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INTRODUCTION

The European Economic Community (EEC or Community) is a system of attributed powers under the aegis of the Treaty of Rome (EEC Treaty).1 The EEC Treaty conveys sovereign powers in enumerated policy areas, subjecting the member states to Community exercise of these powers to the extent necessary for the proper functioning of the Community.2 Traditionally, environmental protection had not been within the purview of the Community's attributed powers. The Single European Act of July 1, 1987 (SEA) finally granted the EEC express environmental policy- and law-making powers.3 The SEA amended the EEC Treaty by adding, inter alia, Title VII, the Environmental Title, and article 100A. The Environmental Title, consisting of articles 130r–130t, defines the objectives of the Community's environmental policy, empowers the

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2 The current member states are Belgium, Denmark, the Federal Republic of Germany, France, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom.

Council of the European Communities (Council)\textsuperscript{4} to implement these objectives, and permits member states to adopt stricter standards than those of the Community in limited circumstances.\textsuperscript{5} The Environmental Title further obliges the Community to integrate environmental policy into all other Community policies. In addition, article 100A requires a high level of environmental protection in all EEC harmonizing measures relating to the creation of the internal market by December 31, 1992. Article 100A permits the Council to act by qualified majority, and member states may apply stricter national measures instead of the EEC environmental measures.

This Article provides an overview of the EEC's new environmental policy- and law-making powers under the EEC Treaty, and discusses the allocation of these powers between the Community and the member states. By way of necessary background, Part I of this Article briefly explains the institutions and legal instruments of the EEC, as well as the relationship between Community and member state law. Part II discusses the formulation and implementation of environmental policy by the Community prior to the SEA. Part III elaborates on the meaning and application of articles 130r–130t and 100A, emphasizing the interplay of these provisions with each other and with other relevant provisions of the EEC Treaty. Finally, Part IV examines the legal status of articles 100A and 100B after December 31, 1992. This Article concludes that the Community should use its broad environmental powers wisely and extensively. In particular, the Community should lead the effort to prevent transboundary environmental problems in cooperation with Eastern European and less developed countries.

I. The Institutions and Legislative Process of the EEC

A. The Legal Nature of the EEC Treaty

Promoting economic activities, raising the standard of living, and establishing closer relations between member states have been among the goals of the EEC Treaty since its inception.\textsuperscript{6} The


\textsuperscript{5} Unless otherwise indicated, references in the text and the footnotes to treaty articles are to the EEC Treaty.

\textsuperscript{6} EEC Treaty, \textit{supra} note 1, at art. 2.
member states sought to achieve these goals with the creation of a common European market and the progressive harmonization of their economic policies.\(^7\) The EEC Treaty consequently transfers limited sovereign legislative, executive, and judicial powers, including treaty powers, from the member states to the EEC institutions. The Community, therefore, is an intergovernmental organization that has legal personality and is subject to international law.\(^8\) In principle, international law no longer applies to intra-Community relations among member states because—as established by the Court of Justice of the European Communities (Court of Justice)—the EEC Treaty established a legal order of its own.\(^9\)

B. *The Community Institutions*

1. The European Parliament

The European Parliament (Parliament) is not a traditional representative body because its 518 representatives represent more than one people\(^10\) and lack legislative powers.\(^11\) The Parliament acts principally as a supervisory body of the Commission of the European Communities (Commission)\(^12\) and an advisory body to

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\(^7\) *Id.* at art. 3.


\(^9\) Case 6/64, Costa v. ENEL, [1964] E.C.R. 585, 593; 3 C.M.L.R. 425, 454 (1964). The Court of Justice of the European Economic Community (Court of Justice) held that by creating a Community of unlimited duration, having its own institutions, its own personality, its own legal capacity and capacity of representation on the international plane and, more particularly, real powers stemming from a limitation of sovereignty or a transfer of powers from the states to the Community, the Member States have limited their sovereign rights, albeit within limited fields, and have thus created a body of law which binds their nationals and themselves. *Id.* See also Simma & Vedder, Art. 210, in *Kommentar zum EWG-Vertrag*, supra note 3, at No. 19.

\(^10\) Decision 76/787, Commission Decision of September 20, 1976, concerning the election of the representatives of the Assembly [European Parliament] by direct and universal suffrage, O.J. L.278/1 (1976); V. Herman & J. Lodge, *The European Parliament and the European Community* 29–30 (1978). The members of the European Parliament (MEPs) are elected in the following ratio: France, the Federal Republic of Germany, Italy, and the United Kingdom each elect 81 MEPs; Spain 60; the Netherlands 25; Belgium, Greece, and Portugal 24; Denmark 16; Ireland 15; and Luxembourg 6.


\(^12\) See Merger Treaty, *supra* note 4, at 5–6.
the Council. The Parliament’s most significant role rests in its power to shape the Community budget.13

The Council presents a draft budget to the Parliament, which can approve the budget by affirmative vote or inaction within forty-five days.14 With regard to expenditures required by the EEC Treaty or secondary Community law—that is, legislation enacted under the EEC Treaty—the Parliament may, acting by an absolute majority of votes, propose modifications to the Council’s draft budget.15 The Council may accept, reject, or modify these proposed modifications without further input from the Parliament.

With regard to other expenditures, a majority of the members of the Parliament may amend the Council’s first draft budget within a maximum rate of increase. If the Council subsequently modifies the Parliament’s amendments, the Parliament, acting by a majority of its members and three-fifths of the votes cast, may further amend the Council’s second draft budget.16 Parliament may then formally adopt the draft budget or, if acting by a majority of its members and two-thirds of the votes cast, reject the draft budget as a whole and request a new one.17

The SEA expanded the Parliament’s advisory function in the legislative process in two areas, thereby establishing what is known as the cooperation procedure. First, measures relating to the establishment of the internal market are subject to the cooperation procedure. Under this procedure, the Council adopts a common position based on a proposal from the Commission and after obtaining the opinion of the Parliament. The common position is communicated to the Parliament for a second reading in which the Parliament may amend or reject the common position by an absolute majority. If the Parliament rejects the Council’s common position, the Council can act further only by unanimity.18 Second,

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15 P. Kapteyn & P. Verloren Van Themaat, supra note 13, at 225.
16 See EEC Treaty, supra note 1, at art. 203(9); Sopwith, Legal Aspects of the Community Budget, 17 COMMON Mkt. L. REV. 315, 323 (1980).
17 See EEC Treaty, supra note 1, at art. 203(8); Sopwith, supra note 16, at 323–24.
18 EEC Treaty, supra note 1, at art. 149(2). The cooperation procedure applies to acts that are based on EEC Treaty articles 7, 49, 54(2), 56(2)(ii), 57 (with the exception of the second sentence of paragraph two thereof), 100A, 100B, 118a, 130e, and 130q(2). See also P. Kapteyn & P. Verloren Van Themaat, supra note 13, at 265.
the cooperation procedure also requires the Parliament's assent to the conclusion of accession or association agreements under articles 237 or 238 of the EEC Treaty.19 Thus, the influence of the Parliament over policy matters is not insignificant. Especially in light of the 1989 EEC parliamentary elections, which added thirty new members of Parliament from "Green" parties, environmental advocacy is likely to gain force in Community politics.

