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EUROPEAN ENVIRONMENTAL LAW: BEFORE AND AFTER MAASTRICHT

EILEEN BARRINGTON*

SUMMARY

- I. INTRODUCTION
- II. BEFORE THE SINGLE EUROPEAN ACT
- III. THE SINGLE EUROPEAN ACT
- IV. THE TREATY OF MAASTRICHT
 - A. *Generally*
 - B. *Article 130R(1) of the Treaty of Maastricht*
 - C. *Article 130R(2) of the Treaty of Maastricht*
 - D. *Article 130R(4) of the Treaty of Rome*
 - E. *Article 130S(1) of the Treaty of Maastricht*
 - F. *Article 130S(3) of the Treaty of Maastricht*
 - G. *Article 130S(4) and (5) of the Treaty of Maastricht*
 - H. *Article 130T of the Treaty of Maastricht*
- V. CONCLUSION

I. INTRODUCTION

European Environmental Law has evolved significantly since the formation of the European Economic Community in 1957. The Treaty of Maastricht ("Treaty" or "Maastricht"),¹ which amends the Treaty of Rome and which entered into force on November 7, 1993, provides for even further developments. This article will examine the power and governing provisions of the European Community ("EC") with regard to Environmental Law both before and after Maastricht. Essentially, the development of European Environmental Law can be divided into three chronological segments:

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1. Treaty on European Union, Feb. 7, 1992, reprinted in Common Mkt. Rep. (CCH) 25,300 and 1 C.M.L.R.573 and 719 (1992). The Treaty is better known as the Maastricht Treaty, a reference to the town in which it was signed. For an introduction to the Maastricht Treaty, see Eileen Barrington, *Towards European Union: The Treaty of Maastricht*, 2 U.MIAMI Y.B. INT'L L. ** (1993)

from formation of the EC to the Single European Act ("SEA"), after the SEA but before Maastricht, and after Maastricht.

II. BEFORE THE SINGLE EUROPEAN ACT

There was no explicit legal basis for European Community ("EC" or "Community") action in the area of Environmental Law before the SEA entered into force in 1987. Many EC directives were nonetheless adopted by the European Commission before 1987, but their legal basis was sometimes contestable.

Generally, the Commission relied on Article 100 or on Article 235 of the Treaty of Rome of 1957.² Article 100 is the basic article relating to the harmonization of laws which have a direct effect on the functioning of the Common Market. Article 235 provides:

"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 Assembly, take the appropriate measures".³

The Commission has also invoked the declaration in the Preamble of the Treaty of Rome in order to justify its proposals in the area. In the Preamble, the signatories to the Treaty affirmed "as the essential objective of their efforts, the constant improvement of the living and working conditions of their peoples".⁴ The link was rather tenuous.

However, the European Court of Justice ("ECJ") had recognized the importance of the environment, at Community level, long before the SEA. This role was necessarily limited and could serve only to justify the otherwise protectionist actions of the Member States. This development was brought about by the important "Cassis de Dijon" decision,⁵ in which the Court of Justice decided that Member States had "mandatory requirements" which they could justifiably protect.⁶ Although protection of the environment

2. Treaty Establishing the European Community, March 25, 1957, 298 U.N.T.S. 11 [hereinafter EEC Treaty]. The EEC Treaty is commonly referred to as the Treaty of Rome.

3. EEC Treaty art. 235.

4. EEC Treaty Preamble.

5. Case 120/78, Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein, 1979 E.C.R. 649.

6. *Id.* at 662.

was not listed among the mandatory requirements specifically recognized in the case, the Commission later stated, in a Communication published to clarify the implications of the Cassis de Dijon judgement,⁷ that protection of the environment fell within the scope of such "mandatory requirements".⁸

The ECJ subsequently confirmed this interpretation in the "Used Oils"⁹ and the "Danish Bottles" cases.¹⁰ In these cases, the Court went so far as to state that the protection of the environment was "one of the Community's essential objectives."¹¹

III. THE SINGLE EUROPEAN ACT

Gradually, both the public and the politicians came to realize that the fundamental aim of achieving a single market would necessitate further spheres of competence for the Community. The environment transcends frontiers. Noxious industrial development in one country could pollute the atmosphere of another. The Member State in which the offending industry is situated may not concern itself about injury to citizens of the other Member States. Furthermore, any measures taken to protect the environment on a purely national level would distort competition and seriously impede the workings of a single market. The supranational mechanisms of the Community would clearly be useful here.

