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Preface—The International Approach to Common Environmental Threats and the Example of the European Community

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THE INTERNATIONALIZATION OF THE ENVIRONMENTAL PROBLEM

The European Community—United States Environmental Policy Conference, held at Berkeley in April of 1992, took place in a world that is becoming increasingly internationalized and is experiencing closer legal and economic integration between states in all fields. Environmental issues have a particularly significant impact on the global movement towards internationalization—as governments act in response to the increase in pollution generally and the increase in cross-border pollution in particular.

The growing tendency to seek centralized solutions to environmental problems can be seen not only within the European Community (EC) or the United States (U.S.), but also outside these (semi-) federal structures, as in the context of the General Agreement on Tariffs and Trade (GATT) or United Nations Conference on Environment and Development (UNCED). The collection of international environmental issues is broad, ranging from ozone depletion and endangered species protection to regulation of the transboundary movement of waste; hardly any country is untouched by global environmental problems.

The Berkeley Conference considered aspects of environmental policy in the U.S. and in the EC. The experiences of the U.S. and the EC in formulating environmental policy may provide lessons for global policy. The connection between environmental policy and other fields of international policy creates the obvious danger of conflicts between various interests and interest groups. These conflicts of interests hinder decision making and problem solving. The European Community serves as an example. Within individual Member States, there are disagreements about the desirability of certain Community actions and Member States disagree with each other about the road to be taken. Within the Euro-

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pean Commission, there are conflicts between the various Directorates-General. Amongst the institutions of the Community, there are often differences of opinion: the European Parliament plays a role of its own, but not necessarily the most environmental one. Finally, there are the divergent interests of consumers, NGO's, and industry. Similar conflicts can be spotted in the U.S. and in other international organizations.

This Preface presents some of the recurring themes of the EC-U.S. Conference and, by extension, of the articles in this volume. These themes are central to the environmental policies of global organizations. The discussion is presented in three, somewhat overlapping, parts. First, the choice between multilateral action and unilateral action is illustrated by a discussion of the European Community. This choice is complicated by the problem of extraterritorial decisions, which are made by one body for application outside its borders. Second, the problems of enforcement in a multi-state structure are discussed. Third, this Preface argues the need for stable structures, rather than mere incremental decision making, in multi-national environmental programs.

EUROPEAN COMMUNITY POLITICS: THE CHOICE BETWEEN MULTILATERAL AND UNILATERAL ACTION

Within the EC there has been a trend toward more substantial Community legislation in the environmental field. Community environmental legislation has become more concrete, more coercive, and involves a higher degree of legal and economic integration.

The present tendency for debates about the future structure of the Community to focus on "subsidiarity" could herald a change in direction for EC environmental policy. Subsidiarity, the principle according to which the Community should only act insofar as the objectives of the proposed action cannot be better achieved by the Member States, would mean less Community legislation and more Member State freedom. This could indicate a movement in EC environmental law away from increasingly centralized action. However, so far nobody seems to interpret the principle of subsidiarity in the environmental field in that sense. The suggestion, perhaps made most importantly by the European Council of Edinburgh (December 1992), that some of the (proposed) directives and regulations are too detailed and should be redrafted, may be an early sign of that view of subsidiarity.

In the Fifth Environmental Action Programme, in which the EC Commission sets out its policy for the years 1993-2000, the principle of subsidiarity has been reinterpreted and applied in terms of "shared responsibility." This implies that all actors in society (industry, consumers, governments, NGO's) have their own responsibility for environmental policy. Nothing in the Action Programme suggests that
the principle will mean fewer Community actions. On the contrary, it reflects—as does the Treaty of Maastricht—a considerable strengthening of Community policy in the field.