2. The Commission

The Commission is the quasi-executive organ of the Community.20 The seventeen Commissioners, chosen for their expertise, are independent, lacking bias in favor of any member state.21 The Commission represents and defends the interests of the Community vis-à-vis the member states and ensures the proper functioning and development of the common market. This duty obliges the Commission to guarantee that the Community institutions and member states apply the EEC Treaty and secondary legislation, to issue recommendations and opinions, to exercise its powers of decision, for example, in the area of competition law,22 to exercise the powers conferred upon it by the Council,23 to implement the budget, to publish an annual report on the activities of the Community, and to negotiate international agreements. Furthermore, the Commission may initiate legislative proposals in those areas in which the Council can not act independently.

3. The Council

The Council is the most important legislative institution of the Community.24 In addition, the Council exercises executive powers to coordinate the economic policies of the member states. Council members espouse the interests of their respective member state

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19 See Vedder, Art. 237, in Kommentar zum EWG-Vertrag, supra note 3, at No. 22a; Vedder, Article 238, in Kommentar zum EWG-Vertrag, supra note 3, at 21a.
20 See EEC Treaty, supra note 1, at arts. 155–163.
21 See P. Mathijsen, supra note 14, at 52–68.
22 See, e.g., EEC Treaty, supra note 1, at arts. 89(2) and 90(3) (regarding competition law).
23 EEC Treaty, supra note 1, at art. 145, para. 3. For example, the Council conferred such powers with respect to the common agricultural policy.
and act on instructions from the home government. Temporary delegates to the EEC, Council members are usually those ministers domestically in charge of the affairs under discussion in the Council.

The Council does not have general regulatory powers. Its authority to take legislative action is confined to the areas of attributed powers under the EEC Treaty and, in most instances, arises with a Commission draft proposal. The Council may request such proposals, but the Commission has the discretion to decline. The EEC Treaty specifies when the Council must act by majority, qualified majority, or unanimity. Where Community action is needed but the EEC Treaty does not provide the necessary powers, the Council may act in reliance on article 235 of the EEC Treaty.

Article 235 is an interstitial grant of power under the EEC Treaty. This article applies when the Council must act in order to attain an objective of the EEC Treaty, but lacks attributed powers. In these instances, the Council may, acting by unanimity, take the necessary measures based on a proposal from the Commission and after consulting with the Parliament. The grant of power under article 235 does not amount to a codification of implied powers. Implied powers flow from existing powers that would be meaningless or impossible to apply without implied powers. Article 235 grants more than implied powers—because the Council has the explicit power to carry out an EEC Treaty objective—but grants less than new, attributed powers. Rather, article 235 enables the Council to fill the interstices of attributed powers under the EEC Treaty.

4. The Court of Justice

The Court of Justice ensures that Community institutions and member states observe and implement Community law. The

25 P. MathijSEN, supra note 14, at 34–52.
27 P. MathijSEN, supra note 14, at 46–47.
Court of Justice interprets the EEC Treaty and rules on the validity and meaning of secondary Community law,29 but does not review the compatibility of member state law and Community law.30 Assuming a law-making capacity, the Court of Justice sets out the law by establishing general legal principles such as the principles of equality, due diligence, and proportionality.31 The principles of Community law further ensure fundamental human rights.32 The jurisdiction of the Court of Justice extends over the following legal actions.33

a. Infringement Action

The Court of Justice may entertain an action alleging a member state's failure to fulfill its obligations under primary or secondary Community law.34 This action may be brought by the Commission under article 169 of the EEC Treaty or by a member state under article 170. The Court of Justice issues a declaratory judgment with which the defendant member state is required to comply under article 171.35 If the judgment is ignored, however, the only sanctions available are further actions under articles 169 or 170 alleging the defendant member state's failure to comply with article 171.

b. Action for Annulment

The Court of Justice has jurisdiction to review the legality of all regulations, directives, and decisions of the Council and the

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29 The thirteen judges of the Court of Justice are assisted by six advocates-general who act with complete impartiality and independence, and make—in open court—reasoned submissions on cases brought before the court. Judges and advocates-general are appointed for a period of six years by common accord of the member states.


33 For a detailed overview of the jurisdiction of the Court of Justice, see P. Kapteyn & P. Verloren van Themaat, supra note 15, at 273–310.


35 EEC Treaty, supra note 1, at art. 171.
Commission. Member states, the Commission, or the Council may challenge the legality of these acts on the grounds of lack of competence, infringement of an essential procedural requirement, infringement of the EEC Treaty or any rule of law relating to its application, or misuse of authority. On the same grounds, natural or legal persons can bring an action with respect to a decision addressed to them—or, in special circumstances, with respect to other acts of an individual character such as directives. If the Court of Justice finds the action to be well grounded, it can declare the act to be void under article 174, and can require the issuing institution to take remedial measures under article 176. Article 171 obliges the defendant institution to comply with the declaratory judgment.

c. Action for Failure to Act

Under article 175, the Court of Justice has jurisdiction to adjudge a Community institution’s failure to act. Member states and Community institutions may lodge an action with the Court of Justice alleging that the Council or Commission infringes the EEC Treaty by its failure to act. Natural or legal persons may lodge an action alleging that a Community institution has failed to address a binding act to them. If the Court of Justice holds that the institution’s failure to act violates the EEC Treaty, article 176 requires that the institution take the necessary measures to comply with the judgment.

d. Action for Damages with Respect to the Non-contractual Liability of the Community

The Court of Justice has further jurisdiction to hear proceedings under the second subparagraph of article 215. This article requires the Community to rectify, in accordance with the common principles of member state law, any damage its institutions or servants may have caused in the performance of their duties. Grounds for liability include an unlawful act by a Community

