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The Interdependency of Community and Member State Activity on Nature Protection Within the European Community

Ludwig Krämer*

INTRODUCTION

In 1991, the European Commission moved out of Berlaimont, its headquarters in Brussels, Belgium, after learning that the building was contaminated by asbestos. The Commission asked the Belgian government to destroy the existing building and construct a new one in its place, but Belgium merely “repaired” the building. Because it owned the building, Belgium’s refusal to replace it was final.

This story illustrates the difference between the European Community (EC) and the United States that has the greatest implication for nature protection within Europe. The Federal Government of the United States owns one-third of all United States territory, including land that provides vital habitat for wildlife. For example, the United States Federal Government owns ninety percent of the habitat of the spotted owl. Consequently, the Federal Government is authorized to protect vast areas of wildlife habitat, including that of the spotted owl, without needing or requiring intervention by the states. In contrast, the Member States and private parties own all the land within the EC. For example, Member States own all of the habitats of the Greenland white-fronted goose, an endangered species in Europe. Despite EC efforts to preserve these habitats, the Greenland goose will be affected by individual Member State legislation. Even when Member States adopt nature protection measures, widespread ownership of private land within the Member States may limit the effectiveness of the measures. Consequently, all nature protection measures within the EC are subject to a greater level of

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* Head of Legal Affairs, Directorate-General XI, Commission of the European Community. This paper reflects the personal opinion of the author only.
2. Id. at 129.
3. See Treaty Establishing the European Economic Community [EEC Treaty] art. 222 (“This Treaty shall in no way prejudice the rules in Member States governing the system of property ownership.”).
A. Limiting Factors for Nature Protection in the European Community

Several additional characteristics of the relationship between the EC and its Member States further contribute to the difficulties encountered by the EC when it considers and enacts nature protection legislation.

1. Unanimous Adoption by the Council of Ministers

When the Commission proposes Community-level nature protection legislation, the Council of Ministers must adopt the proposal by a unanimous vote. Therefore, any Member State may veto Commission proposals. One can imagine the difficulties if federal legislation in the United States had to be unanimously adopted by all 50 states. These difficulties are intensified in the case of the EC. Although the EC has only twelve Member States, these countries have different languages, cultures, histories, and government systems, as well as different nature protection policies.

2. Member State Nationalism

The attention to nature protection paid by Member States reflects the traditional European focus on national borders, rather than on the transfrontier management of wildlife. The policies of Member States reflect this approach.

3. Volatility of the EC Environmental Protection Budget

EC revenue for environmental protection relies on the collection by Member States of various tariffs, levies, and a portion of the value-added tax (VAT). Political expedience demands, therefore, careful decisions as to which nature protection measures should be taken by the Community and which measures should be taken by the individual Member States.

4. Member State Jurisdiction for Land Use Planning

Currently, the EC has no jurisdiction over land use planning. Land use planning and decision making is carried out solely by the competent

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5. Land use planning is not subsumed under any single legislative enactment. If ratified, however, the Maastricht Treaty may allow the Community to adopt, by unanimous decision, land use rules. See infra note 107.
authorities of Member States or subnational entities such as the German Länder. The EC potentially could interfere with land use planning by restricting disbursement of EC Structural Funds which cofinance rational land use measures and thus promote regional economic development.\(^6\) However, the author is unaware of any specific project that was abandoned because the EC refused to finance the project for environmental reasons.\(^7\) The suspension of payments for projects that do not comply with EC legislation or policies also could significantly affect a Member State’s planning decisions and public opinion,\(^8\) but this type of pressure is rarely, if ever, exerted. In contrast, federal agencies in the United States are often substantially involved in land use decisions.\(^9\)

5. *Inadequate Enforcement of Environmental Legislation*

Finally, several federal agencies, services, or bodies within the United States are charged with ensuring implementation and enforcement of federal legislation at the state and local levels.\(^10\) No such agency exists in the Community to perform this function. Rather, Member States are responsible for implementing and enforcing EC nature protection legislation. In some Member States, implementation and enforcement agencies do not exist, are understaffed, or lack the resources to ensure compliance. Currently, the EC Commission tends to accept rather than question and challenge the situation.\(^11\)

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6. The EEC Treaty provides:

In order to promote its overall harmonious development, the Community shall develop and pursue its actions leading to the strengthening of its economic and social cohesion. In particular the Community shall aim at reducing disparities between the levels of development of the various regions and the backwardness of the least-favoured regions.

EEC TREATY art. 130A (as amended 1987). And:

The Community shall support the achievement of these objectives by the action it takes through the Structural Funds (European Agricultural Guidance and Guarantee Fund, Guidance Section, European Social Fund, European Regional Development Fund) . . . and the other existing financial instruments.

Id. art. 130B (as amended 1987). For further discussion of the difficulties in striking a balance between vital economic development and environmental protection within the EC, see infra part II.


10. Such agencies include the Fish and Wildlife Service, the Forest Service, the Bureau of Land Management, and the National Park Service. See generally GEORGE C. COGGINS ET AL., FEDERAL PUBLIC LAND AND RESOURCES LAW (3d ed. 1993).

11. See generally DAVID BALDOCK, *THE ORGANIZATION OF NATURE CONSERVATION IN SELECTED EC COUNTRIES* (1987); Krämer, supra note 8, at 18. A specific piece of legislation for punishing noncompliant Member States would require unanimous passage. States
The Development of Nature Protection Within the European Community

The important role that the factors described above play in nature protection efforts within the Community is well illustrated by the experiences of the EC over the last twenty years in enacting various habitat and species protection measures. In its early days, the EC did not make nature protection a high priority, primarily because Member States were concerned about the future of their national jurisdiction, including their authority to enact nature protection legislation. Subsequent legislation at the EC level has been fairly effective, although the characteristics of the EC-Member State relationship described above and other problems continue to plague the Community’s efforts to protect habitats throughout the Member States.

