PRINCIPLES OF ENVIRONMENTAL PROTECTION

Paper presented to the Avosetta Group, Amsterdam Oct. 11, 2002

by Gerd Winter

Structure, function and content appear to be the 3 questions which must be clarified when we want to come to grips with environmental principles in the European Treaties.

I. STRUCTURE

For a start some measure of legal philosophy may help to understand what a principle might be.

Principles have legal value. By this they are to be distinguised from political goals on the one side and moral values on the other. Some content of such goals or morals may nevertheless overlap with the content of a principle.

Ronald Dworkin, the Anglo-Saxon authority in matters of principles proposes that principles should be understood to only contain individual rights. They should be distinguished from collective goals. Such goals are persued, he says, not by principles but rather by policies. „Arguments of principle are arguments intended to establish an individual right; arguments of policy are arguments intended to establish a collective goal. Principles are propositions that describe rights; policies are propositions that describe goals."[1]

Robert Alexy, Dworkins German counterpart, opposes this arguing that collective goals too can be given legal force which means that they can have the quality of principles. For instance, the freedom of press is a collective interest which has legal force in a number of legal systems.

Dworkin sees the law quality of principles to be based on the judiciary and its professional wisdom. This is a view characteristic of legal philosophers with a common law background. „The origin of these (i.e. some principles applied in a certain court case) as principles lies not in a particular decision of some legislature or court, but in a sense of appropriateness developed in the profession and the public over time."[2]

Not astonishingly Alexy who has civil law systems with a clearcut hierarchy of laws and the constitution in mind submits that principles may be, and are in fact often established by the constitution. This is not to say that Alexy would have to be rated as positivist positivism being refuted by Dworkin for their insistence that principles must be based on precise and institutionalised „secondary" norms of recognition.

---

1 R. Dworkin, Taking rights seriously, Harvard UP 1977, p. 90

2 Dworkin, op. cit. p. 40

Alexy combines both the possibility of a positive constitutional decision and the possibility of judge made principles even in civil law systems.

Principles must be distinguished from rules. Some, such as Dworkin, see the difference as one of generality and hierarchy. Principles are more general than rules, and they have the power to direct their interpretion or even overrule them. This hypothesis is certainly correct but does not provide much guidance because nothing is said about the precise deontic quality of rules and principles.

Again Alexy may be consulted in this regard. He proposes a distinction which has widely been discussed in German legal doctrine. According to him rules are applicable in full and without exception (unless exceptions are explicitely built into the rule itself). If a rule collides with another it is either invalid or not applicable depending on certain higher level rules of collision. Principles, by contrast, are goals which shall be reached as far as possible. They can be balanced against others if two principles invoked to solve a problem of rule interpretation or invalidation contradict each other.

Take, for instance, a rule which grants freedom of tv reporting about criminal cases. In one case decided by the German Constitutional Court a tv movie was made about a murder some time after the case had already widely been covered by the press and tv. The convicted murderer claimed that the movie would encroach upon his right to privacy and his chances of resocialisation. The Court ruled in the case that there were two conflicting principles at stake, i.e. freedom of press and the right to privacy. It suggested that none of them was absolute but must be balanced against each other according to the conditions given in the concrete case.

The court went on saying that in the case before it it appeared that the case had already been widely reported such that the encroachment on the freedom of press resulting from the suppression of the movie was not severe. On the other hand the court found the continuing public display of the individual convict and his deed to be a serious intrusion into his personal rights. Balancing both sides the court concluded that the right of the convict prevailed over the right of the press.

Two observations can be drawn from this judgement. The first is that no principle can have absolute priority over another. In other words no abstract order among principles, be it ordinal or even cardinal, should be constructed. Even the highest principle, human dignity, must possibly step back under certain compelling conditions.

Secondly, the court seems to have a rule (a rule, not a principle) in mind which helps to find a compromise when principles collide. Alexy phrases this principle as follows: „The higher the degree of non-fulfillment or impairment of the one principle, the greater must be the importance of the fulfilment of the other principle“. In our murder case the right of privacy was severely affected whilst the freedom of press was less. Therefore the right to privacy coud prevail.

