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THE EUROPEAN COMMUNITY AND MANAGEMENT OF THE ENVIRONMENT: A DILEMMA

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Gasoline containing a lead content of greater than 0.4 grams per liter shall not be produced or used after January 1, 1972. As of January 1, 1976, the content of lead in gasoline shall not exceed 0.15 grams per liter.

Benzinbleigesetz of the Federal Republic of Germany.

Gasoline shall be put on the market in the area of the European Common Market only if the lead content of such gasoline does not exceed 0.5 grams per liter as of January 1, 1974, and 0.4 grams per liter as of January 1, 1976.

Proposal Draft Directive of the Commission of the European Community.

Environmental management, long seen as merely a regional or national problem, has recently received emphasis as an international concern. The need for cooperation on the international level has been felt because (1) disparate national environmental measures can disrupt patterns of international trade and competition; (2) common resources such as the oceans and the atmosphere demand common protective action; (3) activities taking place in one state can have an adverse effect on persons and property in another state; and (4) the similarity of the problems in most countries generates a cooperative search for similar solutions.

Once international cooperative action is accepted as necessary to manage the environment, the central issues become: (1) how to develop international normative rules and standards, and (2) how existing and newly created international organisations can be utilized to further this process.¹ Despite the Declaration of the Human Environment and the Action Program² concluded by the 1972

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1. See generally Rauschnig, *Umweltschutz als Problem des Völkerrechts*, 27 *Europa Archiv* 567 (1972); Bleicher, *An Overview of International Environmental Regulation*, 2 *Ecology L.Q.* 1 (1972); Angelo, *Protection of the Human Environment—First Steps Toward Regional Cooperation in Europe*, 5 *Int'l Lawyer* 511 (1971); Contini & Sand, *Methods to Expedite Environmental Protection: International Ecostandards*, 66 *Am. J. Int'l L.* 37 (1972).

2. UN-A/Conf. 48/CRP 26 (1972).

United Nations Conference on the Human Environment, international norms involving the conservation of shared resources and regulating national activities are very vague and consist mainly of a patchwork of rules to safeguard sovereign and economic interests. Existing international organisations are also largely unsuited to the task of environmental protection. Their power is typically limited to the coordination of actions of national states and to the formulation of recommendations which the participating states are free to disregard.

A hopeful exception to this general pattern is the supra-national European Community (EC), consisting of the European Coal and Steel Community (ECSC),³ the European Atomic Energy Community (EAC)⁴ and the European Economic Community (EEC).⁵ These institutions, functioning through a common institutional framework,⁶ exercise a remarkable degree of control over the economic affairs of the member states,⁷ having the power not only to make non-binding recommendations to member states, but also able to issue directives, regulations and decisions binding member states, individuals and legal persons within their jurisdictions.⁸ These powers are so different from those of an ordinary international body that one authority has referred to the EEC Treaty, the most comprehensive of the three, as a "Treaty-Constitution."⁹ The same point could be made regarding the fact that the three treaties provide the basis for a unitary Community.

If authority to enact binding norms is a prerequisite for effective action by an international body to manage the environment, the European Community should be well suited to the task. In recent months, however, there has been increasing evidence that the Community is enmeshed in the dilemma of how to carry out its principal work of furthering the economic integration of the member states without hindering the effort to protect and manage the environment. This article, after discussing the legal authority of the Community to deal with environmental problems and summarizing

3. Treaty Establishing the European Coal and Steel Community, 261 U.N.T.S. 140 [hereinafter cited as ECSC Treaty].

4. Treaty Establishing the European Economic Community, 298 U.N.T.S. 167 [hereinafter cited as EAC Treaty].

5. Treaty Establishing the European Economic Community, 298 U.N.T.S. 3 [hereinafter cited as EEC Treaty].

6. The principal institutions are the Commission of the European Communities, the Council of the European Communities, the European Parliament and the Court of Justice.

7. These consisted of Belgium, France, Germany, Italy, Luxemburg and the Netherlands. On January 1, 1973, Britain, Ireland and Denmark became members.

8. The principal types of legislative acts of the Council of Ministers and the Commission are defined in Article 189 of the EEC Treaty. For the best and most comprehensive study of the process of Community Lawmaking, see Stein, *Harmonization of European Company Laws—National Reform and Transnational Coordination* (1971).

9. Stein, *Toward Supremacy of Treaty-Constitution by Judicial Fiat: On the Margin of the Costa Case*, 63 Mich. L. Rev. 491, 513 (1965).