Primarily, EC habitat conservation legislation has been enacted pursuant to the policies and suggestions of the four Environmental Action Programmes which the Commission drafted and the Council adopted between 1973 and 1987. The changing tone of the Environmental Action Programmes throughout this period reflects the increased awareness of environmental problems within the EC and the correspondingly greater acceptance by Member States of Community competence. The Council has also adopted directives and regulations relating to nature protection beyond the suggestions of the Environmental Action Programmes. The Council’s greatest focus has been on bird habitats, although it has also taken action to protect other habitats and species.

Part I of this paper describes the four Environmental Action Programmes and the most significant nature protection measures that have been enacted at the EC level over the last two decades. Part II discusses the growing acceptance of EC competence for nature protection matters, existing problems and trends, and the critical need for increased data collection.

I
TWENTY YEARS OF ENVIRONMENTAL LEGISLATION


When the Treaty of Rome established the EC, effective in 1958, it did not mention the words “environment,” “environmental policy,” or “environmental protection.”12 Regardless, Member States soon developed concern over environmental issues. In 1971, the Commission proposed to the Community that it should enact environmental protection which are notorious for their environmental violations are unlikely to agree.

12. See EEC TREATY (as in effect in 1958); LUDWIG KRÄMER, FOCUS ON EUROPEAN ENVIRONMENTAL LAW 26-27 (1992) (stating that the absence of environmental policy in the original EEC Treaty resulted in inaction on environmental matters).
measures. Soon thereafter, the heads of state and government of the six founding Member States and the three nations poised to join the EC—Denmark, Ireland, and the United Kingdom—met in Paris to hold their first meeting. Prompted by the Commission’s proposal, the meeting called for Community measures to address environmental issues and invited the Community institutions to formulate and adopt a program of environmental action.

In response to these actions and to growing public pressure, the Community adopted the First Environmental Action Programme in 1973. The Programme’s provisions on nature protection were extremely cautious since the majority of Member States were of the view that nature protection was within their exclusive competence. As a result, the Community felt compelled to justify the provisions of the Programme relating to nature protection by arguing that capturing and killing hundreds of millions of migratory and other birds resulted in worldwide protest actions against some Member States. Bird mortality also allowed pests to increase, with particularly adverse impacts on agriculture. Consequently, more farmers used insecticides which, in turn, threatened human health.

The correlation between agricultural activity and the natural environment shaped the Programme’s suggestions for the Community. The Programme called for: (a) a directive on agricultural activity in certain less-favored areas; (b) a directive to promote forestry measures to supplement agricultural activity; (c) a study of the effects of modern agricultural techniques on the environment; (d) studies to improve food quality; (e) a study of the problems caused by livestock wastes; and (f) harmonization of the legislation and actions of Member States and international organizations to protect birds and certain other species.

15. The 1968 cultural revolution spurred the Club of Rome “limits to growth” and the 1972 UN Stockholm Conference on the Environment. In addition, Britain, Denmark and Ireland joined the EC in 1973, bringing an awareness of environmental problems throughout Europe.
17. See id. at 38-40.
18. Id. at 40.
19. Id.
20. Id. at 38-40. The directive adopted pursuant to the suggestion regarding agricultural activity in less-favored areas was termed “a directive on mountain and hill farming and farming in certain less-favored areas” and allowed Member States to subsidize such farming in accordance with certain allowed aid and incentive measures. Council Directive 75/268, 1975 O.J. (L 128) 1.
A growing concern over birds soon prompted the EC to act beyond the suggestions of the First Environmental Action Programme. In 1974, the Commission recommended to Member States that they ratify two international conventions that addressed the protection of birds. One year later, the European Parliament adopted a resolution requesting the Commission to submit a proposal to the Council on the protection of birds.

Subsequently, the Commission completed two studies that documented the alarming decline of wild birds in Europe and notified the public that the Community-wide threat to wild birds was far more severe than it appeared to be when examined from an individual State perspective. Consequently, nature protection organizations campaigned heavily for Community measures on bird protection.

Motivated by the resolution of the European Parliament and the strong pressure of public opinion, the Commission submitted a proposal to the Council at the end of 1976. Over two years later, the Council unanimously adopted Directive 79/409 which aimed at comprehensive protection of all wild birds within the Community. The Directive requires Member States to designate habitats for 150 bird species which are particularly threatened and to implement specific conservation measures in those areas. The designated habitats must form a contiguous network throughout Europe to ensure the birds' survival.

Adopting this Directive exceeded the express power granted the Council by the EEC Treaty. The Council therefore justified the Direc-


26. Id. art. 4, at 4.

27. Krämer, supra note 8, at 39. All twelve Member States have implemented the Directive with legislation to protect birds. In some States, however, this legislation is hunting legislation rather than conservation legislation. Id. at 19.
tive with article 235 of the Treaty,28 carefully wording the Directive as follows:

Effective bird protection is typically a trans-frontier environment problem entailing common responsibilities . . . [and] the conservation of the species of wild birds naturally occurring in the European territory of the Member States is necessary to attain, within the operation of the common market, . . . the Community's objectives regarding the improvement of living conditions, a harmonious development of economic activities throughout the Community and a continuous and balanced expansion, but the necessary specific powers to act have not been provided for in the Treaty . . . .29

Simultaneously, Member States retained their jurisdiction over, and interest in, environmental matters. Several States and the Council of Europe30 formulated two regional conventions on nature protection. These conventions, which addressed the conservation of European wildlife and natural habitats and the conservation of species of migratory wild animals, were signed in 1979.31


The Second EC Environmental Action Programme32 explicitly abandoned the correlation between agricultural policy and environmental protection and thus initiated independent nature protection measures. The "Fauna and Flora Protection" chapter of the Programme emphasized the necessity to protect nature, specifically wild animals and plants.33 On the other hand, the Programme did not propose many concrete actions at the Community level, partly because the majority of

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28. 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, take the appropriate measures.

