when the Community had adopted common internal rules in a given field. Besides, if Member State exercise of these powers could "affect" the Community rules, then Community external power became exclusive, and the Member States lost all power to create international agreements in the field. In subsequent cases,[70] the Court of Justice further expanded the implied powers of the Community in external relations, by stating that, when it is necessary to attain Community objectives, the existence of external powers does not depend on the internal powers having been actually exercised. In other words, external powers do not depend upon a previous entry into force of Community internal rules.

Within this general legal framework, the more specific problem of the distribution of external powers in the field of the environment must be analyzed. Under the *AETR* case's parallelism analysis, if the Community has acted in a given area of the environmental field, then is the Community's power to negotiate exclusive or shared with the Member States? The SEA's Article 130r(5) states that:

> Within their respective spheres of competence, the Community and the Member States shall cooperate with third countries and with the relevant international organizations. The arrangements for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 228.
>
> The previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.[71]

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68. EEC TREATY arts. 111, 113, 114, 229(2), 238.

69. Case 22/70, Commission v. Council, 3 E.C.R. 263 (1971).

70. *See* Joined Cases 3, 4 and 6/1976, 6 E.C.R. 1279 (1976); Opinion 1/76, 3 E.C.R. 741 (1977).

71. EEC TREATY art. 130r(5).

The second subparagraph of Article 130r(5) would seem to answer that the SEA does not establish exclusive Community power in the field of external relations. However, in order to counterbalance this second subparagraph, the Final Act of the SEA declared that:

> The Conference considers that the provisions of Article 130r(5), second subparagraph do not affect the principles resulting from the judgment handed down by the Court of Justice in the AETR case.[72]

In light of these somewhat conflicting statements, the proper interpretation of the relative external powers of the Community and the Member States is questionable. The rule apparently establishes a general principle that the Community and the Member States jointly hold the task of management of international relations in the environmental field;[73] and that, in order to pursue this goal, each can conclude agreements with other international entities. But, within the sphere of such joint management, what are the respective powers of the Community and the Member States?

On the whole, I believe that three rules can be formulated to determine the respective competence of the Community and the Member States. First, since Article 130r(5) refers to agreements negotiated and concluded pursuant to Article 228, which itself is interpreted according to the principle of parallelism of powers, it must be inferred that the Community has competence to conclude agreements concerning the environment whenever it has also internal competence in that area. As seen previously, the internal competence of the Community in the environmental area is determined according to the principle of subsidiarity of Article 130r(4). Thus, the subsidiarity principle also controls the Community's external competence; in other words, the Community has competence to negotiate international environmental agreements when the objectives of the agreement can be better attained at a Community level than at the level of the individual Member States.[74] In the second place, the second principle of the *AETR* case, allowing for exclusive Community power in situations where Member State action could impede Community action, cannot be applied to the environmental field. It is doubtful whether Community power

72. SEA, *supra* note 33, Final Act, Declaration on Article 130r of the EEC Treaty.

73. *See* Saggio, *supra* note 36, at 46.

74. *Id.*

could ever be exclusive in light of the second subparagraph of Article 130r(5).[75] Finally, the Declaration on Article 130r(5) in the Final Act refers only to the *AETR* case and does not mention subsequent developments of the Court's case law. This implies that the EC can act at the international level only in areas where it has already enacted internal rules and cannot exercise implied power in areas where it has not yet concretely accomplished an environmental policy.

In any case, the overall interpretation of Article 130r(5) still raises many doubts and hopefully the Court of Justice will clarify this issue in the near future.

