

INTERNATIONAL ENVIRONMENTAL LAW

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International organisations and environmental law

International environmental protection, though largely developed in the last decades, confronts two major problems: the feebleness of international law considering its enforcement, and the need for economic development in many countries. International environmental law is at a very early stage of development and has evolved at a time when the heterogeneity of the international community has rapidly intensified and when economic problems have correspondingly increased and the needs and aspirations of the poorer states have become urgent.

The traditional sources of international law are international treaties and customs. However, other texts, such as UN General Assembly resolutions or Declarations, which, in principle, have no binding effect, could be considered at least as guidelines towards a rational interpretation of international environmental law. Treaties must be ratified by states in order to bind them legally.

Custom is a common practice, rarely put into a concrete text, supported by the conviction of the interested that it is motivated by a sense of legal obligation, not merely a comity. Yet, regarding the environment, it is difficult to discover such a world-wide conduct, in a globe of more than 200 different states, of diverse cultures, policies and legal systems. However, some customary rules were embodied in treaties. UN General Assembly Resolutions and Declarations have not, in principle, a binding effect. Nevertheless, some strongly support that unanimous resolutions, accompanied by a conform subsequent conduct by the signatory states constitute, at least, a customary rule of law.

The most important international organisation is the United Nations. Its purpose is quite broad, because it covers pledges to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian nature and in promoting and encouraging respect for human rights and for fundamental freedoms for all, and to be a centre for harmonising the action of nations in the attainment of these common ends. According to the Charter, all nations are equally sovereign and must fulfil their obligations in good faith. The UN has seven main instruments charged with categorising and developing international law: the General Assembly, which includes all member states, the Security Council (SC), the Economic and Social Council (ECOSOC), the Trusteeship Council, the Secretariat, the International Court of Justice and the International Law Commission (ILC). Decisions within the UN General Assembly are taken by majority vote. The SC can only decide if there is a positive vote of nine of its fifteen members, the five permanent members having the power of a veto. The UN, in principle, cannot oblige member states to obey international treaties they have not ratified. Yet, in some extreme cases of violation of international principles and state rights, the UN can use armed powers to impose its will. This is not the case for environmental regulations, though, as they do not have the authority required to be enforced in such a way, compared to rules such as liberty of nations and human life.

Although the UN had considered the environment before the Stockholm Conference on Human Environment (UNCHE) in 1972, it was this conference which established the major elements of the UN environmental programme: an Environmental Fund created by voluntary contributions by the states, the UN Environmental Programme (UNEP), consisting of a Governing Council, a Secretariat, and the Declaration of twenty-six principles on the human environment.

As for the UNEP, it was established by the UNCHE in order to act as focal point for environmental action and co-ordination with the UN system, to promote international co-operation in the field of the environment and to recommend, as appropriate, policies to this end and to provide general policy guidance for the direction and co-ordination of environmental programmes within the UN system.

The UNEP was to serve as a catalyst in developing and co-ordinating an environmental focus in the programmes of other organisations, rather than initiating or mandating environmental programmes on its own account. It has no supranational powers; it does not even have the independent status of the specialised agencies, each of which has its own constituent treaty and enabling powers. The UNEP has played, though, a very important role in taking important initiatives, in co-ordinating various international and national organisations and in rationalising the formulation of international environmental law.

The Declaration of the United Nations Conference on the Human Environment contains twenty-six rules and its fundamental principle is that "Man has a fundamental right to freedom, quality and adequate conditions of life, in an environment of quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations." The other rules of the Declaration refer to natural resources (Principle 2), and pollution (Principles 6 and 8).

There are additional UN agencies relevant to the development of environmental law: the International Maritime Organisation (IMO), the International Labour Organisation (ILO), the

Food and Agriculture Organisation (FAO), the United Nations Educational, Scientific and Cultural Organisation (UNESCO), the International Oceanographic Commission (IOC), the World Health Organisation (WHO), the World Meteorological Organisation (WMO), the International Bank for Reconstruction and Development (IBRD), the International Monetary Fund (IMF) and the International Atomic Energy Agency (IAEA).

As for other international bodies, the European Union has a very weighty part in the formulation of environmental law, and the Council of Europe has modelled proposals of environmental regulations. The Organisation for Economic Co-operation and Development (OECD) and the North Atlantic Treaty Organisation (NATO) also have their environmental departments and rules. International organisations have no authority to produce and impose international law and are only a part of the law-making process. Their most obvious key role is that they provide a permanent forum in which state members can engage in a continuous negotiating process to arrive at the compromises necessary to propel the law forward, in situations of different legal, cultural and religious systems and values.

Principles of international environmental law

The rights and obligations of states pertaining to the protection of the environment constitute the essence of international law, since its rules are *letterae mortae* if they have no power to impose their respect or to be enforced. Certain rules imposing the respect of environmental protection regulations are included in UNEP principles, in the UN Convention on the Law of the Sea (UNCLOS), and in the projects of bodies such as the International Law Commission (ILC), the International Law Association (ILA), the World Commission on Environment and Development (WCED) and in the UN's Conference on Environment and Development (UNCED) Rio Declaration. The main principles of international environmental law include:

Duty to prevent, reduce and control environmental harm

According to this customary principle, the states are required by international law to take adequate steps to control and regulate sources of serious global environmental pollution or transboundary harm, within their territory or subject to their jurisdiction. Principle 21 of the 1972 Stockholm Declaration on the Human Environment imposes to states the obligation to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or to areas beyond the limits of national jurisdiction.

