Keynote Address—The Road to Maastricht

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INTRODUCTION

Professor Buxbaum, ladies and gentlemen, on behalf of the European participants, I would first like to thank you most heartily for your warm hospitality. I am especially indebted to the Ecology Law Quarterly for organizing this conference. We are all very pleased to be meeting here in California, a state which has been trend-setting in balancing economic and environmental interests.

I would like to begin by placing this conference in a general political context. When this conference was first planned, just two years ago, we could not foresee the tremendous changes that would soon occur in the world around us. In our transatlantic relationship, the traditional areas of concern have been security, trade, and economics. But the recent breakup of the bipolar world has freed intellectual energy and resources to meet new challenges. Within this new political context, we have a unique opportunity today to have a transatlantic dialogue on issues that touch our long-term environmental security.

However, it is far from certain that we, as developed societies, can meet these challenges in time. I have just come from the fourth and final preparatory meeting in New York for the upcoming UNCED conference in Rio de Janeiro. The message suggested by the conference is clear: the industrialized world, particularly the United States, Europe, and Japan, must shoulder a dual responsibility. First, we must correct our own patterns of natural resource use and lessen our impact on the environment. Second, we must promote change in the development patterns of the world at large, which includes both developing countries and countries "in transition," such as those in Eastern and Central Europe. Unless we intensify our efforts in both these respects, the Rio conference will not do much to alter the prevailing trend toward environmental destruction.

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Yet, the global context is not the only relevant context for our meeting. At the regional level, the European continent is also undergoing a process of political and institutional change. In a certain sense, the "new-Europe" is meeting the "old-America," which has well established federal institutional patterns. Within the Community, we are in the process of creating new solutions that are adaptable to "old European" cultures in a new setting. For example, this meeting takes place at a time when three significant agreements are being adopted by the European Community. The single European market will enter into force at the end of 1992. This has already had, and will continue to have, a significant effect on environmental legislation. The Treaty on European Union, which you call the Maastricht Treaty, also provides momentum for environmental legislation at the Community level. Finally, our meeting takes place a few weeks after the European Commission's adoption of the Fifth Environmental Action Programme entitled "Towards Sustainability." This new strategy for integrating environmental considerations into all policy areas of the European Community has just arrived before the Council of Ministers and the European Parliament for adoption. It represents, I believe, an entirely new phase of environmental thinking in Europe.

I intend to elaborate on the Single European Act, the Maastricht Treaty, and the Fifth Environmental Action Programme, but first I would like to make one further preliminary reflection. Our meeting will reveal the extent to which valid comparisons can be made between federal and state interaction in the United States and similar relationships between the Community and its member states. The comparisons may be different for different sectors: thus, environmental questions and problems relating to the waste sector, nature protection, water resources, and air pollution may reveal varying degrees of similarity in solutions and approaches.

As their European counterparts study these comparisons, American lawyers may want to reflect on another aspect of environmental policy, one on which the European environmental policies of the last twenty years may have a bearing: regional agreements. In the new venture toward a North-American Free Trade Agreement (NAFTA), environmental cooperation will certainly play a part. In the same way the European Community shapes its policies within the context of social, economic, cultural, and climatic differences, so will the U.S. face the need to harmonize the differences in Mexican, Canadian, and American environmental policies.

1. The program was approved in its formal orientation and structure during the EC Environmental Council of December 15-16, 1992.
I
THE HISTORY OF ENVIRONMENTAL LAW IN THE EC

I would now like to address the various phases of Community environmental policies. Very broadly speaking, one can distinguish three such phases. The first phase can be dated roughly between the early 1970's and the mid-1980's when the Single European Act entered into force. The second, and current, phase might be called a hybrid phase. This period is influenced both by the Single European Act and an increasing amount of international activity by the EC. Finally, the third period will commence after the Maastricht Treaty enters into force and will continue until the end of this century.

A. Phase 1: The Early Stages

In 1972, the European heads of government first mentioned the word "environment," and requested the Council of Ministers to develop a "thinking" in the field. Three words particularly characterize this first phase in Community environmental policy. First, it was a reactive period. Most action was largely a reaction to environmental crises, or a result of outside pressure. For instance, the Seveso accident in 1976 gave rise to a Directive on major risks posed by certain industrial installations.