I believe the second observation is commendable. The first is certainly also plausible in that it rejects the possibility of one for ever rank orders of principles. However, one may nevertheless accept prima facie rankings which only allocate burdens of proof. In such cases if a higher principle is affected those defending the opposing principle have the burden of proofing that their principle is more seriously impaired than the other.

What does all this have to do with EU environmental principles?

First of all, we may have a clue to persuade those who deny the legal quality of the environmental principles.[3] They seem to be afraid that there would be no room left to manoevre for the legislator if the principles were taken as legally binding. Those who oppose this often refer to the discretionary margin the courts would allow the legislator when applying principles. However, discretion is a tool too readily available. I believe a rule of collision such as expounded earlier would provide some more guidance without necessarily strangulating the legislative process.

Secondly, we may derive guidance as to the question much debated in German doctrinal literature whether the environmental principles

have a higher value than other principles such as e.g. the internal market, or vice versa. I believe that the core environmental principles such as the principle of high level of protection and the precaution principle should indeed be regarded as prioritary but in the sense of a prima facie priority allocating the burden of proof to the opposing principles.

I need a short digression in order to explain this proposition. No matter if related to a state or a sui generis polity, constitutions organise *societal* relationships, including relationships between citizens and governments. As to the question of the place of the environment in such a constitution, the answer might appear that protection of the environment should be framed and represented analogous to other principles like the protection of economic enterpreneurship, human health, social security or consumer interests.

However, this would assume that nature is a concern comparable to any other. Yet, it is the pre-condition of survival for human society. While the biosphere can exist without human society, the reverse is not true. Human society has developed the potential to destroy earth as a habitat, and despite efforts of conservation, it is still progressively exhausting natural resources and damaging the environment. Approached from the perspective of the habitable biosphere, it would therefore be a misconception if in the European floating polyarchy environmental protection were represented as a principle on equal foot with any other principle.

---

[3] Pro: A. Epiney, *Umweltrecht in der Europäischen Union* (Köln: Heymanns Verlag, 1997) p. 108. Contra: L. Krämer, *EC environmental law* (London: Sweet & Maxwell, 4th ed. 2000), p. 8; J.Jans, European environmental law (London: Kluwer Law International) 1990, p. 20, both authors referring to the principle of high level of protection.

II. CONTENT

1. Sources

Numerous principles on environmental matters are found in the EC treaty. They are contained in:

- the integration principle (Article 6),[4]
- the objectives of preservation of the environment, protection of human health, rational utilisation of natural resources and promotion of measures at international level (Article 174 (1)),
- the principles of aiming at a high level of protection, precaution and prevention, of rectification at source and of making the polluter pay (Article 95 (3) and Article 174 (2)).

In addition some points to consider are mentioned the legal character of which I shall not explore any further. The points embrace the taking into account of the available scientific data, diverging regional conditions, potential advantages and drawbacks of action, and the balanced development of the regions (Article 174 (3)).

2. Method of interpretation

A methodological remark may be appropriate. The question may be raised whether the environmental principles established by the treaty should be interpreted in terms of the traditions of the Member States, or if there is a genuine EU component to be respected. In the former case the principles would have to be given a rather modest content because in many Member States environmental protection has only recently entered into constitutions therefore not constitutional traditions which could be a basis for community principles in the sense of Art. 6 para 2 EU Treaty.

However, I believe a fresh approach can be tried founding itself on the *sui generis* character of the Union. The Union which is certainly not an omnipotent (federal) state, but it possesses other than normal international organisations some supranational powers. Whilst states must find an equilibrium of all interests concerned, the "irregular" European polity can be given special and even unbalanced tasks. Among these may figure an especially strong task and, indeed, identity of protecting the environment, because the larger the geographic extension of a regime the more appears the environment as an exhaustible resource. The view from within a state will hardly see the environment as a highly vulnerable spaceship or

---

[4] The integration principle, as combined with the principles of high level of environmental protection and of sustainable development, was also adopted by Article 37 of the Charter of Fundamental Rights.

biosphere. Such a view is more likely to be triggered from a position "above" the states. Therefore we do not need to first of all clarify the role of environmental protection in state constitutions before discussing the same issue in regard of the European polity. There is a genuine task to be fulfilled on the Community level. This must be kept in mind when the content of the principles shall be determined.