Transboundary co-operation in cases of environmental risk

This principle expects from states to co-operate with each other in mitigating transboundary environmental risks.

"Polluter Pays" principle

The OECD's definition of this principle is that the polluter should bear the expenses of carrying out measures decided by public authorities to ensure that the environment is at an "acceptable state," or, in other words, that the cost of these measures should be reflected in the cost of goods and services, which cause pollution in production and/or in consumption. According to eminent commentators, the "Polluter Pays" principle is essentially a principle of economic policy and its primary object is economic, not environmental, that is the restitution of costs of pollution.

Principles of equal access and non-discrimination

The principle of non-discrimination obliges the states to give equivalent treatment to the domestic and transboundary effects of pollution and requires that polluters causing transfrontier pollution should be subject to standards no less severe than would apply to pollution with domestic effects only.

Principles of sovereignty over natural resources

- *One state sovereignty:* The principle of permanent sovereignty over natural resources dictates that natural resources are allocated to sovereign states according to the boundaries established to delimit their respective land territory and territorial seas. The UN General Assembly, in Article 1 and 2 of the Charter of Economic Rights and Duties of States, affirmed this principle as follows: "Every state has the sovereign and inalienable right to chose its economic system, as well as its political, social and cultural systems in accordance with the will of its people, without outside interference, coercion or threat in any form whatsoever." It also declared, expressly, that "every state has and shall freely exercise full permanent sovereignty, including possession, use and disposal, over all its natural resources."
- *Shared natural resources:* As for the shared natural resources, that is the resources which do not fall wholly within the exclusive control of one state,19 Article 3 of the Charter of Economic Rights and Duties of States decrees that: "in the exploitation of natural resources shared by two or more countries each state must co-operate on the basis of a system of information and prior consultation in order to achieve maximum use of such resources without causing damage to the legitimate interests of others."
- *Common property and the "reasonable use" principle:* Common property, in international law, refers primarily to areas beyond national jurisdiction, of which the high seas and superjacent airspace are the most important examples. The principle of international law is that these common spaces are open for legitimate and reasonable use by all states, and may not be appropriated to the exclusive sovereignty of one state. Thus, for example, according to an ICJ decision, all states that fish in the high seas must make a rational use of their fishing capacities in order to preserve the natural resources of the sea for other states.

- *Equity and equitable utilisation*: The concept of "equity" is fundamental in law. However, pertaining to its use in international environmental law – and, in particular, in the use of shared natural resources or common property – its contents are not clear. The "equitable" utilisation of resources entails a balancing of interests and taking into account of all relevant factors. What these factors are and how they can be balanced depends entirely on the context of each case.

Pollution of international watercourses

The law governing the pollution of international watercourses constitutes an example of the application of the "equitable use" principle. The term "international watercourse" means the rivers, the lakes or groundwater sources which are occupied by two or more different states. As for the principles ruling the use of the international watercourses, three theories were proposed: territorial sovereignty, territorial integrity, equitable utilisation and common management.

1. *Territorial sovereignty*: According to the first doctrine, territorial sovereignty means that one state enjoys absolute dominion over water within its territory, including extracting as much as necessary, or altering its quality, regardless of the effect this has on the use or supply of water in downstream or contiguous states. Yet this theory finds little support amongst modern lawyers.
2. *Territorial integrity*: The opposed theory to the previous one is the "territorial integrity" doctrine, according to which the lower riparian state has a full right to a complete flow of water of natural quality and can thus prevent the upstream state from interfering with the flow of water. There is quite insignificant support of this theory.
3. *Equitable utilisation*: The most approved theory is the "equitable utilisation" doctrine which considers that international watercourses are shared resources and consequently must be equitably used by all interested states. According to this theory, any use of an international watercourse affecting other states does not require their consent, but the sovereignty of a state over rivers within its borders is qualified by a recognition of the equal and correlative rights of other states. This view has been the favourite of states, and dispute settlements in North America and India have been dominated by it. As for the balance between pollution and use of waters, this latter, provoked by one watercourse state, could exist in the watercourse in a proportion not excessively harmful for the other states: the ILC explained that an equitable use by one state could cause "appreciable" or "significant" harm to another state using the same watercourse, yet not entail a legal injury, or be otherwise wrongful. The ILC proposed to include equitable utilisation of watercourses as a principle of international law. According to the 1987 ILC Report to the UN General Assembly, some factors pertaining to the determination of equitable use of international watercourses can be taken into account. These contain: (a) geographic, hydrographic, hydrological, climatic, ecological and other factors of a natural character; (b) the social and economic needs of the watercourse states concerned; (c) the effects of the use of the watercourse in one watercourse state on other watercourse states; (d) existing and potential uses of the international watercourse; (e) conservation, protection, development and economy of use of the water resources of the watercourse, and the costs of measures taken to that effect; (f) the availability of alternatives, of corresponding value, to a particular planned or existing use.