C. *Member State Implementation of Environmental Measures*

The second clause of Article 130r(4) sets forth the principle that the Member States should be responsible for implementing environmental measures. According to some writers, this clause restricts the legal instruments available to the Community because, in their view, it compels the use of directives, which require Member States to act, as opposed to regulations, which the Community can enforce directly.[76] These scholars believe that the second clause of Article 130r(4) means that the Community can act, in principle, only as a legislator[77] or a policy-maker,[78] because the clause limits implementation and enforcement of environmental measures to the Member States. This view is not convincing because Article 130s, which establishes the legislative process for the adoption of environmental policy, allows the Council to "decide what action is to be taken by the Community."[79] The Council should therefore have a choice as to the form of the legislative measures and be able to employ any measures allowed in Article 189 of the Treaty of Rome.[80]

Many scholars who argue that Article 130r(4) limits the Community to directives as a method of enforcing the EC environmental policy are critical of this limitation. These writers believe that the Community should have a more active role in implementation and administrative enforcement of the

75. For similar conclusions, *see* Mengozzi, *supra* note 5, at 393-394, n.29. For a different opinion, *see* Saggio, *supra* note 36, at 46-47.

76. Vandermeersch, *supra* note 21, at 423-4.

77. *Id.* at 424.

78. Crockett and Schultz, *supra* note 36, at 174-183.

79. EEC TREATY art. 130s.

80. *See* Glaesner, *supra* note 36, at 11; Saggio, *supra* note 36, at 48.

environmental policy,[81] or even that the EC should develop its own centralized mechanisms of implementation and enforcement of environmental norms and policies.[82] A distinction should be drawn, however, between the traditional distribution of tasks between the Community and the Member States and what could be considered to be the Community's overuse of directives rather than other legislative means, such as regulations. The traditional distribution of tasks between legislative powers of the Community and executive powers of the Member States itself should not be criticized. The problem lies in the excessive use of directives that occurred in the past. This overuse has left broad discretionary power to the states to implement environmental measures, and created problems because Member States have often either implemented environmental directives slowly, or used different and conflicting methods.

The Member States are not solely to blame for their intransigence in implementing environmental directives. It should not be forgotten that the Community has mechanisms for controlling the implementation of Community legislation. Article 130r(4) does not jeopardize the general duties of the Member States resulting from Articles 5 and 189 of the Treaty of Rome. Above all, this clause does not jeopardize the right of the Commission to ensure the implementation of Community measures on the basis of Article 155 of the Treaty of Rome.[83] Although Article 155 gives the Commission controlling powers only with regard to the "common market," the concept of common market is not restricted to the four fundamental freedoms, and now comprises all the objectives and tasks of the EC.[84] Therefore, the controlling powers of the Commission also cover the observance by the states of Community measures in the field of the environment.[85]

Some recent activity by Community institutions appears to indicate that the Community is taking enforcement of an environmental agenda more seriously. The Commission has recently sought to reassert its authority on the implementation and enforcement of environmental measures.[86] It improved internal procedures to deal with complaints regarding environmental matters, and

81. Vandermeersch, *supra* note 21, at 425.

82. Crockett and Schultz, *supra* note 36, at 183.

83. EEC TREATY art. 155.

84. *See* Krämer I, *supra* note 36, at 672.

85. *Id.*

86. On the recent steps taken by the Commission, *see* KRÄMER II, *supra* note 36, at 80; Crockett and Schultz, *supra* note 36, at 184.

threatened to start infringement procedures against several Member States.[87] In 1990, it proposed the creation of a "green police" force in order to ensure observation of environmental measures.[88] It should also be noted that the Economic and Social Council recommended in 1990 that Community environmental measures be adopted in the future in the form of regulations rather than by directives, a measure that would help to correct many of the implementation problems experienced in the environmental field.[89] In May 1990, the Council accepted a proposal for the creation of a European Environment Agency and a European Environment Monitoring and Information Network responsible for administering the environmental programs of the Community.[90]

In conclusion, the SEA has maintained the traditional principle that implementation and enforcement of Community measures is largely left to the Member States. But the Community is trying to reinforce its own role and its means in order to improve the implementation and enforcement of its environmental measures.