The second word that characterizes the period is incidental. Environmental activity was incidental because even though existing action programs indicated a general concern for environmental problems, they did not provide a binding policy framework. In addition, there was little incentive for the Member States to implement these action programs. Instead, the programs were very often seen merely as shopping lists of the Commission's hopes as it embarked upon new courses in governance.

Finally, environmental activity during the period was unarticulated in the sense that the environmental policy at that time had no firm legal basis in the EC Treaty. Environmental policy was largely based on article 235, which grants power to the Council to take action on issues not covered by the Treaty provided consensus is obtained. The strength of


4. The article states:
If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament,
that environmental policy, of course, was largely determined by the actions of the Member States at the national level. In some countries, there were strong pressures to introduce national environmental norms, while in others there was virtually no pressure to develop any environmental legislation at all. As a result, the added value of any overarching European Community activities was of rather limited significance for some Member States.

This original lack of articulation is still reflected, in some respects, in our current phase. Although we now have far more activity in the field of environmental policy, we still rely on the heritage of the past in the current Treaty articles on the environment. Community legislation is non-exclusive and may exist alongside national legislation. Even in the provisions of the Single European Act concerning the establishment of the internal market, where Community legislation is exclusive, article 100A, paragraph 4 allows a Member State to delay enacting Community regulations or to exceed Community norms where its individual socio-economic situation so requires.5

Most measures enacted in the first period, primarily in the fields of air quality and water resources, had a double legal basis, referring at the same time to both article 100 and article 235 of the Treaty. Article 100 directs the Member States to harmonize their national laws with the laws created by the European Community.6 This article was only applicable where environmental concerns were directly linked to the internal market. For example, when regulating chemicals7 or when car emission norms were established,8 only article 100 was used as a legal basis. Article 235, on the other hand, concerns the implied powers of the Commu-

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5. EEC Treaty art. 100A, para. 4 (as amended 1987). This paragraph provides that Member States may enact stricter national legislation relating to environmental issues if the state deems it necessary, provided that the European Commission under the control of the European Court of Justice finds this compatible with the Treaty. Id.

6. Article 100 provides in part that "[t]he Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." EEC Treaty art. 100.


nity in certain areas. Measures on nature protection were based only on article 235 since these measures were in no way linked to the establishment of the internal market.

At this point, I would like to note that in 1991 in the Titanium-dioxide case, the European Commission attacked the Council for adopting a dual legal basis, that is, for relying on both articles 100A and 130S. The Court has followed the Commission, and therefore this approach is no longer possible. When regulating the environment, the Council must choose each time to find a basis in article 100A or in article 130S, but it cannot use both Treaty articles simultaneously.

B. Phase II: The Current Phase Under the Single European Act

The current phase in European environmental law can be seen as a hybrid phase. This phase entered into force on the first of July, 1987, when the Community environmental policy was first given a firm legal basis. Two legal impulses are important to the new approach. First, at the recommendation of the European Commission, a new chapter on the environment was introduced in articles 130R through 130T. At the same time, article 100A came into force.

Article 100A is a key provision that has triggered the passage of Community legislation enabling the Community to achieve a single market within the set timeframe of 1992. There are four important provisions in this article that have had an impact on environmental issues. Of particular significance is that, for the first time, directives drafted by the Council regarding the harmonization of national law with Commission proposals can be issued with a qualified majority vote instead of unanin-

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12. Article 130S is part of the chapter on the Environment added by the Single European Act and provides that the Council, “acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community.” EEC Treaty art. 130S (as amended 1987).

This article will be altered if the Maastricht Treaty enters into force to provide that the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt:
- provisions primarily of a fiscal nature;
- measures concerning town and country planning, land use with the exception of waste management and measures of a general nature, and management of water resources;
- measures significantly affecting a Member State's choice between different energy sources and the structure of its energy supply.

ity.\textsuperscript{14} This change is also applicable to legislation involving environmental issues.\textsuperscript{15}

A second, qualitative change was instituted in article 100A paragraph 3, which requires a high level of protection by the Commission on issues concerning health, safety, environment, and consumers.\textsuperscript{16} This requirement has established a political litmus test for action that was absent in the first phase.