37 EEC Treaty, supra note 1, at art. 174.
38 Id. at art. 175. See also D. Wyatt & A. Dashwood, supra note 34, at 76.
39 EEC Treaty, supra note 1, at art. 178. See also D. Wyatt & A. Dashwood, supra note 34, at 76–77.
40 EEC Treaty, supra note 1, at art. 215 (second subparagraph).
institution, actual damages to the applicant, and a causal connection between the two.41

e. Disputes Between the EEC and its Civil Servants

The Court of Justice has further jurisdiction under article 179 to hear disputes between the Community and its civil servants. In these staff cases, the court's jurisdiction is subject to the limits and conditions of the staff regulations or the conditions of employment.

f. Preliminary Ruling

Under article 177, the Court of Justice has jurisdiction to hear questions on the validity and interpretation of Community law.42 In order to ensure the uniform application of Community law in all member states, the Court of Justice may accept such questions from national courts and tribunals that depend on a preliminary ruling in order to properly resolve the case before them.43 Specifically, a request for a preliminary ruling is proper if it relates to a question of interpretation of the EEC Treaty, of the charter and by-laws of authorities established by an act of the Council, or of the validity and interpretation of acts of the Community institutions. The Court of Justice's ruling is termed preliminary because it does not become part of the decision of the local tribunal. Nonetheless, the national court or tribunal must apply the preliminary ruling to the case before it and issue a judgment that is consistent with the preliminary ruling.44

g. Court of First Instance

The Court of Justice has appellate jurisdiction over questions of law arising from judgments of the Court of First Instance.45 Pursuant to article 168a, the Community established the Court

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42 EEC Treaty, supra note 1, at art. 177; D. Wyatt & A. Dashwood, supra note 34, at 77-80.
43 Courts or tribunals of member states whose decisions cannot be appealed under national law must request an interpretive ruling from the Court of Justice.
44 D. Wyatt & A. Dashwood, supra note 34, at 78.
45 For a detailed account of the Court of First Instance and its jurisdiction, see Kennedy, The Essential Minimum: The Establishment of the Court of First Instance, 14 EUR. L. REV. 7 (1989); Millett, The New European Court of First Instance, 38 INT'L & COMP. L.Q. 811 (1989).
of First Instance to reduce the increasingly numerous and lengthy proceedings before the Court of Justice. The jurisdiction of the Court of First Instance covers four types of actions: staff cases; complaints by undertakings or associations thereof challenging acts that relate to levies, production controls, pricing practices, and agreements and concentrations under articles 50, and 57 through 66 of the Treaty establishing the European Coal and Steel Community (ECSC Treaty); complaints by natural or legal persons against Community institutions relating to the implementation of the competition rules that apply to undertakings under the EEC Treaty; and finally, damage claims by natural or legal persons alleging damages arising from acts or failure to act in the three preceding categories.

C. Community Legal Acts

A distinguishing feature of the EEC Treaty’s legal regime is the power of the Council and, to a lesser extent, of the Commission to achieve the objectives of the EEC Treaty by enacting new legislation. Article 189 provides that the Council and the Commission shall “make regulations, issue directives, take decisions, make recommendations, or deliver opinions.” Regulations, directives, and decisions are binding; recommendations and opinions are non-binding acts. The following sections introduce each of these legal instruments and their legal effect.

1. Regulations

A regulation has general application: it is binding in its entirety and directly applicable in all member states—thus, law in every sense of the word. A regulation is binding in its entirety because it imposes on member states the obligation to implement each

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46 EEC Treaty, supra note 1, at art. 168a; Decision 88/591, Council Decision of October 24, 1988, establishing a Court of First Instance of the European Communities, O.J. C215/1 (1989). Seventy-nine cases were brought before the Court of Justice in 1970, as opposed to 385 in 1989.

47 ECSC Treaty, supra note 1, at arts. 50, 57–66; L. Brown & F. Jacobs, supra note 28, at 65.

48 D. Wyatt & A. Dashwood, supra note 34, at 38.

49 EEC Treaty, supra note 1, at art. 189. See also P. Kapteyn & P. Verloren van Themaat, supra note 13, at 188–89.

50 EEC Treaty, supra note 1, at art. 189. See also D. Wyatt & A. Dashwood, supra note 34, at 58–41; P. Mathijsen, supra note 14, at 112–14.
one of its provisions. To be directly applicable means that the regulation does not need to be transformed into national law by the legislative institutions of the member states. The regulation has precedence over anterior and posterior national law and binds the member states as well as their citizens and national authorities. A regulation also has direct effect by granting citizens individual rights that all national authorities must uphold against other individuals and member states. 51

2. Directives

Directives are addressed to member states and oblige them to achieve specific results. 52 Directives are not directly applicable because they require national implementation, but they can have direct effect. Direct effect exists if a member state fails to implement the directive in due time or in the correct manner, 53 and its provisions are “unconditional and sufficiently clear and precise.” 54 In these cases, individual litigants may thus rely on a directive in all courts of the state and as against all authorities, whether acting in their private or public law capacities. 55

3. Decisions

A decision is binding in its entirety and may be addressed to member states as well as private parties. 56 Decisions are akin to administrative acts because they normally implement other Community rules. A decision addressed to a member state may produce direct effect under the same conditions that apply to directives.

52 EEC Treaty, supra note 1, at art. 189. See also D. Wyatt & A. Dashwood, supra note 34, at 114.
55 See D. Wyatt & A. Dashwood, supra note 34, at 44–45.
56 See EEC Treaty, supra note 1, at art. 189; D. Wyatt & A. Dashwood, supra note 34, at 41–47; P. Mathijsen, supra note 14, at 115.
4. Recommendations and Opinions

Recommendations and opinions may be addressed to member states, enterprises, and individuals. These acts are non-binding and are not subject to review by the Court of Justice. Nevertheless, the authority of Community institutions often imbues recommendations and opinions with significant political force.

5. Enforcement and Sanctions

Member states that violate Community law are not subject to sanctions under the EEC Treaty. They are merely subject to legal actions brought by other member states or the Commission under articles 169 and 170 for infringing the EEC Treaty. Individuals and enterprises that violate Community law, however, may be subject to fines and periodic penalty payments. Such pecuniary obligations may be enforced according to the rules of civil procedure of the respective member states.