D. *Member States' Freedom to Adopt Higher Protection*

The final principle, which completes the overall picture of the distribution of powers between the EC and the Member States, is the Member States' freedom to adopt a higher level of environmental protection than that of the Community. This principle emerges from Articles 130t and 100a(4) which entitle the states, under certain circumstances, to move away from the environmental measures of the Community.

Article 130t states that: "[t]he protective measures adopted in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty."[91] This rule was conceived because it was expected that the EC environmental standards might be set at a level too low to satisfy those Member

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87. Crockett & Schultz, *supra* note 36, at 185.

88. *Id.*

89. *Regulations, Not Directives, Recommended to Implement Environmental Laws Faster*, 13 INT'L ENV. REP. (BNA), at 323-4 (Aug. 8, 1990).

90. Council Regulation 1210/90 on the Establishment of the European Environmental Agency and the European Environment and Observation Network, 1990 O.J. (L 120) 1.

91. EEC TREATY art. 130t.

States willing to maintain a strong national policy of environmental protection.[92] In other words, this rule is founded on the principle that the Member States are free to diverge from the standards of the Community norms only when they want to ensure a higher level of environmental protection.[93] Since the Member States can act to ensure higher protection even in an area where the Community has already acted, it logically follows that, in the field of environmental protection, the Community measures do not have a preemptive effect on national measures. This is a division of power employed in only one other circumstance in the Treaty of Rome, in Article 118a(3) concerning social policy.[94]

Member States are not free to enact environmental legislation more stringent than the Community's because of the requirement that national measures be compatible with the Treaty. Compatibility means that Member State measures must meet the Member States' general duties, provided in Article 5 of the Treaty of Rome.[95] Mostly compatibility means that national measures cannot breach the rules on free movement of goods,[96] unless a restriction of free movement of goods is admissible pursuant to Article 36. Article 36 allows restrictions that are justified, among other reasons, on grounds of "protection of health and life of humans, animals or plants," provided that the restrictions do not constitute "a means of arbitrary discrimination or a disguised restriction on trade between Member States."

There is a real danger that the Member States may introduce barriers to trade by adopting more stringent environmental measures.[97] This conflict between the Community goals of environmental protection and of free movement of goods has already been the object of various disputes. Probably the most famous case was the 1988 *Commission v. Denmark* ruling concerning Danish regulations which required beer to be sold in returnable containers.[98] In this case, the Court acknowledged that protection of the environment was a fundamental objective of the Community, which must be balanced against the

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92. KOPPEN, *supra* note 36, at 59.

93. Du Vivier and Hannequart, *supra* note 36, at 228.

94. EEC TREATY art. 118a, ¶ 3 (stating that "the provisions adopted pursuant to this Article shall not prevent any Member State from maintaining or introducing more stringent measures for the protection of working conditions compatible with this Treaty").

95. *See* Nollkaemper, *supra* note 36, at 60.

96. *See* Glaesner, *supra* note 36, at 11; Vandermeersch, *supra* note 21, at 426.

97. *See* Francioni, *supra* note 36, at 28.

98. Case 302/86, Commission v. Denmark, 8 E.C.R. 4607 (1988).

fundamental objective of free movement of goods. The Court ruled that if the national environmental protection measures are proportional to the environmental objective, applied in a non-discriminatory manner and necessary to the achievement of the objective, then the measure is valid despite its limitation of the free movement of goods.[99]

The second important article that allows Member States to move away from the environmental measures of the Community is Article 100a(4). This Article applies when the environmental measure is adopted in the framework of approximation of laws in view of the internal market. This clause, in short, establishes that, if a harmonization measure is adopted by a qualified majority, the Member States may apply national measures instead of the Community measure, either under Article 36 or if the provision relates to the protection of the environment or to the working environment.[100]

This rule raises a problem of interpretation. The most important issue is whether the Article allows Member States to apply less stringent national provisions than the relevant Community provision. A proper interpretation of Article 100a would not allow less stringent Member State provisions to replace Community action for two reasons. First, lesser Member State standards would contradict the principle stated in Article 100a(3) that the Community should at minimum guarantee "a high level of protection" to the environment in considering legislation.[101] Second, while Title VII would not specifically apply to legislation adopted under Article 100a, it does show by implication that the drafters of the SEA did not want the Member States to undercut the ability of the Community to create effective environmental legislation.[102] Therefore, national measures departing from Community measures should be allowed only when they raise the level of protection.[103] Thus, under this interpretation, the principle of Member States' freedom to adopt a higher level of environmental protection is also confirmed in Article 100a(4).