The third important characteristic of Article 100A is the increased role of the European Parliament. Because article 100A requires the Commission and Council to act in concert with the Parliament, the Parliament can, by tabling amendments, force the Commission and the Council to change their proposals.\textsuperscript{17} This requirement has changed the entire process of decision making, as was seen in the case of European car emissions standards, when Europe, ten years after the United States, finally concluded that stricter car emission controls were necessary. The European Parliament encouraged both the Commission and the Council to adopt a more environmentally sound position.\textsuperscript{18}

Finally, article 100A, paragraph 4 leaves open the possibility of stricter national action in exceptional circumstances, despite the principle of harmonization.\textsuperscript{19} There has been great reluctance thus far on the part of Member States to invoke this paragraph, although very recently the Federal Republic of Germany, the Netherlands, and Denmark notified the Commission that they intend to pass stricter legislation on pentachlorophenol.

The Single European Act's chapter on the environment has also had an impact on environmental policy, although there are some notable differences from article 100A. For example, article 130S always requires unanimity in the decision-making process, except where the Council, again by unanimity, decides otherwise.\textsuperscript{20} A second difference is that the

\textsuperscript{14} EEC Treaty art. 100A, para. 1 (as amended 1987).

\textsuperscript{15} Fiscal provisions are excluded from the qualified majority provision and will continue to be excluded under the Maastricht Treaty. EEC Treaty art. 100A, para. 2 (as amended 1987); EEC Treaty art. 100A (as amended by Maastricht Treaty, 31 I.L.M. at 263). Since these are key elements of national sovereignty, they will continue to be covered by the rule of unanimity.

\textsuperscript{16} The article provides that the Commission will take as a base a high level of protection in its proposals concerning health, safety, environmental protection, and consumer protection. EEC Treaty art. 100A, para. 3 (as amended 1987).

\textsuperscript{17} EEC Treaty art. 149, para. 2 (as amended 1987).

\textsuperscript{18} Since that time, Europe has been catching up. Its ambition is to bypass the U.S., perhaps by the end of the century.

\textsuperscript{19} See supra note 6. Article 100A, paragraph 4 provides that if a Member State deems it necessary to apply national provisions relating to the protection of the environment, it may do so by notifying the Commission of these provisions. EEC Treaty art. 100A, para. 4 (as amended 1987).

\textsuperscript{20} The Council can decide not to require unanimity on the basis of article 130S, paragraph 2. This provision reads in part “the Council shall . . . [by unanimity] define those
role of the European Parliament is limited to one of consultation.\(^{21}\) Furthermore, while article 100A in principle requires uniform rules throughout the Community, article 130T allows Member States to consider Community legislation as establishing only minimum norms.\(^{22}\) This allows for the possibility of Member States enacting stricter national environmental measures.

Article 130R, paragraph 4, embodies the principle of subsidiarity—the principle that Community action related to the environment is limited to instances where it is determined that the necessary objectives can be attained more effectively at the Community level than at the individual Member-State level.\(^{23}\) Interestingly, this article has never been invoked by any of the Member States in their environmental policies, perhaps due to the fact that subsidiarity is less applicable in situations where there are significant transboundary impacts. I think it is also quite clear that the language of this article serves to make it an important political tool, but suggests that it will not be easily enforced.

Currently, Member States have primary responsibility for the financing, implementation, and enforcement of Community measures.\(^{24}\) The Commission retains a certain amount of control after implementation pursuant to its general responsibility of supervising the administration of Community goals. The insufficient implementation of Community law is one of the most important weaknesses of the Community's current environmental legislation. Both the Commission and the Member States are beginning to look more seriously at this problem. The European Parliament has been paying special attention to the possibility of inspections by the European Environment Agency. Last October, under the Dutch Presidency, an informal environmental Council of Ministers devoted their efforts solely to this topic. In addition, the related question of enforcement has also been addressed by the Member States under the Fifth Environmental Action Programme.\(^{25}\) A suggested first step was the setting up of a national network of enforcement agents matters on which decisions are to be taken by a qualified majority." EEC TREATY art. 130S, para. 2 (as amended 1987).