D. The Interplay of Community and Member State Law

Since the 1964 Costa v. ENEL case, the Court of Justice has consistently held that Community law has precedence over national law. In Costa, the Court of Justice reasoned that “[t]he executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardizing the attainment of the objectives of the Treaty . . . and giving rise to . . . discrimination.” All national law, including constitutional law, that conflicts with provisions of the EEC Treaty or directly applicable secondary law is inapplicable. National courts must protect the rights that Community law confers upon individuals, and must set aside all national law that conflicts with

57 EEC Treaty, supra note 1, at art. 189; P. Mathijisen, supra note 14, at 115.
58 See supra text accompanying notes 34–41.
59 See, e.g., EEC Treaty, supra note 1, at art. 87(2)(a) (violation of competition rules). These obligations are imposed either by directive or regulation.
60 Id. at art. 192.
62 Id. at 594, 3 C.M.L.R. at 455.
Community law. Further, all authorities of the member states are bound by the opinions of the Court of Justice.

II. ENVIRONMENTAL POWERS PRIOR TO THE SEA

A. Historical Background

Prior to 1987, the EEC Treaty contained no mention of environmental protection. The stated Community objectives contained in the Preamble and articles 2 and 3 did not pertain to environmental issues. In 1987, the SEA supplemented the EEC Treaty with explicit environmental law- and policy-making powers. The Community, nevertheless, had passed environmental legislation for well over a decade prior to the SEA.

Historically, this apparent disregard for the principle of attributed powers was usually justified because article 2 defines the harmonious development of economic activities in the Community as one of the objectives of the Community. This language was interpreted to suggest at least partial authority for a common environmental policy because economic development could not be achieved without appropriate regulation of corresponding environmental pollution and nuisances. Thus, the Community was not a priori precluded from formulating and enacting a common environmental policy.

1. The Four Environmental Action Programs

The 1972 Paris Summit Conference of the Heads of State or Government of the Member States issued the first official mandate for Community environmental action. The member states unanimously requested the Community institutions to draft an environmental action program. Since then, the Council and the Council members as representatives of their governments have

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65 Between 1973 and 1987, the Community passed over 150 environmental legislative acts.
issued four environmental action programs, all of which are still in force.\textsuperscript{68}

Environmental action programs are policy statements of the Community and the member states and take the form of working papers that oblige Community institutions to internally coordinate their environmental policies.\textsuperscript{69} Environmental action programs can not serve as the legal basis for legislation by Community institutions because they have no legal effect under article 189 and do not attribute power to the Community. Instead, articles 100 and 235 served as the legal basis for most environmental legislation and for judicial implementation of the action programs.\textsuperscript{70}

The Community initially formulated its environmental policy in the First Environmental Action Program in 1973.\textsuperscript{71} EEC environmental policy aims at regulating economic expansion so as to provide the best living conditions for the European population, and to reconcile expansion with the imperative need to preserve the environment.\textsuperscript{72} Four years later, the Second Environmental Action Program stressed the so-called main areas,\textsuperscript{73} and in 1983, the Community issued a Third Environmental Action Program with the aim of making the Community a world leader in environmental protection.\textsuperscript{74}


\textsuperscript{69} Cf. H. IpSEN, EUROPÄISCHES GEMEINSCHAFTSRECHT No. 22/30 (1972).

\textsuperscript{70} Glaesner, Die Einheitliche Europäische Akte, 21 EUROPA 119, 141 (1986). In addition, articles 7, 42, 43(2), 74, 75, 84(2), 92, 113, 117, and 213 of the EEC Treaty served as the legal bases for special purposes. Sometimes legislation was unduly based on the EEC Treaty as a whole, without invoking a specific treaty article.


\textsuperscript{72} Id. at 5. The First Environmental Action Program sets forth three types of action for implementing environmental policy: the reduction and prevention of pollution and nuisances; the improvement of the environment and quality of life; and the participation in international organizations dealing with environmental issues.

\textsuperscript{73} Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States meeting within the Council of 17 May 1977 on the continuation and implementation of a European Community policy and action program on the environment (1977–1981), O.J. C139/1 (1977) [hereinafter Second Environmental Action Program]. The Second Environmental Action Program stresses the reduction of pollution and nuisances; the non-damaging use and rational management of land, the environment, and natural resources; and the general protection and improvement of the environment.
the Third Environmental Action Program added prevention as an imperative policy consideration. Accordingly, economic and social development should neither create nor exacerbate environmental problems. Environmental policy should thus reflect an understanding that natural resources constitute both the basis and limit of economic and social development. The Fourth Environmental Action Program, issued in 1987, stresses the need to adopt high standards of environmental protection and quality requirements. Most importantly, the Fourth Environmental Action Program integrates environmental policy into all other Community policies.

2. Judicial Recognition of Environmental Policy

Since 1985, the Court of Justice has officially included environmental policy as one of the Community's objectives. For example, in Commission v. Denmark (Danish Bottle case), the Court of Justice held that environmental protection was a fundamental Community objective for purposes of exemptions from article 30. Thus, national legislation that results in obstacles to trade is nevertheless compatible with article 30 so long as the Community has not already regulated the same activity, and the national legislation is purely environmental in purpose, is applied evenly to imported and domestic products alike, and is necessary to satisfy imperative requirements such as environmental protection.

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75 Id. at 8-12.

76 Fourth Environmental Action Program, supra note 68, at 40. A high level of environmental protection is regarded as a critical factor for the future economic success of the Community. The Fourth Environmental Action Program recognizes that environmental protection may stimulate economic growth and create jobs. Id. at 14.


79 See EEC Treaty, supra note 1, at art. 30. Article 30 prohibits quantitative restrictions on imports and measures having an equivalent effect between member states.
B. The Relevance of the Environmental Action Programs and Pre-1987 Legislation After the SEA

The adoption of the SEA in 1987 did not invalidate the existing legal framework that had emerged through fifteen years of cooperation between the Community and the member states. The four environmental action programs, as well as the numerous legislative enactments in the years preceding the SEA, formed the basis of environmental law as well as the hermeneutic background of the new environmental provisions of the EEC Treaty.80

III. Environmental Powers After the SEA

The drafters of the SEA were aware of the potential friction between free trade and environmental protection in the Community. The anticipated economic growth associated with the establishment of the internal market by December 31, 1992 may well cause new environmental problems. For example, the marginal increase in electricity consumption associated with anticipated economic growth of 4.5–7 percent will increase—assuming today’s level of technology—emissions of sulphur dioxide by 8–9 percent and emissions of nitrogen oxides by 12–14 percent by the year 2010. Implementation of the internal market further implies the removal of border checks, the harmonization of technical standards and regulations, the reduction of national market entry barriers, and the opening up of public procurement contracts to foreign bidders. These measures will likely impair environmental quality because many of the national regulations that are to be abolished currently protect the environment.81 Thus, the SEA amended the EEC Treaty not only by adding environmental powers under Title VII, but also by subjecting the creation

