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# Norm Evolution in EC Environmental Law<sup>1</sup>

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Editors' Note: We have included this paper in the ConWEB series, even though it is much longer than the work we normally present, because we believe it makes a valuable contribution to our understanding of issues of constitutionalism and governance beyond the state, and in particular the law/politics interface. Yoichiro Usui is preparing a shorter version of the paper within the framework of the UACES Study Group on Constitutionalism and Governance beyond the State, which will be published in due course [AW & JS]

## ABSTRACT

Will the next generation experience the same quality of natural environmental beauty as that of former generations? Environmental protection is one of the most serious tasks to be dealt with in the days and years ahead, and in tackling this issue, the question of how environmental norms evolve is an essential topic for consideration. With regard to the above, the EC has demonstrated a number of interesting institutional practices. This paper illuminates a role of law in the EC institutional practices, which have brought about the evolution of environmental norms. This role is argued in terms of the discursive power of law. In order to elucidate this discursive viewpoint, this paper offers a conceptual framework as follows: 1) Law catalyses *normative discourse* during the process of the creation, application and interpretation of norms. Laws in and of themselves are also normative discourses; 2) The concept of *governance frames* is referred to as the shared meanings of core norms, key concepts and regulative principles in a specific issue-area; 3) The accumulation of discourses around and of laws (re)creates a frame, and these discourses are contextualised within the preceding frames. This interaction causes norms to evolve; Lastly, 4) the concept of *regime* is referred to, and the institutional setting that supports normative discourses and frames is described. Regimes are defined as institutional complexes which procedurally reproduce normative discourse and substantively establish a policy agenda upon which a frame is built. In this way, this paper understands the development of EC environmental law as an example of norm evolution in a regime, in which the interaction of normative discourses and governance frames occurs. Building on this conceptual framework, this paper describes the norm evolution in EC environmental law. Before the legal base for environmental secondary legislation was provided by the SEA in 1987, the institutional practices of the EC had already led to: the ECJ judgments concerning environmental matters; legislation orientated towards environmental protection; and international environmental conventions to which the EC is party. On the basis of normative discourses around and of these laws, a governance frame has been transformed from a market supporting frame into a holistic and ecosystem-oriented frame. This paper thus illuminates a role of law in EC institutional practices which

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have brought about the evolution of environmental norms, from the viewpoint of discursive power of law in issue-framing.

## Introduction

It was the Single European Act (hereinafter SEA) in 1987 that formed the legal base for EC environmental legislation. At that time, Article 174 EC provided three main 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.’<sup>2</sup> At least insofar as the setting of this legal base for enacting secondary legislation is regarded as the birth of EC environmental law, it may be said that there was no environmental law before the SEA and it was after the SEA that environmental protection became one of the fields of EC law.

However, secondary legislation clearly orientated to environmental protection had since the 1970s been enacted, along with three Community environmental action programmes (hereinafter EAP), international environmental agreements had been concluded by the Community and environmental matters had been brought before the European Court of Justice (hereinafter ECJ). Despite the economic orientation of the building of the common market in the early stages of European integration, EC environmental law had, therefore, been developed in the area of secondary legislation, international agreements and case law. In this regard, it can be said that the environmental *acquis* was gradually created through legal practices even before a clear legal base was established in primary legislation. Nowadays environmental protection is one of the *main* fields of EC law established in Articles 174, 175, 176 EC, on the basis of Article 6 EC which provides the principle of environmental integration for realising sustainable development.

The solving of environmental problem is now one of most urgent tasks facing both contemporary society and future generations. In Europe, environmental issues in general have come to be taken more seriously,<sup>3</sup> and climate change in particular requires attention.<sup>4</sup> Of course, the proliferation of legislation and case law does not by themselves lead to the alleviation of environmental deterioration. However, it is guaranteed that effective environmental problem-solving cannot take place without shared environmental norms and the evolution of these norms. This paper insists that EC environmental law is a noteworthy example of norm evolution. While the institutional setting of the EC is orientated towards the building of the common market, its day-to-day institutional practices have brought about environmental norms, which inevitably constrain economic concerns. Therefore, the experience of the EC is an

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<sup>2</sup> In the treaty reform in Maastricht, a clause for the promotion of international environmental cooperation was added to this Article.

<sup>3</sup> *The Global Assessment of the European Community Programme of Policy and Action*, COM(99) 543.

<sup>4</sup> *Environment 2010: Our future, Our choice*, COM(2001)31 final.

interesting research theme in exemplifying the endogenous logic of institutional complexes. This paper aims to illuminate one dimension of roles of law in this institutional practices, which have brought about the evolution of environmental norms.

In order to approach this theme, two sub-questions are addressed in this paper: *what* does the development of EC environmental law mean; and *how* is EC environmental law developed? These two sub-questions are argued in terms of the discursive power of law<sup>5</sup> in issue-framing. Accordingly, it is beyond the scope of this paper to directly answer *why* the law has in the way that it has done developed. The paper focuses on institutional practices, but this focus should not lead to the conclusion that an institutional setting is the only and absolute cause of the development of law. Needless to say, it is not enough to focus on institutional practices in order to answer the third question of *why* law develops in a particular manner. To answer that question, other factors outside the institutional context should be considered. Nevertheless, both the first question and the second question shed light upon the main question of what a role of law in the institutional practices is.

The structure of this paper is as follows: Chapter 1 presents a conceptual framework for considering what the development of EC environmental law means and tracing its developmental process, by making reference to the concepts of discourse, frame and regime; Chapter 2 examines the institutional setting of the EC in which EC environmental law is developed; Chapter 3 traces out the developmental process of EC environmental law on the basis of what the previous chapters argue. It is the intention of this paper to illuminate the institutional practices that have enabled EC environmental law to become a prominent illustration of norm evolution, and to address the fundamental question of what a role of law is in the institutional practices that have brought about the evolution of environmental norms, from the viewpoint of discursive power of law in issue-framing.

## **1 Conceptual Framework**

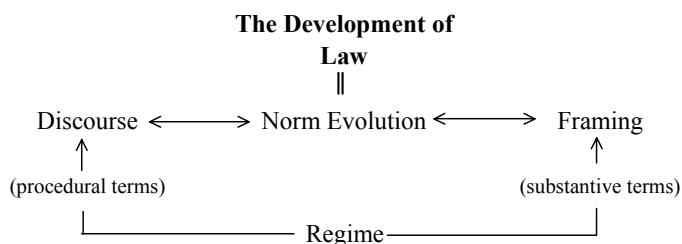
This chapter offers a conceptual framework for considering the development of EC environmental law. On the one hand, this framework defines what this development means, on the other, it outlines how EC environmental law is developed through the institutional practices of the EC. EC environmental law is not regarded as a mere competent relationship between the Member States and the EC; rather, it is emphasised that the law represents shared environmental

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<sup>5</sup> For the discursive viewpoint of law see the following two studies based on the arguments of Foucault. A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1994); C. Muller-Hoff, 'Representations of Refugee Women: Legal Discourse in Europe' (2001) *Law, Social Justice & Global Development (LGD)* 2001(1) <<http://elj.warwick.ac.uk/global/issue/2001-1/mullerhoff1.html>>. While this paper is inspired by these Foucaultian perspectives of discourse, the main concern is a normative viewpoint of social constructivism concerning discourse, as will be discussed below.