EC activity in the field, will explore this dilemma and offer possible solutions to the impasse.

THE LEGAL AUTHORITY OF THE EUROPEAN COMMUNITY TO DEAL WITH ENVIRONMENTAL PROBLEMS

The European Community is an institution designed primarily to achieve the integration of the economies of the member states. This is implemented through the establishment of a Community-wide system of competition which allows each nation's economy to be freely penetrated by individuals and firms of other member states. The provisions of the EEC Treaty thus institute freedom of movement of goods, freedom to supply services across borders, freedom of movement for workers, freedom of movement of capital, and freedom for individuals and companies to establish businesses throughout the Community. Restrictive arrangements and the establishment of monopolies which distort competition are proscribed. National monetary and economic planning are to be coordinated, and social policies which may affect the fundamental freedoms of the treaty are to be harmonized. Common Community policies are to be established in certain economically important areas, such as agriculture, transportation, energy and commercial relations with third countries.

In view of this emphasis on economic integration and progress, it is not surprising that the Community treaties contain no express authority allowing the supra-national institutions to enact rules for the purpose of environmental management. The framers of the treaties had no intention of giving the Community powers in this area. Despite this fact, environmental problems have received increasing attention on the Community level, and at the Summit Conference in Paris in October, 1972, the heads of state of the nine member states for the first time "underlined the importance of a community-wide environmental policy" and invited the institutions to establish an action program in this area.¹⁰

There are many provisions in the various treaties which touch on environmental problems and upon which some Community authority can be based. The protection of animals and plants can justify prohibitions and restrictions on the export and import of goods within the Community.¹¹ The supra-national institutions of the Community also have wide powers over agricultural policy,¹² transport policy,¹³

10. Au Sommet à Paris, La Déclaration Finale, Le Monde, Octobre 22-23, 1972, at 3.

11. EEC Treaty, Art. 36. The intention of the framers of the treaty was to protect domestic animals and plants.

12. EEC Treaty, *supra* note 5, at Art. 43.

13. EEC Treaty, *supra* note 5, at Art. 75.

and social policy,¹⁴ which would appear to allow limited Community environmental measures to be taken in these areas. Moreover, the EEC Treaty gives the Community a general power to conclude agreements with international organisations and third countries,¹⁵ which can extend to the solution of international environmental problems.

The EAC and ECSC Treaties also touch upon environmental concerns. The EAC has indirect power to safeguard the people of the Community against the hazards of radioactive materials.¹⁶ The ECSC Treaty gives the institutions powers over health and safety conditions in the coal and steel industries,¹⁷ but has nothing to do with management of the natural environment.

These provisions, however, are clearly insufficient as a basis for comprehensive environmental action on the Community level. More general authority is needed. The EEC Treaty contains three far-reaching grants of law-making power to Community institutions which can be interpreted as conferring power in the field of environmental management. First, the improvement of the living conditions of the peoples of the Community is one of the essential objectives of the EEC Treaty,¹⁸ and an accelerated raising of the standard of living in the member states is also a Community task.¹⁹ It is doubtful, however, whether this grant of power can serve as the basis for comprehensive environmental law-making, since in the nearly unanimous view of the commentators on the treaty, these general provisions do not alone provide a basis for Community legislation.²⁰

A second relevant general category of Community law-making is the authority granted to the supra-national institutions to engage in the "approximation"²¹ of national laws of member states. Article 100, the relevant clause of the EEC Treaty, calls for the approximation of legislative and administrative provisions of member states that "directly affect the establishment or the operation of the Common Market." Article 101 gives the Council of Ministers the power, on the Commission's proposal, to issue directives to remove distortions of competition caused by differences in national laws, and Article 102

14. EEC Treaty, *supra* note 5, at Arts. 117-118.

15. EEC Treaty, *supra* note 5, at Art. 228-31.

16. EAC Treaty, *supra* note 4, at Arts. 30-39.

17. ECSC Treaty, *supra* note 3, at Art. 55.

18. EEC Treaty, *supra* note 5, at Preamble.

19. EEC Treaty, *supra* note 5, at Art. 2.

20. See H. Ipsen, *Europäisches Gemeinschaftsrecht* 559-60 (1972).

21. The term "approximation" is used in contradistinction to the term "unification." The aim is to make national laws more similar, not necessarily to make them uniform.

creates a procedure for preventing the rise of new distortions caused by future national legislative proposals.²²

These provisions, however, do not provide a basis for environmental management. Their primary purpose is to eliminate disparities in national measures where they constitute obstacles to economic integration and the free movement of goods, services and economic units across national frontiers. Environmental management, therefore, can at best be only incidental to the process of removing distortions of competition; and it is more likely that use of these provisions will actually have a negative influence on environmental protection. The requirement of a unanimous vote for Community directives in this area,²³ will tend to ensure a compromise on the lowest common denominator of national environmental measures, which will effectively eliminate distortions of competition caused by disparities in national environmental legislation, but will result in the repeal of the most stringent and progressive national laws.