\(^{21}\) Article 130S, paragraph 1, provides that "the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community." Id. art. 130S, para. 1 (as amended 1987).

\(^{22}\) Article 130T provides 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." Id. art. 130T (as amended 1987).

\(^{23}\) Id. art. 130R, para. 4 (as amended 1987).

\(^{24}\) "Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures." Id. art. 130R, para. 4 (as amended 1987).

within each of the Community's Member States. Thus, the dialogue among Member States on the question of enforcement has begun.

II

PHASE III: INTO THE NEXT CENTURY: ENVIRONMENTAL POLICY UNDER MAASTRICHT

It is at this point that we come to the third phase of development in EC environmental law, a phase we may look forward to once the Maastricht Treaty is in force. I would like to make a more few general remarks before outlining the environmental elements of the Treaty. I believe it is enlightening to consider the broader meaning of Maastricht for the Community before commenting on its implications for EC environmental policy.

A. The General Characteristics of the Maastricht Treaty

Because Europe today is faced with the challenge of new membership—perhaps five to ten new member countries in the coming two decades—the need to reinforce stronger internal cohesion is the Community's most prevalent concern. The first discussion of this issue occurred at the Summit of Hanover, and the Maastricht Treaty was signed just three years later. Despite its incompleteness and possible limitations, the Maastricht Treaty is the most fundamental revision of the Community's Treaty in thirty-four years. Although the United Kingdom objected to the use of the word "federalism" in the Maastricht Treaty, the development of new federal elements is unmistakable. The Treaty represents not the end of that development, but rather one phase in a continuing process. With this in mind, I would like to indicate what I believe to be the four major changes made by the new Treaty. First, Maastricht adds an entirely new dimension of competencies to the Community structure. For example, the economic monetary union, leading to the creation of a common currency by 1997 (or ultimately 1999), and the common foreign and security policies among all Member States have new, strong intergovernmental components. Similarly Maastricht contemplates new competencies in the fields of justice and domestic affairs. In these areas, the role of the European Commission is more limited: decisions are mostly taken by unanimity and are not subject to control by the Court of Justice. Furthermore, the role of the European Parliament is restricted to giving advisory opinions.

28. Id. tit. VI [art. K], 31 I.L.M. at 327-29.
Second, the Maastricht Treaty creates three Community pillars under the roof of a European Union. It creates, in addition to the existing Community, two other structures—one responsible for coordinating the Member States’ foreign and security policies and one responsible for their justice and domestic affairs. These new structures will come under the roof of the European Union, but their existence is entirely separate from that of the Community. Unlike the Community, the European Union does not have a legal personality. Unfortunately, Maastricht fails to clarify many other characteristics of the Union relationship. Although a few general points can be made, the relationship between the European Community and the two other structures created by Maastricht is somewhat unclear. All three policy areas are governed by common institutions. Thus, in this sense, the Maastricht Treaty essentially fuses these structures together. The three pillars will be governed by the same institutions—the Council of Ministers, the Commission, and the European Parliament—but their respective roles will depend on the competencies transferred. E.g., in the field of foreign affairs, this will lead to a situation of greater European political cooperation and greater Community cohesion under the Council Secretariat. The Committee of Permanent Representatives will continue to serve as coordinating body among the Council’s sixteen configurations. As a result, an important transformation in the decision-making process has begun. Of course, at this moment it is premature to speculate on what final form this transformation will take. Several important questions remain unanswered: What will be the impact of these developments on the management culture of the Community? Will the decisions and actions of the Community be more influenced by the Community’s supranational focus or by the cooperative intergovernmental components of the Treaty? These dynamics will greatly affect the way the Community operates, and are important to consider.

Another important clue to the relationship of the European Community to the other Union structures is that the development of competencies runs in only one direction: only the Community may develop more areas of competence. For example, article A, paragraph 3 of the Maastricht Treaty states, “[t]he Union shall be founded on the European Communities, supplemented by the policies and forms of cooperation established by this Treaty.” The Treaty thus supports greater Community cohesion and uniformity, rather than independent Member State action.