The theory of common management needs a community of interests, planning and action of all the watercourse states in order to achieve integrated development of the international watercourse. This doctrine includes the "equitable use" principle, nevertheless it goes beyond it and institutes a "positive" behaviour in managing the watercourse. It demands from states not only to compromise certain plans of exploitation of the watercourse, but also to permanently co-operate in administering their common resource, e.g. by international specialised institutions. Examples of such arrangements are, amongst others, the Permanent and Technical Commission for Nile Waters, the River Niger Commission, the Danube Commission, etc. The ILC understanding that the common management theory must become a principle of international law, indicated, in 1984, some of the functions these institutions ought to have:

- collect, verify and disseminate information and data concerning utilisation, protection and conservation of the international watercourse
- propose and institute investigations and research concerning utilisation, protection and control
- monitor the international watercourse on a permanent basis
- recommend to the watercourse states measures and procedures for the optimal utilisation and the effective protection and control of the watercourse
- serve as a forum for consultations, negotiations and other procedures for peaceful settlement entrusted to such commissions by watercourse states
- propose and operate control and warning systems with regard to pollution and other environmental effects of water uses, which may cause damage to the rights or interests of watercourse states

Finally, the principle of transboundary co-operation in cases where the use of international watercourse may cause damage to the environment, is imposed by international legal texts. According to this rule, states are entitled to prior notice, consultation and negotiation in case of danger to the environment by the use of a shared resource.

Marine pollution

The main legal text imposing rules on marine pollution is the 1982 UNCLOS. Its primary aim is to establish a legal order for the seas and oceans which will facilitate international communication and will promote the peaceful uses of the seas and oceans, the equitable and efficient utilisation of their resources, the conservation of their living resources, and the study, protection and preservation of the marine environment.

The UNCLOS and other international treaties impose to the states the duty to protect the marine environment and specify this obligation by asking the states to take all measures necessary to prevent and control pollution damage to other states.

There are also regional seas (such as the Baltic sea, the Mediterranean, the North Atlantic, the Arabian Gulf etc.) treaties which treat the protection of marine environment and impose rules to the signatory states.

Many international agreements provide also common standards for states that have under their flags vessels likely to pollute the seas, in particular pertaining to the safety of shipping and the protection of the environment.

The transboundary co-operation principle also applies here, as the UNCLOS indicates that once they are aware of imminent or actual pollution of the sea, states must give immediate notification to others likely to be affected. Moreover, the "Polluter Pays" principle is in use in the law of the sea.

International control of hazardous waste

The London Dumping Convention, the Basel Convention on the Control of Transboundary Movements on Hazardous Waste and some regional agreements contain the same principles and impose a common policy on the matter: "This policy combines an increasingly strong preference for elimination, or disposal at source, of toxic, persistent or bio-accumulative waste wherever possible, with, in other cases, a regime of regulation, monitoring, prior environmental impact assessment, or prior consent designed to minimise the risks of disposal and provide for the protection of other states and the environment of common spaces." Other principles, less stringent are contained in the 1982 UNCLOS.

Nuclear energy

The IAEA is the main agency responsible for pronouncing safety measures against possible nuclear pollution. Its Statute and Health and Safety documents refer to standards, regulations, rules or codes of practice established to protect man and the environment against ionising radiation and to minimise danger to life and property.

Euratom, the European Community of Nuclear Energy, to which belong all member states of the EU, also set standards concerning nuclear safety that EU members must respect.

The Nuclear Test Ban Treaty (NTBT) is a legal text prohibiting nuclear tests in the atmosphere, at sea, in outer space, in Antarctica or in any circumstances that radioactivity exceeds the frontiers of the testing state.

Regarding pollution by nuclear energy, all principles of international law apply. Moreover, the liability of the polluting state is absolute, meaning that – contrary to the normal civil liability where the polluter does not bear any responsibility if he can prove that he respected all safety standards and that, therefore, the pollution was hazardous – the state has to pay damages regardless of respecting – or not – safety measures, or of the type of the hazardous accident.

Atmosphere

The main international issue concerning air pollution is the harm to the ozone layer. The air where the ozone lays is not considered a "common property." The UN General Assembly went beyond that and stated that global climate change "is the common concern of mankind." The status of "common concern," indicates the common legal interest of all states in protecting the global atmosphere, whether directly injured or not, and in enforcing rules concerning its protection. The 1985 Vienna Convention for the Protection of the Ozone Layer obliges states to take "appropriate measures," including the elaboration of legislation and administrative controls, in order to protect human life and the environment from activities that can modify the ozone layer.

The air pollution which is produced in one state but affects others, is regulated by the 1979 Geneva Convention on Long-Range Transboundary Pollution. The parties to this treaty undertook to develop the best policies and control measure to gradually reduce and prevent air pollution, as far as possible. The 1987 Montreal Protocol, which accompanies the Convention, sets specific standards and prohibits the use of certain substances that can harm the ozone layer.

The Climate Change Convention, finally, calls for measures which will safeguard the earth from climatic phenomena, provoked by human activities, which could alter the appearance of the globe and imperil the life of humans, animals and plants.

Wild fauna and flora

We have referred, previously, to the concept of "natural resources." This term includes both living and non-living resources. Living resources are distinguished from non-living ones by the fact that they are renewable if conserved and destructible if not. They comprise plants, animals, micro-organisms and the non-living elements of the environment on which they depend.