A third possible basis of authority for the enactment of Community environment protection is the gap filling procedure of Article 235 of the EEC Treaty. This provision provides law-making power where action by the Community appears necessary to achieve one of the treaty objectives, and the treaty itself has not provided for the necessary powers of action. Both of these tests would appear to be met with regard to the area of environmental protection. Nevertheless, it is doubtful whether such a vague authority can be the basis for a Community environmental program. Far from being an implied powers clause similar to American constitutional doctrine, Article 235 was intended only to supply a basis for filling small loopholes and gaps in the treaty law-making system. It is to be applied restrictively and provisionally.²⁴ To use this article as a basis for comprehensive Community environmental measures would appear to be inconsistent with the present interpretation of its role in Community law.²⁵

In view of the limitations of the existing provisions of the Community treaties in the area of environmental management, it would appear that a clear basis for effective action can only be provided through amendment of the EEC Treaty.²⁶ Only in this

22. EEC Treaty, *supra* note 5, at Arts. 3(h), 100-102.

23. Under Article 100, approximation directives can be issued only by unanimous vote by the Council of Ministers on which all member states are represented.

24. H. Ipsen, *Europäisches Gemeinschaftsrecht supra* note 20, at 475-76.

25. In addition, the procedure provided by article 235 does not lend itself to strict controls. An unanimous vote by the Council of Ministers is required, and the European Parliament, through which the only input of national legislative bodies would be possible, has only a consultative role.

26. An amendment procedure is provided by Article 236.

manner can authority for Community environmental action be provided which goes beyond concerns for economic distortions. A limited role for subsidies by national governments to clean up the environment could be permitted.²⁷ An effective decision-making process could also be worked out, doing away with the requirement of unanimous vote by the Council of Ministers and giving the European Parliament real power to develop legislative norms and controls.

EUROPEAN COMMUNITY ACTIONS IN THE AREA OF ENVIRONMENTAL MANAGEMENT

Until 1971, environmental management was regarded by the EC as a matter to be handled on the national level. Although the Community had issued two environmental directives in 1970, which dealt with the control of noise levels and exhaust gases of motor vehicles,²⁸ they were part of the programme to harmonize national laws to remove distortions of competition; concern for the environment was not a factor.

The EC institutions first recognized that environmental problems should be seriously dealt with on the Community level in early 1971, and this concern resulted in the publication in July, 1971, of the First Communication of the Commission of the European Community on the Environmental Protection Policy of the Community.²⁹ In this document the Commission proposed that the Council of the Community adopt a comprehensive programme of action to manage the environment. Articles 2, 100 and 235 of the EEC Treaty were cited as a basis for Community action. The proposed measures included provisions for the protection of public health, the establishment of a pollution monitoring network, the coordination of research programs and the harmonization of national environmental legislation.³⁰

The Commission received numerous comments on its proposal from other Community institutions, member states and private groups. After studying these comments, the Commission published a second communication on the subject of a Community environmental

27. Articles 92 and 93 of the EEC Treaty forbid national subsidies with certain exceptions.

28. Richtlinie des Rates der Europäischen Gemeinschaften zur Angleichung der Rechtsvorschriften der Mitgliedstaaten über den zulässigen Geräuschpegel und die Auspuffvorrichtung von Kraftfahrzeugen vom 6. Februar 1970, Amtsblatt der Europäischen Gemeinschaften Nr. L 42, at 16 (Feb. 23, 1970); Richtlinie des Rates der Europäischen Gemeinschaften zur Angleichung der Rechtsvorschriften der Mitgliedstaaten über die Verunreinigung der Luft durch Abgase von Kraftfahrzeugmotoren mit Fremdzündung vom 20. März 1970, Amtsblatt der Europäischen Gemeinschaften Nr. L 76, at 1 (April 6, 1970).

29. Kommission der Europäischen Gemeinschaften, Erste Mitteilung der Kommission über die Politik der Gemeinschaft auf dem Gebiet des Umweltschutzes, Brüssel, 22 Juli 1971, Dok. SEK (71)2616.