80 Grabitz & Zacker, Die neuen Umweltkompetenzen der EWG, 8 Neue Zeitschrift für Verwaltungsrecht 297, 298 (1989) [hereinafter Neue Umweltkompetenzen].
81 For example, it is expected that the removal of border checks controlling the movement of hazardous waste would lead to the free export of such waste. Furthermore, if environmentally compatible technical and product standards were removed, member states would be able to export their substandard products to the whole Community. Lastly, if fiscal incentives and disincentives for certain environmental behavior were harmonized and thus became less available, externalizing the costs of environmental protection in this manner would lower the cost of energy for the consumer, thereby stimulating pollution-intensive energy use.
of the internal market under article 100A to high environmental protection standards.\(^{82}\)

A. **The Environmental Title: Articles 130r–130t**

Title VII, the Environmental Title, endows the Community with legal authority for environmental policy and legislation under the EEC Treaty. The Community's power to carry out environmental policy is now guaranteed as one of its attributed powers. Articles 130r–130t enumerate the Community's environmental policy objectives, the basic means of implementing these objectives, and the specific powers of the various Community institutions. Additionally, articles 130r–130t establish the principle of parallel competence of member states and the Community in the environmental field.

1. **Objectives and Scope of Application**

The specific objectives enumerated in article 130r(1) are comprehensive and far-reaching. They are clearly limited, however, because the objectives stated in article 130r(1) are exhaustive, not merely examples of permissible objectives.\(^{83}\) The Community's

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\(^{82}\) In addition, the SEA supplemented the EEC Treaty with article 118a regarding the improvement of the work environment. SEA, *supra* note 3, at art. 21.

\(^{83}\) EEC Treaty, *supra* note 1, at art. 150r. Article 130r provides:

1. Action by the Community relating to the environment shall have the following objectives:
   - to preserve, protect and improve the quality of the environment,
   - to contribute towards protecting human health,
   - to ensure a prudent and rational utilisation of natural resources.

2. Action by the Community relating to the environment shall be based on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source, and that the polluter should pay. Environmental protection requirements shall be a component of the Community's other policies.

3. In preparing its action relating to the environment, the Community shall take account of:
   - available scientific and technical data,
   - environmental conditions in the various regions of the Community,
   - the potential benefits and costs of action or lack of action,
   - the economic and social development of the Community as a whole and the balanced development of its regions.

4. 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. Without prejudice to certain measures of a Community nature, the Member States shall finance and implement the other measures.

5. Within their respective spheres of competence, the Community and the Member States shall co-operate with third countries and with the relevant international
common environmental policy is further not restricted to the borders of the Community because the EEC Treaty contains language to the effect of "environmental policy of the Community," not "environmental policy in the Community." In addition, environmental policy is not restricted to the natural environment and thus extends to artificially created human environments.84

2. Guiding Principles and Decision-Making Criteria

Pursuant to article 130r(2), the Community's environmental policy must reflect three guiding principles. Environmental policy should be preventive, should force the polluter to pay for environmental costs, and should attempt to rectify environmental damage at its source. These principles cannot always be clearly distinguished from each other because they are partly interrelated.85 According to the prevention principle, the Community should always try to avoid environmental nuisances instead of ameliorating their effects. This principle also requires that the environmental impact of projects be considered as early as possible in all planning and decision-making processes.86 Rectification of environmental damage at source complements prevention. Accordingly, where environmental damage can not be prevented altogether, it must be held to a minimum and must be kept from proliferating.

The polluter-pays principle regulates the allocation of costs associated with environmental protection.87 In principle, polluters bear the total costs of preventing, eliminating, and compensating for environmental damage. The imposition of costs should encourage polluters, especially corporations, to reduce pollution
and to develop cleaner products and technologies, thus facilitating a more rational use of environmental resources. In practice, financial incentives or environmental fees, rather than rigidly enforced environmental regulations, often prove to be more efficient and economically feasible means of environmental protection.

Article 130r(3) requires Community institutions to base environmental measures on the following four criteria. The Community must consider available scientific and technical data, regional environmental conditions in the EEC, cost-benefit analyses of the problem to be remedied before and after intervention, and the economic and social development of the whole Community and the balanced development of its regions. Along with the three aforementioned principles, these four criteria are the standards according to which the Community must formulate its environmental policy.

3. Powers and Limits of Article 130s

Article 130s expressly grants the Community the power to issue environmental legislation. The scope of this legislative power is defined by the environmental policy objectives set forth in article 130r(1), and further by article 130r(5), which restricts the Community to action in its sphere of authority.

Upon a proposal from the Commission, and after consultation with the Parliament and the Economic and Social Committee (ECOSOC), the Council may decide what environmental action the Community shall take. The Council, the Parliament, and the ECOSOC may ask the Commission to issue proposals, but it is within the Commission's discretion to grant these requests.

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90 For more details, see Vandermeersch, supra note 88, at 419.
91 EEC Treaty, supra note 1, at art. 130s. Article 130s provides:

The Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament and the Economic and Social Committee, shall decide what action is to be taken by the Community.

The Council shall, under the conditions laid down in the preceding subparagraph, define those matters on which decisions are to be taken by a qualified majority.
92 Id. at art. 130s, para. 1.
Generally, article 130s requires the Council to act by unanimity. The unanimous voting requirement reflects the fear of various member states that the Community’s environmental policy will affect national industries and create barriers to intra-Community trade.\(^{93}\) This apprehension is partly attributable to the heated discussions concerning the emission-free automobile in the months preceding the drafting of the SEA.\(^{94}\) Thus, the Community’s basic environmental powers currently depend on the reconciliation of diverse national interests in a unanimous Council vote.

