

# *Fordham Environmental Law Review*

---

*Volume 4, Number 2*

2011

*Article 4*

---

## The Environmental Policy of the European Community Toward Central and Eastern Europe

Stephen J. Jones\*

\*

Copyright ©2011 by the authors. *Fordham Environmental Law Review* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/elr>

## NOTES

### THE ENVIRONMENTAL POLICY OF THE EUROPEAN COMMUNITY TOWARD CENTRAL AND EASTERN EUROPE

#### INTRODUCTION

Central and Eastern European (CEE) states<sup>1</sup> have naturally looked to the prosperous European Community for assistance on many fronts in the transition to free-market, democratic institutions. The European Community, for its part, has reason to respond and even to seek out a guiding role. The Community's leading role in assisting the CEE states was recently sealed by a resolution of the Group of 24 (G-24) leading industrial states designating the Community's executive body, the Commission, as the coordinating body for such assistance.<sup>2</sup> This Note is concerned with the role assumed by the Community in improving the environment of its Eastern neighbors.

Central and Eastern Europe's environment has routinely been characterized as an ecological disaster and a human tragedy. The Community cites as a paradigm of environmental degradation the "extensive acid rain damage to forests (up to 75% of Polish forests are said to be affected), and the poisoning of complete river systems (the water of the Vistula is unfit even for industrial use)."<sup>3</sup> The specter of the Chernobyl disaster is an ever-present reminder of the urgency and seriousness of the trans-boundary Eastern environmental problems for the Community. The Community certainly has a humanitarian basis for its response to this challenge, but the Community also has evident self-interest in aiding its

---

1. Central and East European States include Poland, Hungary, the Czech and Slovak Federal Republic, Romania, Bulgaria and the former Yugoslavia. Community environmental programs do not currently extend to Yugoslavia because of the military conflict there. The Czech and Slovak Federal Republic divided into two independent nations as of January 1, 1993, but Community cooperation is expected to continue with the two new states. Reunification makes the situation of the former German Democratic Republic unique. The Community agreement on the incorporation of the GDR into the Member State of Germany subjects this territory to Community law and standards on the environment with certain derogations relaxing compliance during a transitional period. Environmental assistance is largely coordinated through Germany. The situation of the former GDR is therefore largely beyond the scope of this Note. The former Soviet republics, including the Baltic States, also figure in Community environmental policy toward Central and Eastern Europe, especially in areas such as nuclear safety and other technical assistance. Ties to these states are less well-developed than with other Eastern states, due in part to geography. No Member State shares a border with a former Soviet Republic.

2. The European Community and its Eastern Neighbours, European Documentation Periodical 8/1990, at 15. The Group of 24, or G-24, consists of the twelve Member States of the Community, Australia, Austria, Canada, Finland, Iceland, Japan, New Zealand, Norway, Sweden, Switzerland, Turkey, and the United States of America.

3. Proposal for a Resolution of the Council of the European Communities on a Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, COM (92) 23 final at 89.

neighbors, since the Eastern environmental hazards threaten the Community. Indeed, many of the East's environmental problems such as nuclear radiation and air pollution have global implications. A third motive for Community assistance is to protect the Community's internal commercial market while laying the groundwork for its future expansion. A fourth motive for assistance is to provide for the physical security of the Community: a sound environmental policy as one part of the economic and social transition in the East may prove useful in ensuring that this is a peaceful and successful process.

This Note proceeds in three parts to examine the Community's environmental policy toward the CEE states. Part I examines the Community's legal basis for taking environmental action outside the Community and with regard to Eastern Europe in particular. Part II analyzes the environmental policies and strategies which underlie the Community's environmental action in Eastern Europe. Part III examines specific undertakings by the Community to implement that policy in Eastern Europe. Finally, this Note concludes that the Community must lead the CEE states by example even as the Community pursues its CEE program of regulatory and enforcement reform, pollution remediation, technical and financial assistance and investment.