3. Sustainability and environmental protection

Sustainability as well as environmental protection have been written into the proclamation of objectives of the Union, both by the Maastricht and Amsterdam treaties. How do these principles relate to each other? In the Maastricht version of the treaties, the preamble of the Union treaty mentions environmental protection, Article B of the Union treaty refers to 'economic and social progress which is ...sustainable', and Article 2 of the EC-treaty appeals for 'sustainable ... growth respecting the environment'. In the Amsterdam version the preamble (recital no. 8) of the Union treaty once again mentions environmental protection but cites, in addition, 'the principle of sustainable development', Article 2 of the Union treaty repeats the "balanced and sustainable development", and Article 2 of the EC treaty combines the "balanced and sustainable development"with "a high level of protection and improvement of the quality of the environment."

In sum, the objectives apparently adopt a double approach: environmental protection and sustainability. The older concept of protection has been flanked by the newer of sustainability. This does not mean that the former concept has become obsolete. Both objectives can be understood to be complementary. In what precise sense needs however to be clarified.

One possibility is to understand sustainability as concerned with the consumption of natural resources (such as forests, water, minerals, or arable land) whilst the focus of protection is concerned with the utilisation of environmental media (such as the atmosphere, soil, or inland waters and the sea) as absorption potential for many kinds of residues (such as exhaust, sewage, or waste). The fact that Art.174 ECT, para 1 1st and 3rd indent, distinguish between protection of the environment and utilisation of natural resources speaks in favor of this interpretation.[5]

Another and more profound understanding would notice a shift of paradigm. Protection, more traditionally, involves the shielding of the environment against over-exploitation, inferring from what the environment can tolerate what the economy must refrain from, whereas sustainability concerns the inner logic of the economy, demanding that environmental protection is perceived as a (at least long-term) self-interest of the economic actor. In the instrumental perspective, whereas for protection it would suffice that production processes are subjected to "external" threshold values, sustainability would necessitate that environmental concerns be part of the management structure of the firm.

---

5 Cf. J. Jans *European Environmental Law* (Groningen: Europa Law Publishing), p. 28.

It seems that this understanding of sustainability should be retained. It should be opposed to a much broader and looser concept which has emerged over the last years. This concept understands sustainability to mean that economic, social and ecological concerns stand on equal terms and must be compromised. Not only robs this understanding the concept of sustainability of any precise meaning, it has often served as a disguise of subsuming environmental concerns to the demands of economic growth.

I therefore suggest that the wording of Art. 2 EC Treaty is not changed with respect to the mentioning of environmental protection and sustainability. However, we should warn against including recital no. 8 of the Amsterdam version in the preamble of the new EU constitution. This recital is anyway a monster because too many concerns are here drawn together. As far as the environment is concerned it might be better to reserve for it a separate recital where both a high level of environmental protection and sustainable economic and social progress are mentioned. In addition, the prioritary stance of the natural conditions of life should be expressed. This could be done by introducing the concept of a livable biosphere. Reference can be made to the UNESCO concept "man and the biosphere".[6]

4. Precaution

The precaution principle means that action should not only be taken if a damage is to be expected with certainty but also if the knowledge base is uncertain.[7] Although the principle was derived from German environmental law it is unclear to what extent some aspects familiar with the German notion which go beyond the uncertainty issue were also taken up. These additional aspects include: concern for long-distance or long-term damages, for low probabilities of occurrence (e.g. of accidents), and for small scale damages.

5. Subsidiarity

EC environmental policy is, in accordance with the subsidiarity principle, "subsidiary" to Member State environmental policy. Although the debate of the early nineties about the exact meaning of the principle of subsidiarity as laid down in Article 5 (2) EC has now settled down, four important points of controversy remain which have also a bearing on environmental action.

The *first* such question is whether the subsidiarity principle a priori aims at *minimizing* EC measures, or concerns the *optimal level* of regulating the problem at stake. The 1987 Treaty had adopted the second approach[8] and was, in this respect,

---

6 See Resolution 28 C/2.4 of the UNESCO General Assembly. See also G. Winter, "Umwelt-Ressource-Biosphäre. Ansichten von Natur im Recht" (2000) *GAIA* 3, 200 et seq.