Many international organisations have had activities aiming at the protection and conservation of living resources, but there is no system of complete and universal cover of the matter. The 1972 UNCHE, in Principle 4, imposes man's responsibility to safeguard the heritage of wildlife and its habitat and to improve it. Many treaties amplify the UNCHE principles regarding wildlife: the World Conservation Strategy (WCS), the World Charter for Nature, and the recommendations of the World Commission on Environment and Development (WCED). Yet, no international convention considers the protection of the entirety of wildlife. Specialised treaties protect a single species, such as polar bears, or vicuna, or a group of species, such as

whales, migratory birds, and seals. Regional and bilateral agreements also exist. The principal method used in these conventions is the listing of species and of the locations where these species live and which states must protect and preserve. Some legal texts create, also, wildlife parks and reserves where the endangered animals can live unharmed. The Convention on Trade in Endangered Species (CITES) imposes an international permit system in exporting and importing wild animals that are threatened by extinction. The Convention on Biodiversity recognises the need to protect the widest possible pool of wild genes, since all cultivated plant or domestic animals originate from wild species.

In the present state of international environmental law, treaties cover most of the issues pertaining to the protection of the environment, and international organisations, such as the UNEP constitute an important forum for negotiation between states and for formulating law. Though the evolution in this field has been enormous since the 1972 UNCE, one can agree with the critics that remark that international environmental law remains preponderantly "soft" in character, unsystematic and insufficiently comprehensive in scope.

Legislative competence in environmental matters in the EU

Contrary to international law that is frequently impotent in its enforcement and addressed to various numbers of states, according to their participation in a treaty, European Union law resembles a national legal system. Rules pertaining to the protection of the environment are strictly applied to all EU member states.

The Paired Competence Rule

This rule defines that in certain fields of activities (mostly economic) both the EU institutions and the member states have the power to legislate and enforce law. Although EU competence prevails in case of conflict with member state legislation, there is room for national rules to exist in certain cases. The institutions and legal mechanisms of the EU differ from classic national institutions and laws. The main legislative and decision-making power within the Union is in the hands of the Council (of Member State Ministers), which is the most powerful EU institution. Amongst the other three institutions, the European Commission possesses certain legislative capabilities, but remains mainly the institution which elaborates and proposes legal acts; it is the initiator and co-ordinator of EU policy. Moreover, the Commission, either alone or with the President of the Council, represents the Union in international negotiations with third states (concerning also environmental matters).

The European Parliament has chiefly an advisory, supervisory and, to a certain extent, a deliberative role. The Court of Justice is an institution composed of judges, who have the power to annul measures taken by the Council, the Commission or the member states, and which are incompatible with the Treaties. The Commission, the member states, as well as individuals, can appeal for the Court's protection, when their rights under the Treaties are imperilled. This applies, also, for measures hostile to the environment which, obviously, oppose the rule of the Treaties.

The EU legislative measures fall under three categories:

- Regulations are legal texts that have a uniform, direct and unconditional effect on the legal systems of member states; they are enforced plainly and immediately.
- Directives are enactments that have to be implemented by the institutions of member states within their territory in a fixed time-limit. In case of a conflict between a Regulation and a Directive, the Regulation prevails.
- Decisions bind only the states or persons to whom they are addressed. In case of conflict between a Regulation and a Decision, the Regulation prevails.

European Union competence

Principles

The European rules are uniformly applied to all the Member States of the Union. Yet, the legislative sovereignty of the Union, contrary to the unlimited ruling power of an autonomous state, is restricted to domains of activities.

According to the Treaties of Rome and Paris, the domain of the European Communities' legislative authority encompasses, in principle, the economic activities of the Community (predecessor of the Union), which constituted a *sui generis* international organisation, competent for the management of economic life. Notwithstanding the fact that the environment is endangered primarily, if not solely, by the effects of modern economy, it did not officially constitute such a sector of regulatory activity until 1986. As a matter of fact, a political agreement, concluded in the outskirts of the European Community institutions, inaugurated the Community engagement in environmental matters. The declaration of the leaders of the member states, dated 20 October 1972, acknowledged the necessity to improve the quality of life and to bestow a particular attention to the protection of the environment. This is how the programs of environmental protection were adopted and specific rules were enforced.

Yet, it was in 1986 that environmental protection acquired the rank of a main Community aim. That year, the Unified European Act, and later, in 1992, the European Union Convention, defined clearly the objectives of the Union in environmental subjects. Article 130R paragraph 1 of the EEC Treaty states that action by the Community relating to the environment shall

have the following objectives: (a) preserve, protect and improve the quality of the environment; (b) contribute towards protecting human health; (c) answer a prudent and rational utilisation of natural resources.

The same article maintains the Polluter Pays principle, introduced by the Council Recommendation 75/436/Euratom, and the Prevention principle. Moreover, respecting the most recent evolution, the Treaty imposes also the Precaution principle. In any case, it is asserted that the environmental policy of the union must aim at a high level of protection and that every other European policy ought to take into consideration the need for the conservation of the environment.

Methods

The third paragraph of Article 130R delineates the methods of relevant Community action: to take into consideration the available scientific and technical data, as well as the specific conditions of different European regions, the advantages and disadvantages of economic and social planning and development.