#### I. THE LEGAL BASIS FOR COMMUNITY ACTION ON THE ENVIRONMENT

The legal basis for Community environmental action is found in the Treaty of Rome of 1957,<sup>4</sup> as amended, which established the European Economic Community. The Treaty of Rome did not contain provisions relating to the environment, but in 1972 a Paris Community leaders summit produced a set of environmental principles on which adoption of five year environmental action programs followed.<sup>5</sup> These programs outlined Community environmental policy and action plans. In 1992 the fifth action program was proposed.<sup>6</sup> "Through 1986, the Community's specific environmental initiatives were generally based on [EEC] Treaty Articles 100 or 235. Article 100 . . . provides for the harmonization of Member State laws that 'directly affect the establishment or functioning of the common market.'"<sup>7</sup> Article 235 provides for "implied powers."<sup>8</sup> Elas-

---

4. Treaty Establishing the European Economic Community [EEC Treaty]. The European Community is comprised of three communities: the European Coal and Steel Community, the European Atomic Energy Community and the European Economic Community. Four institutions commonly govern the communities: the European Parliament, Commission, Council and Court of Justice.

5. The Paris summit also resulted in a European Commission service to deal with environmental and consumer issues. This service is currently the Directorate-General for the Environment, Nuclear Safety and Civil Protection.

6. See *infra* Section II.B. of this Note for a discussion of this program.

7. GEORGE A. BERMAN, ROGER S. GOEBEL, WILLIAM A. DAVEY & ELEANOR M. FOX, *EUROPEAN COMMUNITY LAW: CASES AND MATERIALS* (1993) at 1101-02.

8. *Id.* EEC Treaty, art. 235, provides:

tic provisions of the Treaty were thus used to deal with newly perceived issues affecting the Community. Recently, Article 238, providing for the conclusion of agreements by the Council with the assent of the European Parliament, has been used as the basis for international agreements with CEE states.<sup>9</sup>

Recognizing the importance of Community environmental policy, the EEC Treaty amendments of the Single European Act added a new title on the environment to the Treaty, containing three articles. Entering into force as of July 1, 1987 and providing the new legal basis for international environmental action, Title VII on the environment reads as follows:

Article 130r

1. Action by the Community relating to the environment shall have the following objectives:
  - (i) to preserve, protect and improve the quality of the environment;
  - (ii) to contribute towards protecting human health;
  - (iii) to ensure a prudent and rational utilization 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:
  - (i) available scientific and technical data;
  - (ii) environmental conditions in the various regions of the Community;
  - (iii) the potential benefits and costs of action or of lack of action;
  - (iv) 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 a 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 cooperate with third countries and with the relevant international organizations. The arrangements

---

If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.

9. These agreements include environmental provisions. See *infra* Section III.A. of this Note.

for Community cooperation may be the subject of agreements between the Community and the third parties concerned, which shall be negotiated and concluded in accordance with Article 228.

The previous paragraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Article 130s<sup>10</sup>

The Council, acting unanimously<sup>11</sup> 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.

Article 130t

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.<sup>12</sup>

The new Title VII explicitly empowers the Community to act in the environmental sphere, but Article 130r(5) also allows individual Member States of the Community to enforce more rigorous environmental measures as long as they are compatible with the Treaty. Article 130r(5) provides the legal basis for Community action with regard to non-Member State third countries and international organizations in the environmental sphere.<sup>13</sup> International agreements reaching beyond the Article 130 powers relating to the environment, e.g. covering non-environmental areas, must also be based on the Community's external relations powers.<sup>14</sup>

Articles 130r - 130t constitute the current Treaty basis for action on the environment, but the addition of this title in the Single European Act may be superfluous since the Community was already implementing an environmental policy under pre-existing Treaty articles. Nevertheless, the new title recognized the high priority of environmental action at the Community level and formally institutionalized environmental policymaking and action at the Community level.

---

10. See Emile Noel, *Working Together — The Institutions of the European Community*, European Documentation Periodical (1991) for an explanation of the Community legislative process.

11. Article 100a of the EEC Treaty, introduced by the Single European Act, provides that measures may be adopted less than unanimously, by a "qualified majority." See EEC Treaty, art. 100a. Article 100a applied to measures to harmonize the laws of Member States by the end of 1992. The Court of Justice has ruled that Article 100a was a proper basis for Community environmental legislation to establish the "internal market" of the Community by December 31, 1992. See *Commission v. Council*, Case C-300/89, [1991] ECR — (June 11, 1991).

12. EEC Treaty, *supra* note 4.

13. EEC Treaty, art. 130r(5). Article 228 referred to in art. 130r(5) provides for the legal mechanism by which the agreements between the Community and third parties may be concluded.