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99. *Id.* at 4630-1.

100. EEC TREATY art. 100a, ¶ 4 states: "If, after the adoption of a harmonization measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions."

101. EEC TREATY art. 100a(3).

102. *Id.* Title VII, art. 130r.

103. *See* Francioni, *supra* note 36, at 33.

IV. MODIFICATIONS OF THE TREATY ON EUROPEAN UNION

The new Treaty on European Union (Maastricht Treaty), signed at Maastricht on February 7, 1992 and not yet in force, does not contain any remarkable changes in the field of Community environmental policy.[104] There are, however, two modifications which are worth mentioning: the first modifying the legislative process for the adoption of the environmental policy, and the other modifying the subsidiarity principle.

The first modification concerns the legislative procedures provided for by Articles 130s and 100a of the Treaty of Rome. The Maastricht Treaty modifications provide for more active participation by the European Parliament and give more weight to qualified majority voting in the legislative process.

The present Article 130s, as discussed previously, provides, in general, for a unanimous decision of the Council after mere consultation with the Parliament. Pursuant to the second paragraph of Article 130s, the Council may also adopt certain measures by a qualified majority after unanimous decision to vote on these types of measures by this procedure. The new Article 130s contained in the Maastricht Treaty provides for four different legislative procedures: the cooperation procedure, the procedure of joint decision, the unanimous decision of the Council after consultation with the Parliament, and finally the unanimous decision of the Council to vote by a majority.

Under the new Article 130s(1), the Council will generally deliberate pursuant to the procedure of cooperation established by the new Article 189c, following almost entirely the procedure presently provided for by Article 149(2) of the Treaty of Rome.[105] In this procedure, the Parliament has an active role extending beyond mere consultation, but the Council, acting at times by a qualified majority and at times unanimously, still maintains the final decision. However, this cooperation procedure does not apply to some important environmental areas, such as town and country planning, land use, and

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104. Treaty on European Union, Feb. 7, 1992, 31 I.L.M. 247 (1992) [hereinafter Maastricht Treaty].

105. *Id.* art. G(38) (amending EEC TREATY art. 130s(1)). The new Article 130s proposed by the Maastricht Treaty states:

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

management of water.[106] In these areas, the original procedure with unanimous decision of the Council after mere consultation with the Parliament still applies.[107]

For the adoption of so-called "general action programs" (new Article 130s(3)),[108] the procedure of joint decision established by new Article 189b is applicable. This is a very complex procedure providing for action in concert between the Council and the Parliament, with mediation by the Commission and the intervention of a Conciliation Committee. If this procedure of action in concert does not produce any result, the Council can proceed on its own initiative and adopt the common position, voting by a qualified majority. But the European Parliament can afterwards reject the adopted text, by an absolute majority of its members.

The Maastricht Treaty modifies the procedure of harmonization of Article 100a as well. The present Article 100a(1) of the Treaty of Rome, as discussed previously, establishes that the Council decides by a qualified majority on a proposal from the Commission and in cooperation with the Parliament. The new text of Article 100a(1), introduced by the Maastricht Treaty, provides for a Council decision pursuant to the procedure of joint decision of the new Article

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106. *Id.* art. G(38) (amending EEC TREATY art. 130s(2)). The proposed Article 130s states:

> By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 100a, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament ad 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.