norms on the basis of which the EC establishes a collective cognition concerning environmental issues in general. In other words, the development of EC environmental law is regarded as norm evolution in the process of which the common meanings of core norms, key concepts and regulative principles, which constitute a governance frame for environmental issue-areas, are constructed. In this conceptual framework, norm evolution is assumed to occur through discourses and to come into being as a frame; the latter is seen to create the context of the former, and one of the aims of this paper is to examine the institutional practices concerning this interaction between discourses and frames. Here, law is understood in terms of its discursive power. That is, law is seen as catalysing normative discourses, but at the same time laws are nevertheless regarded as normative discourses. The institutional setting that enables discourses and frames to interact is conceptualised as regimes. Regimes procedurally reproduce discourses and substantively establish a policy agenda on the basis of which EC environmental governance is framed. Thus, the conceptual framework of this paper is seen in Diagram 1:

**Diagram 1**



### 1.1 Discourse

The social world is commonly experienced on the basis of shared meanings of the concepts which constitute the world. It is an accumulation of the unviewable and the endless discursive practices of countless individuals that creates, modifies and/or makes more precise the web of such meanings. As such, this discourse can be seen as being inescapably penetrated with an extant system of common meanings. However, since this system of meanings are socially constructed through intersubjective struggles or collaborations between countless individuals, their discursive practices transforms the extant system of common meanings. To put this another way, the social world is not formed from absolutely objective materials which exist irrespective of the observer. The world, that is, the research object in social sciences, consists of a web of meanings that can be recreated through discursive practices, and discourse can consequently be regarded as (re)creating the common meanings which constitute the social world.<sup>6</sup>

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<sup>6</sup> For the constitutive role of discourse for creating a social world and how it binds agents

With regard to the role of discursive weaving of intersubjective meanings, Diez explains as follows:

‘The context about concepts is . . . not only between individuals and groups defending one meaning against another, but also between different ways of constructing ‘the world’ through different sets of languages. These different languages are not employed by actors in a sovereign way. It is the discursive web surrounding each articulation that makes the latter possible, on the one hand (otherwise, it would be meaningless), while the web itself, on the other hand, relies on its reproduction through these articulations.’<sup>7</sup>

Diez offers the concept of a ‘discursive nodal point’ to describe the interconnectedness of discourses. This point is beyond the control of any individual. All perceptions are the objects of particular discourses that are bound up with other discourses, and all individuals can participate in discursive practices, but none of them can control what system of meanings discourses weave as a whole. Individual discourses within ‘web’ are ‘held together by nodal points’.<sup>8</sup> Further to this, institutions ‘cannot be separated from the discourses they are embedded in’.<sup>9</sup> What should be taken into consideration when institutions change, is ‘a change in the discursive construction of these institutions’.<sup>10</sup>

It seems that Diez’s viewpoint can be taken to suggest an affinity between discourse analysis and legal interpretation. Law is certainly seen as a distinct and closed discourse available only to the lawyer, however, this discourse can be said, despite its exclusivity, to be simultaneously open to a wider context sociologically. With regard to this, the argument of Cotterrell should be borne in mind. Criticising Dworkin’s view on the exclusivity of legal discourse, Cotterrell suggests that the closed system of legal discourse, or a normative discursive unity, should be examined in terms of its sociological conditions.<sup>11</sup> In this sense, the potential of law to create shared meanings must be considered in terms of its discursive power.

Building on these viewpoints, it appears that law can be conceptualised by reference to the concept of discourse. On the one hand, law can be regarded as being developed through *discourses* for the creation, application and interpretation of norms and instruments. This normative discourses in legislature, execution and judiciary are constrained by the previous legislation and case law and also by social (or pre-legal) norms. In these discursive spheres, law establishes the obligations of Member States and the competent relationship between Member

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structurally, see Hunt and Wickham, based on Foucault. A. Hunt and G. Wickham, above n.5, at 7-9.

<sup>7</sup> T. Diez, ‘Speaking ‘Europe’: the politics of integration discourse’ (1999) 6 *Journal of European Public Policy* 598, at 603.

<sup>8</sup> *Ibid.*, at 608.

<sup>9</sup> *Ibid.*, at 610.

<sup>10</sup> *Ibid.*.

<sup>11</sup> For an argument on legal discursive closure, see R. Cotterrell, *Law’s Community: Legal Theory in Sociological Perspective* (Clarendon Press, 1995), at 91-110.

States and the EC. On the other hand, the legal texts of individual laws (legislation and case laws) themselves can also be regarded as discourses contributing to weaving the *shared meanings*, which constitute our world, in the sense that law is the outcome of collective decisions in a community. The former discourse (for norm creation, application and interpretation) can be called the *normative discourse around law*, and the latter (legal texts of individual laws) the *normative discourse of laws*.

These forms of discourse can further be divided into the political and the legal. Needless to say, the adjective ‘political’ has very wide connotations, and its meaning can even be said to depend on individual writers. In this paper, *political discourse* is defined as primarily and mainly orientated towards policy goal-setting; *legal discourse* is defined as orientated towards norm-interpretation for the identification of legal obligation and its nonfulfillment. Here a political discourse may be a disguised norm orientation for pursuing power or interest maximisation. However, such a political discourse may also be constrained by social norms or legal norms.

This understanding can be put into the context of the distinction between soft and hard law. Political discourses can be understood as those forms of written or verbal communication which cannot be the subject of judicial review<sup>12</sup> and therefore may be hortatory declarations or soft law. However, as the degree of obligation and precision expressed by the document or wording is increased,<sup>13</sup> political discourse advances closer to legal discourse. For instance, the principle of subsidiarity may have different meanings subject to the type of discourse in which it appears. In political discourses, subsidiarity is argued to be the principle enabling the empowerment of local communities, the promotion of transnational local networks, the retaining of competence by a Member State or the federalisation of the EU. In legal discourses, subsidiarity is the principle used for judging the validity of EC legislation or common action formation at the EU level in terms of competence misuse.<sup>14</sup>

Furthermore, *intermediate discourses* can be assumed at the intersection of political and legal discourses. Primary and secondary legislation and international agreements fall into this category and in the context of EC environmental law, Articles 6, 174, 175, 176 EC,

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<sup>12</sup> On this point Scott’s argument is instructive. See J. Scott, ‘Shared responsibility and the Community’s Structural Funds: a legal perspective’, in U. Collier et al. (eds) *Subsidiarity and Shared Responsibility: New Challenges for EU Environmental Policy* (Nomos Verlagsgesellschaft, 1997). She draws a clear line between law and policy, by introducing ‘the concept of “justiciability”, namely the susceptibility of the measure in question to application by a court of law’ (at 156). For example, depending on the susceptibility, it can be judged whether a concept, for example subsidiarity, is ‘a legal norm’ or ‘socio-philosophical principle’ (at 157).

<sup>13</sup> For the concept of obligation and precision in this gradation, see K. W. Abbott, et al., ‘The Concept of Legalization’ (2000) 54 *International Organization* 401.