14. See *infra* Section III.A. of this Note.

The Treaty on European Union, known informally as the Maastricht Treaty, would, if ratified, introduce as a principal objective of the Community the promotion of sustainable growth respecting the environment.<sup>15</sup> It would include among the activities of the Union a policy in the sphere of the environment.<sup>16</sup> The Community policy on the environment would also be required to contribute to promoting measures at the international level to deal with regional or worldwide environmental problems.<sup>17</sup> This change is significant in that it would mandate a constructive international environmental policy. However, as a practical matter, the Community has already embraced and acted on this principle.

Although the Single European Act recognized Community competence on the environment, the voting requirements of Article 130s are stringent. Unanimity is required on the part of the Council. In other words, each Member State must agree on a Community environmental measure and each holds veto power. This means that a lowest common denominator in environmental protection within the Community may result, hardly in accord with Community aspirations toward a "high level of protection."<sup>18</sup> Of course, Member States may take more stringent measures under Article 130t, but this will have little impact at the international level: CEE states will be encouraged to comply with the lower Community standards rather than certain higher Member State measures.<sup>19</sup> The Treaty on European Union would amend Article 130s, making approval of environmental measures easier.

## II. COMMUNITY ENVIRONMENTAL POLICY AND STRATEGY: COMMUNITY GOALS FOR CENTRAL AND EASTERN EUROPE

### A. *The Role of the Community in Context*

The Community is the most important international player in environmental assistance to CEE states. As stated above, the G-24 nations have delegated the task of coordinating assistance to CEE states to the Commission. Thus, funding is not limited to that from the Member States alone. As to the relationship between the Community and the Member States, Article 130r(5) affirms the Member States' individual competence in international environmental relations. Article 130r(5) is an example of the Community principle of subsidiarity under which Member States carry out activities which may be as easily or more easily executed at the Member State level than at the Community level. Member States may be

---

15. Treaty on European Union, Feb. 7, 1992, O.J. (C 224) 1, art. 2 [hereinafter TEU].

16. TEU, art. 3(k).

17. TEU, art. 130r(1). See COM (92) 23/I final at 3 for the discussion of these Treaty measures.

18. TEU, art. 130r(2). But see *supra* note 11, which notes that Article 100a formed a limited basis for enacting Community environmental legislation with less stringent voting requirements.

19. See, e.g., the discussion of harmonization of laws at Section II.B. of this Note.

expected to use these powers, especially, with regard to problems on shared borders with CEE states. The Community may expect to retain the leading role, however, for three reasons. Many of the CEE problems are of a regional nature best handled by a coordinated policy. Second, the Commission has non-Community resources to use. Third, the Member States are on the whole satisfied with the efficiencies of a plan coordinated at a Community level. This is reflected in the political support given the Commission activity at the Council level.

### B. *The Fifth Programme on the Environment*

As discussed in the introduction of this Note, the European Community, since 1972, has summarized its environmental goals in a series of four five-year action plans. The Commission has recently submitted its fifth program to the Council. This program is entitled "Towards Sustainability: A European Community Programme of Policy and Action in relation to the Environment and Sustainable Development."<sup>20</sup> After consultation with the European Parliament and the Community's Economic and Social Committee, the Council will issue a resolution approving the program and calling for its implementation. The program covers the years 1993 to 2000, with a review and any necessary amendments to take place in 1995. The Fifth Programme, like its predecessors, is essentially a statement of facts, policy and strategy. It does not contain implementing legislation. It is a blueprint for Community action on the environment, as well as action by public and private enterprise and the general public.

As understood through the Fifth Programme, Community policy on the CEE environment is the product of the evolution of the Community's own policy. The Community initially looked inward to solve its own "particularly acute problems."<sup>21</sup> As sensitivity to environmental issues grew, so too did awareness of the transboundary nature of many environmental threats: international cooperation was required. A similar pattern of initial priority action on acute CEE problems is underway, with concurrent establishment of agreements and institutions through which longer term environmental goals may be attained.<sup>22</sup>

The overarching goal around which future Community policy is based is the achievement of sustainable development on a global scale. The Fifth Programme states that the term "sustainable" is "intended to reflect a policy and strategy for continued economic and social development without detriment to the environment and the natural resources on the quality of which continued human activity and further development depend."<sup>23</sup> For further definition of the term, the Fifth Programme cites the Report of the World Commission on Environment and Development:

---

20. COM (92) 23/II final [hereinafter *The Fifth Programme*].

21. *Id.* at 81.