EEC Treaty art. 235.


30. The Council of Europe convened the meetings, drafted the text, and monitors implementation.


33. Id. at 25.
Member States still adhered to the opinion that the EC had no general competence in matters of nature protection.\textsuperscript{34}

The Second Programme echoed the earlier Commission recommendations that Member States join international conventions on the protection of fauna and flora. In particular, the Programme suggested a Community regulation incorporating the principles of the 1972 Washington Convention on Trade in Endangered Species of Wild Fauna and Flora (CITES Convention)\textsuperscript{35} into Community law.\textsuperscript{36} The Programme also announced proposals for the restriction of trade in endangered species.\textsuperscript{37}

The Council followed the recommendations of the Programme relating to international conventions, enacting the CITES Convention into Community law in 1982.\textsuperscript{38} In December of 1981, the Council had decided to allow the EC to accede to the Berne Convention and the Bonn Convention.\textsuperscript{39}

All three Council actions were based on article 235 of the EEC Treaty.\textsuperscript{40} When adopting the CITES proposal, the Council resorted to article 235 because "the [EEC] Treaty has not provided the necessary specific powers."\textsuperscript{41} In allowing the accession of the EC to the Berne Convention, the Council merely stated that the powers necessary to attain one of the objectives (it did not specify which one) were "not provided for by the Treaty, other than article 235 thereof."\textsuperscript{42} The decision relating to the Bonn Convention assured Member States of the decision's limited effect on EC competence by stating that "the conclusion of the

\textsuperscript{34} Krämer, \textit{supra} note 8, at 46. Indeed, the First Environmental Action Programme and its later implementation had shown that the announcement of concrete actions by the Community could actually prove counterproductive since Member States which opposed the actions did not feel legally bound by political action programmes. This problem still exists. The Fifth Environmental Action Programme, proposed by the Commission in 1992, does not propose concrete actions. \textit{See 3 Commission Proposal for a Resolution of the Council on a Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, COM(92)23 [hereinafter Proposal for Fifth Environmental Action Programme].}


\textsuperscript{36} \textit{See Second Environmental Action Programme, \textit{supra} note 32, \S 142, at 26.} The terms of the CITES Convention limited access to the Convention to nation-states. CITES, \textit{supra} note 35, art. 1(h). The Gabarone amendment, which would permit the accession of regional economic organizations such as the EC, has not yet been ratified by a sufficient number of nation-states. \textit{See Proposed Amendment to CITES art. 21, \textit{reprinted in 3 Basic Documents of International Environmental Law} 1359-60 (Harald Hohmann ed., 1992).}


\textsuperscript{38} Council Regulation 3626/82, 1982 O.J. (L 384) 1.

\textsuperscript{39} Council Decision 82/72, 1982 O.J. (L 38) 1 (Berne Convention); Council Decision 82/461 1982 O.J. (L 210) 10 (Bonn Convention). \textit{See also supra} notes 30-31 (discussing the Berne and Bonn Conventions).

\textsuperscript{40} \textit{See supra} note 28 and accompanying text.

\textsuperscript{41} Council Regulation 3626/82, \textit{supra} note 38, pmbl., at 2.

\textsuperscript{42} Council Decision 82/72, \textit{supra} note 39, pmbl., at 1.
Convention by the Community implies no extension of the exclusive powers of the Community, without prejudice to any legal acts which the Community may adopt at a later date."\textsuperscript{43}

In the early 1980's, the international public grew increasingly concerned about the threat to whales. During this time, the Commission submitted proposals for common rules on the import of whales or other cetacean products\textsuperscript{44} and on the general trade in endangered species.\textsuperscript{45} The Council first addressed proposed rules on whale imports by adopting Regulation 348/81 which banned the import of whales and whale products, effective January 1, 1982.\textsuperscript{46} Again, the Council based this Regulation on article 235, emphasizing that measures enacted pursuant to the Regulation "should be Community-level measures and should at the same time respect the Community's international obligations."\textsuperscript{47}


The Third EC Environmental Action Programme\textsuperscript{48} definitively treated wildlife and nature protection as an issue independent of other Community concerns. For the first time, the Programme mentioned the need to evaluate the environmental effects of Member State and Community measures enacted pursuant to their regional, industrial, energy, transport, tourism, and agricultural policies.\textsuperscript{49} Since unratified international conventions are not binding and enforcing ratified conventions is difficult, the Programme also emphasized the importance of Community actions independent of and as a complement to international actions.\textsuperscript{50} The Programme discussed three sets of measures: (a) biotope conservation; (b) controlling the plundering of natural habitats; and (c) controlling and banning trade in endangered species.\textsuperscript{51}

\begin{itemize}
  \item \textsuperscript{43} Council Decision 82/461, supra note 39, pmbl., at 10. International conventions on the environment are often ratified by the EC and by Member States. The Commission only monitors Member State enforcement of convention terms pursuant to provisions which are enforceable under a Community directive or regulation. \textit{See Krämer, supra} note 8, at 44. Thus, the rules of the Berne Convention were only monitored to the extent that equivalent provisions existed under Directive 79/409, \textit{supra} note 25.
  \item \textsuperscript{44} Commission Proposal for a Council Regulation on Common Rules for Imports of Whale Products, 1980 O.J. (C 121) 5. This proposal was based on article 113 of the EEC Treaty, which deals with commercial policy. \textit{See EEC Treaty} art. 113.
  \item \textsuperscript{46} Council Regulation 348/81, 1981 O.J. (L 39) 1.
  \item \textsuperscript{47} \textit{Id.} pmbl., at 1.
  \item \textsuperscript{49} \textit{Id.} at 13.
  \item \textsuperscript{50} \textit{Id.}
  \item \textsuperscript{51} \textit{Id.}
\end{itemize}
identified the conservation of biotopes as the central objective of nature protection.\textsuperscript{52}