<sup>14</sup> For example, see Opinion of Case C-376/98 *Germany v. European Parliament and Council* and Case C-74/99 *R v. Secretary of State for Health and Others, ex parte Imperial Tobacco Ltd and Others*, June 15 2000, paras. 141 and 142.

environmental regulations or directives and international environmental conventions can be termed intermediate discourses. In the sphere of legal discourses, these legal texts present the judicially reviewable obligations of Member States, a connection with other legal norms or legislation, and the constitutional traditions of Member States or international legal norms. In the sphere of political discourses, these texts manifest collective recognition of public problems, policy goals and some hortatory principles. Thus, political discourses and legal discourses can be seen to be woven into legislation.

Subsequently, six types of discourses can be assumed as shown in Diagram 2. ‘A’ is the political discourse around law; ‘F’ is the legal discourse of laws; ‘B’ and ‘E’ are the intermediate discourses around law and of law respectively. As will be argued in Chapter 3, EC environmental law can be interpreted as developing mainly through F (the legal discourse of laws) and E (the intermediate discourse of laws) supported by the other types of discourses. Diagram 3 shows an example of the putting into picture of this systematisation in the context of the EU’s official documents. Although there are ambiguous or unclear borders in the above categorisation, it nevertheless seems to be helpful for understanding the discursive sphere as institutionalised in the EU.

**Diagram 2**

	Political Discourse	Legal Discourse	
Discourse around Law	A	B	C
Discourse of Laws	D	E	F

**Diagram 3**

	Political Discourse	Legal Discourse	
<b>Discourse around Law</b>	EAPs	Formal Notice Letter	Reasoned opinion
	Council Declaration	Opinion of Interveners in the ECJ	Opinion of Advocate General
	European Council Conclusion	Council Resolution	Common Position of the Council
<b>Discourse of Laws</b>	Article 37 of EU Charter of Fundamental and Human Rights	Basic Treaties	
	Declaration 9 of Nice Treaty	Secondary Legislation	Case Law
	Commission Recommendation	International Agreements	

As an instance of the political discourse around law (A in Diagram 2), the wording of the 1990 European Council Declaration can be referred to:

‘Mankind is the trustee of the natural environment and has the duty to ensure its



enlightened stewardship for the benefit of this and future generations. Solidarity must be shown with the poorer and less developed nations.’<sup>15</sup>

In contrast, the wording of the case law of the ECJ is an example of the legal discourse of laws (F in Diagram 2). It says:

‘[I]t should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest (the protection of the environment in this case – inserted) pursued by the Community.’<sup>16</sup>

It should be noted that a concept can be found in different discourses which transmute into various documents holding differing status. This means that a concept can be placed in different discursive spheres defined according to their institutional context and as a result of which different documents hold different statuses. Put into different discursive spheres, a concept changes with regard to an aim and function. For instance, the principle of environmental integration can be found both in Article 6 EC after Amsterdam and in the 1972 EAP before the SEA. The former says:

‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.’

The latter is says:

‘Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes’.<sup>17</sup>

While the former is an intermediate discourse of laws (E in Diagram 2) in the sense that it identifies the obligations of the EC, the latter is a political discourse around law (A in Diagram 2), in aiming to introduce a new common policy strategy.

It seems, however, necessary to give some explanation for B and C in Diagram 2. The discursive arrangement in the diagram pays attention to the pre-litigation procedure as the discursive sphere providing the intermediate and the legal discourse around law. In this respect, Case C-365/97 *Commission v. Italy*<sup>18</sup> serves as a reference. The Court stated that:

‘the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined

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<sup>15</sup> Declaration by the European Council on the environmental imperative, Dublin, 25 and 26 June, Bull. EC 6-1990, Annex II, point 1.36, at para.20.

<sup>16</sup> Case 240/83, *Procureur de la Republique v. Association de defense des bruleurs d’huiles usages (ADBHU)* [1985] ECR 531, at 549, para.12.

<sup>17</sup> Programme of Action of the European Communities on the Environment, OJ 1973 C112/3, at 6.

<sup>18</sup> Case C-365/97, *Commission v. Italy* [1999] ECR I-1773.

dispute as its subject-matter.’<sup>19</sup>

According to this viewpoint, it may be said that the pre-litigation procedure is the institution for catalysing the normative discourse around law. This procedure obliges the Commission to issue a *formal notice letter* and a *reasoned opinion*.<sup>20</sup> In this case, against the claim of the Italian government that the Commission did not provide a precise and clear formal notice letter, the Court argued that the purpose of the letter is to ‘delimit the subject-matter of the dispute, so that it cannot thereafter be extended’, and accordingly that the letter ‘cannot be subject to such strict requirements of precision’.<sup>21</sup> In contrast, the reasoned opinion provided in Article 226 EC ‘must contain a coherent and detailed statement of the reasons’<sup>22</sup> for concluding that a state failed to fulfill its obligations. Thus, the formal notice letter may fall into the category of intermediate discourse around law; the reasoned opinion may be regarded as the legal discourse around law, in terms of precision for identifying the nonfulfillment of obligations. In addition, the political strategy of the Commission at the stage of the formal notice letter may not be denied and this letter cannot, therefore, be said to present the legal discourse around law in a precise sense.

Thus, the aim of this paper is to grasp the evolution of environmental norms in the EC by examining these forms of discourses. As will be argued below, the intermediate and the legal discourse of laws (E and F in Diagram 2) must be taken into account in order to trace this evolution. In any event, taking this point of view means that legal practices are put into a theoretical context of discourse that is assumed to (re)create the shared meanings comprising the social world. For the purpose of approaching an understanding of norm evolution in the environmental issue-area, the shared meanings must be specified in terms of environmental governance.

## 1.2 Framing

As noted above, the social world can be jointly experienced through the formation of shared meanings of fundamental concepts. Shared meanings enable the social world to emerge as an objective (or more precisely, intersubjective) world, and this general view can be applied to considering how a specific issue-area emerges into collective recognition. As a coherent system of shared meanings which establishes governance in a specific issue-area, it is the *frame*<sup>23</sup> which enables this. Public problem-solving is conditional on the formation of a frame to recognise a situation as problematic and as such, a frame differentiates one issue-area from

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<sup>19</sup> *Ibid.*, para.35.

<sup>20</sup> For the pre-litigation procedure, see Section 2.1 in Chapter 2.

<sup>21</sup> Case C-365/97, para.23 and 26.

<sup>22</sup> *Ibid.*, para.26.

<sup>23</sup> For the concept of the frame, see Y. Surel, ‘The role of cognitive and normative frames in policy-making’ (2000) 7 *Journal of European Public Policy* 495 and B. Kohler-Koch, ‘Framing: the bottleneck of constructing legitimate institutions’ (2000) 7 *Journal of European Public Policy* 513. For a critical view of frame analysis, see R. A. Payne, ‘Persuasion, Frames and Norm Construction’ (2001) 7 *European Journal of International Relations* 37.

others. For instance, the formation of an environmental frame differentiated the EC environmental issue-area from market-building issues.

On the one hand, the frame for governance is viewed in this paper as the shared understanding of a code of behaviours, of what situations are problematic and how certain issues should be governed. That is, framing builds a coherent system comprising *core norms* substantiating the code, *key concepts* expressing the situation and *regulative principles* directing the strategy. In detail:

core norms (*i.e.* environmental protection as a public interest, environmental regulation without disguised protectionism, individual environmental rights or value of nature per se etc.);

key concepts (*i.e.* value limit, pollution, the market in relation to the environment, environment as a whole, biodiversity or ecosystem etc.) and

regulative principles (*i.e.* sustainable development, environmental integration, polluter-pay or precaution etc.).