The procedure within the EU institutions is a complicated one. The Council of Ministers decides on a majority basis whether a protective measure must be adopted. Exceptionally, if tax and development measures are to be voted for, or if the planned action affects, considerably, the choice of a member state amongst specific energy sources, the decision must be unanimous. The legal text containing these resolutions may be a Regulation or a Directive.

Environmental protection also appears in another Article of the Treaty. Article 100A, regarding the internal market regulations, proclaims that a high level of environmental protection must be the basis for the Commission's legislative proposals to the Council. The Council decides on a majority basis the transformation of the proposal into a Directive. Protective measures can be enforced more easily via Article 100A than Article 130, but only as Directives and not as Regulations.

In practice, Community instruments pertaining to the protection of the environment are based on the provisions of Article 130 S. On an institutional basis, one must mention the European Environment Agency, created by Council Regulation no 1210/90.⁴³ Still, this establishment, which is a legal entity and has a Board of Directors, a scientific Committee and an Executive Director, does not actually have any judicial power; it must essentially collect information on the quality of environment and the coercion this latter suffers from various sources. This information ought to be the EU guideline on environmental matters.

Member state competence

The "More Stringent Protection" rule

Like other European policies, the protection of the environment is not the exclusive competence of the Union. The Treaty, in its Article 130R paragraph 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."

Thus, European legislation constitutes the "minimal obligatory protection" for the environment. Where the Union has adopted a measure, a member state remains competent to maintain more stringent protective measures compatible with this Treaty (Article 130T). A similar clause exists in the provisions of Article 100A. A member state may maintain a national environmental measure which provides a more important level of protection than the corresponding Community harmonisation measure. Here, the objective of environmental protection is considered to be of such importance that it allows the member state to "opt out" of the internal market rule. Nevertheless, the national measure must not constitute an arbitrary discrimination or a disguised restriction on trade. The system of shared competence for environmental protection, set up under the Treaty, aims at optimising protection, an aim underlying several environmental provisions in the EEC Treaty. It leads to the consequence that the environment, under the system of the EEC Treaty, must not remain unprotected. Where the Community does not protect it, it must not prevent member states from doing so.

The conflict between environmental protection and free market rules

The legislative faculty of the EU states may confront two fundamental rules of the Union: First, the fundamental Article 30 of the Treaty, which prohibits quantitative restrictions that restrict the free circulation of goods in the internal market. Second, the antitrust rules (Article 85, 86 and 90) which imposes the free competition of private undertakings within the Union. Thus, for example, member state legislation that prohibits the access of goods in the country, due to their hostility to the environment, contradicts the rule of Article 30. The same conflict arises when enterprises form a cartel to produce "green" goods, with the consequence of altering competition between them. As for the first issue, Article 36 of the Treaty provides that Articles 30-34 (prohibiting restrictions to free trade) shall not preclude prohibitions or restrictions, justified on grounds of [...] the protection of health and life of humans, animals or plants [...].

Therefore, the Treaty allows certain trade restrictions, though it enumerates the justifications for any restraint of that kind. The European Court has interpreted Article 36 in favour of the free trade rule, considering, particularly, that the collection of grounds upon which a restriction is legal is exhaustive and, therefore, no other protection reasons can be added. Hence, an issue is raised, since it is obvious that numerous member state measures, which aim at the protection of the environment cannot be considered as protecting the health and life of

humans, animals or plants. Such measures include environmental taxes, environmental labelling, waste prevention measures, measures to assess environmental impact and measures on environmental liability.

Yet, the European Court, in its famous "Cassis de Dijon" decision, expanded the field of reasons justifying trade restrictions by national legislation. It declared that, if no Community legislation is regulating a matter, a member state restriction to the free circulation of goods is legal, provided that it is both applicable, without distinction, to national and other member state goods and excused by mandatory requirements. Such mandatory requirements, as referred to by the Court, can be fiscal controls, fair trading practices and consumer protection, as well as additional ones, not mentioned explicitly in the decision.

Thus, following the most rational consideration, after the 1986 and 1992 amendments of the Treaty, the protection of the environment became a fundamental EU objective and, as such, cannot retreat before other objectives, i.e., free trade. Consequently, in the absence of Community rules, it is the member states which decide which degree of protection they want to have for the environment (inside or outside of their national borders), granted that the environmental measures does not create an arbitrary discrimination or a disguised restriction on trade, signifying unjustified favour to national products and simultaneous bans to imported ones. The mention to individual member state regulation pertaining to environmental protection is not an issue here. Yet, it is important to note that there are differences in the EU countries' legal systems, related to the legal form and the level of legal sensibility concerning the protection of the environment. For example, few member states comprise in their Constitutions regulations pertaining to environmental matters.

Acts and Regulations

The European Union legal texts concerning the environment and energy can be distinguished in two categories: the first contains acts directly regulating matters pertaining to environmental management and protection, hence imposing obligatory rules of conduct to member states and citizens; the second consists of regulations concerning various issues (especially energy sources and use) including provisions which aim at managing these issues under an environment-friendly mode of thought. These regulations are included mostly in the energy policy, which shall also be examined.