Under the second subparagraph of article 130s, the Council may unanimously decide to act in certain areas by qualified majority rather than by unanimity. The Council may adopt qualified majority voting as the future voting procedure in broad, specified areas of environmental policy, as well as in individual cases. Qualified majority voting under the second subparagraph of article 130s is a dynamic legislative procedure and is likely to be invoked as the member states develop trust in the Community’s environmental policy. Irrespective of voting procedures, however, the exercise of the Council’s new environmental powers is subject to the following three significant restrictions.\(^{95}\)

\(\text{a. Assigning Tasks Between the Community and Member States}\)

The Community may only act with respect to environmental issues to the extent that it is in a better position than member states to attain the objectives of article 130r(1).\(^{96}\) Member states share legislative power with the Community in this field because article 130r(4), like articles 130r–130t in general, defines Community power, but does not preempt member states from taking legislative action regarding the environment. Whether the Community is indeed better suited to take environmental action depends on the following factors. The Council must base its unanimous decisions, \textit{inter alia}, on the principles and decision-making criteria of article 130r(2) and (3), ecological conditions, and the availability of economic and technical resources. Typically, the Community is in a better position to address transboundary pol-

\(^{93}\) J. De Ruyt, L’Acte Unique Européen 217 (2d ed. 1989).
\(^{95}\) See \textit{Neue Umweltkompetenzen}, supra note 80, at 299–300.
\(^{96}\) EEC Treaty, supra note 1, at art. 130r(4).
olution problems, such as air pollution and the control and deposit of radioactive waste. Member states usually retain jurisdiction over clearly defined, regional environmental problems, for example, the pollution of smaller lakes, or land-use planning.

b. More Stringent Member State Measures

A member state may maintain or introduce measures more stringent than the Community measures adopted in common under article 130s. The member state measures must be compatible with all EEC Treaty provisions. Thus, a member state can not use article 130t to avoid its duties under Community law. In particular, a member state may not adopt environmentally motivated product standards that, in effect, protect the national industry by discriminating against imported goods or creating trade barriers in violation of articles 30 and 36. Member states can legitimize more stringent measures under article 130t only if the Community passed the original measures under article 130s, and article 130t is only available as an exemption to article 130s.

c. National Energy Policy

It follows from the First Declaration of the Conference of the Representatives of the Governments of the Member States in reference to article 130r, that the energy policy of individual member states has priority over the environmental policy of the Community. The scope of this political compromise remains undefined because energy policy has not yet been invoked as a reason for a member state's deviation from Community environmental policy. Future application of the energy policy exception may define the scope of the exemption.

97 EEC Treaty, supra note 1, at art. 130t. Article 130t provides:

The protective measures adopted in common pursuant to Article 130s shall not prevent any Member State from maintaining or introducing more stringent protective measures compatible with this Treaty.

98 See Grabitz, Art. 130t, in Kommentar zum EWG-Vertrag, supra note 3, at Nos. 7 and 8.

99 Article 130t is not applicable where the Community institutions acted under articles 99, 100, 100A(1) or 118a(2) of the EEC Treaty.

100 Articles 100A(4) and 118a(3) only apply to provisions passed under articles 100A(1) and 118a(2), respectively.

4. International Cooperation

The Community and the member states may pursue their own environmental policies in cooperation with third countries and international organizations.\textsuperscript{102} International environmental cooperation has long been considered a priority: the First Environmental Action Program already stressed international environmental cooperation, especially with the Organization for Economic Cooperation and Development (OECD), the Council of Europe, the United Nations Educational, Scientific and Cultural Organization (UNESCO), and the United Nations Environment Programme (UNEP).\textsuperscript{103} Member states retain their sovereign autonomy to conduct policy in the area of international cooperation—that is, those activities that are pursued neither as the result nor with the aim of entering into a treaty.\textsuperscript{104}

The Community has treaty power in the area of environmental policy under subparagraph one of article 130r(5). Under subparagraph two of article 130r(5), however, member states retain their original treaty power. A narrow reading of article 130r(5) could suggest that member states may subject themselves to treaty obligations that are inconsistent with those already assumed by the Community.\textsuperscript{105} This interpretation would mean that member states are not bound by the Community's existing treaty obligations, and would contradict the principles announced in the ERTA case.\textsuperscript{106}

The Conference of the Representatives of the Governments of the Member States resolved this ambiguity in favor of the ERTA principles when it declared that they are not affected by subparagraph two of article 130r(5). This Conference statement means that, in the field of environmental policy, member states relin-

\textsuperscript{102} EEC Treaty, \textit{supra} note 1, at art. 130r(5).

\textsuperscript{103} First Environmental Action Program, \textit{supra} note 71, at 47–48.

\textsuperscript{104} A recent example of cooperation is the ministerial declaration of the Helsinki Commission of February 15, 1988. Ministers representing both EC member states—Denmark and the Federal Republic of Germany—and non-member nations—Finland, Poland, Sweden, the former German Democratic Republic, and the Soviet Union—signed a declaration to reduce, with modern technology, the most dangerous toxic pollutants in the Baltic Sea at their point of origin.

\textsuperscript{105} Glaesner, \textit{supra} note 70, at 141.

\textsuperscript{106} Case 22/70, Commission v. Council (ERTA), [1971] E.C.R. 263, 263, 10 C.M.L.R. 335, 335 (1971) (member states no longer have the right to undertake obligations with third countries if the obligations would affect provisions adopted by the Community while implementing an objective of the EEC Treaty).
quisht their treaty power in two situations. First, member states surrender treaty power with respect to subject matters over which the Community exercises its internal legislative power. Second, member states surrender treaty power in areas where the Community has concluded international agreements necessary to achieve an objective of article 130r(1), and has simultaneously issued implementing legislation.\textsuperscript{107}

5. Interplay of Environmental Policy and Other Community Policies

Environmental policy is currently the most prominent Community policy. According to article 130r(2), environmental policy is a component of all other Community policies, reflecting the view that the preservation and protection of the environment should form the context for all other policy decisions. The objectives, guiding principles, and decision-making criteria of article 130r(1)–(3) should guide the formulation, adoption, and interpretation of any Community acts, particularly those regarding the internal market. Any exercise of Community power must conform to the ubiquitous requirement of high standards of environmental protection.\textsuperscript{108} Environmental policy and protection is thus the only Community objective that currently must be observed without exception in the exercise of Community powers.

B. Article 100A

Article 100A is the fundamental legal instrument of the Community for harmonizing member state law in order to achieve the envisioned internal market by the end of 1992.\textsuperscript{109} Article

\begin{itemize}
  \item \textsuperscript{107} \textit{Neue Umweltkompetenzen, supra} note 80, at 303.
  \item \textsuperscript{108} \textit{Id.} at 300.
  \item \textsuperscript{109} \textit{EEC Treaty, supra} note 1, at art. 100A. Article 100A provides:
    \begin{enumerate}
      \item By way of derogation from Article 100 and save where otherwise provided in this Treaty, the following provisions shall apply for the achievement of the objectives set out in Article 8A. The Council shall, acting by a qualified majority on a proposal from the Commission in cooperation with the European Parliament and after consulting the Economic and Social Committee, adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.
      \item Paragraph 1 shall not apply to fiscal provisions, to those relating to the free movement of persons nor to those relating to the rights and interests of employed persons.
      \item The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, environmental protection and consumer protection, will take as a base a high level of protection.
    \end{enumerate}
\end{itemize}
100A provides for the harmonization of member state law relating to the free movement of goods, people, services, and capital. Similar to the procedures under article 130s, the Council can only act based on a proposal of the Commission, in cooperation with the Parliament, and after consultation with the ECOSOC. The Council, however, may act under article 100A by qualified majority as a matter of course.