Further enhancing the power of the Community, the other Union structures can transfer their competencies to the Community. The

29. The Committee of Permanent Representatives will be responsible to the Council of Ministers. EEC Treaty art. 151 (added by Maastricht Treaty, 31 I.L.M. at 289).
Council may decide at any given moment to communitarize certain actions currently within a cooperative intergovernmental competence. Article B of the Maastricht Treaty clearly indicates that it is necessary "to maintain in full the [concept of] 'acquis communautaire.'" Acquis communautaire means that all the Community measures that have been established over the last thirty-four years are adopted as the foundation of the Community and should serve as the basis for all future development. Hence, Community action, as opposed to independent Member State action, is again reinforced as the guiding principle.

The third major element of the Maastricht Treaty I wish to discuss is the substantially increased role of the European Parliament in Community affairs. I believe this element has been underemphasized. While there is a deficiency of democracy in the structure of the Community, the European Parliament has received unparalleled new powers under Maastricht. For example, the Parliament has the right of inquiry, the right of petition, and the authority to appoint an Ombudsman (a general counsel for complaints).

More significantly, however, the Treaty gives the European Parliament the power of codecision in Community legislation, a power which was previously limited to budgetary matters. Maastricht amends article 100A(1) of the EEC Treaty, stating that all matters related to the internal markets will utilize the process of codecision as governed by 189B.

In addition, the environmental "action programs" mentioned in proposed article 130S, paragraph 3, also fall under the codecision procedure.

An important aspect of this codecision procedure is what is known as the conciliation procedure. Under the terms of this procedure, a conciliation committee is created to negotiate the final terms of a particular measure between the Council and the European Parliament. In the past, dissension between the Council and the Parliament in such a situation had the same effect as a veto of the measure. For the first time, pursuant to this procedure, the Council and the Parliament will consult in the same way as they do currently with respect to budgetary questions. Questions as to this procedure remain. For example, the exact role of the Commission in the negotiation is, as yet, unclear.

34. EEC TREATY art. 100A, para. 1 (as amended by Maastricht Treaty, 31 I.L.M. at 263).
35. EEC TREATY art. 130S, para. 3 (as amended by Maastricht Treaty, 31 I.L.M. at 286).
37. EEC TREATY art. 189B (added by Maastricht Treaty, 31 I.L.M. at 296-97). The Treaty also extends the power of the Parliament in the area of foreign affairs. Association
The cooperation procedure, which currently exists under the Single European Act and is continued under Maastricht, does not confer full codecision power, but nevertheless gives powers to the Parliament pursuant to article 189C.38 The cooperation procedure allows the European Parliament, under certain circumstances, to submit amendments to proposals which then can be rejected by either the Commission or the Council of Ministers; in contrast, the codecision procedure affords the Parliament more power to affect the final text.39 This procedure will prevail everywhere that a qualified majority exists. For example in Maastricht, it is utilized in the creation of trans-European networks, development policy, and environmental policy (with some exceptions).40 Both the cooperation and codecision procedures impact environmental policy. This aspect of the decision-making powers will be discussed in the next section.

The fourth and final general change effected by the Maastricht Treaty is that the Treaty has moved the Community from the traditional inter-state Europe toward a citizens' Europe, a development which I believe has been underestimated by commentators. The citizens' Europe concept emphasizes the role of the European Parliament, and also recognizes the creation of political parties at the European, as opposed to the national, level.41 In addition, the Treaty creates a citizenship of the European Union, and endows citizens with special rights regardless of nationality, such as the right of Community citizens not residing in their nation of citizenship to vote in local elections.42 The Treaty also establishes the Committee for the Regions,43 and thus recognizes that the Community is more than a collection of states. In essence, the Treaty acknowledges that there are several levels of government prevailing in a number of Member States; consequently, regional development is important.

All of these developments, of course, are still embryonic.

B. Environment in the Maastricht Treaty

The Maastricht Treaty is also unique in its provisions on the environment. For the first time, the concept of sustainability has been introduced into a treaty as a central objective. The Maastricht Treaty

agreements and agreements implicating financially important institutional consequences will henceforth require the assent of the European Parliament.