The Maastricht Treaty responds to certain limitations in the environmental provisions of the EEC Treaty. Largely due to the unanimous voting requirements for the Council of Ministers, Community action in the environmental field was often slow, vague, and obviously the result of compromises. The Maastricht Treaty brings about some important changes with regard to the environmental paragraphs of the EEC Treaty (articles 130R-T). These changes include amended decision-making procedures, which are in line with the overall tendency to abandon unanimous voting in the Council and further involve the European Parliament; the inclusion of the principle of a high level of environmental protection in Community action; and the possibility of financially supporting poorer Member States’ compliance efforts via a Cohesion Fund. At the same time, the Maastricht Treaty maintains “opting-out” possibilities for the Member States, whereby Member States may apply stricter national provisions if necessary to preserve a higher level of environmental protection within their own territory.

The Cohesion Fund can be seen as a regional version of Vice President Al Gore’s “Global Marshall Plan,” described in his book *Earth in the Balance*. The Cohesion Fund will enable the Member States who need financial help to catch up with environmental developments. Four Member States presently fulfil the criteria to apply for compensation: Ireland, Spain, Portugal, and Greece. To date, the only solution to the (economic) problems facing Member States who want to comply with environmental legislation has been to allow these states a longer period of time for compliance.

The elements mentioned in the previous paragraphs seem to reflect the necessary minimum for sustainable development in (semi-) federal structures or multi-lateral structures in general. The emergence of stronger Community decision-making powers and stronger environmental protection goals supported by the opting-out possibilities and the financial compensation mechanism are positive signs in Europe. They promote coordination and flexibility. In the United States, by comparison, strongly centralized environmental protection is the norm. Yet, even there centralized policy is not monolithic: national policy makers often rely on the states to identify new policy areas and to develop innovative regulatory strategies, hence the common phrase “states as laboratories.”

Related to the choice between multilateral and unilateral measures is the issue of extraterritorial actions. Indeed, extraterritoriality is an important problem with regard to the very legitimacy of multilateral actions. There is a growing need felt by countries and groups of countries
to do something about general global threats, such as ozone depletion, and about more specific environmental problems, such as the extinction of species in other parts of the world. In the context of international regulation, this need can be met if the differences between national environmental requirements are dealt with in some way. Within the EC, the issue has arisen most notably in the context of the free movement of goods. The European Court of Justice has circumvented the problem on a number of occasions, carefully tiptoeing past a principled judgment. The Scottish Grouse Case, in which the Dutch prohibition on the import of Scottish Grouse was challenged and found to be in contradiction with EC law, offers the most recent example of these tactics. One of the seemingly insolvable issues raised here is the question of delimitation of environments. It is difficult to say where one country's environment ends and another's begins.

ENFORCEMENT

The problem of enforcement is hard to solve by legal means alone. Here the influence of both conflicts of interests and differences in mentality is felt. The EC, which faces immense implementation problems, once more provides us with some practical information on the issue. The idea behind the predominant use of directives for EC environmental measures is that they set a target to be reached by all Member States alike, but the Member States act through their own legal systems. Out of the presently existing two hundred directives on environmental matters, only a few have actually been implemented by all twelve Member States. Even in a federal structure with a powerful central government, absolute compulsion is probably not possible. In the United States, the federal Constitution's Supremacy Clause dictates that all federal law shall govern in each state. However, as last year's Supreme Court decision New York v. United States illustrates, the ability of the central government to compel action by the states remains controversial.

Still, even if all the EC directives were implemented correctly and promptly in all Member States, there could still be differences between the various Member States' approaches to sanctioning breaches of community norms. The competence of the Community to prescribe one sanction is disputable. But even if the Community could set the sanction as well as the standard, the problem of the actual execution would continue to exist. At present, the potential (legal) influence of the Community ends outside the Member State courthouses. There is no way to force Member State judges to apply a sanction to an individual case in a certain way. The efforts to vest the European Environmental Agency with the power to investigate environmental problems on the spot, i.e., in the Member States, have failed so far. Such power would be of great help
promoting actual application of Community environmental standards in each Member State.