For these reasons, the SEA¹² introduced Title VII on the Environment,¹³ consisting of Articles 130R, 130S, and 130T, into the Treaty of Rome.¹⁴ Title VII essentially conferred competence on the Community to act in the area of the environment.¹⁵

7. Communication from the Commission concerning the consequences of the judgment given by the Court of Justice on 20 February 1979 in Case 102/78 ("Cassis de Dijon"), 1980 O.J. (C256) 2.

8. *Id.* at 2, 3.

9. Case 240/83, *Procureur de la République v. Association de défense des bruleurs d'huiles usagées*, 1985 E.C.R. 531.

10. Case 302/86. *Commission of the European Communities v. Kingdom of Denmark*, 1988 E.C.R. 4607.

11. Case 240/83 *Procureur de la République v. Association de défense des bruleurs d'huiles usagées*, 1985 E.C.R. 531 at 549; Case 302/86, *Commission of the European Communities v. Kingdom of Denmark*, 1988 E.C.R. 4607 at 4630.

12. Single European Act, 1987 O.J. (L169) 1.

13. Single European Act art. 25, 1987 O.J. (L169) at 11, adding Title VII to Part Three, "Policy of the Community," of the EEC Treaty.

14. *Id.*

15. *Id.*

Article 130R of Title VII sets out a list of the objectives for environmental "action by the Community."¹⁶ It specifies that such action should be preventive and also applies the principle that the polluter pays.¹⁷ Article 130S provides that in the area of Environmental Law, the Council shall decide by unanimous vote, and according to the procedure whereby it is merely obliged to consult the Parliament.¹⁸ Article 130T provides that Member States will not be prevented from maintaining or introducing more stringent protective measures.¹⁹

The SEA also added Article 100A to the Treaty.²⁰ Article 100A(1) provides that the Council, in adopting measures which have as their object the establishment and functioning of the internal market, shall decide by way of qualified majority and according to the co-operation procedure.²¹ Article 100A(3) specifies that the Commission, in its proposals which concern environmental protection, will take as a base a high level of protection.²²

In theory, therefore, the measures necessary for the completion of the internal market were to be based on Article 100A, while those whose aim was the preservation, protection and improvement of the environment were to be based on Article 130S. However, the distinction between these two provisions has been far from clear.

The significance of the distinction lies in the different voting and procedural requirements provided for by the two articles. If a certain measure were based on Article 100A, it would be adopted by the Council by *qualified majority* and according to the *co-operation procedure*, which confers greater power on the Parliament. If based on Article 130S, it would be adopted by *unanimous vote*, the Parliament having merely been *consulted*.

The dilemma inherent in the choice of legal basis was partly resolved by the "Titanium Dioxide" case.²³ In this case the ECJ set aside directive 89/1428 on waste from the titanium dioxide indus-

16. Single European Act art. 25, 1987 O.J. (L169) at 11, EEC Treaty art. 130R.

17. *Id.*

18. Single European Act art. 25, 1987 O.J. (L169) 12, EEC Treaty art. 130S.

19. Single European Act art. 25, 1987 O.J. (L169) 12, EEC Treaty art. 130T.

20. Single European Act art. 18, 1987 O.J. (L169) 8, EEC Treaty art. 100A. The article was integrated into Part Three, "Policy of the Community" under Title I, "Common Rules."

21. *Id.*

22. *Id.*

23. Case C 300/89, Commission of the European Communities v. Council of the European Communities, 1991 E.C.R. 2867.

try. The directive had been adopted by the Council with Article 130S as its legal basis (unanimity and consultation) whereas the Commission had proposed 100A (qualified majority and the co-operation procedure).