22. *See infra* Part III of this Note.

23. *The Fifth Programme, supra* note 20, at 3.

"[sustainable development is] development which meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>24</sup> Clearly, the Community definition is aspirational only and not reasonably calculated to facilitate the attainment of defined, near-term goals. Sharp, time-consuming debate may be expected over the scientific concepts surrounding sustainable growth, allocation of costs and use of resources especially in light of the inter-generational equity goal. The adoption without more precise definition of the sustainable development goal is unfortunate given the leadership role of the Community in the CEE states.

Although the Community fails to define adequately its long term goal of sustainability, the Fifth Programme outlines a good deal of nearer-term concrete action. At the Community and at the international level, Community strategy embraces the goal of preventive action, limiting pollution at the source.<sup>25</sup> Cost savings in waste management and pollution remediation follow. This strategy also embraces the Community's "precautionary principle" of avoiding or limiting activity deemed harmful or potentially harmful even where the scientific evidence of harm is not necessarily conclusive.<sup>26</sup>

The Fifth Programme is laid out in three parts. Part I of the Programme addresses the Community's internal environment.<sup>27</sup> This section identifies "Selected Target Sectors" for strategic action in the program's 1993-2000 running period: industry, energy, transport, agriculture and tourism. "Themes and Targets of the Programme" are climate change, acidification and air quality, protection of nature and biodiversity, management of water resources, the urban environment, coastal zones and waste management. The Fifth Programme also addresses management of risks and accidents, education, research and development, the role of Member States and implementation and enforcement of the Programme. These internal goals for the Community will have effect on the CEE states through the process of harmonization of laws, to which the CEE states are committing themselves in the Europe Agreements discussed below

Part II of the Fifth Programme involves the international level. This section affirms a Community role internationally and discusses environmental threats and issues, international cooperation, bilateral cooperation and the United Nations Conference on Environment and Development (UNCED or the Earth Summit).<sup>28</sup> Regarding the CEE

---

24. *Id.* at 4.

25. *See supra* note 12, especially EEC Treaty, art. 130r.2. *See also* Restatement of the objectives of the Community Environment Policy, 1987 O.J. (C 328) 40.

26. The Fifth Programme, *supra* note 20 at 25.

27. *Id.* at 21. *See also* Part III of the Fifth Programme, which includes a discussion of priorities and costs.

28. *See generally* Section III of this Note. The Fifth Programme was issued on March 27, 1992, prior to the Earth Summit. Discussion of this conference in the Fifth Programme is therefore limited.

states, the Programme specifically affirms that the Europe Agreements already concluded, as well as those being negotiated, "provide the long-term framework within which relations between the Community and these countries will develop including environmental protection."<sup>29</sup> Also on the international front, the Community has embraced the 1992 UNCED AGENDA 21, which constitutes the United Nations' international environmental program into the next century.<sup>30</sup> It is too soon, however, to see how AGENDA 21 will affect Community action on the CEE environment.

The Community recognizes that its present internal path is not one of sustainable growth. Rather, the Community believes that its policies are a transition to sustainable growth. The Community's level of environmental protection will be the mark to which CEE action will aspire. Political and economic realities suggest that, on the part of the Community, assistance to CEE can not be expected which would result in a higher level of protection in CEE than in the Community. Nevertheless, the Community should seek to guide the CEE development in order that the CEE may avoid the West's developmental mistakes of the past, as in the area of waste management. Community technical assistance should further the use of clean technologies in CEE states. Further, the Community should discourage the development of highly pollutive industries and practices. The long-term reality is that to attain sustainable growth, the Community will have to alter its own policies. It is unrealistic to expect that CEE states will achieve this goal before the Community. The Community recognizes that achieving sustainable growth in CEE will require financial and other resources "well beyond those available under the PHARE and other G-24 Programmes."<sup>31</sup> The Community therefore calls for CEE states themselves to "assume responsibility for generating required investments" and for "forward-looking lending policies" by financial institutions.<sup>32</sup> These CEE-based "solutions" must be greeted with near-term skepticism, given the recent CEE economic decline.