\textbf{I. Protection of Seals}

Beginning in 1982, the killing of baby seals, particularly in Canada, attracted considerable attention from the Western European media. Prompted by the demands for action by environmental organizations and the general public, the Commission submitted a proposal to ban imports of baby seal fur.\textsuperscript{53} However, several Member States questioned whether the EC had competence in this matter. They also doubted whether a ban was necessary to protect the baby seals and were concerned that commerce with Canada would be adversely affected.\textsuperscript{54} Consequently, the Council responded cautiously to the Commission's proposal. In conjunction with Member State representatives, the Council adopted a resolution inviting Member States to restrict the import of baby seal furs into their countries.\textsuperscript{55}

The lack of response on the part of the Member States soon prompted the Council to enact stronger measures. Only two months after the adoption of the joint Council/Member State Resolution, the Council issued a directive prohibiting the import into the Community of baby seal furs and products derived therefrom for two years, effective October 1, 1983.\textsuperscript{56} As with previous EC nature protection directives, this Directive was based on article 235 of the EEC Treaty. In 1985, its application was extended for four more years.\textsuperscript{57} In 1989, the import ban was extended for an undetermined time.\textsuperscript{58}

\begin{flushleft}
\textsuperscript{52} Id.
\textsuperscript{53} Commission Proposal for a Regulation on Rules for a Prohibition to Import Skins of Certain Sealpups and Products Derived Therefrom into the Community, 1982 O.J. (C 285) 7. This proposal was preceded by two resolutions of the European Parliament. See Resolution of the European Parliament on Community Trade in Seal Products and in Particular in Products Deriving From the White Coat Pups of Harp and Hooded Seals, 1982 O.J. (C 87) 87; Resolution of the European Parliament on the Commission's Failure to Implement Parliament's Resolution of 11 March 1982, 1982 O.J. (C 267) 47. In both cases, Parliament had urged the Commission to submit proposals for the import ban.
\textsuperscript{54} See EC Import-stop für Felle von Babyrobben, SUDDEUTSCHE ZEITUNG, Mar. 1, 1983, at 20 (stating that France, Great Britain, Belgium, Denmark, and Greece opposed binding legislation, arguing that regulations which are based on purely moral motives could not be adopted under the EEC Treaty). See also ECKARD REHBINDER & RICHARD STEWART, ENVIRONMENTAL PROTECTION POLICY 103 (2 INTEGRATION THROUGH LAW, Mauro Cappelletti et al. eds., 1985).
\textsuperscript{55} Council Resolution with Regard to Seal Pups, 1983 O.J. (C 14) 1.
\textsuperscript{58} Council Directive 89/370, 1989 O.J. (L 163) 37. This Directive only requires Member States to submit import/export figures to the EC and does not require the Member States to assess the ban's effectiveness. Often, the import/export figures are months or years out of date. Monitoring the success of the Directive is therefore problematic. Krämer, supra note 8, at 18.
\end{flushleft}
2. Initial Funding for Nature Protection

In 1983, the Commission submitted a proposal to the Council for the creation of a Community environmental fund. The draft regulation, based on article 235, would have allowed the Community to assist financially Member States in order to promote "clean" technologies, which consume less raw materials and energy and produce less pollution than existing technologies. The fund would have also financed fifty to seventy percent of the cost of acquiring or otherwise protecting habitats protected under Directive 79/409 and the Berne, Bonn, and Barcelona Conventions.

Although the Commission justified the draft regulation under article 235 of the EEC Treaty, Member States viewed the creation of a Community environmental fund as beyond EC jurisdiction and as a threat to national budgets. Member States were only willing to accept EC financial assistance for areas already targeted by EC legislation. Member States were thus unwilling to accept EC financial assistance for areas protected by the Berne, Bonn, and Barcelona Conventions, despite their ratification by the Community. Consequently, the Council did not agree to the proposed general Community environmental fund.

Instead, the Council adopted Regulation 1872/84, providing funds on a limited basis over three years for Community demonstration projects of clean technologies and new methods for measuring water and air pollution and pilot projects for the protection of threatened bird habitat. The Council made it clear that the nearly 6.5 million European Currency Units (ECU) earmarked for nature protection were only for habitats encompassed by Directive 79/409 and not for the habitats protected under the three international conventions.

60. Id. arts. 1-3, at 9.
62. See generally LUDWIG KRÄMER, FOCUS ON EUROPEAN ENVIRONMENTAL LAW 104-05 (1992) (describing the Commission's proposal for ACE and the refusal of the Council to approve the Fund in its proposed form).
63. Council Regulation 1872/84, 1984 O.J. (L 176) 1. New methods for measuring air and water pollution using bio-indicators or other contaminants are often expensive. The pilot projects were to be used in habitats under particular threat, using protection measures which were especially effective and could serve as a model for other threatened areas. Id. arts. 1, 2 at 2.
64. See supra notes 25-27 and accompanying text.
65. Council Regulation 1872/84, supra note 63, arts. 1, 12, at 2-3. Even when the EC as such is a party to an international convention, EC Member States enforce the terms of the convention. See supra note 43; see also Krämer, supra note 8, at 44.
In 1986, the Commission again tried to obtain Community funding for habitats and biotopes of species other than birds by submitting a proposal for the renewal and enlargement of Regulation 1872/84. The Council refused to accept the enlargement and limited the financial assistance of the new funding, contained in Regulation 2242/87, to biotope and habitat protection for the birds protected pursuant to Directive 79/409. Responding to requests from Spain, Portugal, Greece, and Italy, however, the Council included in the new Regulation pilot projects for the protection of Mediterranean soil against fire, erosion, and desertification. Financial assistance under the new Regulation increased only slightly from the prior Regulation, providing 8.6 million ECU over four years for the nature protection measures.