107. *Id.* art. G(38) (amending EEC TREATY art. 130s(2)).

108. *Id.* art. G(38) (amending EEC TREATY art. 130s(3)). The proposed Article 130s(3) states:

> In other areas, general action programs setting out priority objectives to be attained shall be adopted by the Council, acting in accordance with the procedure referred to in Article 189b and after consulting the Economic and Social Committee.
>
> The Council, acting under the terms of paragraph 1 or paragraph 2, according to the case, shall adopt the measures necessary for the implementation of these programs.

189b.[109]

Thus, the new procedures for the Community legislative process in the field of the environment have the merit of giving a larger role to the European Parliament and to the qualified majority voting, but they are very complex and may give rise to many disputes concerning their practical application.

The second noteworthy modification introduced by the Maastricht Treaty to Community environmental policy concerns the subsidiarity principle. The present wording of the subsidiarity principle, contained in the first clause of Article 130r(4), has disappeared from Title VII dedicated to the environment. However, the Maastricht Treaty expressly inserts the subsidiarity principle among the general principles of the Community in the First Part of the Treaty of Rome. In fact, the new Article 3b states the following:

> The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein. In areas which do not fall within its exclusive jurisdiction, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale of effects of proposed action, be better achieved by the Community.
>
> Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty.[110]

Article 3b produces two effects of great importance: first, the principle that the Community is endowed only with enumerated powers is solemnly restated; and second, the subsidiarity principle, although to a certain extent better defined, leaves the restricted ambit of the environmental policy and gains a very central role in the general distribution of powers between the EC and the Member

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109. *Id.* art. G(22) (amending EEC TREATY art. 100a(1)). The proposed Article 100a(1) states:

> 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 7a. The Council shall, acting in accordance with the procedure referred to in Article 189b 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.

110. *Id.* art. G(5) (amending EEC TREATY art. 3b).

States.

V. CONCLUSION

The progressive development of the Community environmental policy has shown some peculiar features relative to other Community policies. There has been a trend to expand the Community powers in the environmental field, which developed before the SEA, but mostly within the SEA itself. However, this trend has met with strong resistance by the Member States, which have sought to maintain concurrent powers. This has led to a divergence from the normal phenomenon of European integration whereby Community powers tend, as time passes, to become exclusive. Instead of the normal trend of increasing Community power, the environmental field has been dominated by the principles of subsidiarity of Community powers and Member States' freedom to adopt higher environmental standards, even when the Community has already taken environmental measures in a given area. In short, there has been no process of preemption of national powers in the environmental policy.

The example of the environmental policy has induced the states to generalize the principle of subsidiarity, by expanding it to all the areas which do not fall under the exclusive jurisdiction of the Community. It has also induced the states expressly to regenerate the principle of the enumerated powers of the Community, a principle which was gradually dissolving in the practice of the Community institutions.

The Member States, in my opinion, have brought to an end a period in which the process of expansion of Community powers had taken place in a dynamic but disorderly way, through the use of Article 235 of the Treaty of Rome, the theory of implied powers, and the innovative case law of the Court of Justice. Now the Member States want to regain control over the development of Community powers and over the integration process which previously had been mostly entrusted to the Community institutions. The Member States want to realize this also by means of the formal procedure of revising the Community treaties, and thus through the use of precise written norms. If this conclusion is true, then the European Court will have a less "praetorian" role to exercise in the interpretation of Community law,[111] and instead will have to take on the task of formulating very precise legal criteria to define the distribution of powers between the Community and the Member States.

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111. *See generally*, G. Federico Mancini, *Attivismo e autocontrollo nella giurisprudenza della Corte di Giustizia*, 30 RIVISTA DI DIRITTO EUROPEO 229 (1990).

In short, if the process of European integration accelerates and if the Community changes more rapidly towards a federation, then it is also absolutely necessary that the relationship between the EC and the Member States be governed increasingly by well-defined legal norms and be dominated by the principle of the rule of law.