38. EEC TREATY art. 189C (added by Maastricht Treaty, 31 I.L.M. at 298).
40. EEC TREATY art. 129D (as amended by Maastricht Treaty, 31 I.L.M. at 281); EEC TREATY art. 130W (as amended by Maastricht Treaty, 31 I.L.M. at 287); EEC TREATY art. 130S (as amended by Maastricht Treaty, 31 I.L.M. at 286).
42. EEC TREATY arts. 8-8E (added by Maastricht Treaty, 31 I.L.M. at 258-59).
43. EEC TREATY arts. 198A-198C (added by Maastricht Treaty, 31 I.L.M. at 300).
incorporates article 2 of the EEC Treaty and adds to it a commitment to “sustainable and non-inflationary growth respecting the environment.” At the same time, the provisions in article 130R of the EEC Treaty, paragraph 2 are strengthened in the Maastricht Treaty: “Environmental protection requirements must be integrated into the definition and implementation of other Community policies.” While this phase of integration had already begun under the Single European Act and Fourth Environmental Action Programme, it was seen then as a largely theoretical concept. Now, in the Fifth Environmental Action Programme, and as a result of the Maastricht Treaty, it has become a central principle.

The environment chapter of the Maastricht Treaty also recognizes the growing international role of the European Community in the environmental field. The proposed amendments to EEC Treaty, article 130R, paragraph 1 speak of the need for the European Community to get involved in regional, as well as worldwide, environmental problems. Thus far, our regional involvement includes activities in central and eastern Europe, the Mediterranean, various river basins, and the seas surrounding Europe. The worldwide environmental problems are expected to be discussed in Rio de Janeiro.

Another important aspect of the Maastricht Treaty is the effect of the previously discussed decision-making process on environmental policy. Once the Treaty enters into force, two main procedures will be used: either the cooperation procedure, mentioned in the proposed EEC Treaty article 130S, paragraph 1, or the codecision procedure, set out in the proposed EEC Treaty article 189B.

I should point out that important exceptions to these procedures are indicated in proposed article 130S, paragraph 2. Member States who are concerned about the negative impact of stricter environmental policy on their economic growth can invoke any one of three exceptions, which

44. EEC TREATY art. 2 (as amended by Maastricht Treaty, 31 I.L.M. at 56-57).
45. EEC TREATY art. 130R, para. 2 (as amended by Maastricht Treaty, 31 I.L.M. at 285) (emphasis added).
46. See Fifth Environmental Action Programme, supra note 25.
47. EEC TREATY art. 130R (as amended by Maastricht Treaty, 31 I.L.M. at 285).
48. “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.” EEC TREATY art. 130S (as amended by Maastricht Treaty, 31 I.L.M. at 286) (emphasis added).
50. The relevant portions of the proposed article provide that the Council must act unanimously when adopting:
- 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.

EEC TREATY art. 130S, para. 2 (as amended by Maastricht Treaty, 31 I.L.M. at 286).
were included at the request of Member States with such concerns. In these instances, the Council must act unanimously to adopt proposals. The first exception applies to fiscal provisions. This is not a new idea, but its presence in Maastricht reinforces the idea that fiscal measures go to the heart of national sovereignty. The second exception regards town and country planning, land use, and the management of water resources, but it does not include questions of waste management and measures of "a general nature," qualifications which I believe important. A third exception regards situations where a change in energy sources could have a major impact on the costs of economic development.

In cases where exceptions are made, the principle of unanimity prevails and the rights of the European Parliament are limited to the traditional concept of consultation, rather than cooperation or codecision. However, to complicate matters further, the possibility of deciding such issues by a qualified majority does exist if the Council agrees to do so unanimously as proposed in article 130S, paragraph 2.51

In general, these new decision-making procedures will generate many institutional, or even constitutional, discussions between the European Parliament, the Member States, and the Commission. There has already been considerable wrangling between the Commission and the Member States regarding general economic and social cohesion52 and the more independent procedures allowed for in proposed article 130S. With two more decision-making procedures added to an already complicated list, discussions on the environment may very often lead to the Court of Justice for a final determination.