3. Environmental Impact Assessments

Another significant nature protection measure adopted during this period was Directive 85/337, which required an environmental impact assessment for certain public or private projects affecting the environment. Projects covered by this Directive include the construction of motorways, railways, airports, large power stations, nuclear energy plants, chemical installations, and waste elimination installations. The Directive significantly influences Member State land use planning procedures since it requires Member States to integrate environmental effects into the planning process.


The Single European Act (SEA), enacted prior to the Fourth Environmental Action Programme, eliminated all doubts regarding Com-

68. Id. art. 1(1)(f), at 8.
69. Id. art. 1(2), at 9.
71. Id. Annex I, at 44.
72. In the seven years since adoption of Directive 85/337, two significant problems with the Directive have emerged. First, although the Directive requires environmental impact assessments for projects listed in Annex II, some Member States have retained their discretion to decide whether to require assessments for these projects. Krämer, supra note 8, at 24. Second, even where the assessment procedure is formally observed, the environmental impact assessments may underestimate environmental effects and justify decisions already made. Id. at 40. Despite these problems, the Directive is an important improvement to Member State planning procedures.
munity competence on nature protection by adding articles 130R-130T to the EEC Treaty. The SEA integrated the habitat protection objectives of environmental legislation with the protection of human health, requiring that Community actions relating to the environment "preserve, protect, and improve the quality of the environment; . . . contribute towards protecting human health; . . . [and] ensure a prudent and rational utilization of natural resources."75

The SEA safeguarded the interests of Member States against over-reaching Community measures with the "subsidiarity clause" of article 130R(4) and the unanimous decision-making clause of article 130S.76 The "subsidiarity clause" allows the EC to legislate only when it can do so more effectively than individual Member States.77 Further, since environmental legislation requires unanimous approval by the Council and consultation with the European Parliament and the Economic and Social Committee, any Member State can veto legislation contrary to its interests.78 In addition, Member States may maintain or introduce more protective environmental measures than those promulgated by the Community.79

Because of the newly explicit EC jurisdiction over environmental issues, the Fourth Environmental Action Programme as drafted by the Commission addressed habitat protection and other environmental measures more broadly than had any previous Programme.80 Without reference to the subsidiarity principle, the Commission identified areas for Community action, including (a) financing habitat protection for all species, (b) improving the welfare of laboratory and domesticated animals, and (c) encouraging Member States to implement and enforce EC nature protection measures.81 In particular, the Programme developed a nearly complete nature protection strategy in a long chapter entitled "Manage-

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75. EEC TREATY art. 130R(1) (as amended 1987) (listing objectives of the Community). The wording of this article will change slightly under the Maastricht Treaty on European Union. See also EEC TREATY art. 130(R)(1) (as amended by Maastricht Treaty, supra note 4, 31 I.L.M. at 285).
76. See EEC TREATY arts. 130R(4), 130S (as amended 1987).
77. The "subsidiarity clause" of article 130R(4) states:
The Community shall take action relating to the environment to the extent to which the objectives referred to in paragraph 1 can be attained better at Community level than at the level of individual Member States. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures.
Id. art. 130R(4) (as amended 1987).
78. EEC TREATY art. 130S (as amended 1987).
79. Id. art. 130T (as amended 1987) ("The 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.").
81. Id. Annex §§ 5.1.2, 5.1.4, 5.1.10, at 31, 32.
This chapter addressed waste management and announced a comprehensive Community study to examine whether Structural Funds, primarily used for economic development, could also address urban and coastal soil protection problems. Furthermore, the chapter discussed nature and natural resources, indicating that the Community needed to protect habitats and biotopes of all fauna and flora species and thus implying that national implementation of the Berne Convention was insufficient.

The Council adopted the Fourth Environmental Action Programme in a tone more guarded than that proposed by the Commission. The Council resolution adopting the Programme gave higher priority to the protection of bird habitats than to the habitats of other species. The Council was also attentive to the inherent division of legislative labor between the Community and Member States, invoking the subsidiarity clause of article 130R(4) of the EEC Treaty as amended by the Single European Act.

However, the actions of the Community pursuant to the Fourth Action Programme have to a large extent followed the policies set forth by the Commission in the Programme and the objectives of the SEA. The Community concentrated on a comprehensive directive to conserve habitats of wild fauna and flora, which was finally adopted in the spring of 1992. The Directive provides that within ten to twelve years, the Member States must establish a differentiated and flexible system of habitat designation and monitoring; it also provides EC financial assistance to Member States to mitigate the costs of the detailed reporting requirements. The Council also promulgated other environmental protection directives and regulations, banning the import of African elephant ivory in 1989 and protecting water resources from livestock-related nitrate pollution in 1991. Finally, the Council promulgated legislation which addressed both human health and environmental concerns. In 1991, the Council adopted Directive 91/217 which requires treatment of wastewater in municipalities with over 2000 people.