A coherent system comprising these elements can be defined as the frame for governance in a specific issue-area.

On the other hand, frames can be assumed to emerge through *discourses*. With the exchange and accumulation of discourses, a shared frame between Member governments, EU institutional actors and societal actors creates a world of common meaning in the environmental issue-area. Through this creational process, the common definition of problems and solutions concerning this issue-area is established. In this paper, it is assumed that the accumulation of discourses enables frames to be created, deepened or transformed and from this standpoint EC environmental law must be considered in terms of discourse. In this regard, the role of law is taken seriously with reference to the concept of discourse. Law catalyses normative discourses, and laws themselves are also normative discourses, as noted in the previous section. Conversely, frames are assumed to be prescribed by normative discourses that are contextualised by a preceding web of shared meanings. In this way, normative discourses are constitutive of the creation and modification of frames.

What, then, is the institutional arrangement which supports discourses and framing and enables them to operate? To tackle this, this paper uses the concept of regime. Regimes are understood as an accumulation of institutions enabling the interaction between discourses and framing, both in procedural and in substantive terms. As such, regimes are regarded as an arena in which norms evolve.

### **1.3 Regime**

International Relations have provided many interesting studies based on the concept of

*regime* since the 1970s.<sup>24</sup> Their main target is to grasp the concept of international cooperation which is more narrow than an ‘international structure’ and wider than a ‘formal organisation’.<sup>25</sup> In the same vein as realist interpretations,<sup>26</sup> this regime concept is offered to tackle the question of how states are able to constrain their own practices through international agreements despite their strong inclinations towards interest and power maximisation. According to Krasner, ‘the regime concept . . . has attracted a number of scholars who have been primarily identified with the realist tradition’, not the scholars who have invoked ideational transnationalism.<sup>27</sup>

At first sight, it therefore seems odd that this concept is applied to the institutional context of the EU. Needless to say, the EU is a highly organised and its interstate politics is regulated by a highly federal-like constitutionalised system.<sup>28</sup> While the arguments of liberal intergovernmentalism,<sup>29</sup> which stresses the preferences of the big powers in the EU, are reasonable, the system of EU interstate politics is not as the same as the system of international politics. The former has a high degree convergence of the Member States’ expectations owing to the highly legalised and judicialised system. Surely the EU is more than an international regime.<sup>30</sup>

However, the classical definition of regime by Krasner can, on account of its ambiguity, open a wider perspective. Krasner’s famous definition is as follows:

‘Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors’ expectations converge in a given area of international relations’.<sup>31</sup>

On this analysis, regimes can be regarded as prescribing international governance in a specific issue-area. On the basis of this definition, it is possible to extend the meaning of regimes. First of all, the area where there are sets of ‘principles, norms, rules, and decision-making procedures’ is not necessarily limited within ‘a given area of international relations’, although this limitation becomes important when trying to specify a unit of international cooperation which is more narrow than an international structure and wider than a formal organisation. It

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<sup>24</sup> S. Haggard and B. A. Simmons, ‘Theories of International Regimes’ (1987) 41 *International Organization* 491, at 491.

<sup>25</sup> *Ibid.*, at 492.

<sup>26</sup> S. D. Krasner, ‘Regimes and the Limits of Realism: Regimes as Autonomous Variables’ (1982) 36 *International Organization* 497, at 497.

<sup>27</sup> *Ibid.*

<sup>28</sup> J. H. H. Weiler, *The Constitution of Europe: Do the new clothes have an emperor? And other essays on European integration* (Cambridge University Press, 1999).

<sup>29</sup> A. Moravcsik, *The Choice for Europe: Social Purpose & State Power from Messina to Maastricht* (Cornell University Press, 1998).

<sup>30</sup> For example, see M. Zürn and D. Wolf, ‘European Law and International Regimes: The Features of Law Beyond the Nation State’ (1999) 5 *European Law Journal* 272.

<sup>31</sup> S. D. Krasner, ‘Structural Causes and Regime Consequences: Regimes as Intervening Variables’ (1982) 36 *International Organization* 185, at 186.

can be supposed that all social relations, insofar as they produce a stable order, are reproduced with 'principles, norms, rules, and decision-making procedures', which can make 'actors' expectations converge'. Second, for the reason that organs with organisationally differentiated forms – such as legislative, judicial or executive bodies – are not referred to at all in Krasner's definition, it can be claimed that what matters is not the organisational form of organs carrying out their individual functions, but the institutional context that makes 'actors' expectations converge'. Third, it is possible to extend this concept as follows:<sup>32</sup> each regime in its respective issue-area can be subsumed within another regime in a wider issue-area; for example, there can be the regime *A* consisting of regime  $a_1, a_2, \dots a_n$ . The EU is a good example. For instance, the EC environmental regime consists of a water regime, an air regime, an urban regime, and so on. This environmental regime is, however, one of elements of the more comprehensive regime of the first pillar in the EU, and this bigger regime, based on the EC Treaty, is subsumed in the 'single institutional framework' (Article 3 TEU) of the EU.

The concept of regime, as described here, makes it possible to relativise the traditional organisational form of governance, *i.e.* governmental organisation within the modern nation state, and to conceptualise the governance structure without having to refer to the form of the state. By observing the EU as a kind of regime, and thereby an accumulation of specific regimes, the dichotomy between federalist and internationalist approaches can once be set aside. All centralised states, federal states and international organisations can be seen as an accumulation of individual regimes, which have different scopes of issues. What should be examined in terms of regime is therefore not which organisational form has the task of governance, but how shared meanings concerning norms emerge: the meanings that are systematised as the frame for governance. Attention to the organisational form of governance easily leads to a dichotomy within traditional state-centred thinking between a federalised unit and intergovernmental cooperation. It should be noted that regardless of whether a regime is formed in a federalised arrangement or not, regimes may bring about effective norm-building and framing. There may be a state that is inferior to the EC in terms of effective environmental governance.

Further to this and drawing on the concept of framing, regimes can be a coupling point between governance and legal studies. On the one hand, since all frames are based on social and/or legal norms they may be described as normative in nature. Even purely cognitive frames for governance are normative for the reason that framing can take any legal form of agreements irrespective of softer and harder forms, which must first be interpreted normatively. On the other hand, for the reason that all regimes are formed in a specific issue-area, they can be regarded as

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<sup>32</sup> This argument may be attributed to a suggestion by Jo Hunt at the research meeting for my MA thesis.

institutionalising the frame of governance. In other words, regimes emerge along with a bundle of agreements aimed towards public problem-solving in a specific issue-area. Therefore, regime development must necessarily be seen as being accompanied by norm-building and framing and studying regimes means examining what institutional arrangement promotes and supports what norm and frame. In this respect, the concept of regime offers the point of convergence between governance and legal studies.