As a result of these difficulties, differences between the Member States still remain. The growing liberalization of trade and the establishment of the Internal Market will highlight the considerable problems of enforcement. Companies could decide to transfer their activities to the Member States which are known to be least harsh in applying Community environmental standards. The attractiveness of low standards to industry will remain a problem for at least a few more decades.

Economic instruments may provide an answer to the enforcement dilemma. On the one hand, economic instruments can be enforced relatively easily, as in the case of taxes, labels, or charges. Another advantage of economic tools is that these instruments tend to enhance the process of cost internalization, which in turn speeds up the greening of mentality. On the other hand, economic tools meet considerable resistance, at least initially, from industry and consumers. A good illustration is presented by the proposed EC directive for a CO₂/energy tax. The Directive contains a clause which makes introduction of the tax dependant on similar action by other OECD countries. The fear of putting the Community's industry at a competitive disadvantage is the main reason for this clause. Those governments which are not willing to enforce Community standards for fear of economic disadvantage are not likely to favor the introduction of economic instruments either.

THE GLOBAL CHALLENGE

The EC offers examples of a case-by-case or incremental approach to environmental policy making. The Court of Justice, for example, has so far been able to express itself twice on the issue of the relationship between environmental interests and free trade within the EC: in 1988 in the Danish Bottle Case and in 1992 in the Belgian Waste Case. Although the Court managed to reach a satisfactory result in these individual cases, on both occasions it failed to set out a thorough line of jurisprudence in the field. Similarly, until recently, legislation was primarily passed in response to individual accidents or problems, rather than with a broad view of the environment.

The danger of the case by case approach is that in the end the environment will be the victim. A balancing of interests is vital to an integrated way of thinking about the environmental problem, but a balance can never be achieved in this "occasional" way. Full integration of environmental considerations into general policy making will never take place spontaneously, and it certainly will not occur as long as environmental costs are not internalized into the costs of production and consumption. Conversely, forced integration of environmental policy
considerations might stimulate the internalization of environmental costs.

In any case, the development of global environmental rules and structures will not be easy. The United States, even with its strong federal structure, fails to integrate environmental concerns fully. In any international setting, procedural frameworks for decision making and strong substantive standards will be needed to tackle the environmental problem. A structural approach—as opposed to the existing incremental approach—is indispensable. The existing approach consists of many treaties and some case law, all treating individual topics and incidents. The EC is slowly developing structures of the right sort; but other international organizations, like the GATT, need to undergo more extreme structural change to incorporate the new understanding of the international environmental problem.

"BERKELEY 1992"

The important task of conferences like the one held in Berkeley in 1992 is to learn about the means of environmental protection employed in different governmental systems. At the European Community—United States Environmental Policy Conference, people from the academic world and from government on two continents discussed and commented upon the approaches taken to date. In the course of the conference it became clear that the European Community and the United States are not enough alike to allow direct exchange of legal models and theories. Only in the field of the shipment of waste does there seem to be a striking resemblance in the law and case law of the two structures. Nonetheless, in both the U.S. and the EC, the institutional structures are in place. Over a long period of time (in the U.S.) and relatively quickly (in the EC) common problems and challenges have been tackled through these structures. With regard to environmental problems, the structures are presently undergoing new testing. They could therefore be regarded as starting points for the international environmental challenges. All the arguments set out above presently pose immense problems to lawyers and policy makers alike. This is true regardless of the exact structure of the organizations: federal (U.S.), supranational (EC), multilateral (GATT) or global (UNCED).

Many of the issues touched upon above are dealt with more elaborately in this issue. The papers address deep issues of law that Europe and the United States will confront, regardless of any future institutional changes. The legal doctrine reflected in the papers could also—at least in part—serve as the basis for discussion outside the EC and the U.S. Any federal, supranational, or international initiative in the environmental field should learn from the impressive legal experience laid down in these contributions to "Berkeley 1992," an important multilateral initiative!