82. Id. Annex § 5, at 30-36.
83. Id. Annex §§ 5.2, 5.3, at 32-35.
84. Id. Annex § 5.1.6, at 30.
85. See Fourth Environmental Action Programme, supra note 74.
86. See id., at 3.
87. Id. at 2. See also supra notes 76-77 and accompanying text (discussing the "subsidiarity clause").
89. Id. arts. 3-8, at 10-12.
92. Council Directive 91/271, 1991 O.J. (L 135) 40. Treatment costs are expected to be nearly 60 billion ECU.
1. Increased Funding for Habitat Protection

The Community also recognized the importance of financial resources for effective habitat protection. The Commission proposed in 1990 that the EC bear more of the financial burden of nature protection in Member States. Recognizing the inadequacy of the 8.6 million ECU provided for nature protection under Regulation 2242/87, the Council adopted the Commission's proposal in 1991. Soon thereafter, the Council decided to consolidate all funding for environmental measures, adopting, in the spring of 1992, a Commission proposal to create a general environmental fund, called LIFE. LIFE will absorb all funds now designated for environmental measures, such as ACNAT. Threatened areas and endangered species are allocated 45% of the total LIFE budget of 400 million ECU over five years.

During this period, the Community has had to balance the other interests and pressures in the Member States, often to the detriment of the article 130R(1) objectives. With regional, agricultural, and social funds, the Community supported development projects in the Mediterranean and contributed to the expansion of road, railway, and street networks throughout Europe. Even where the environmental impacts of these projects were assessed pursuant to Directive 85/337, the impacts increased the general pressure on the environment. These

94. See supra notes 67-69 and accompanying text.
95. Council Regulation 3907/91, 1991 O.J. (L 370) 17. Under this regulation 50 million ECU will be made available within the first two years. Id. art. 1, at 17.
97. See supra note 93-95 and accompanying text.
98. LIFE Regulation, supra note 96, at 5.
99. See supra note 75 and accompanying text.
100. The Structural Funds intervention has considerably increased since 1988, due to a basic revision of the functioning of the funds in 1988. Between 1988 and 1992, some 50 billion ECU were distributed to Member States.
101. See, e.g., Council Regulation 563/91, 1991 O.J. (L 63) 1 (concerning Community actions for environmental protection in the Mediterranean Sea (MEDSPA)).
102. See, e.g., Towards Trans-European Networks for a Community Action Programme: Communication From the Commission To the Council and the European Parliament, COM(90)585 final.
103. See supra notes 70-72 and accompanying text.
104. See generally DAVID BALDOCK, AGRICULTURE AND HABITAT LOSS IN EUROPE (1990) (describing how the EC's agricultural policy has adversely affected wildlife habitat throughout Europe) [hereinafter AGRICULTURE AND HABITAT LOSS]. For further references to sources describing other habitat problems in EC Member States, see id. at 55-60. See also David Baldock & Tony Long, Bad News for the Environment - The EC's Integrated Mediterranean Programmes, EUR. ENVTL. REV., Dec, 1987, at 15; Krämer, supra note 8, at 39 (Structural Fund assistance may harm habitats designated for protection by Directive 79/409).
projects are necessary, and are supported additionally by national funds. Yet, the public is increasingly aware that the financial assistance by the EC to promote economic growth has brought a supplemental threat to the local and regional environment.  

2. *Effect of the Maastricht Treaty*

The Maastricht Treaty, if ratified, will allow majority decision making on most environmental measures and will expressly recognize EC competence in the areas of land use planning and water management. Although the Maastricht Treaty will require unanimous passage by the Council for legislation relating to town and country planning, land use planning, and water resource management, the current version of the Treaty authorizes the Council to change this. The Member States, however, are likely to resist majority decision making by the Council in those areas.

If the measures which are made by majority decision pursuant to the Maastricht Treaty prove too onerous for Member States, the Treaty authorizes both some exemptions from the new legislative requirements and financial assistance from a Cohesion Fund that will be established in 1993. The Treaty implies that the Fund will only finance projects

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105. See citations listed *supra* note 104.

106. See *supra* notes 4-5 and accompanying text (discussing the potential effect of the Maastricht Treaty on environmental decision making and land use planning).

107. See *EEC TREATY* art. 130S(2) (as amended by Maastricht Treaty, *supra* note 4, 31 I.L.M. at 286):

> By way of derogation from the decision-making procedure provided for in paragraph 1 and without prejudice to Article 100[A], the Council, acting unanimously on a proposal from the Commission and after consulting the Commission and after consulting the European Parliament and the Economic and Social Committee, shall adopt:

- provisions primarily of a fiscal nature;
- measures concerning town and country planning, land use with the exception of waste management, and measures of a general nature, and management of water resources;
- measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply. The Council may, under the conditions laid down in the preceding subparagraph, define those matters referred to in this paragraph on which decisions are to be taken by a qualified majority.

*Id.*

108. See *supra* note 4 and accompanying text; *infra* part III.


> Without prejudice to the principle that the polluter should pay, if a measure based on provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting the measure, lay down appropriate provisions in the form of:

- temporary derogations and/or
- financial support from the Cohesion Fund to be set up no later than 31 December 1993 pursuant to Article 130[D].

*Id.* The Cohesion Fund will "provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure." *Id.* art. 130D.
adopted by majority vote,\textsuperscript{110} which will exclude financial assistance for measures related to land use or town and country planning unless the Council votes for majority decision making in these areas. While the details of the Fund's operation still need to be worked out, only Member States with a gross national product below the average are eligible; presently Spain, Portugal, Greece, and Ireland qualify.\textsuperscript{111} Economic considerations, not ecological needs, will be the basis for the Fund's intervention.