30. *Id.*

management program.³¹ This included three proposals for specific decisions to be taken by the Council of Ministers of the Community. The first proposal would require specific action by the Commission and the Council of Ministers within a fixed time period. Such action would include the adoption of water, air and noise criteria, measures to protect the natural environment and the harmonization of legislation.³² The second Commission proposal would have the member states through their representatives in the Council of Ministers enter into an agreement which would require them to inform the Commission of every planned legal or administrative environmental measure to the extent the common goals or the operation of the common market would be affected. It would also prevent the member states from putting any such measure into effect if the Commission, within five months of receiving notice, were to place a proposal on the same subject before the Council of Ministers.³³ The third Commission proposal would have the Council make a recommendation to the member states who are represented on the International Commission for the Protection of the Rhine.³⁴ It would urge them to work through the Commission to define water quality criteria for the Rhine and to make provision for the private and public expenditures necessary to achieve the desired standards.³⁵ At this writing these Commission proposals are being examined by working groups under the Council of Ministers of the Community. Despite favorable comment by committees of the European Parliament³⁶ and a call for action³⁷ by the chiefs of state of the enlarged European Community at the Summit Conference in Paris on October 19-20, 1972, the negotiations will be difficult.

The debates that took place at the European Ministerial Confer-

31. Kommission der Europäischen Gemeinschaften, Mitteilung der Kommission an den Rat über ein Umweltprogramm der Europäischen Gemeinschaften, Brüssel, 22. März 1972, Dok. SEK (72)666.

32. Entwurf eines Ratsbeschlusses über ein Programm zur Verminderung der Umweltbelastung und zum Schutz der natürlichen Umwelt, Brüssel, 22. März 1972, Dok. KOM (72)333.

33. Entwurf eines Abkommens der im Rat vereinigten Regierungsvertreter der Mitgliedstaaten über die Unterrichtung der Kommission im Hinblick auf die etwaige Harmonisierung von Dringlichkeitsmassnahmen im Bereich des Umweltschutzes auf dem gesamten Gebiet der Gemeinschaft, Brüssel, 22. März 1972, Dok. KOM (72) 334.

34. Germany, France, Luxemburg, the Netherlands and Switzerland are represented on the Commission. All except Switzerland are also members of the European Community.

35. Entwurf einer Empfehlung des Rates an die Mitgliedstaaten, die gleichzeitig Unterzeichner des Abkommens über die Internationale Kommission zum Schutz des Rheins gegen Verunreinigung sind, Brüssel, 22. März 1972, KOM (72) 335.

36. Bericht über die Mitteilung der Kommission der Europäischen Gemeinschaften an den Rat über ein Umweltschutzprogramm der Europäischen Gemeinschaften nebst Entwürfen für Massnahmen auf dem Gebiet des Umweltschutzes. Europäisches Parlament, Sitzungsdokumente 1972-1972, Dok. 74/72 (July 3, 1972).

37. Au Sommet à Paris, La Déclaration Finale, *supra* note 10.

ence on the Environment, convened by the Council of Europe from 28 to 30 March, 1973, showed that there is a conflict of interest between the Council and the European Community in relation to environmental competence and concerns. Shortly after this Conference the Bundesrat, the second house of the Federal Republic of Germany which represents the Länder, issued a well-formulated position paper on the question of the Community's competence in the environmental field (Bundesrat Drucksache 120/73 (Beschluss)). It takes a negative view of the Community's Environment Management Program referred to above, considering that the Community has no competence in this field.

THE DILEMMA OF THE EUROPEAN COMMUNITY

Effective environmental action by the European Community is impeded by difficulties of legal authority and agreement among Community institutions and member states. But these are merely symptoms of a deeper problem. The Community is faced with the dilemma of how to build a common economic market and eliminate distortion of competition without undermining environmental management and protection efforts. The encouragement of measures to clean up the environment would dictate that the Community should look with favor upon national legislation furthering this goal. On the other hand, national standards for products, industrial processes or environmental quality often have the effect of hindering trade and distorting competition within the Community. Since this endangers the functioning of the common market, the Community sees its role to take action to eliminate differences in national measures through the process of harmonization of legislation. Because of the requirement of unanimous agreement among the member states on the level of the Council of Ministers, there is the tendency that this process will result in a compromise on the lowest level of environmental protection, thus striking down innovative national action and causing stagnation of environmental consciousness within the Community.