7 See ECJ in the BSE case

8 Article 130r read: "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 State".

confirmed by the 5th Action Program. The Commission used to follow this line in its practice of motivating legislative proposals.[9] By introducing a two step test, (insufficiency of member state action and better achievement by Community action) the wording of Article 3 b (2) of 1993 and Article 5 (2) of 1997 seems to support the first interpretation. Such a reading would imply that once it is concluded from the first test that Member State action sufficiently achieves the objective, the question of whether EC action could not be even more effective becomes obsolete. Such an outcome is highly undesirable. It is even logically unfeasible. For, how could the adequacy of national measures be assessed without prior consideration of the alternative at the EC level? Therefore, it is submitted that the two steps proposed by the subsidiarity principle are rearranged such that as a first step the national and EC alternatives are identified, and as a second assessed in view of a number of criteria of the kind listed in the Protocol on subsidiarity[10] and other documents[11] and publications[12] (transnational effect, conflict with requirements of the Treaty, benefits of scale, effects on investment and quality of life, globality of the problem, etc.).

The *second problem* relates to the question of whether, once the competent level has been determined, the relevant organs are not obliged rather than permitted to make use of their powers. Those who argue that this is indeed the case understand "subsidiarity" in its literal sense i.e. of providing assistance.[13] But although in a political discourse about subsidiarity this may be considered it would be to overstate the force of subsidiarity as a legal principle.[14] If one accepts the notion of a constitutional duty to act, then this should be derived from the specific policy-related provisions of the Treaty (such as those discussed earlier), not from a general understanding of subsidiarity.

The *third point* of controversy is whether subsidiarity merely requires a comparison of Member State action with EC alternatives or, in addition, a comparison of public action with societal self-control. Although subsidiarity in the Catholic tradition extends to the government/society comparison, according to the clear wording of Article 5 the EC principle is only related to the Member State/EC dimension. The question whether the goal could be better attained by self regulation, is a matter to be judged in the light of the proportionality principle. To be sure, in this instance we should apply the unwritten version, associated with the justification of encroachments on basic rights, rather than the one contained in Article 5 (3) EC, the latter, in common with the other sections of Article 5 EC, exclusively concerning the

---

9 See e.g. Proposal for a Council Directive on integrated pollution prevention and control, Com(93) 423 p. 11.

10 Protocol on the application of the principles of subsidiarity and proportionality, No. 5. For an interpretation of the Protocol see Jans, op. cit. p. 12.

11 Earlier lists of the Council and the Commission as well as the German and even the Bavarian government are reproduced in D. Mertens (ed.) *Die Subsidiarität Europas* (Berlin: Duncker und Humblot 1993).

12 L. Kraemer *E.C.Treaty and Environmental Law* (London: Sweet & Maxwell, 3rd ed. 1998) p. 76, citing H. Sevenster.

13 Cf. V. Constantinesco "'Subsidiarität': Magisches Wort oder Handlungsprinzip der Europäischen Union?" (1991) *EuZW* 561.

14 G. Winter "Subsidiarität und Deregulierung im Gemeinschaftsrecht" (1996) *EuR* 259.

Member State/EC dimension.[15] In its proposals for legal acts, the Commission not always separately identifies these two dimensions, even though it would contribute to transparency if it were to do so.

This applies in particular to instances where legal acts operate to *deregulate* a policy area. Often, deregulation has been mixed up with subsidiarity[16] and even "sold" by using the rhetorical subsidiarity.[17] Deregulation is, however, a matter of political discretion, rather than imperative command. A genuine enquiry into the necessity of the measure, if compared with self-regulation, would require the Commission to prove that the problem can equally well be resolved by self-regulation. Mere reference to subsidiarity should not free the Commission from this enquiry.