II

TRENDS FOR NATURE PROTECTION IN THE EUROPEAN COMMUNITY

In 1992, the Commission published its State of the Environment Report and proposed a Fifth Environmental Action Programme.\textsuperscript{112} It concluded that EC environmental laws and policies over the last twenty years have not managed to stop and reverse the slow but constant degradation of the natural environment.\textsuperscript{113} Despite the enactment of many nature protection measures and increasing Community jurisdiction, the EC has been unable to keep pace with other trends which increasingly burden the environment. Mitigating these trends will require strong political will throughout the Community.

EC nature protection efforts have not been wholly unsuccessful. The EC has adopted 200 binding pieces of law which relate to environmental issues, including EC directives, regulations and decisions.\textsuperscript{114} Many of these address nature protection. The EC has restricted trade in threatened and endangered species\textsuperscript{115} and issued general protection measures, such as environmental impact assessment legislation.\textsuperscript{116}

\textsuperscript{110} Applying the Fund to legislation adopted unanimously would allow the Member States eligible for the Cohesion Fund to veto the measures unless financial assistance was guaranteed.

\textsuperscript{111} See Protocol on Economic and Social Cohesion, annexed to the Maastricht Treaty, supra note 4. "The Cohesion Fund . . . will provide Community financial contributions to projects in the fields of environment and trans-European networks in Member States with a per capita GNP of less than 90 percent of the Community average . . . ." Id. These conditions are at present fulfilled for the four Member States mentioned.

\textsuperscript{112} Proposal for Fifth Environmental Action Programme, supra note 34.

\textsuperscript{113} See generally id., particularly volume III which reports on the state of the community's environment.

\textsuperscript{114} Krämer, supra note 8, at 2.

\textsuperscript{115} The Commission Proposal for a Regulation to Revise Regulation 3626/82 on Trade in Endangered Species is based on article 100A of the EEC Treaty.

\textsuperscript{116} Under the Maastricht Treaty, new legislation would be based on majority decisions under article 130S, which reads: "The Council, acting in accordance with the procedure referred to in Article 189[C] 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 130[R]." EEC TREATY, art. 130S(1) (as amended by Maastricht Treaty, supra note 4, at 286). Article 189C provides for majority decisions. Id. art. 189C.
The EC's financial assistance for the preservation of bird habitats has also been successful. Under Regulation 1872/84, eighty-eight requests for financial support of habitats were submitted, and forty-eight biotope projects were supported, for a total of more than 8 million ECU.\textsuperscript{117} Under Regulation 2247/87, ninety-four requests were submitted for more than 65 million ECU,\textsuperscript{118} far surpassing the available funding.\textsuperscript{119} Most of this support was used for land acquisition and other conservation efforts by national, regional, or local agencies, nature protection foundations, and science institutes.

These successes reflect the growth of Community competence. In the 1970's, Member States stiffly objected to any measure at the Community level; the Commission tried to counter by resorting to the Common Agricultural Policy as a justification for environmental protection. The Council similarly assuaged early Member-State objections by relying on article 235 of the EEC Treaty for authority.\textsuperscript{120}

Several factors may be responsible for the subsequent gradual acceptance by Member States of increased EC environmental legislation, although no solid policy research on this issue has been conducted. These factors include: (a) the EC acted relatively cautiously and nearly always when public opinion and environmental organizations in Member States favored measures at the Community level; (b) the international conventions that were ratified and enforced by Member States inadequately addressed nature protection problems, since they lacked legal rigor and enforcement structures; (c) the natural environment of Western Europe was, and still is, perceived by the public as gradually deteriorating;\textsuperscript{121} (d) several Member States lacked the administrative infrastructure, financial resources, and even the political will to take the necessary measures for nature protection, thus requiring Community-level action to protect the environment of Western Europe; and (e) the nature protection problems addressed were largely transboundary problems, limiting the effect of purely state solutions.

Today, the EC is largely accepted as an integrating legislator and coordinator. Even EC legislation that does not directly relate to environmental protection may considerably influence projects within Member States that adversely affect the environment. For example, the EC oversees trans-European networks for transport, telecommunications, and en-

\textsuperscript{118} Commission of the European Communities, SEC(89)1240 final.
\textsuperscript{119} See supra note 69 and accompanying text.
\textsuperscript{120} See supra part I.
\textsuperscript{121} See 3 Proposal for Fifth Environmental Action Programme, supra note 34 (entitled "The State of the Community Environment," in which the Commission gives a rather dark picture of the environmental situation).
ergy infrastructures. The EC may only issue guidelines, but the guidelines are adopted by majority decision. Since the EC would cofinance these networks under the Maastricht Treaty, the "guidelines" may strongly influence the Member State's acceptance and siting of a transportation project. For example, where an EC guideline suggests a high-speed railway link between Paris and Amsterdam, the lining of such a link is, by existing geography, largely predetermined. Therefore, Belgium and the Netherlands have very little opportunity to reject the guideline.

On the other hand, the subsidiarity principle expressed in the SEA and the Maastricht Treaty and the lack of an EC enforcement mechanism may limit the ability of the Community to reverse the ongoing environmental degradation in Europe. For example, the EC has no enforcement bodies of its own to act at the local level and enforce the actual implementation of its nature protection directives, such as Directive 79/409 and Directive 92/43. This responsibility is left to local, regional, or Member State bodies, some of whom actively cooperate

122. See EEC Treaty arts. 129B & 129D (added by Maastricht Treaty, supra note 4, 31 I.L.M. at 281). Article 129B states that "the Community shall contribute to the establishment and development of trans-European networks in the areas of transport, telecommunications and energy infrastructures." Id. art. 129B(1). Article 129D provides that "[g]uidelines and projects of common interest which relate to the territory of a Member State shall require the approval of the Member State concerned." Id. art. 129D.