### III. IMPLEMENTING THE POLICY

The Community has been confronted with far-reaching environmental threats within the CEE states. Air and water pollution from energy production, manufacturing and insufficiently strict waste management are but a few of the many areas in urgent need of reform. The Community has therefore sought to remediate quickly the most serious threats while at the same time laying the groundwork for closer ties on many fronts between the Community and CEE states. Association Agreements have been signed between the Community and CEE states, forming the broad basis for relations in many areas, including the environment. Direct en-

---

29. The Fifth Programme, *supra* note 20, at 90.

30. The Fifth Programme, *supra* note 20, at 92.

31. *Id.* at 90. See *infra* Part III of this Note.

32. *Id.*

vironmental assistance has been offered, bridging the gap between short and long-term methods of managing the environment. Remediation projects have been initiated to handle various environmental threats. Forward looking counselling has been provided to CEE governments to institutionalize systems of environmental regulation. The European Bank for Reconstruction and Development has been initiated as a mechanism to fund investment over the long term. These cornerstones of Community action on the CEE environment and other forms of bilateral and international cooperation are discussed in this section.

#### A. *Association Agreements between the Community and CEE States*

Association Agreements, known as "Europe Agreements," between the Community and individual CEE states provide a broad framework for future relations between the parties.<sup>33</sup> Thus far, the Community has concluded such agreements with Poland, the Czech and Slovak Federal Republic and Hungary<sup>34</sup> Negotiated by the Community under Treaty Article 238, these agreements require ratification by the Member States since their scope extends beyond that to which the Community may independently commit the Member States. Ratification by the Member States is expected to take place, but interim trade agreements are in place in the meantime.<sup>35</sup> Further agreements with Romania and Bulgaria are under negotiation. Less comprehensive trade and cooperation agreements are also being negotiated with the Baltic states and Albania.

Each of these agreements contains or will contain environmental provisions, as is appropriate given the Treaty of Rome Article 130r(2) requirement that the environment be considered. The agreements do not, however, explicitly integrate environmental language into the many provisions. This is unfortunate since the agreements concern areas with direct environmental impact such as trade, agriculture, fisheries, industry, energy (including specifically nuclear) and capital investment. Tying Community benefits to environmental goals to be attained by the CEE states would have been highly effective since the CEE states have the highly important incentives of trade and investment to spur their cooperation. Arguably, Community environmental policy will govern Community interpretation of the Europe Agreements. CEE states will

---

33. See "Association Agreements with the countries of Central and Eastern Europe: A General Outline," reproduced in Europe, Europe Documents No. 1646/47 (Sept. 7, 1990). Association agreements have been entered into previously by the Community with the Mediterranean states, but the term "Europe Agreements" applies to agreements with CEE states. The Commission has issued a General Outline for Europe Agreements. See Europe, European Documents No. 1646/47 (Sept. 7, 1990).

34. These agreements have not yet been officially published. The Commission provided an unofficial copy of the agreement with Poland as a representative Europe Agreement [hereinafter the Poland Agreement]. The agreement with the Czech and Slovak Federal Republic will presumably be renegotiated given the recent breakup of that state.

35. Three interim trade agreements have been published to date: Poland, 1992 O.J. (L 114); Czechoslovakia, 1992 O.J. (L 115); and Hungary, 1992 O.J. (L 116).

presumably be encouraged to comply with Community interpretations, as the Community is the economically dominant contracting party

Although the Europe Agreements could have gone further, nevertheless, they do address environmental issues. Article 80 on the environment of the Poland Agreement states:

1. The parties shall develop and strengthen their cooperation in the vital task of combating the deterioration of the environment, which they have judged to be a priority.
2. Cooperation shall centre on:
  - effective monitoring of pollution levels;
  - combating regional and transboundary air and water pollution;
  - efficient energy production and consumption, safety of industrial plants;
  - classification and safe handling of plants;
  - water quality, particularly of cross-boundary waterways;
  - waste reduction, recycling and safe disposal; implementation of the Basle Convention;
  - the environmental impact of agriculture; soil erosion; the protection of forests and flora and fauna;
  - land-use planning, including construction and urban planning;
  - use of economic and fiscal instruments;
  - global climate change.
3. To these ends, the parties plan to cooperate particularly in the following areas:
  - exchange of information and experts, including information and experts dealing with the transfer of clean technologies;
  - training programmes;
  - approximation of laws (Community standards);
  - cooperation at regional level (including cooperation within the framework of the European Environmental Agency, when established by the Community) and international level;
  - development of strategies, particularly with regard to global and climatic issues.<sup>36</sup>