A *fourth point* relates to the fact that the Commission often provides a quantified account of the benefits and costs of Community action as opposed to lower degrees of integration or inaction. This has occasionally provoked bizarre calculations of the gains of avoided fatalities valued in Euros as opposed to costs of pollution abatement. For instance, in the proposal for a Directive on new and stricter clean air standards for sulphur dioxide and other exhaust emissions, the Commission estimated the expected additional costs at 48 Million ECU and the expected gain in avoided mortality at up to 3.784 Million ECU per year, a life being valued as up to 4,2 Million ECU.[18] Whereas it is perfectly reasonable and even required by the Protocol on subsidiarity to consider financial burdens which actually fall upon public and private actors[19], such exercise of artificial monetarisation of intangible goods is neither sound nor required by subsidiarity as a legal principle. In the instance cited the result may appeal to environmentalists, but this should not be an excuse for unreasonable methodology.[20] In fact, in the case of benzene standards the Commission's assessment of costs and benefits found that the abatements costs were excessive in relation to the benefit gained. The Commission made some effort to follow the unliked result up with some qualitative reasoning which however had the taste of "corriger la fortune". Preferable is therefore to be the Commission's own finding in the proposal for a Water Framework Directive where it stated:

"Given the said difficulties the Commission concludes that any assembling of figures or estimations concerning a financial cost/benefit-analysis would at best be unreliable and at worst misleading or quite simply wrong. Therefore in the following

---

15 Dissenting Jans, op. cit. p. 14 et seq.

16 L. Kraemer *E.C.Treaty and Environmental Law* (London: Sweet & Maxwell, 3rd ed. 1998) p. 73.

17 G. Winter "Subsidiarität und Deregulierung im Gemeinschaftsrecht" (1996) *EuR* 263

18 Com(97)500, p. 18 et seq.

19 Protocol on the application of the principles of subsidiarity and proportionality, No. 9 3d indent.

20 In fact, in the case of benzene standards the economic assessment of costs and benefits found that the abatements costs were excessive in relation to the benefit gained. The Commission made some effort to follow the unliked result up with some qualitative reasoning which however had the taste of "corriger la fortune" (see Com(1998)591 p. 15). On efficiency analysis in environmental regulation in general see G. Winter "Nutzen und Kosten der Effizienzregel im öffentlichen Recht" forthcoming in E. Gawel (ed.) *Effizienz im Umweltrecht* (Baden.Baden: Nomos).

analysis mainly the kind of cost/benefit-factors involved by the proposal are given. Figures are only submitted in order to convey an idea of the order of magnitude of the costs of monitoring and management."[21]

III. FUNCTIONS

Four different contexts may be distinguished in which environmental principles (and indeed any principles) may play a role:

the framing of EC competences,

- the justification of restrictions by EC action of fundamental rights,
- the mandation and direction of the EC institutions to act, and
- the justification of restrictions by Member State action of basic freedoms
- the mandation and direction of Member States to act.

1. Framing EC competences; justification of restrictions of basic rights

In the first and second contexts, i. e. competences for action and justifications of restrictions of fundamental rights, the requirements have an *enabling* character, which without doubt entail legal effects.

With regard to competences this legal effect of the objectives is expressed by the reference made to them in Article 175 para 1 EC whilst the principles and criteria have been given legal value by court jurisprudence. For instance, in the *BSE* case the Court of Justice, referring to the principles of high level of protection, prevention, and integration, held that "where there is uncertainty as to the existence or extent of risks to human health, the institutions may take protective measures without having to wait until the reality and seriousness of those risks become fully apparent."[22] In the *Bettati* case the court has even given the criterion of taking account of available scientific and technical data legal effect.[23]

As to encroachments upon fundamental rights the European courts have very rarely invoked the objectives and principles of Article 174 EC as a source for justification. It seems that the national plaintiffs challenging action based on EC environmental legal acts seldomly allege that these laws violate European fundamental rights. One rare example is *Standley*.[24] This is interesting to note from a German background because

---

21 Com(97) 49 p. 22 (my translation).

22 ECJ, Case C-180/96 *United Kingdom v Commission* [1998] E.C.R. I 2265 (No. 99)

23 ECJ, Case C-341/95 *Gianni Bettati v Safety High-Tech Srl* [1998] E.C.R. I 4355 (No. 48 et seq.).

24 ECJ, Case C-293/93 *Standley* [1999] E.C.R. I 2603. The relevant passage is in Nos. 55 and 56 which read: " It is true that the action programmes which are provided for in Article 5 of the Directive and are to contain the mandatory measures referred to in Annex III impose certain conditions on the spreading of fertiliser and livestock manure, so that those programmes are liable to restrict the exercise by the farmers concerned of the right to property.