The conceptualisation of regime by Armstrong and Bulmer is instructive for helping to put the concept of regime into the research context of this paper. They analyse ‘regime’ from an institutionalist perspective and take a politico-legal approach. Building on Krasner’s definition, they regard the concept as follows:

‘Governance regimes each reflect one admixture of rules, procedures and norms embedded within the systemic context. Procedurally, each governance regime comprises the prevailing admixture of institutions, rules and norms together with the relevant policy ‘players’. . . The prevailing admixture varies over time: system-wide reforms may have repercussions on the governance regime, such as through the EP being granted rights to participate in legislation by co-decision: an overarching norm such as subsidiarity may have to be given serious consideration; or court rulings may clarify relevant legal bases and policy procedures.’<sup>33</sup>

In their definition, regimes are ‘one admixture of rules, procedures and norms’ in a specific issue-area to be governed and individual regimes are embedded into the common ‘systemic context’. In other words, *regimes* are an institutional complex for *governance* in a specific issue-area (‘governance regime’ is used in their wording).

On the other hand, Toope<sup>34</sup> offers a ‘constructivist incarnation’ of the concept of regime. Stressing the role of routine dialogue and information-sharing among states, Toope insightfully explains a constructivist understanding of regime theory:

‘Regime theory, especially in its constructivist incarnation, helps to explain how binding legal norms may emerge from those patterns of expectation developed through the increasing co-ordination of discussions and actions amongst States. Common endeavour, even common debate, can give rise to shared meanings which crystallize into norms. States participating in such regimes ‘learn’, and the learning affects not only their appreciation of self-interest, but may even come to alter the self-perception and identification of the State.’<sup>35</sup>

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<sup>33</sup> K. A. Armstrong and S. J. Bulmer, *The governance of the Single European Market* (Manchester University Press, 1998), at 72.

<sup>34</sup> S. J. Toope, ‘Emerging Patterns of Governance and International law’ in M. Byers (ed) *The Role of Law in International Politics* (Oxford University Press, 2000).

<sup>35</sup> *Ibid.*, at 105.

According to this understanding, regime formation can be seen as resulting from the process of ‘shared meanings which crystallize into norms’. To put it another way, it can be said that this view emphasises the intersubjectivity in the frame of governance in any issue-area and attempts to describe the sharing process of frame in the course of regime development.

Building on these viewpoints concerning the evolutionary process of norms and frames in a specific issue-area, this paper defines the concept of regime as follows. Regimes have two dimensions. One is the procedural dimension of arranging who participates in the creation, application and interpretation of norms and instruments to govern a specific issue-area. This means that regimes enable the stable reproduction of normative discourses. As noted above, law catalyses normative discourses and individual laws in themselves are part of these normative discourses. The other is the substantive dimension with respect to the policy agenda and the core norms that differentiate a specific issue-area from the whole. In this conception, it is through the regime that governance materialises as a policy programme encapsulating a coherent system of goals, principles and instruments. Regime can, therefore, be understood as institutionalisation of the intersubjective frame of governance and according to this conceptualisation, all regimes have a shared frame between the actors in a specific issue-area. To put these two dimensions together, regimes can be defined to be an accumulation of procedural institutions on the basis of specific policy agendas and norms. In other words, regimes procedurally reproduce normative discourses, substantively establish a shared frame and thus support the interaction between the discourses and the frame. The EU can be understood as consisting of many regimes and although all of these regimes have different procedures, they are all ‘embedded within the systemic context’<sup>36</sup> as prescribed by the Basic Treaties.

The arguments above have been used to conceive a conceptual framework for considering the development in EC environmental law which is as follows. This development can be taken to mean norm evolution in the change or deepening of frames of governance in a specific issue-area; it is the regime that promotes and supports this evolution in procedural and substantive terms since in procedural terms the regime reproduces normative discourses around law and laws and establishes, in substantive terms, a policy agenda as a core upon which a shared frame is built; accordingly, the regime can be regarded as an arena in which norm evolution takes place.

In terms of ontological premises, this framework may be put into the theoretical context of social constructivism<sup>37</sup> in the sense that *framing*, which sets up common understandings about

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<sup>36</sup> Armstrong and Bulmer, above n.33, at 72.

<sup>37</sup> For social constructivism in the theoretical context of politico-legal studies, see A.-M. Slaughter, A. S. Tulumello and S. Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 *American Journal of International Law*

how to view and act in the world, is assumed to constrain, and be also constrained by, *discourses*; conversely, discourses are assumed to be constitutive of framing in that they form common meanings via which society is collectively recognised and *norms* are seen to be shared meanings evolving from the interaction between discourses and a frame. In methodological terms, this paper claims that a research project based on this conceptual framework can be regarded as ‘institutionalist’<sup>38</sup> in the sense that the endogenous institutional dynamics are the primary focus and empirical materials are specified according to the EU’s institutional context in order to discover how normative discourses are reproduced and how frames are established.

In the following pages Chapter 2 examines the general features of the EC environmental regime, focussing on its formal character, three weaknesses of the regime and the trends towards a new governance mode. Chapter 3 traces norm evolution in EC environmental law, giving special attention to the normative discourses in the case law of the ECJ, secondary legislation and international agreements.

## 2 EC Environmental Regime

Building on the conceptual framework offered in Chapter 1, this Chapter takes a general view of the features of the EC environmental regime. While the purpose of this overview is, for the present, to examine what type of regime exists in the environmental issue-area of the EC, the eventual aim is to show the institutional context for environmental norm evolution and the role of law itself in this regime. As mentioned in Chapter 1, law catalyses the normative discourses which affect, and are affected by, the frame as a coherent system of core norms, key concepts and regulative principles in an issue-area. Regimes are an institutional arrangement procedurally reproducing normative discourses and substantively establishing a policy agenda on the basis of which a frame is formed. Thus, regimes should be considered as an arena in which the interaction between normative discourses and a frame for governance occurs, causing norms to evolve.

In this Chapter, two general features of the EC environmental regime are discussed. In Section 2.1 the formal institutions of procedure are looked at. In Section 2.2 the weaknesses concerning the implementation deficit, the inadmissibility of citizens into the ECJ and the parasitic upon market-building policy agenda are looked at. In Section 2.3 it is considered how law plays its own role in this regime, in which the new mode of environmental governance has been introduced to respond to the ineffectiveness of the command and control approach. An

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367 and J. Shaw and A. Wiener, ‘The Paradox of the European Polity’ (1999) *Harvard Jean Monnet Working Paper* No.10/99 <http://www.jeanmonnetprogram.org/papers/99/991001.html>.

<sup>38</sup> For institutionalism in the context of EU legal and governance studies, see above n.33 and K. A. Armstrong, ‘Regulating the free movement of goods: institutions and institutional change’, in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995).



overview of this Chapter was follows.

First, it has been found that EC environmental actions are founded not on political commitments not subject to judicial review, but on formal institutions based on the general principles of EC law and the decision-making procedures that are set up at a systemic level, *i.e.* the procedural institutions that apply to the individual regimes comprising the EC as a whole. Member governments and institutional actors such as the Commission, the Council and the EP thus have legal obligations that are reviewed by the ECJ, and financial sanctions are applied for non-compliance with the judgments of the ECJ. Further to this, the policy agendas established within the environmental regime are so various and comprehensive that it can easily be differentiated from other international environmental regimes that deal with a single issue such as climate change, ozone depletion, the protection of the Mediterranean Sea and the Rhine and so on. Thus, the EC environmental regime seems to be equipped with vertically-arranged institutions for the creation, application and enforcement of norms which cover almost all of the issue-areas related with the environmental problems.