Environmental Policy

General environmental policy

There are legal texts that characterise the basic environmental policy of the Union. These acts impose principles and sets forth procedures and organisational rules in the field of environmental policy. We have already mentioned the European Environmental Agency and we shall now make reference to the general environmental measures which colour the European line in the field.

Environmental information

In June 1990, a Directive which establishes the freedom of access to environmental information was adopted. This enactment, which bestows more transparency to administrative conduct, provides that anyone shall have the right of access to information about the environment which is in the possession of a public authority. This right may be restricted, however, in order to prevent the disclosure of business secrets.

Environmental effects – Eco-audits

In 1993, the Regulation EEC/93/1836 – Eco-management and Audit Scheme (EMAS) was adopted as an environmental management and auditing scheme for European industry. The Regulation contains a method for the evaluation and the improvement of the environmental performance of industrial activities. This "eco-management and audit scheme" also provides for the information of citizens on the results of the audits accomplished. According to this principle, the achievements should be constantly improved by the economically viable use of the best technologies available.

Eco-label

The Council establishes a European system of "eco-labelling" and provides for a European ecological label (a flower made up of 12 stars and an "E" for Europe) which can be affixed to products meeting certain environmental standards. The Council Regulation EEC/92/880 Eco-label Award Scheme is interested in the total impact of the product, from production through distribution, use or consumption and disposal. A product will only be permitted to bear the label, if it is substantially less damaging to the environment than similar products. This label is awarded on the basis of detailed ecological criteria adopted for each product category, including the raw materials used, the means of production, the size and packaging of the product, and its disposal.

Environmental liability

The Council Recommendation 75/436 Euratom, ECSC, EEC have imposed on the EU legal system the international "Polluter Pays" principle.

Integrated pollution prevention and control

In addition to Council Directive 85/337/EEC – Environmental Impact Assessment, the new Directive (Proposal for a Council Directive 93/C 311/06 – Integrated pollution prevention and control) on integrated pollution control imposes, on all installations, to meet the appropriate standards for emissions based on the best available technology.

International environmental law and the EU

The EU is increasingly participating in international environmental measures and action. It has signed the Basel Convention on the transborder movement of hazardous waste, and has participated in the 1992 Rio and 1997 Kyoto UN Conferences, at which a number of conventions and programmes were adopted.

Council Regulation EEC/92/1973 – Financial Instrument for Environment (LIFE)

The EU has in its arsenal an institution responsible for financing various environmental programmes and regulating the funds: the Financial Instrument for Environment (LIFE), established by the Council Regulation EEC/92/1973.

Air

- Council Directive 70/220/EEC – Emissions from motor vehicles
- Council Directive 82/884/EEC – Lead in air
- Council Directive 84/360/EEC – Industrial plants
- Council Directive 89/369/EEC – New municipal waste incinerators
- Council Decision 93/389/EEC – Monitoring mechanism of Community CO₂ and other greenhouse gas emissions
- Proposal for a Council Directive 94/C 216/04 – Ambient air quality assessment and management

European legislation on air pollution takes, in principle, three regulatory approaches: i) the setting of air quality objectives, ii) source-oriented legislation concerning automotive emissions and emissions from stationary sources and iii) legislation concerning specific substances.

In order to combat the greenhouse effect, the Council has voted austere rules in order to accelerate the elimination of substances hostile to the ozone layer and to establish harmonising measures for monitoring, exchange of information and warning of the population if certain thresholds of ozone concentration are exceeded. With regard to CO₂ emissions, the Council decided in 1990 to stabilise CO₂ emissions by the year 2000 at 1990 levels. The EU strategy to limit carbon dioxide emissions and to improve energy efficiency includes a tax on such emissions and on energy use.

EC legislation also provides for air quality measures. Directive 80/779 on limit values for sulphur dioxide and suspended particulates, fixes mandatory ambient air quality standards and stricter, non-binding, guide values for sulphur dioxide and suspended particulates in the atmosphere. The Directive specifies measurement methods and establishes three types of zones in which air quality standards may differ from the general standards.

Pollution by motor vehicles

The 1970 Directive on air pollution by motor vehicles, as amended, lays down emission standards for carbon monoxide, hydrocarbons and nitrogen oxides together with specific testing methods.

Pollution from industrial plants

The 1984 Directive on combating air pollution from industrial plants, named "Framework Directive," has, as its purpose, the reduction and prevention of air pollution from industrial plants, particularly in the following sectors: i) energy industry, ii) production and processing of metals, iii) manufacturing of non-metallic mineral products, iv) chemical industry, v) waste disposal and vi) major pulp paper manufacturers. The Large Combustion Plants Directive obliges member states to establish programmes for the reduction of sulphur dioxide and nitrogen dioxide up to the year 2003.

Specific substances

Further Directives provide for the gradual reduction and, ultimately, elimination of lead in petrol, together with the establishment of a distribution system of unleaded petrol as well as for limiting values of lead in the air. The 1987 Directive on the prevention and reduction of environmental pollution by asbestos obliges the member states to take the necessary measures to prevent asbestos emissions into the air, asbestos discharges into the aquatic environment and solid asbestos waste, as far as reasonably practicable. A 1993 Directive establishes limit values for sulphur contents in gas oils. Another 1993 Directive provides for the control of organic volatile compounds in petrol. The Directive establishes a broad range of measures concerning terminal storage facilities, loading and unloading of mobile reservoirs, etc., with the aim of reducing the environmental effects caused by evaporation, occurring at all stages of the process of storage and distribution of petrol.