German environmental laws have often been challenged for violating fundamental rights such as the right of free enterprise or private property. It is true, however, that the European courts have sometimes referred to environmental protection principles as yardstick for a proportionality test (which, although being an element of the more comprehensive examination of violations of basic rights, is sometimes used as a separate yardstick). For instance, in the *Bettati* case the Court of Justice said that the regulation restricting the use of a chemical was proportional in relation to its environmental protection goal.[25]

As to the substance of the requirements of Article 174 EC, their full meaning should be appreciated in the enabling context. For instance, in the *Safety Hi-Tech* judgement the Court applied the principle of a high level of protection, but did not find it had been violated because the principle did not require the 'technically highest level'.[26] The Court was further asked to decide whether a marketing restriction of a chemical substance always requires a comprehensive assessment of its effects on all of the relevant environmental compartments. The Court ruled that it was sufficient to show negative effects on just one compartment, which in the case was the ozone layer, whilst it did not find it necessary also to assess effects on the warming up of the atmosphere.[27] This example shows that the Court does explore the full meaning of Article 174 EC.

It should be added that, by implication, in the enabling context, there is room for reasoning *a maiore ad minus*. Article 174 EC sets out the minimum standards for action, and does obviously not exclude that, if even stronger reasons are present the measure may also be taken. For instance, as a Community measure can be based on the precaution principle, it can of course also be taken if there is an imminent danger of environmental damage. Or, as a Community act pursuing a high level of protection may be restrictive for the relevant actors, it can all the more be adopted if the measure envisaged is less restrictive. Another implication of the enabling character is that even one ground for action suffices, in other words not all of the imperatives need to have been fulfilled. This was the dominant message of the *Safety Hi-Tech* judgement.

2. Mandation and direction

In the third context EC action is mandated and directed. It is of utmost importance to know if and with what intensity the EC institutions (and in fact also Member States, see infra 3) are pushed to take environmental protection measures. The environment although recognised as a reason for justifying encroachments upon competences and freedoms will bear the burden of proof in these contexts. By contrast, if there is an

---

However, the system laid down in Article 5 reflects requirements relating to the protection of public health, and thus pursues an objective of general interest without the substance of the right to property being impaired.

25 ECJ, Case C-341/95 *Gianni Bettati v Safety High-Tech Srl* [1998] E.C.R. I 4355 (No. 54 et seq.).

26 ECJ, Case C-284/95 *Safety Hi-Tech* n. 9 above (No. 49). See also ECJ, Case C-233/94 *Germany v. Parliament and Council* [1997] E.C.R. I-2405 (No. 48) for the respective clause in Art. 95 sec. 3.

27 Loc. cit. No. 45.

obligation to act the burden of proof that some environment protection measure is unsound is shifted to the other (the economic) side.

We may once more consider the sui generis character of the Union in order to understand that the environmental principles do indeed have a mandatory and directive force. Normal constitutions usually accept the "competence competence" of the state as an implicit basis, and seek to define those powers in the context of, inter alia, fundamental rights which limit state action. Such constitutions have traditionally been reserved about incorporating programmatic proclamations, driving the state to act. One of the characteristics of the EU, which distinguishes it from a state, is that the Union is driven by a program of action, and that the bases for competence, for secondary law-making, are framed as means for fulfilling that program, or even as obligation to do so. This dynamic feature could be particularly useful as regards a specific policy focussing upon preservation of the biosphere.