Second, despite the high degree of formalisation of the EC environmental regime, it can be said that some weak points have been seen in the developmental process of this regime. Overall, the following three points can be made: 1) there is an implementation deficit of secondary law at the Member State level; 2) it is difficult for societal actors like environmental NGOs to bring a case before the ECJ; 3) there is a dependency of environmental legislation on other common policy sectors, especially on the building of the common market, in terms of a legal base. In other words, the effectiveness of the regime depends on the political will of the Member States, which may often attempt to minimise their legal obligations; participation of societal actors in the EC judicial process is strictly constrained; until the SEA there was no legal base for environmental legislation, and the institutional inertia<sup>39</sup>, depending on the legal base of other issue-areas, has remained even after the SEA. Certainly, some of these weaknesses have been lessened, following pre-SEA developments, post-Maastricht and post-Amsterdam. Each reform of the primary law has gradually provided the constitutive foundation for the EC environmental regime and has somewhat alleviated these weak points. Nevertheless, the weaknesses still remain in one form or another.

Third, a new mode of EC environmental governance and the likelihood that it will stimulate normative discourses and framing is considered. Despite the weak points of the EC environmental regime, environmental legal practices have accumulated alongside the reforming of primary law and through these practices, the normative discourses surrounding secondary laws and case law have grown too. As will be argued in Chapter 3, this type of discourse has

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<sup>39</sup> For this concept, see K. A. Armstrong and S. J. Bulmer, *The governance of the Single European Market* (Manchester University Press, 1998), at 220.

undoubtedly enabled a frame for EC environmental governance to be elaborated. This framing, based on the growth of the normative discourses, should be taken seriously in a new mode of environmental governance highlighting flexible, decentralised, participatory, reflexive and deliberative arrangements.<sup>40</sup> This new mode can be interpreted as emphasising the discursive power of law which contributes to frame development.

## 2.1 Formal Institutions

A 'policy in the sphere of the environment' (Article 3 (1) EC) is formally laid down by the institutional arrangement of the EC (that is, 'the first pillar' in the EU). EC environmental measures and the obligations of Member States are *not only* prescribed generally by primary law (Basic Treaties) and the international conventions, to which the EC is a party, *but also* concretised by secondary laws provided in Article 249 EC as Regulations, Directives and Decisions. As will be noted, these laws are not always used as legal instruments giving Member States *substantive* obligations like emission standards or the prohibition of a toxic substance. These secondary laws are also enacted for binding Member States in terms of decision-making procedures, citizen participation, and information exchange between Member States etc.

These institutional practices are reviewed by the ECJ, and primary law provides the following judicial practices: actions of the Commission against a Member State in Article 226 EC; actions of a Member State against other Member States in Article 227 EC; imposition of a lump sum penalty against Member States for not complying with the judgment of the ECJ in Article 228 EC; actions concerning the non-legality of actions of EC institutions and Member States in Article 230 para.1 EC; the direct action of individual citizens under Article 230 para.4 EC; and preliminary references from national courts concerning the interpretation of EC law in Article 234 EC.

Thus, it can be said that the main instruments of the EC environmental regime are hard laws which clearly identify the legal obligations of EC institutions and Member States and which are open to review by the ECJ. Soft laws, such as the political statements in EAPs, Council resolutions, Commission recommendations and the declarations of the European Council, are basically supportive. In this sense, the EC environmental regime can be said to be founded on highly formal institutions distinguishing the regime from other international regimes which depend on informal institutional settings.

This formal institutionalisation of the environmental regime means that it is embedded into the systemic context concerning both the norm-making process in the legislature and the enforcement mechanism in the judiciary. As such, the EC environmental regime is, along with

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<sup>40</sup> J. Scott, 'Flexibility, "Proceduralization", and Environmental Governance in the EU', in G. de Búrca and J. Scott (eds) *Constitutional Change in the EU: From Uniformity to Flexibility?* (Hart Publishing, 2000), at 265-272.

other individual regimes comprising the EC as a whole, founded on the general principles of EC law and is prescribed in procedural terms. The general principles may be stated as being legal certainty, non-discrimination, free movement of goods, freedom of competition, proportionality, transparency and fundamental rights.<sup>41</sup>

With regard to the legislative procedure, environmental secondary legislation has two patterns. One is the QMV procedure of Article 175 (1) EC based on Article 251 EC, in which the EP and the Council take part in the co-decision procedure and which means that the EP can reject the common position of the Council. The other is the procedure of Article 175 (2) EC, which requires the Council to act unanimously and to only consult with the EP -- this procedure applies financial measures, town planning and the choice of energy sources. The co-decision procedure is an outcome of the Treaty revision in Amsterdam of 1997. At the time of the SEA, environmental measures required the Council to act unanimously, and while the Treaty reform in Maastricht enabled the Council to act by the QMV based on Article 252 EC, the influence of the EP was constrained to proposing amendments to the common positions of the Council.

As for the enforcement mechanism, firmly established procedures can be found:<sup>42</sup> the *administrative phase*, in which the Commission attempts to redress the infringements of Member States by using Article 226 to send a formal notice letter and by issuing a reasoned opinion against the Member State in question; the *judicial phase* based on the action of the Commission against a Member State in Article 226 EC, the action of a Member State in Article 227 EC when the Commission takes no action and the action of the Commission in Article 228 EC when it finds non-compliance of a Member State with the judgment of the ECJ. In the judicial review process in the EC, the principle of co-operation provided in Article 10 EC has often been referred to, in terms of the prevention of conflict between Member States, and between national and EC law concerning the matters that Treaties do not have assume in advance.<sup>43</sup> Further to these legislative and judicial institutional arrangements, it should be kept in mind that the principles established by the ECJ in cases other than those on environmental protection can be applied to the environmental regime. The doctrine of direct effect and individual rights based on directives are examples of this.<sup>44</sup>

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<sup>41</sup> See J. Shaw, *Law of the European Union*, Third Edition (Palgrave, 2000), at 333.

<sup>42</sup> *Ibid.*, at 302-3.

<sup>43</sup> *Ibid.*, at 297-300. Also see K.-H. Ladeur, 'Flexibility and "Co-operative Law": The Co-ordination of European Member States' Laws - The Example of Environmental Law', in G. de Búrca and J. Scott (eds) above n.40, at 284-5. For early environmental Cases based on this cooperation principle, see Cases 3, 4, 6/76, *Cornelis Kramer and others* [1976] ECJ 1279, para.44-5, and Case 141/78, *France v. United Kingdom* [1979] ECR 2923, para.8-12.

<sup>44</sup> See Case C-131/88, *Commission v. Germany* [1991] ECR I-0825, at para.7. However, examining the difficulty of identifying the conditions of direct effect in environmental legislation in the EC, Krämer says that 'there are very few decisions where the Court of Justice discussed the direct effect of an environmental provision'. See L. Krämer, *Focus on European Environmental Law*, Second Edition (Sweet & Maxwell, 1997), at 98.