These provisions are statements of policy and intent and clearly do not provide any substantive or mandatory terms as to implementation, goals, timetables or oversight and review

Further articles also incorporate environmental considerations into the policies to be furthered by the Poland Agreement, but these also suffer from vagueness. The title on "Economic Cooperation" provides that "[p]olicies designed to bring about economic and social development . . . should be guided by the principle of sustainable development."<sup>37</sup> Unfortunately, the "principle of sustainable development" is not defined in the agreement. Moreover, the "should be guided" language of this title is not on its face mandatory

---

36. Poland Agreement, art. 80, *supra* note 34, at 34.

37. See *supra* Section II.B. of this Note for a discussion of sustainable development in the context of the Fifth Programme on the Environment.

The Poland Agreement chapter on "Approximation of Laws," noted as an area of planned cooperation in the Environment title, subparagraph 3 above, appears to embody a major incentive to CEE states to take legislative action on the environment. This chapter states that "[t]he contracting parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community"<sup>38</sup> While the Community prospers, the CEE states will have incentive to forge closer economic ties leading to eventual application for membership. The "accession" process requires approximation of laws between the applicant and the Community. Approximation is often referred to as "harmonization of laws" in the United States. As may be inferred, harmonization does not necessarily require the literal adoption of a Community law, but rather requires essential compatibility of laws.<sup>39</sup> Environmental law is specifically stated as an area to which this process "shall extend."<sup>40</sup> This chapter reveals, however, that Poland has agreed to use its "best efforts to ensure that future legislation is compatible with Community legislation," but that changing existing law is not required. The costs associated with stricter environmental laws may slow the legislative reforms by CEE states. Even as stricter laws are enacted, the difficulty of enforcement of such laws will remain.

### B. PHARE Programs

Operation Phare, or the PHARE programme, is a Community program of economic assistance for reforms in certain CEE states. The PHARE programme was set up as a bilateral assistance program at a Group of Seven summit in Paris in July 1989, which "charged the European Commission with coordinating assistance from the Group of 24 Western industrialized countries taking part in the programme."<sup>41</sup> The program was created to assist Poland and Hungary (PHARE is an acronym for Poland and Hungary Action for Restructuring the Economy), and has been expanded to assist the Czech and Slovak Federal Republic,

---

38. Poland Agreement, art. 68, *supra* note 34, at 29.

39. In the last twenty years the Community has enacted over 200 pieces of environmental legislation. Moreover, other Community legislation with regard to sectors like transportation have indirect effect on the environment.

40. Poland Agreement, art. 69, *supra* note 34, at 29.

41. The European Community and its Eastern neighbors, *supra* note 2. Regulation (EEC) No. 3906/89 (Dec. 18, 1989) was the Community legislation creating Operation PHARE. See 1989 O.J. (L 375) 11. Council Regulation (EEC) No. 2698/90 of September 17, 1990 amended the earlier regulation, extending the scope of PHARE to allow aid to Bulgaria, Czechoslovakia, Romania, Yugoslavia and the German Democratic Republic. Since reunification, the former GDR no longer qualifies for assistance. Aid to Yugoslavia has been interrupted by the war there. For a more detailed description of the operation of the PHARE program, see *PHARE: Assistance for Economic Restructuring in the Countries of Central and Eastern Europe: An Operational Guide*, Luxembourg: Office for Official Publications of the European Communities (1992).

Romania, Yugoslavia and Bulgaria.<sup>42</sup>

Environmental programs are an important part of the PHARE roster of initiatives. 1990 projects in Poland, Hungary, the Czech and Slovak Republic and the former GDR were sufficiently numerous and varied that "PHARE-financed technical assistance teams were set up in the respective Environment Ministries to assist with programme preparation and implementation."<sup>43</sup> Dissatisfied with the 1990 PHARE approach to project selection (which the Commission called a "project shopping list"<sup>44</sup> approach), the Commission focused more closely on strategy, producing in 1991 a three year "Environmental Sector Strategy for CEE."<sup>45</sup> This strategy "identifies a number of policy objectives and priorities including public awareness building, strengthening and expansion of the institutional, policy and regulatory frameworks and transfer of information and technology."<sup>46</sup> These objectives underlie the 1991 PHARE environment programs for Poland, Hungary, Romania, Bulgaria and the Czech and Slovak Federal Republic. Also in 1991, the first PHARE regional environment program began, covering "initiatives for the Danube Basin, the Black Triangle, the extension of CORINE activities to CEE, a Report on the State of the Environment in Europe and applied research."<sup>47</sup> The 1991 PHARE Environment Programme also made an allocation to a Regional Nuclear Safety Programme.<sup>48</sup>