In its judgment, the Court drew up some guidelines to be used in deciding which article should be chosen as the legal basis for certain measures. The Court first held that the directive at issue concerned both the protection of the environment and the elimination of various national disparities which affected competition.²⁴ Therefore it was a measure which could have been adopted either on the basis of Article 100A or on the basis of Article 130S.

The Court went on to hold that these two provisions could not be applied cumulatively since each resulted in different procedures.²⁵ It thus held that, in this situation, Article 100A was the proper legal basis.²⁶ Its reasons were, first, that Article 130R(2) provides that environmental protection requirements shall be integrated as a component of the Community's other policies.²⁷ This means that a measure need not necessarily be based on Article 130S merely because one of its objectives is the protection of the environment. Second, provisions which concern the environment may also have an influence on competition between undertakings.²⁸ Therefore, a measure whose aim is the elimination of distortions of competition may contribute to the completion of the single market and as such it falls within Article 100A. Lastly, the Court held that Article 100A(3) obliges the Commission, in the area of environmental protection, to take as a base a high level of protection.²⁹

It is debatable whether the same reasoning will apply after Maastricht. Certainly, the Court will no longer be able to invoke its third reason, because it will no longer be able to rely on the existence of a requirement of a high level of protection in order to choose between the legal bases provided by Article 100A and Article 130R(2). The first argument will, however, be reinforced by Maastricht's innovations. The second argument, which is probably the strongest since it can encompass quite a variety of measures, will be unaffected.

24. *Id.* at paragraph 13.

25. *Id.* at paragraph 21.

26. *Id.* at paragraph 25.

27. *Id.* at paragraph 22.

28. *Id.* at paragraph 23.

29. *Id.* at paragraph 24.

Certainly the terms of the Treaty do not put an end to the debate on the appropriate legal basis for environmental action. As we will see, Maastricht does introduce qualified majority voting in certain areas where previously measures were adopted by unanimity. However, the exception to this rule is sufficiently broad to continue to give rise to conflict between, on the one hand, the Council and, on the other hand, the Commission and the Parliament.

The ECJ has previously proved itself to be an ardent supporter of the development of EC competence in certain areas and of the increase in EC power. It acts as a watch-dog in order to ensure that the role of the Parliament is not undermined by decisions on legal bases taken by the Council. On that basis, one may predict that even if the Court has lost one of its arguments which allows it to choose Article 100A rather than Article 130S as a legal basis, it may very well come up with others. The "Titanium Dioxide" case is the kind of "political" decision whereby the ECJ displays its commitment to the development of the Community.

IV. THE TREATY OF MAASTRICHT

A. *Generally*

The Treaty of Maastricht was signed on February 7, 1992³⁰, and it entered into force on November 1, 1993. Certain aspects of the Treaty, which received much media attention, are already well known, such as the provisions on Economic and Monetary Union, the creation of a European citizenship, and the establishment of a common foreign policy and security policy. The effects of Maastricht will be felt in other areas as well, including that of environmental protection.

Title II of the Treaty of Maastricht, among other things, redefines the tasks of the Community. Henceforth, protection of the environment is to be one of its basic principles.

"The Community shall have as its task, by establishing a common market and an economic monetary union and by implementing the common policies on activities referred to in Articles 3 and 3a, to promote throughout the Community a harmonious and bal-

30. George Brock, *Sober Suits set Seal on History*, THE (LONDON) TIMES, Saturday, February 8, 1992, Overseas News section; *European Community Treaty*, THE WASHINGTON POST, Saturday, February 8, 1992, page A17, Around the World Section; *EC signs Historic Pact*, THE CHICAGO TRIBUNE, Friday, February 7, 1992, page 1, News section.

anced development of economic activities, sustainable and non-inflationary growth respecting the environment. . . ."³¹

The referenced Article 3 now includes, as an activity of the Community, "a policy in the sphere of the environment."³²

The Treaty of Maastricht also amends Articles 130R, 130S and 130T of the Treaty of Rome.³³ There is no further mention of "action by the Community relating to the environment". Rather it is the Community's "policy on the environment"³⁴ which is referred to.