1. Applicability of Article 100A

The status of articles 100A and 130s is co-equal: neither commands priority per se. The question of which article provides the appropriate legal basis for environmental measures depends on the objective relationship of such measures to either completing the internal market or protecting the environment. Product

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4 If, after the adoption of a harmonisation measure by the Council acting by a qualified majority, a Member State deems it necessary to apply national provisions on grounds of major needs referred to in Article 36, or relating to protection of the environment or the working environment, it shall notify the Commission of these provisions.

The Commission shall confirm the provisions involved after having verified that they are not a means of arbitrary discrimination or a disguised restriction on trade between Member States.

By way of derogation from the procedure laid down in Articles 169 and 170, the Commission or any Member State may bring the matter directly before the Court of Justice if it considers that another Member State is making improper use of the powers provided for in this Article.

5 The harmonisation measures referred to above shall, in appropriate cases, include a safeguard clause authorising the Member States to take, for one or more of the non-economic reasons referred to in Article 36, provisional measures subject to a Community control procedure.

110 Id. at art. 100A(2).

111 The cooperative legislative procedure that applies to article 100A is the following. The Commission drafts a proposal, which the Council may unanimously amend. The Council forwards the draft to the Parliament for a first reading and adopts by qualified majority vote the so-called common position in consideration of the Commission proposal and the opinion of the Parliament. If the common position does not incorporate the Parliament's amendments, the Council must submit the common position for a second reading to the Parliament which can either approve, amend, or reject it. In case of a rejection, the Council can act further on the proposal only by unanimity. EEC Treaty, supra note 1, at art. 149(1)–(2). See also Schweitzer, Art. 149, in KOMMENTAR ZUM EWG-VERTRAG, supra note 3, at Nos. 6–9.


113 Neue Umweltkompetenzen, supra note 80, at 301. See also Krämer, Einheitliche Europäische Akte und Umweltschutz: Überlegungen zu einigen neuen Bestimmungen im Gemeinschaftsrecht, in Europäisches Umweltrecht und Europäische Umweltpolitik, supra note 112, at 137, 158–59.
standards that can create trade barriers—for example, a prohibition of the use of chlorofluorocarbons in spray cans—directly relate to the functioning of the internal market and should be based on article 100A. 114 Conversely, industrial plant and production standards, such as titanium dioxide emission limits, potentially distort competition both within the individual member states concerned, and within the Community as a whole. They do not, however, influence trade or competition outside the Community, and thus should be based either on article 130s or article 100. 115 Measures that would not have a direct impact on trade or competition in the member states or the Community should be based on article 130s. These measures would include all general environmental programs, measures for the protection of flora and fauna that are of no importance to trade, and regional and national environmental planning. 116 Articles 100 and 100A only apply if a measure has a direct impact on the common or internal market, respectively. Without this requirement, these two articles could always be employed in light of the ubiquitous indirect effects of environmental measures on trade and competition. 117

2. High Level of Protection

The legislative authority of article 100A enables the Community to harmonize and thereby displace national environmental law. The Community has eliminated national measures, for example, with respect to the lead content of petrol 118 and the per-

114 Measures that the Council may adopt under article 100A(1) include directives, regulations, and decisions. The Council's preferred legislative format is the directive, especially in light of the declaration by the Conference of the Representatives of the Governments of the Member States that "the Commission shall give precedence to the use of the instrument of the directive if harmonization involves the amendment of legislative provisions in one or more Member States." Declaration on Article 100A of the EEC Treaty, O.J. L169/24 (1987).

115 EEC Treaty, supra note 1, at art. 100. Article 100 is relevant where an objective relationship exists between the purpose of the contemplated regulation and the completion of the common market, where environmental considerations play only a secondary role, and where no specialized norms exist. For a discussion of the difference between the common market and the internal market, see generally Zacker, Binnenmarkt und Gemeinsamer Markt—Zwei Begriffe desselben Inhalts?, 35 RECHT DER INTERNATIONALEN WIRTSCHAFT 489 (1989).

116 Neue Umweltkompetenzen, supra note 80, at 300–01.

117 Id. at 302.

missible sound levels and exhaust systems of motor vehicles.\textsuperscript{119} In light of this new Community power, member states ensured the continued protection of their national environment by including article 100A(3) in the EEC Treaty. Article 100A(3) obliges the Commission to adopt a high standard of environmental protection in its proposals to the Council. This provision combines environmental and economic policy and exemplifies—as required in article 130r(2)—how environmental policy can be incorporated into all other Community policies.

At a minimum, the high standard of protection under article 100A(3) must be consistent with the requirements of article 130r(1)–(2).\textsuperscript{120} It is unclear, however, whether article 100A(3) requires state-of-the-art protection. The language of articles 100A(3) and 130r(2) neither requires nor implies state-of-the-art standards. Article 8c, in effect, allows the Commission's proposals under article 100A(3) to require relatively low levels of protection where warranted by the otherwise arduous burden of bringing the less developed economies of certain member states into compliance with the internal market.\textsuperscript{121} Furthermore, it is unlikely that the qualified majority necessary under article 100A would adopt proposals requiring state-of-the-art protection. In essence, the level of protection that the Commission reasonably can propose will be limited by the anticipated economic and political feasibility of its proposals.\textsuperscript{122}

3. "Opting Out:" Application of National Law After Adoption of Community Harmonizing Measures

Article 100A(4) permits member states to opt out, that is, to apply stricter environmental measures in an area harmonized by

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\textsuperscript{120} Møller, \textit{Binnenmarkt und Umweltschutz}, 42 \textit{Europa-Archiv} 497, 503 (1987).

\textsuperscript{121} EEC Treaty, \textit{supra} note 1, at art. 8c.

\textsuperscript{122} See Langeheine, \textit{Art. 100A}, in \textit{Kommentar zum EWG-Vertrag}, \textit{supra} note 3, at No. 55.
Community legislation. If the Council has acted pursuant to article 100A(1), the Community can not require member states to lower their standards. For political reasons, replacing unanimity with qualified majority voting made the opting-out procedure a necessity. It is uncertain, however, whether opting out is available only when the Council has acted by a qualified majority, or when it acted by unanimity as well.

a. Who Can Opt Out?