As the most important instruments for environmental action, secondary laws cover many areas of environmental protection. On the one hand, with regard to the comprehensiveness and unity, the EC environmental regime should be distinguished from other international environmental regimes based on international law, which takes a sector-by-sector approach. According to the classification of EUR-Lex on the EU website,<sup>45</sup> the EC environmental regime consists of the following constituent regimes: nuclear safety and radioactive waste, water protection and management, monitoring of atmospheric pollution, prevention of noise pollution, chemicals, industrial risk and biotechnology, management and efficient use of space, the environment and natural resources, conservation of wild fauna and flora, and waste management and clean technology. On the other hand, there are several measures enabling the free access of citizens to environmental information as well as eco-label, eco-audit and eco-management measures, etc. Moreover, environmental concerns in secondary laws spread to issue-areas such as agriculture, social policy related to working conditions and human health, transport, regional structural policy, development cooperation and so on. This interpenetration of the environmental concerns is based on Article 6 EC, which provides the principle of environmental integration.

In addition, it must also be noted that although this highly formalised regime has been established step by step since the SEA through reform of the Basic Treaties, many secondary laws and case laws in relation to environmental protection were in existence in the pre-SEA days. The EC environmental regime is thus based on an accumulation of these legal practices and institutional changes.

However, the following problems must be noted in the EC environmental regime: 1) there are deficits in the implementation of secondary laws on the Member State level; 2) societal actors cannot virtually take recourse to the ECJ to demand judicial protection at the EC level; 3) environmental secondary legislation parasitises the legal bases of other issue-areas, especially of the market building. Although primary legislation has eased the process of overcoming the problems of the EC environmental regime, it cannot be said that these problems have completely been solved. For instance, the inadmissibility problem continues to be a shortcoming of this regime even after Amsterdam. Imagine the following circumstance: the implementation of EC environmental legislation is subject to the political will of each Member State, individual citizens demanding judicial protection do not have access to the ECJ and environmental norms are only legitimised insofar as they support market building. This circumstance represents a serious weakness in the regime.

## **2.2 Weaknesses**

Weaknesses have been ameliorated not only by change at the level of primary law. As will

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<sup>45</sup> See, [http://europa.eu.int/eur-lex/en/lif/ind/en\\_analytical\\_index\\_15.html](http://europa.eu.int/eur-lex/en/lif/ind/en_analytical_index_15.html).

be argued in Chapter 3, an accumulation of case law and secondary laws as normative discourses has also brought about evolving environmental norms in advance of big changes to the Treaties and this evolution can be said to contribute to the improvement of the problems of the EC environmental regime. While conflicts have taken place around the weaknesses, the institutional context of the EC environmental regime has brought about norm evolution, especially through judicialised responses to these conflicts, as will be shown in Chapter 3. In the following sections, the weaknesses are considered in detail.

### 2.2.1 Deficits in Implementation

In 1998 the Commission submitted a Special Report concerning the implementation of water pollution directives.<sup>46</sup> The Report showed examples of current implementation failures of the Member States to fulfill their obligations concerning the directives. According to this Report, 20 directives concerning water quality have been adopted since 1973.<sup>47</sup> Amongst these, the Report paid special attention to the following three directives: Council Directive on urban waste water treatment (UWWT Directive),<sup>48</sup> on the protection of waters against pollution caused by nitrates from agricultural sources (nitrates Directive)<sup>49</sup> and on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture.<sup>50</sup>

From this survey, the Report showed ‘numerous instances of non-conformity with, non-application or incorrect application of the Directives’<sup>51</sup> and listed Greece, Spain, Italy, Belgium, Netherlands, Portugal, Austria, France and Finland, particularly as having failed to transpose the water-related Directives.<sup>52</sup> Nine in fifteen of the Member States were named! For instance, the UWWT Directive has not been transposed by Germany, Greece, Spain and Italy and the nitrates Directive has not transposed by Austria and Finland. In addition to this the nitrates Directive was not correctly transposed by Belgium, Greece, Spain, Italy, Netherlands, Portugal, nor was it correctly applied in France.<sup>53</sup> Furthermore, there have been serious nonfulfillments of the obligation to provide reports. The Commission has not received the implementation programme report prescribed in Article 17 of the UWWT Directive. Needless to say, the negligence in reporting means that it is almost impossible for the Commission to assess the progress of this policy.<sup>54</sup>

Krämer examines each deficit in implementation in detail.<sup>55</sup> According to him, failures in

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<sup>46</sup> Special Report No 3/98, OJ 1998 C 191/2.

<sup>47</sup> *Ibid.*, at para.2.

<sup>48</sup> Council Directive 91/271/EEC, OJ 1991 L 135/40.

<sup>49</sup> Council Directive 91/676/EEC, OJ 1991 L 375/1.

<sup>50</sup> Council Directive 86/278/EEC, OJ 1986 L 181/6.

<sup>51</sup> Above n.46, at para.13.

<sup>52</sup> *Ibid.*, at para.13-14.

<sup>53</sup> *Ibid.*, at note 9 and para.12-15.

<sup>54</sup> *Ibid.*, at para.15.

<sup>55</sup> Krämer, above n.44.

implementation can be categorised into three types; late or omitted transposition, incomplete or incorrect transposition and incorrect application in practice. Among the examples that he lists, of particular importance is the nonfulfillment of planning obligations<sup>56</sup> for setting clean-up plans, monitoring plans and other related programmes concerning waste, air and water etc. on a national level. According to Krämer's argument, there are conflicts between the national and the EC legal order, and the conflicts can be ascribed not only to the differences of legal systems but also to the lack of the political will of the Member States sometimes due to a dislike for Brussels-made standards.<sup>57</sup>

The consequences of this remark become more serious when the institutional arrangements for the implementation of EC law are considered. It is well known that it is impossible for EC law to be implemented without the legal and administrative systems of the Member States and the primary reason of this can be ascribed to limited administrative resources at the EC level. This dependency can be shown in the fact that directives (Article 249 EC) must be transposed into the legal orders of the Member States and the following statement of the ECJ demonstrates the difficulty of ensuring that directives are applied in the manner envisaged by EC-law makers:

‘the Court has held that the implementation of a directive in national law does not necessarily require the provisions of the directive to be adopted formally and verbatim in an express legislative provision designed for that purpose’.<sup>58</sup>

It is important to note that even regulations (Article 249 EC), which ought to be applied directly into national legal orders, must be supported by additional measures of the Member States. Krämer says that because there is additional work in giving authorisation and licence, undertaking surveillance and monitoring, and doing reporting requirements, ‘. . . the regulations are not directly applicable but require Member States to take the necessary steps.’<sup>59</sup>

Thus, the implementation of environmental secondary law depends on the legal and administrative systems of the Member States. Serious failures are caused not only by structural elements, such as the conflict between the EC and national legal orders, but also by the lack of political will on the part of the Member States. How does judicial review operate under these circumstances?

### **2.2.2 Inaccessibility**

To confront these failures in implementation, the EC legal order has a remarkable institution: the judicial review system set up mainly by Article 226, 227, 228, 230 and 234 EC. This judicial review system differentiates the legal order of the first pillar of the EU from any

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<sup>56</sup> *Ibid.*, at 8-10, 135-6.

<sup>57</sup> *Ibid.*, at 6, 11, 18.

<sup>58</sup> Case C-131/88, *Commission v. Germany* [1991] ECR I-0825, para.7.