B. Article 130R(1) of the Treaty of Maastricht

Maastricht adds another objective to article 130R: "promoting measures at [an] international level to deal with regional or worldwide environmental problems."³⁵ This objective goes to show a raised consciousness regarding the internationalization of environmental problems and a strengthening of the Community's position at the global level.

C. Article 130R(2) of the Treaty of Maastricht

The Maastricht version of Article 130R(2) adopts the spirit of Article 100A(3) by providing that "[c]ommunity policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community."³⁶

Furthermore, it provides that "[e]nvironmental protection requirements must be integrated into the definition and implementation of other Community policies. . . ."³⁷ By contrast, the former language of the Treaty of Rome simply provided that "[e]nvironmental protection requirements shall be a component of the Community's other policies."³⁸

31. Treaty on European Union art. G(B)(2), proposed EEC Treaty art. 2.

32. Treaty On European Union art. G(B)(3), proposed EEC Treaty art. 3.

33. Treaty on European Union art. G(D)(38), proposed EEC Treaty arts. 130R, 130S, and 130T.

34. *Id.*

35. Treaty on European Union art. G(D)(38), proposed EEC Treaty art. 130R.

36. Treaty on European Union art. G(D)(38). proposed EEC Treaty art. 130R(2).

37. *Id.*

38. Single European Act art. 25, 1987 O.J. (L169) at 11, proposed EEC Treaty art. 130R(2).

Maastricht also provides that "harmonization measures. . . shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures for non-economic environmental reasons, subject to a Community inspection procedure."³⁹ It is difficult to know in advance what "non-economic environmental reasons" the Commission will accept without some guide-lines given by the case law of the ECJ or by a Communication of the Commission.

D. Article 130R(4) of the Treaty of Rome

Maastricht deletes Article 130R(4) from the Treaty of Rome. The latter provided that "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 the individual Member States."⁴⁰

Article 3B of the Treaty provides that

"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."⁴¹

The principle of subsidiarity is currently giving rise to heated debate in the Member States as to how exactly it should be interpreted and to what extent it restricts Community action.⁴²

Generally, one sees that the amendments introduced by Maastricht clarify the powers of the Community and extend its competence in the area of the environment. The new provisions ensure a greater integration of environmental considerations into the other areas of Community activity. However, one must admit that the amendments are not revolutionary, certainly less so than those introduced by the SEA.

39. Treaty on European Union art. G(D)(38), proposed EEC Treaty art. 130R(2).

40. Single European Act art. 25, 1987 O.J. (L169) at 12, proposed EEC Treaty art. 130R(4).

41. Treaty on European Union art. G(B)(6), proposed EEC Treaty art. 3B.

42. *How not to catch up*, THE ECONOMIST, January 9, 1993 at 19 (at 21 U.K. Edition); *Claymores at the Ready*, THE ECONOMIST, December 5, 1992 at 56 (at 52 U.K. Edition); *Zut Delors*, THE ECONOMIST, October 24, 1992 at 58 (at 50 U.K. Edition); *The European Community; the Road from Birmingham*, THE ECONOMIST, October 17, 1992 at 60 (at 50 U.K. Edition).

E. Article 130S(1) of the Treaty of Maastricht

It was hoped that the major innovation would be made in the amendment of Article 130S(1). The Dutch proposal for the Maastricht Treaty provided for the voting by qualified majority instead of by unanimity, as was provided for in the Treaty of Rome. In theory, this proposal was accepted.

The Maastricht version of Article 130S(1) provides that the Council shall act in accordance with the procedure referred to in Article 189C,⁴³ which means by qualified majority and according to the co-operation procedure.⁴⁴

Certain Member States, however, were opposed to the vote by qualified majority. Paragraph 2, therefore, provides for the inevitable compromise, a derogation from paragraph 1 stating that:

without prejudice to Article I00A, 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 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.⁴⁵

Clearly, the "measures" referred to cover a significant part of the environmental policy of the Community. Article 130S(2) goes on to provide that the Council may, also deciding unanimously, define the matters referred to in paragraph 1 on which decisions may be taken by qualified majority.⁴⁶ There is little doubt that the Commission's Directorate General in charge of the environment (DG XI) was very disappointed by this compromise.