A large measure of power has been placed with the Commission by the Western industrialized countries. The Commission has been charged with not only setting policy and strategy, but with coordinating the G-24 funding for the actual programs and overseeing their implementation. These powers are not of unlimited duration, however. The PHARE programme is not seen as a permanent institution administered by the Community, but as a transitional program to address quickly and efficiently the most urgent CEE needs. The Community has noted that PHARE funding is not adequate to address the pressing CEE needs, but that the CEE states themselves were expected to assume the burden of paying for environmental programs.<sup>49</sup> Obviously, this will only be possible if the initiatives to strengthen the private sector are successful since this is where the wealth required to fund environmental programs is to be generated.

---

42. The Fifth Programme, *supra* note 20, at 90.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* "CORINE" is a French acronym for the Community's "Information System on the State of the Environment in Europe."

48. *Id.* at 90. A technical assistance program for the states of the former USSR already exists to upgrade management and safety of nuclear facilities. Further developments are expected in light of a nuclear safety agreement concluded with the "former USSR countries, as well as from the new European Energy Charter."

49. *Id.*

### C. *European Bank for Reconstruction and Development*

The European Bank for Reconstruction and Development (EBRD) was inaugurated in London on April 15, 1991 to play an important role in the political and economic transformation of the CEE states. Article 1 of the Agreement creating the EBRD states:

[t]he purpose of the Bank shall be to foster transition towards open market economies and to foster private and entrepreneurial initiative in the Central and East European countries committed to and applying the principles of multiparty democracy, pluralism and market economics.<sup>50</sup>

Forty countries, the Community and the European Investment Bank (EIB) signed the articles of agreement as shareholders.<sup>51</sup> CEE states are themselves beneficial shareholders. The EBRD has capital of ECU 10 billion: 45% is held by the Member States, 3% by the Community and 3% by the European Investment Bank, making the sum of the Community's shareholding in the Bank 51% of the total. The EBRD is able to make loans and invest directly in enterprises. These investments must be primarily in the private sector (at least 60 % of its commitments).<sup>52</sup> In addition to its own ordinary capital resources, the EBRD controls so-called Special Funds resources.<sup>53</sup> These additional resources represent funds entrusted to the EBRD by its members in order to foster efficient coordination.<sup>54</sup>

The EBRD charter contains a basis for EBRD action on the environment: in carrying out its mission to aid CEE states in economic reforms, the EBRD "may take measures . . . to promote in all its activities, including technical assistance, environmentally sound and sustainable development and to undertake such other activities as may further these functions."<sup>55</sup> This language appears permissive rather than mandatory, but as for Community action within the EBRD, this Note argues that the requirement that the Community factor environmental considerations

---

50. See D.R.R. Dunnett, *The European Bank for Reconstruction and Development: A Legal Survey*, 28 COMMON MKT. L. REV. 571, 576 (1991). For the Council Decision of November 19, 1990 on the conclusion of the agreement establishing the EBRD, see O.J. (L 372) 1.

51. The original 42 EBRD shareholders were the 24 nations of the Organization for Economic Cooperation and Development, Cyprus and Malta, Egypt, Israel, Liechtenstein, Morocco, South Korea, the EC Commission, the European Investment Bank and eight CEE states: Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland, Romania, the Soviet Union and Yugoslavia.

52. Bull. EC 10-1991 at 82.

53. Dunnett, *supra* note 42, at 585.

54. Dunnett cites a January 30, 1991 Commission paper concerning the PHARE program: "The paper shows that, out of the total 27.5 billion ECUs of commitments to [CEE states] made by the group of the 24 leading industrialized countries, their contributions to the capital of EBRD represent a total of 8.1 billion ECUs." The rest does not flow through the EBRD. *Id.* at 586.