As a final point concerning the environment chapter, I would like to touch on the financing provisions. As I mentioned earlier, the financial responsibility for environmental programs is largely a matter for the Member States. This general clause has been preserved in the Maastricht Treaty.53 Nevertheless, from 1987 to 1992, overall Community spending per year on environmental activities increased from 100 million ECU (roughly $125 million) to 700 million ECU ($850 million). These expenditures are financed by the Community structural funds and the research and development budget, as well as by a newly established fund known as "LIFE" (the French acronym for the financial instrument for European environment).54 This fund was recently established and is mainly catalytic in nature, designed to foster increased action in environ-

51. "The Council may ... define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority." Id.
52. See EEC TREATY art. 130A (as amended by Maastricht Treaty, 31 I.L.M. at 282).
53. "Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environment policy." EEC TREATY art. 130S, para. 4 (as amended by Maastricht Treaty, 31 I.L.M. at 286).
mental areas. It will provide financing for nature conservation projects, as well as for programs to protect the Northern Seas and the Mediterranean.

The issue of how much influence the European Community has, or should have, on the spending of these funds is unresolved. More specifically, what strings should the Community attach to the considerable financial resources that the Member States receive from the Community budget? In the case of the environment, this touches on the relationship between two policies: development and environment. It also brings to the fore the practical dimension of integration. Quite clearly, economic and social cohesion is part of the future of Europe. As a result, certain Member States, in exchange for accepting the constraints of the Single European Market, have requested support for achieving higher than average growth in the Community in order to catch up with their northern neighbors. Despite the varying circumstances of Member States, existing Community legislation, such as the environmental impact assessment directive and other environmental standards and norms, should be respected. But the question remains: To what extent can an additional “green” conditionality be imposed on future funding?

Once the Maastricht Summit is concluded and funding at the Community level is increased further, the administration of Structural Funds will be reviewed. At that time, this issue will be more specifically addressed.

C. The Fifth Environmental Action Programme

I would first like to briefly review four key reasons for the adoption of the Fifth Environmental Action Programme. First, the State of the Environment Report, a new collection of data, indicated that certain negative trends still continue in Europe despite a general awareness of environmental problems. Secondly, it is apparent that the situation in the Community after 1992 will result in the need for a reinforced environmental policy. Thirdly, the greater emphasis on global environmental problems, as addressed in the Dublin Council Declaration of June 1990,55 suggested the need for the Community as a whole to play a leading role. Finally, the new provisions of the Maastricht Treaty themselves reinforce the environmental powers of the Community. All these factors called for a new approach, one characterized mainly by the need to integrate environmental policy into many other policy areas. Such an approach began with the Fifth Environmental Action Programme.

The Fifth Environmental Action Programme mentions five key sectors of activity: industry, energy, transport, agriculture, and tourism.56

56. Fifth Environmental Action Programme, supra note 25.
In each of these sectors, the programme focuses on the extent to which a change in patterns of consumption and general behavior can be achieved. An underlying issue is that of shared responsibility, or subsidiarity. This is a positive concept whereby Member States, the Commission, industry, and the general public all carry relative shares of the burden for protecting the environment. As a precondition for the effective improvement of environmental problems, the Community must move away from a pure "top down," or regulatory, approach to this "bottom up" approach which entails the participation of everyone affected by environmental protection.

The Fifth Environmental Action Programme also considerably broadens the range of instruments available for environmental policy making. The traditional regulatory, command and control approach has been supplemented by reviews of economic and fiscal measures as well as a greater reliance on horizontal measures such as public access to information and environmental auditing requirements.

In addition, the Fifth Environmental Action Programme contains a number of objectives. These objectives and timetables are established not so much as legal goals or requirements, but rather as political goals aimed at guiding both the Community and Member States to pursue action in a cooperative effort. This may be the only way that these goals may be achieved.

Finally, and most importantly, the Fifth Environmental Action Programme, unlike its predecessor, is not solely a Community program, but a joint program for the Community and the Member States. This may allow a gradual merger of priorities between the two levels of government, thereby facilitating future projects. In order to accomplish this, the Fifth Environmental Action Programme also contains some new institutional proposals such as the setting up of a Committee of Directors General for environmental policy review, the establishment of a consultative forum to increase the dialogue between the parties, and an enhanced network for improved implementation.