The availability of opting out raises the question of whether a member state that voted for a harmonizing measure retains the right to opt out of that same measure. While the language of article 100A(4) suggests that opting out is possible only after the Council acted by a qualified majority—implying that only member states who voted against the harmonizing measure may opt out—the spirit and aim of article 100A render this textual interpretation unconvincing. A more plausible theory holds that a member state may always opt out and that opting out is, therefore, available regardless of the outcome of the Council vote. If this were not true, member states would rarely vote for Community measures that are less stringent than their own, but more stringent than prior Community standards. In effect, member states would vote against environmental measures that raise the level of protection in the Community simply to preserve their right to apply stricter national measures. Because this dynamic would undermine the goal of achieving a high level of environmental protection Community wide, all member states must be able to opt out under article 100A(4), regardless of their vote cast.

123 Id. at No. 69.
124 Reform der Organe, supra note 94, at 104.
125 Ehlermann, The Internal Market Following the Single European Act, 24 COMMON MKT. L. REV. 361, 391 (1987); Jaqué, L'Acte Unique Européen, 22 REVUE TRIMESTRIELLE DE DROIT EUROPÉEN 575, 600 (1986); Krämer, supra note 113, at 155; Langeheine, supra note 122, at No. 58.
b. **Grounds for Opting Out**

Grounds for opting out are the major needs set out in article 36\(^{128}\) or the protection of the environment or working environment. In the context of environmental protection, the requirement of a major need demands that national measures must have stricter standards than the Community measures they supersede.\(^{129}\) Stricter national measures may not, however, constitute means of arbitrary discrimination or disguised restrictions on trade between member states. In addition, stricter national measures do not apply unless and until approved by the Commission.\(^{130}\)

c. **May Member States Apply New Stricter Measures?**

Divergent views exist with respect to the meaning of “apply” in article 100A(4). After the Council has adopted harmonizing measures, the question arises as to whether member states may merely maintain higher protection standards, or whether they may introduce new ones. The latter interpretation reflects the policy that member states should be able to adapt to unforeseeable changes relating to environmental protection.\(^{131}\)

A sound textual interpretation, however, suggests that member states are only permitted to apply already existing national measures. The meaning of “apply” in English, and its French and German equivalents in the EEC Treaty, is clear: apply means to put to practical use, not to create something new. “Apply” in article 100A(4) can be distinguished from provisions in article 130t, which expressly grant member states the power to “maintain or introduce” more stringent protective measures.\(^{132}\) Thus, the drafters of the SEA clearly distinguished “apply” from “maintain or introduce,” the former prescribing a more limited power than the latter.

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\(^{128}\) EEC Treaty, *supra* note 1, at art. 36. The grounds for exemptions under article 36 are “public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property.” *Id.*

\(^{129}\) *See* Langeheine, *supra* note 122, at No. 69.

\(^{130}\) *Id.* at No. 83.


\(^{132}\) *Neue Umweltkompetenzen*, *supra* note 80, at 500; Krämer, *supra* note 113, at 155; Langeheine, *supra* note 122, at No. 65.
Furthermore, article 100A was drafted to accelerate and intensify the establishment of the internal market. Article 100A complements article 100, which itself already prohibits member state action after a directive has been passed. It is unlikely then, that article 100A would expand the ability of member states to take unilateral action. National measures passed after Community harmonization under article 100A(4) would be contrary—in spirit as well as effect—to the creation of the internal market.

IV. APPLICABILITY OF ARTICLE 100A AFTER DECEMBER 31, 1992

Article 100A provides for harmonization of member state law in order to achieve the internal market by December 31, 1992, as required by article 8A. Article 8A merely reflects the political will of the member states to establish the internal market by that date, and will not automatically repeal article 100A on January 1, 1993. Thus, article 100A will remain in force after the completion of the internal market.

After December 31, 1992, the Council will have the choice of applying either article 100A or 100B, but article 100B is unlikely to play a significant role in the area of environmental law. Article 100B allows the Council to inventory member state law that falls under article 100A and has not yet been harmonized during 1992, and to declare it equivalent to the law of other member states. The requirements of articles 100A(3) and 130r(2) that all Community policies reflect a high standard of environmental protection, as well as the opting out procedure under article 100A(4), also apply to article 100B. Thus, only those member state measures exhibiting a high level of environmental protection would be equivalenced.

133 Zacker, supra note 115, at 490.
135 Cf. Grabitz, Art. 8A, in KOMMENTAR ZUM EWG-VERTRAG, supra note 3, at No. 5.
136 See Langeheine, supra note 122, at No. 10.
137 EEC Treaty, supra note 1, at art. 100B. Article 100B provides:

1 During 1992, the Commission shall, together with each Member State, draw up an inventory of national laws, regulations and administrative provisions which fall under Article 100A and which have not been harmonised pursuant to that Article.

2 The provisions of Article 100A(4) shall apply by analogy.

3 The Commission shall draw up the inventory referred to in the first subparagraph of paragraph 1 and shall submit appropriate proposals in good time to allow the Council to act before the end of 1992.
protection could be declared equivalent, which makes it unlikely that article 100B will be applied in environmental law.\textsuperscript{138}

\section*{Conclusion}

Establishment of the internal market is often viewed—rather pessimistically—as jeopardizing preexisting environmental protection regimes in the member states. This view apparently assumes that economic development and environmental protection are mutually exclusive. Environmental protection, however, should be considered a positive force and necessary condition for the further economic development of the Community. Admittedly, environmental protection requires expenditures that can slow down economic development. At the same time, however, high environmental quality can act as an economic stimulus by attracting tourists and capital. In addition, countries are likely to recognize quickly that high environmental protection standards in development, production, sale of equipment, and management systems represent competitive advantages and considerable profits. Thus, in the near future, it is unlikely that economic development will occur at the expense of environmental protection, especially in light of the mandate that article 100A imposes on the Community institutions, and the ability of member states to opt out of less stringent Community standards.

As amended by the SEA, the EEC Treaty grants Community institutions broad law- and policy-making powers in the environmental field. The Community will hopefully use these powers extensively, both inside and outside the Community. The EEC is in a unique position to help set the agenda for increased international cooperation—especially with the emerging East European democracies—to solve the increasing number of transboundary environmental problems. To this end, Community environmental standards can and should serve as a model for responsible management of natural and human resources.

\textsuperscript{138} Cf. C. \textsc{Hey} \& J. \textsc{jahns-Böhm}, \textsc{Ökologie und Freier Binnenmarkt} 47 (1989).