Unfortunately, until now no case law exists as to the legal effect of environmental obligations. However, to deny legal effect from the outset would contradict the general line the ECJ has taken as regards programmatic clauses since its judgment of 1985, where it held that the obligation under Article 75 (now 71) EC to take action towards a common transport policy, although allowing for a margin of discretion, binds the Council.[28] It is true, however, that the measures to be taken are more exactly circumscribed in Article 71 than in Article 174 EC. The object of the obligation is here "community policy on the environment", whereas Article 71 and 72 have a number of specific legal acts in mind. Only in relation to the integration principle the Treaty speaks not only of policies but also of "activities".[29]

Assumed there is mandatory legal effect the content of such obligations, however, differs from the enabling context. As outlined earlier, the core principles must be understood such that first of all they have a prima facie priority, secondly they can be balanced against concurrent principles, and thirdly this balancing shall be made such that the more important the intrusion on nature the more weighty the other principle must be in order to prevail. We find a neat version of this kind of prima facie priority and balancing in Art. 6 para 4 of the Habitat Directive. This may serve as a model also in areas outside environmental protection.

Following the ECJ concept of essential contents of individual rights it may also be considered if one cannot also identify essential cores of the environmental principles which can never be sacrificed or only in very extreme cases.

The methodology of distilling those binding principles remains to be developed. For this purpose it would be useful to mirror the core envisaged with the design discussed in the enabling context. This might give rise to the following kind of reasoning.

---

28 ECJ, Case 13/83 *EP v. Council of the EC* [1985] E.C.R. 1513 (No.. 49)

29 Art. 6 EC.

- If *precautionary* measures are admissible, measures which abate *imminent and severe dangers* should be obligatory.

- If measures aiming at a *high level* of protection are admissible, measures aiming at a *minimum level* of protection should be obligatory.

- If measures *improving* the environmental conditions are admissible, measures *preserving* a given environment should be obligatory.

- If measures which *substantially integrate* environmental requirements into any other policy are admissible, a *reasoned and public statement* about the environmental consequences of a measure must be obligatory.

An alternative to mandating protective action is to prohibit detrimental action. It is more modest and realistic but would nevertheless be a significant step forward. Such proposal was made by the Avosetta Group. A new paragraph to be inserted into Art. 6 was suggested which reads:

"Subject to imperative reasons of overriding public interests significantly impairing the environment or human health shall be prohibited."[30]

3. Principles and Member State action

Principles of EC environmental law not only address the EC organs but possibly also the Member States. Two kinds of influence may be distinguished.

First the principles laid down in Article 174 can be invoked for the purpose of *justifying national market regulation* intruding into basic Community freedoms. As with the case where Community action is backed by the principles of Article 174, we may term this an enabling function (from the perspective of the Member States).

Environmental protection has been accepted as a reason for justification of market regulation since the *Danish bottle* case.[31] The same is true with regard to the

---

30 The reasons given are the following: "The proposed amendment to the Treaty is inspired by the jurisprudence on the Treaty Articles 28-30 and has four functions. First, the intention is to ensure, that environmental interests / protection in the balance of interests has at least the same priority as free trade. Second, the intention is to give environmental protection direct effect, requiring EU-instutions as well as Member State to not make decisions or activities which significantly impair the environment or human health, unless such impairment can be reasoned by overriding public interests. Third, the scope is limited to "significant impairment" to ensure, that focus in the court of law is on substantial issues, which leave some discretion for minor impairment. Fourth, when the impairing source (the polluter, the project, the use of natural resources and so on) or the affected part of the environment are covered by EC legislation - it is the EC legislation which defines what is acceptable and thereby, what is significant - in the same way as exhaustive harmonization preempts Member States from recalling the Treaty article 30. The Avosetta Group find, that the proposed amendment establish a fair and reasonable balance between environmental protection and the importance of leaving discretion for policy-makers". (www.avosetta.org)

protection of human health, if only because human health already figures among the interests mentioned in Article 30 EC.[32] But the rational utilization of resources also should be accepted as a valid justification for trade restrictions. For instance, under this criterion a Member State could hinder shipments of waste for recovery to another Member State arguing that national technology of recovery is more effective.[33]

As to the principles in Article 174 (2) EC which concretize those environmental objectives, the ECJ in *Wallonian waste* regarded rectification of damage at source a legitimate ground for Member State waste regulation incorporating the principle of self-sufficiency.[34] The principle of abatement of pollution at source consequently is a legitimate general interest in the sense discussed here. We may infer from this that the same applies to other principles too, namely measures protecting the environment by precaution or by prevention.