123. Id. art. 129D (requiring adoption of the guidelines by the procedure specified in article 189B, which provides for passage by a qualified majority of the Council in the absence of a negative opinion by the Commission).

124. See Maastricht Treaty, supra note 4, art. 129C: "the Community . . . may support the financial efforts made by the Member States for projects of common interest financed by Member States . . . ; the Community may also contribute . . . to the financing of specific projects in Member States in the area of transporting infrastructure . . . ." Id.

125. See article 3B of the Maastricht Treaty, which generalizes, for the whole of the treaty, the idea previously expressed in article 130R(4) of the EEC Treaty, as amended by the SEA, and which reads:

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 competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the 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.

Id. art. 3B (added by Maastricht Treaty, 31 I.L.M. at 257). See also supra notes 76-77 and accompanying text.

126. See supra note 25 and accompanying text.

127. See supra note 88 and accompanying text.

128. Article 169 is the only provision in the EEC Treaty which allows for actions to ensure implementation and enforcement. These actions consist of starting infringement proceedings which could lead to a decision of the European Court of Justice stating that this or that Member State has not respected its obligations under Community law. No sanction can be pronounced. EEC Treaty art. 169. However, under the Maastricht Treaty the European Court could impose a lump sum payment or a penalty payment if the Member State was brought
and support the EC conservation measures and some of whom do not. Without a unified Europe, such discrepancies may become more apparent in the future and require further, albeit limited, EC efforts. It is certainly possible that the Community will begin to issue legislative measures protecting particular species, especially if accompanied by financial assistance, although detailed measures are unlikely.

Similarly, the Community has not enforced nature conservation measures by threatening to withhold or decrease the financial assistance of the Structural Funds. Because the Member States have successfully earmarked the Funds for economic development, the Funds exacerbate the permanent latent conflict between economic development and nature preservation. Local, regional, and Member State nature protection groups, noting that Structural Fund assistance is considerably higher than financial assistance for nature protection, often view the EC as a threat to nature conservation. It is true that Regulation 2052/88 requires any project financed or cofinanced by the EC to "be in harmony with the provisions of the Treaties, with the instruments adopted pursuant thereto and with Community policies, including those concerning... environmental protection." In practice, however, Member-State-level steering committees conduct nearly all the planning for the projects cofinanced by Structural Funds. Primarily because of a lack of resources, EC environmental officials are rarely represented. As the discussion which led to the signing of the Maastricht Treaty demonstrated, Member States jealously defend their decision-making authority in all planning matters, illustrated by their wish to retain unanimous decision making for town and country planning and land use matters. Any change in this situation will take time.

The limits inherent in the EC system do not necessarily doom environmental protection in Europe. First, important environmental legislation has been adopted by unanimous vote at the EC level. Second, decision making at the local and Member State level may be entirely appropriate in some instances. Community-level decisions for measures affecting individual States often do not make much sense, since the EC is far removed from the impact of the decisions. Decisions regarding the siting of a motorway, railway, or port, therefore, have been and will continue to be made at the local, regional, or Member State level, rather than at the Community level. Furthermore, a Member State is well able to efficiently protect the natural environment within its borders when the EC is not involved or interested. Specific questions, such as designating the habitats, biotopes, and scenic landscapes to be protected and the

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before the Court a second time because the Member State had failed to take the measures necessary to comply with the Court's first decision. EEC Treaty art. 171 (as amended by Maastricht Treaty, supra note 4, 31 I.L.M. at 292).
methods of protection, should and will remain with the local authorities, not the EC. Since the EC does not own any of the land and cannot affect property ownership, it can only attempt to influence local decision making. The EC may use financial assistance or other means, but it will hardly be able to decide such matters.

It is obvious that the environment in Europe will continue to be threatened by the economic and political integration undertaken by the EC, particularly the improvement of transport systems and infrastructure, urbanization, the new production technologies in agriculture and industry, mass production, and the use of agricultural fertilizers and pesticides. These trends will not subside, nor should they. The objective of the EC and the Member States must be the reconciliation of nature conservation with economic development, not only by legal mechanisms, but pursuant to a well-developed political will.

The starting point of any widespread political will is a shared understanding of a common problem. The time has probably come to obtain a Community-wide perception of the threats to the natural environment of Western Europe. It will not be easy to change the mentalities of a continent where some localities practice bull and cock fighting, where singing birds and migratory birds are still captured and killed by the millions every year, where public authorities often find it difficult to enforce their own hunting legislation, and where the bear, wolf, and eagle have been rendered nearly extinct. Yet this change is a basic necessity for successful nature protection.

Therefore, the EC must systematically collect data from all of Western Europe regarding endangered species of flora and fauna, habitats, biotopes, and landscapes. Gathering only state lists will be of very limited value, because the Member States are small in size, and nature does not know national borders. Once the obstacles to protecting the natural environment are precisely identified, the political mechanism of the EC, which is based on principles of subsidiarity, partnership, and cooperation between the EC and its Member States, is flexible enough to find responses to the challenges. A close and permanent cooperation is necessary, which includes both EC and Member State measures and which integrates nature preservation needs into decisions made in other areas.

Habitat destruction constitutes the most serious threat to flora and fauna in Western Europe. This fact suggests that the exact location of the borderline between Member State and EC competence in nature protection issues is of secondary importance. The critical question is whether the measures taken will be capable of changing the trend of degradation and ensuring the much-needed preservation of the Western European natural environment.

130. See EEC Treaty art. 222; supra note 3 and accompanying text.
131. Krämer, supra note 8, at 46.