55. *Id.* at 577.

into its other policies makes such consideration mandatory on the part of the Community in its role within the EBRD.

The EBRD is already an important checkpoint for capital resources to be dispersed to CEE states. When the PHARE program ends, or is reduced as envisioned, the relative importance of the EBRD as a focal point for policy and strategy will grow. The Community therefore has an interest in tying EBRD activity to its environmental goals. While the Community does not control the EBRD outright, the membership of the Community and of Member States, the majority shareholding by the Community, EIB and Member States, as well as prior leadership in the PHARE program, indicate a leading role for the Community. The environmental impact of the EBRD's capital makes it clear that environmental policy should be considered up-front, prior to EBRD investment. The EBRD has announced that it will have "no quota on loans and each project will be reviewed on its merits."<sup>56</sup> These projects should be reviewed and approved or disapproved in light of an environmental impact assessment. The Community, as the recognized leader of European environmental policy, should insist that loans, guarantees and investment be tied to compliance with Community environmental goals. Coordination by the Commission of the Fifth Programme with EBRD capital funding will further Community environmental goals, while preventing capital from being used at cross purposes with those goals.

#### D. *Other Assisting Institutions*

Aside from the PHARE programs, Europe Agreements and EBRD, there are numerous other institutions through which the Community will assist, directly or indirectly, in upgrading the CEE environment. The Community is currently a contracting party to thirty conventions and international agreements. A number of these, such as the conventions on the Baltic and the Mediterranean Seas, will directly affect the CEE environment.<sup>57</sup> The Community is also active in the Organization for Economic Cooperation and Development (OECD) and in a number of United Nations (UN) programs and organizations whose work benefits the CEE environment. These include the UN Development Program (UNDP), the UN Disaster and Relief Organization (UNDRO), the UN Economic Commission for Europe (UN-ECE), the UN Environment Program (UNEP) and the World Health Organization (WHO).

Finally, the establishment of the Community's new European Environment Agency should be noted.<sup>58</sup> The Fifth Programme identifies the role of the Agency in addressing the "significant deficiencies in the quantity, quality and comparability of data which are crucial for environment-related policies and decisions."<sup>59</sup> It is anticipated that this Agency

---

56. 1992 — The External Impact of European Unification, June 1, 1990, at 8.

57. The Fifth Programme, *supra* note 20, at 84.

58. Council Regulation 1210/90 of May 7, 1990, 1990 O.J. (L 120) 1.

59. The Fifth Programme, *supra* note 20, at 3.

will act as an information clearinghouse leading to more efficient policy and planning.<sup>60</sup> Unfortunately, this Agency has not begun its work because of a failure among Member States to agree where it should be located.

#### CONCLUSION

The Community clearly recognizes its leading role in assisting the CEE states on the environmental front. The Community recognizes the sovereign right of these states to self-determination, but responds to requests for assistance. In this context, the Community seeks to guide the CEE states toward sustainable growth even as the Community itself moves in that direction.

Trade opportunities will be the Community's major incentive for CEE cooperation on environmental protection. This should be effected in the context of the Europe Agreements where possible, so that environmental considerations are integrated with other areas of common concern. Direct financial assistance and investment give the Community leverage as well. The Community will seek to apply this leverage "to reduce pollution at source," but to do so will require "fundamental changes in [CEE] pricing policies, substantial investments in new equipment and technologies, and even the complete closure of some of the very worst polluting production units."<sup>61</sup> This will be an expensive process and the current funding shortfall must be eliminated.

CEE regulatory frameworks must be strengthened and environmental enforcement stepped up not only to protect the environment, but to ensure that CEE industry does not obtain commercial advantage over EEC industry through avoidance of pollution control costs. The CEE states' internal legal systems will become the essential means of CEE environmental improvement as programs of direct assistance are phased out in favor of lending and investment.

The Community will not be able to lead CEE states further than the point to which the Community itself has travelled. The acceptance of a leading role is pragmatic and noble, but carries with it tremendous responsibility. The Community's internal policies matter more than ever, for they will shape the environmental future of all Europe. The high level of protection mandated by the Treaty on European Union must be achieved. This will best serve the causes of healthy economies and populations at present and in the future.

*Stephen J. Jones*

---

60. Bull. EC 3-1990, at 26.

61. The Fifth Programme, *supra* note 20, at 90.