The second kind of influence by EC principles on national measures is related not to their enabling but to their obliging potential. The Member States are certainly not obliged to respect EC environmental protection principles in the pursuit of normal national political business. But to the extent they do apply EC law, notably in transposing EC directives, they then arguably have also to abide by those principles. This indirect obligation finds its precedent in the reasoning of the ECJ in *Wachauf*. The Court held that the national authorities, when implementing the EC milk quota regulations, must respect the EC fundamental right of private property.[35] Although this reasoning concerns fundamental rights[36], there is no reason why it should not also be applicable to fundamental environmental principles framed in more objective terms.

In line with the distinction between enabling and obliging contexts, it is understood that we are dealing with an obliging context here. Therefore, only indispensable core principles will produce binding effects.

Assuming that Member States' legislation pursues a respectable level of environmental protection, the principle of an indirect impact of EU principles may

---

31 ECJ, Case 302/86 *Commission v Denmark* [1988] E.C.R. 4607 (No. 9). For a full account of the case law see H. Temmink "From Danish bottles to Danish bees: the dynamics of free movement of goods and environmental protection-a case law analysis" (2000) Yearbook of European Environmental Law vol. 1 p.61-102.

32 ECJ, Case C-473/98 *Kemikalieinspektionen v Toolex* [2000] n.y.r. (No. 38). On differences of terminology in Article 174 Article 30 see Jans, op. cit. p. 27.

33 In the Dusseldorp case, where Dutch export restrictions for waste for recovery were at stake the ECJ could have invoked the general interest in prudent resource utilisation. But the Court was not asked to express itself on this matter, and the case itself did not necessitate such expression because the recovery technology in the country of destination was not less effective than the one in the country of origin. See G. Winter, "Die Steuerung grenzüberschreitender Abfallströme" (2000) *Deutsches Verwaltungsblatt* 10, 657 et seq.

34 ECJ, Case C-2/90 *Commission v. Belgium* [1992] E.C.R. I-4431 (No. 34).

35 ECJ, Case 5/88 *Hubert Wachauf v Bundesrepublik Deutschland* [1989] E.C.R. 2609 (No. 19)

36 See for a fuller account M. Ruffert, "Die Mitgliedstaaten der Europäischen Gemeinschaft als Verpflichtete der Gemeinschaftsgrundrechte" (1995) EuGRZ p. 518 et seq.

not appear of much practical significance. One crucial exception, however, is formed by the integration principle. This principle is unknown in almost all Member States. For instance, according to this principle, an EC directive on the liberalization of the energy market must be transposed into national law by Member States in a way that takes into consideration the environmental implications.[37]

One more element of the relationship between national and EC law should be considered in connection with the foregoing. EC law, be it primary or secondary, also impacts on national constitutions, which has become most visible in the arena of human rights. The basic freedoms established by the treaties have led the national constitutional courts to reinterpret national constitutional freedoms. For instance, the German freedom of enterprise (Article 12 Grundgesetz) was reconstructed so as to apply not only to Germans, but also to other EU citizens.[38] In the environmental field the basic freedoms of manifestation and association (Articles 8 and 9 Grundgesetz) must also be extended to any EU-citizens.[39] The objectives of environmental protection of the former Article 130r EC have influenced the introduction of a similar objective into Article 20a of the German federal constitution. Likewise, it could be argued that the EC concepts of integrated pollution control and river basin management necessitate a shift of competences for water legislation from the Länder to the Bund, turning the present framework competence into a concurrent competence of the Bund. This would facilitate the task of the federal legislature to produce an integrated conception of air, water and nature related licensing and to organise water management in river basins where they crosscut the jurisdictions of the Laender.

---

37 R. Macrory "Environmental integration and the European Charter of Fundamental Rights", paper presented to the Avosetta Group, January 12/13, 2001, p. 8, (www.avosetta.org) N. de Sadeleer "Les fondements de l'action communautaire en matière d'environnement", in: *L' Europe et ses citoyens* (Peter Lang 2000), p. 112, both authors mentioning more examples.

38 For the related doctrinal controversy see H. Bauer "Europäisierung des Verfassungsrechts" (2000) *JBl*. 750 (758).

39 Bauer, loc. cit.