There have already been several examples of this process. The Community directive of March, 1970, regarding auto emission standards,³⁸ preempted planned legislation in Germany that would have required stricter standards one year earlier than the Community standards. Moreover, on the occasion of the passage by Germany of a law relating to the disposal of used oil (Altölbeseitigungsgesetz),³⁹ the

38. *Supra* note 28.

39. Gesetz über Massnahmen zur Sicherung der Altölbeseitigung, (Law Concerning Measures to Assure the Disposal of Waste Oil) BGBl. I 1419 (1968). See generally Irwin and

Commission made known its concern over the possible impact of the new law on the functioning of the Common Market even though legislation on the same subject in other member states varied greatly and was less advanced.

The most serious example of the negative environmental impact which Community concern for the elimination of obstacles to trade can have occurred in connection with the recent German law regulating the content of lead in gasoline (*Benzinbleigesetz*).⁴⁰ This law, the most advanced among the member states, put into effect a maximum standard for lead in gasoline of 0.4 g./l. (grams per liter) as of January 1, 1972. This is to be reduced to a maximum of 0.15 g./l. as of January 1, 1976.⁴¹ The Commission of the European Community objected to the measure before it was passed using many of the arguments voiced by industrial lobbies objecting to the law. The Commission also threatened to bring an action against Germany in the Court of Justice of the Communities. When this action failed and Germany enacted the law, the Commission prepared a draft directive to combat what it saw as a danger to the free movement of goods within the Community. The draft directive would require a standard for lead of not more than 0.5 g./l. as of January 1, 1974, and 0.4 g./l. as of January 1, 1976.⁴² In an obvious attempt to appease the Germans, any member state may enforce a standard of 0.4 g./l. as of January 1, 1974,⁴³ but the stricter German standard of 0.15 g./l. as of January 1, 1976 would, however, be completely nullified by the draft directive.

The inherent inconsistency between the goal of removing hindrances to trade and promoting environmental progress is bound to remain as long as the European Community's authority is limited to economic progress and to building an economic union. The Community treaties should be amended to give the Community a mandate to take action to manage the environment. To ensure that environmental standards and rules will not be compromised on the lowest level, the requirement of unanimous agreement by the Council of Ministers should be eliminated.

This alone is not enough, however. Even if directives regarding

Burhenne, *A Model Waste Oil Disposal Program in the Federal Republic of Germany*, 1 Ecology L.Q. 471 (1971).

40. Gesetz zur Verminderung von Luftverunreinigungen durch Bleiverbindungen in Ottokraftstoffen für Kraftfahrzeugmotoren, BGBI. I 1234 (1971) [hereinafter cited as *Benzinbleigesetz*].

41. *Benzinbleigesetz*, *supra* note 40, at Art. 2.

42. Vorentwurf einer Richtlinie des Rates zur Angleichung der Rechtsvorschriften der Mitgliedstaaten über Benzin für Motoren mit Fremdzündung zum Antrieb von Fahrzeugen. Commission Dok. III/2051/722-D (undated), Art. 2.

43. *Id.* at Art. 3.

environmental management could be issued on majority vote of the Council, a fundamental problem would remain: the pattern of Community law-making is similar to and possesses most of the inadequacies of ordinary international treaty-making. The undemocratic legislative process and institutions of the Community do not correspond to the far-reaching effect provided for Community measures. This results in wide-spread distrust of Community actions and a hesitancy to allow the meaningful use of the legislative power. Even in a federal state such as Germany controversy exists over whether to allow the federal government to exercise powers in the area of the environment that have been traditionally within the competence of the Länder,⁴⁴ and it is even more difficult to believe that a wide-spread exercise of power by supra-national Community institutions will be tolerated, at least as long as these institutions are retained in their present form.

CONCLUSION

The solution to the dilemma of the European Community thus requires more drastic action than amending the EEC Treaty to give the Community express authority in this area and removing the unanimous voting requirement. A community-wide environmental management program only has a chance of being accepted if, in addition, the law-making process of the Community is made more democratic. The European Parliament should be elected through direct election by the people of the member states. It could be given the principal authority of passing legislation regarding the environment, as well as selected other areas, and an administrative body for environmental management could be created to administer environmental legislation enacted by the Parliament. Even if this were successful, the task would not be easy, as the difficulty in the United States of developing national air and water pollution standards attests, but a solid basis for action would at least be provided.

44. For details of this controversy see Rupp, *Die verfassungsrechtliche Seite des Umweltschutzes*, 1971 *Juristen-Zeitung* 401.