F. Article 130S(3) of the Treaty of Maastricht

Article 130S(3) provides that, in areas other than those set out in Article 130S(2), the Council may adopt general action programs

43. Treaty on European Union art.G(D)(38), proposed EEC Treaty art. 130S(1).

44. Treaty on European Union art.G(E)(61), proposed EEC Treaty art. 189C. It may be noted that proposed art. 189C is worded exactly as the present EEC Treaty art. 149(2).

45. Treaty on European Union art. G(D)(38), proposed EEC Treaty art. 130S(2).

46. *Id.*

setting out priority objectives to be attained.⁴⁷ These programs are to be adopted in accordance with the procedure referred to in Article 189B:⁴⁸ qualified majority and the new “co-decision procedure.”⁴⁹

G. Article 130S(4) and (5) of the Treaty of Maastricht

Maastricht Article 130S(4) provides that “without prejudice to certain measures of a Community nature, the Member States shall finance and implement the environmental policy.”⁵⁰ This proposition was formerly located in Article 130R(4) of the Treaty of Rome.⁵¹

Article 130S(5) of Maastricht, however, adds a new provision which lessens the burden on the Member States and which states that:

“If a measure based on the provisions of paragraph 1 involves costs deemed disproportionate for the public authorities of a Member State, the Council shall, in the act adopting that 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. . . .”⁵²

The creation of The Cohesion Fund is provided for by Article 130D of the Maastricht Treaty.⁵³ Its aim is to “provide a financial contribution to projects in the fields of environment and trans-European networks in the area of transport infrastructure.”⁵⁴

In the Protocol to the Treaty of Maastricht on Economic and Social Cohesion the Member States agree that the Cohesion Fund will provide financial contributions to projects in Member States with a per capita GNP of less than 90% of the Community average which have a programme leading to the fulfillment of the condi-

47. Treaty on European Union art. G(D)(38), proposed EEC Treaty art. 130S(3).

48. *Id.*

49. Treaty on European Union art. G(E)(61), proposed EEC Treaty art.189B.

50. Treaty on European Union art. G(D)(38), proposed EEC Treaty art. 130S(4).

51. Single European Act art. 25, 1987 O.J. (L169) at 12, proposed EEC Treaty art. 130R(4).

52. Treaty on European Union art. G(D)(38), proposed EEC Treaty art. 130S(5).

53. *Id.*

54. Treaty on European Union art. G(D)(38), proposed EEC Treaty art. 130D.

tions of economic convergence⁵⁵ (basically, Spain, Ireland, Greece and Portugal).

H. Article 130T of the Treaty of Maastricht

The principle of Article 130T of the Treaty of Rome remains unchanged in the Maastricht version. The article provides that "the protective measures adopted pursuant to Article 130S shall not prevent any Member State from maintaining or introducing more stringent protective measures."⁵⁶ Maastricht, however, reinforces the centralizing power of the Commission in this area by adding a new obligation, that the Member States notify the Commission of such measures.⁵⁷

V. CONCLUSION

M. Carlo Ripa di Meana, the European Commissioner for the Environment at the time of signature of the Treaty of Maastricht, was perhaps a bit harsh when he described the articles which dealt with the environment as "an empty shell." He was obviously expressing the Commission's disappointment.

Nonetheless, one must bear in mind what the benefits of Maastricht will be. Admittedly, not all the measures relating to environmental matters will be adopted by way of a qualified majority, consequently giving rise to conflict about the appropriate legal bases, and to delay, while political negotiations are conducted. The Community will, however, have an "environmental policy" which must be taken into account when all the other policies are being drawn up and put into action. The Member States have, if not quite leaped forward, certainly taken a step in the right direction:

55. Treaty on European Union Protocol on economic and social cohesion.

56. Treaty on European Union art. G(D)(38), proposed EEC Treaty art. 130T.

57. *Id.*