III
THE EUROPEAN COMMUNITY AND THE INTERNATIONAL REALM
(REGIONAL AND GLOBAL ENVIRONMENTAL ISSUES)

A general issue running through all Community policies on the environment is that in the last five to eight years, a new emphasis has been placed on the Community's role in the international realm. As I indicated earlier, this is also reflected in the new Maastricht Treaty. In the Dublin Declaration of June 1990, the European Council stressed the special responsibility of the Community and its Member States to encourage
and participate in international action to combat regional and global environmental problems.\

Several key environmental problems are currently being addressed by the Community. Regarding ozone depletion, the Community has taken a strong lead by becoming a member of the Montreal Protocol and the subsequent London Amendments, and by actively participating in the drive to further strengthen the protocols to phase out harmful substances. Second, the Community has expressed concern about climate change; hopefully we will be part of a future international climate change convention. The Community, by setting its own target of stabilizing CO₂ emissions in the year 2000 at 1990 levels, also intends to lead industrialized nations in a direct approach to this problem. In addition, the issues of deforestation, tropical forest management, and biodiversity all fall under a prospective framework convention that hopefully will be signed in Rio. A final global issue of concern to the European Community is the international trade in hazardous waste. The Basel Convention, which the Community is close to ratifying, is a necessary step to signal developing countries that the developed countries will take responsibility for this problem in the future. The European Community will also be present as a recognized full participant in the Rio conference.

The international dimension to environmental policy reinforces the need for a practical dialogue between countries in the industrialized world. The United States and Japan, with whom we already have close working relationships, will also be key participants in an industrialized world approach. As an additional benefit, unity on our part may also encourage the developing world to change its patterns of behavior.

CONCLUSION

While European Community environmental activities started relatively slowly, they have picked up considerable speed since the mid-1980's. The creation of the internal market, as well as certain societal pressures have contributed to this acceleration. Since Europe is a more densely populated continent than the United States of America, its people are faced more dramatically with the consequences of past environmental policies and spurred to action. Moreover, the deteriorating situations in our neighboring countries of central and eastern Europe and a heightened awareness of global environmental issues have also influenced Europe's activities in the field of the environment.

57. BULL. EC 6-1990, at 7, 10, 17-20.
As a result, the European Community now has an extensive regulatory framework of environmental legislation which has inspired further actions on a national level by most Member States. Community involvement has also influenced the discourse on, and approaches to, environmental issues on a Community-wide basis. Examples of Community innovation include the directives on the packaging of materials, environmental auditing, and access to information.

Although Member States agree on much regarding the environment, disagreement is also present. Member State differences on the priority of environmental policy in the Community and the nature of environmental problems have been responded to in two ways. First, there has been a move away from concentrating on "northern" issues, which were prominent until five or six years ago, to more comprehensively incorporating "southern" issues. Secondly, more support has been given to help Member States implement European Community legislation. This includes the establishment of the European Environmental Fund discussed at Maastricht (LIFE), as well as the acceptance, in some cases, of temporary derogations from EC legislation by Member States that are not in a position to implement the requirements rapidly.

The Community as a whole has proven to be more effective in addressing global issues than individual Member States acting alone. Clear examples include the phasing out of CFC's and the CO$_2$ stabilization goals for the year 2000. The role of the European Community in the field of the environment has now entered a significant geopolitical dimension. Of course, central weaknesses still remain. There is still too little information and data collection by the European Environment Agency. Member State implementation, moreover, is still not adequate. More citizen participation in the development of environmental policies is welcomed and should be further developed.

However, while work in these areas should be intensified, there are also significant accomplishments to be noted. In the new Fifth Environmental Action Programme a new focus on a strategic approach has been taken. The program emphasizes integration, shared responsibility between the Community, Member States, industry and the general public, and attention to a widening range of environmental instruments. In addition, the Community has become focused on political objectives, targets, and timetables. The result, as a whole, is that the European Community's environmental policy has moved from being reactive, incidental, and unarticulated to being beneficially proactive, strategic, and participatory.