Water

- Council Directive 75/440/EEC – Drinking water
- Council Directive 76/160/EEC – Quality of bathing water
- Council Directive 76/464/EEC – Dangerous substance discharges
- Council Directive 80/68/EEC – Protection of groundwater against pollution
- Proposal for a Council Directive 94/C 222/06 – Ecological quality of water

The protection of water against pollution constitutes a domain of primary legislative development. One can distinguish three categories of rules: i) water quality standards, ii) effluent standards for dangerous substances and specific products and iii) prevention of marine pollution. Manifold directives have been adopted, establishing a system of water quality objectives and standards for certain types of surface waters classified according to their use: i) drinking water, ii) bathing water, iii) water for harvesting fish and shellfish.

Depending upon this classification, the Directives establish maximum allowable concentration (MAC) and guide levels (GL). In order to ensure quality control measures, the Directives set forth methods of measuring and determining the frequency of sampling and analysis. The Council has already adopted several Directives which establish quality standards for surface waters, the most important of which is Directive 75/440. It establishes three classes of standards for surface water intended for drinking water, as well as stricter quality goals and methods for water treatment. A Council Recommendation advises that the Directive should also be used concerning drinking water from groundwater as well. Thus, surface water (and/or groundwater), which does not conform to the least stringent of the mandatory standards, may not be used as drinking water.

Directive 76/160 intends to reduce the pollution of bathing water and to protect it against further deterioration. It applies to all fresh, running and sea water which is designated for bathing use. The Directive establishes harsher mandatory quality standards and guidelines and leaves the designation of bathing areas to the discretion of member states.

Hazardous substances and definite products

Directive 76/464 concerns the pollution caused by certain dangerous substances discharged into the aquatic environment of the Union. The aim of the Directive is to eliminate, over a defined period of time, water pollution caused by the emission of particularly dangerous substances into the water and to reduce pollution by the discharge of other, less hazardous elements. The Directive is accompanied by Directive 80/68 on groundwater which follows the same method, but contains stricter standards.

There are two categories of dangerous substances, according to the Directive, which are contained in a black and a grey list. Pollution from substances listed in the black list must be eliminated, according to a system of uniform effluent standards. This list includes, amongst other elements, mercury, cadmium, persistent organic chemicals, non bio-degradable oils, etc..

The 1991 Directive obliges member states to introduce biological waste water treatment installations for all discharges from agglomeration of more than 15,000 inhabitants by December 2000 and for discharges to fresh water and estuaries from agglomerations between 2,000 and 10,000 inhabitants by December 2000. Directive 73/404 prohibits the marketing and use of detergents of which biodegradability is below 90%.

Marine pollution

Two Directives concerning the piloting of vessels in the North Sea and the English Channel have been issued. These Directives set out minimum safety requirements for tankers entering or leaving EU ports. The EU also participates in the International Treaties concerning marine pollution.

Waste

- Council Directive 75/442/EEC – Waste framework (amended by Council Directive 91/156/EEC)
- Council Directive 91/689/EEC – Hazardous waste
- Council Directive 94/67/EC – Incineration of hazardous waste
- Council Directive 85/339/EEC – Containers of liquids for human consumption
- Proposal for a Council Directive 93/C 212/02 – Landfill waste

In a policy paper adopted in 1989, the Commission set out a Community Strategy for Waste Management, reiterating the main objectives of the EU's waste management policy up to the year 2000: waste prevention by technology and by products; waste recycling and reuse; optimising final disposal; regulation of transport and remedial action.

Framework Directive

With Council Directive 75/442/EEC, the so-called Framework Directive, the European Community established basic obligations for the member states to encourage the prevention, recycling and processing of waste and to ensure that waste is disposed of without injury to the health and the environment. Member states were obliged to establish waste disposal plans and permit systems for business involved in commercial treatment, storing or dumping of waste and to prevent uncontrolled waste disposal.

The Directive was amended by Directive 91/156, which established a new regime under which "waste" is defined in terms of specific categories of substances that the holder discards or is required to discard. The Directive obliges the member states to give preference to the prevention or reduction of waste production and to the recovery of waste by means of recycling, reuse or reclamation and by the use of waste as a source of energy.

Toxic and dangerous waste

Directive 78/319 – Hazardous Waste – on toxic and dangerous waste, applies to all waste which require special treatment in view of the risks presented to public health or the environment. These wastes include arsenic, heavy metals, pesticides, chlorinated solvents, pharmaceutical compounds and asbestos. The Hazardous Waste Directive follows, in principle, the same approach as the Framework Directive (permit requirement for storage, treatment or dumping of dangerous waste, application of the "Polluter Pays" principle and establishment of waste disposal plants etc.).

The new Hazardous Waste Directive no 91/689 has similar provisions, but lays down more stringent requirements for the control and supervision of hazardous waste. Amongst other stipulations, the Directive obliges member states to ensure that any discharge of hazardous waste is recorded and identified and must take measures to prohibit the mixing of hazardous waste with other waste, unless it is a necessary part of waste treatment.

Specific regimes have been established for the disposal of waste oils, PCBs, for waste from the titanium dioxide industry and for batteries and accumulators containing dangerous substances. Another Directive prohibits the dumping on land and into waters of any solid waste, strong acid waste, treatment waste, weak acid waste or neutralised waste.

Prevention and recycling of waste

The 1975 Directive concerning waste from containers of liquids for human consumption obliges member states to adopt programmes in order to meet the standards set forth by the Directive. The Directive on Packaging and Waste provides the framework for a packaging management to encourage low consumption of raw materials and energy.

Chemicals, industrial risks and biotechnology

- Commission Directive 67/548/EEC – Classification, packaging and labelling of dangerous substances
- Council Directive 82/501/EEC – Industrial accidents and emergency response
- Council Decision 89/569/EEC – Good Laboratory Practice
- Council Regulation 90/EEC/220 – Genetically Modified Organisms

The EU system comprises also a method of classification, packaging and labelling of chemicals, pre-market control of chemicals, restrictions on the marketing of certain substances and rules on the storage of hazardous waste and on the major accident hazards of industrial activities in conjunction with hazardous substances. In 1993, the Regulation 793/93/EEC was adopted on the evaluation and control of risks presented by chemical substances to humans and the environment. The Regulation provides for risk assessments of the substances listed in the European Inventory of Existing Commercial Substances (EINECS). The transfrontier movement of hazardous substances is governed by a Regulation on trade of dangerous chemicals. The exporter of these substances is obliged to have prior consent from any importing country outside the EU.

As for biotechnology, the Council Regulation 90/EEC/220 – Genetically Modified Organisms – and the Directives that accompany it, cover the rules on release, laboratory use and notification on genetically modified organisms.

Energy Policy

The EU's main purpose is the installation of an internal market with rules applying to all member states, especially the free-trade rule, that is, deregulated commerce between private

agents. The energy policy could not escape from this aim. Nevertheless, as energy was, in most European states primarily a state concern, and was controlled therefore by the public sector, the realisation of an internal energy market was delayed, in comparison with other sectors of production and commercial activity.

As it is stated, "the trend towards deregulation and the privatisation of former public sectors marked the end of traditional state capitalism, but it has not always led to reduced state power in the management of economy." Nowadays, the role of the regulator concerning the energy policy in the EU is assumed by the Commission. However, the EU policy orders that the liberation of the energy market must be accompanied by safeguard clauses. This is why energy and environment policies are merged in a sole Commission Direction.

Energy and the free-market rule

Many proposals of the Commission aiming at deregulating the energy market (thus leaving the private economic actors relatively free to produce, sell and buy energy) have been made since 1988. Among them, we distinguish: harmonisation of indirect taxation of enterprises; price and investment transparency; competition for public procurement; third party access to oil and gas; integration of electricity and gas grids; application of competition legislation to the upstream part of oil and gas exploration and production; restructuring state aid for coal; plans for an EU policy of supply security by the year 2005; a European Energy Charter; the official merging of energy and environment policy from 1990; amendment proposals for the inclusion of energy in the EU Treaty texts.

Many of the Internal Energy Market (IEM) Commission proposals provoked conflicts with the member states which were discontent to relinquish the control (and in most states, the monopoly) of energy sources and distribution. Thus, the 1989 proposals for price transparency in the electricity and gas sectors created a discord, especially over the issue of third party access to gas and electricity networks.

Third party access means that all energy suppliers should have access to gas pipelines and electricity grids, subject to a payment of a tariff set by an independent authority. This is an essential principle of the internal free market. Nevertheless, the energy companies, often owned by states oppose to third party access. The Directives on electricity and gas third party access were finally adopted by the Council in 1990, but the enforcement of the principle proved difficult. The Council, after member state demands, accepted that the third party access pattern could coexist with the, previous, single buyer model.

Another important European law rule that guarantees the free market establishment and essence of the free market is the free competition maxim. The Treaty prohibits, in principle, the cartels, monopolies and state-aids to private companies, but it can grant a permission of state aid in regard to some economy domain. As for the energy sector, the permission on state aid for the declining coal industry constitutes an example.

The free competition rule also implies that public companies should less and less occupy a privileged position, compared to private entrepreneurs. In the energy field, a 1992 directive imposes the free competition principles to the production of oil and gas. However, there is an exemption: the resource management remains with the member state governments.

Commission competence for energy networks

After the Maastricht Treaty, the European Commission has the competence to decide which infrastructure projects are more urgent and to, consequently, finance these projects. Although infrastructure includes energy production and distribution, the "piece of the pie" allotted to energy production and distribution is relatively small, because the Commission considers that energy networks can attract private funding more easily than ...roads. Yet, ten projects (five on electricity networks and five on gas networks, linking North Africa and Russia with the EU) were approved.

But there are still some difficulties concerning the realisation of inter-European networks. An obstacle to the energy networks is that there are still major differences between the transit, import and export regulations of the member countries.

In European policy and law, there is a large mutation towards deregulation, de-nationalisation and liberalisation of the energy market, as in all the other markets, but, on the other hand, strict, but necessary, limits are imposed to production and trade, aiming at the protection of the environment.

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