<sup>59</sup> Krämer, above n.44, at 119.

other international institution.<sup>60</sup> For instance, Articles 226 and 227 EC give the Commission and the Member States competence to take an action in the ECJ against another Member State for failing to fulfill the obligations prescribed by EC law. This means that the principle of reciprocity seen in the public international legal order is overcome in the EC legal order.<sup>61</sup> Moreover, Article 228 EC establishes provision for the ECJ to impose a ‘lump sum or penalty payment’ on a Member State which ‘fails to take the necessary measures to comply with the Court’s judgment’.<sup>62</sup>

However, this judicial system has limits. For instance, Weiler highlights the politicised nature of the procedure of Article 226, the limitation of human resources to monitor violations and infringements, the inappropriateness of the ECJ procedure in questions of small violations and the lack of real enforcement capability.<sup>63</sup> In the context of environmental law, Krämer criticises the judicial system as follows:

‘It is doubtful whether at present the public interest (CHECK: in?) “protection of the environment” is sufficiently safeguarded by the judicial system set up under the EC Treaty. Indeed, Member States do not make use of their prerogative under Article 170 (now 227 – inserted) of the EC Treaty in environmental matters. And the Commission is overburdened with the task of both promoting an environmental policy together with Member States and their administrative bodies, and at the same time bringing legal actions against Member States and their administrative bodies under Article 169 (now 226 – inserted) for failures to comply with the policies and rules on the protection of the environment.’<sup>64</sup>

In this regard, Article 230 should be significant since it gives ‘any natural or legal person’ the possibility for instituting proceedings before the ECJ. Theoretically, this provision enable societal actors, like an environmental NGO, to bring an action against EU institutions before the ECJ when they find a nonfulfillment of obligations concerning environmental protection. If the Commission, in monitoring the implementation of EC environmental law, can rely on the access of societal actors to the ECJ, this should save the Commission work. This provision would also enable societal actors to participate in normative discourses at the level of the judiciary.

However, the admissibility of societal actors to the ECJ has strictly been constrained. This is the so-called barrier of Article 230,<sup>65</sup> which places the condition of ‘direct and individual concern’ on the *locus standi* of individuals. In order to have access to the ECJ, individuals or the

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<sup>60</sup> J. H. H. Weiler, *The Constitution of Europe: Do the new clothes have an emperor? And other essays on European integration* (Cambridge University Press, 1999), at 26-29.

<sup>61</sup> See, Shaw, above n.41, at 312.

<sup>62</sup> The characteristics of these judicial system in the context of environmental law will be examined in more detailed in section 3.1.1.

<sup>63</sup> Weiler, above n.60, at 27. As for the political nature, Weiler comments that ‘the Commission may have appropriate non-legal reasons not to initiate a prosecution.’ *Ibid.*

<sup>64</sup> Krämer, above n.44, at 315-6.

<sup>65</sup> *Ibid.*, at 315.

associations of societal actors have to demonstrate that they have a clear and ‘direct and individual concern’ in the case in question. In this respect, the ECJ has interpreted this ‘concern’ very strictly and ‘[t]he Court’s case laws have been criticised as unnecessarily restricting the access of individuals’.<sup>66</sup> Environmental matters are no exception to this.

The representative case regarding this strict interpretation is the *Greenpeace* Case.<sup>67</sup> Environmental associations -- *Greenpeace International et al* -- claimed that the construction of electrical power stations (in the Canal Islands of Spain) went ahead without an environmental impact assessment,<sup>68</sup> despite being funded by a grant from the ERDF (European Regional Development Fund). They demanded that the Commission offer more information and suspend the construction plans. After a fruitless meeting with the Commission, the associations brought a case before the CFI. However, the CFI dismissed this action as inadmissible. The groups then brought a suit before the ECJ, appealing against the adjudication of the CFI, and requesting the Court to declare the admissibility of the action. One of the issues in this case concerned whether or not individuals or societal actors can take an EU institution to the ECJ when a Member State that is granted EC financial aid fails to fulfill one of the obligations deriving from EC environmental law.

*Greenpeace et al* argued for the justification of citizens’ access to the ECJ, referring to current developments in environmental legal practices on the national, the EU and international levels. They mentioned the widening of citizen’s procedural rights on environmental matters in Member States, the development of international environmental law<sup>69</sup> and the development of EC environmental law including statements in the 5th EAP.<sup>70</sup> However, the attitude of AG Cosmas on individuals’ locus standi was steadfast. If societal actors cannot bring the Commission before the ECJ when the Commission has granted financial aid to the Member State which subsequently fails to fulfill the obligation of environmental protection, is there any avenue for judicial protection? Under these circumstances, nothing can be done except to wait for other Member States to begin litigation. However, is there any Member State to monitor the failures of another Member States in implementation? Notwithstanding this, AG Cosmas stated that:

‘ . . . the fact that legality must be observed per se within the Community, including the

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<sup>66</sup> Shaw, above n.41, at 528, and for a detail commentary regarding locus standi of individuals, see Chapter 15.

<sup>67</sup> Case C-321/95P, *Greenpeace and others* [1998] ECR I-1651.

<sup>68</sup> In this case, the EIA Directive (85/337/EEC OJ 1985 L175/40) was called into question.

<sup>69</sup> The trends that Greenpeace et al raised are principle 10 of the Rio Declaration; the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; recent judgments of the Court of Human Rights in Strasbourg; the system of administrative review introduced by the World Bank as from 1993 in the case of activities which pose a threat to the environment. See, above n.67, para.22.

<sup>70</sup> *Ibid.* Also see, Opinion of AG Cosmas for the Case, at I-1662, para.27.



obligation to protect the environment, does not automatically confer on a natural or legal person a right or legal interest enforceable by an action under the fourth paragraph of Article 173 (now 230 – inserted) of the Treaty. The Community legal order does not recognize an *actio popularis* in environmental matters either. It is not, therefore, possible to rely, as the sole ground for claiming locus standi, on the legal vacuum which would be likely to be created by the fact that certain infringements by the Commission cannot with certainty be remedied if the task of submitting them for judicial review is entrusted exclusively to the Member States and the Community institutions, which do not in practice have an interest in that regard.<sup>71</sup>

Accordingly, Article 234 EC is important. This is a reference procedure called a preliminary ruling, by which a national court can ask the ECJ for an interpretation of EC law which is in relation to, and may be in conflict with, national law. As such, this procedure opens up the opportunity for individual citizens or environmental NGOs to indirectly access the ECJ via a national court. This procedure draws upon the doctrine of direct effect, according to which EC law gives citizens rights that must be protected when EC law is in conflict with a Member State's law that infringes these rights, or when a Member State fails to fulfill the obligations of the secondary laws which give citizens these rights. Because of the linkage between the reference procedure and direct effect, individuals or societal actors, like environmental associations, may bring a conflict to the ECJ and may rely on the interpretation of the ECJ for demanding redress against the infringements of the individual rights granted by EC environmental law. For example, in the *Greenpeace* case above, the Commission suggested the use of this preliminary reference procedure to the plaintiff.<sup>72</sup>

Preliminary rulings play a crucial role in 'the organic connection between the Court of Justice and the national courts'.<sup>73</sup> Weiler assesses the significance of the procedure in terms of legal order's characteristics as follows:

'The combination of the "constitutionalization" and the system of judicial remedies to a large extent *nationalized* Community obligations and introduced on the Community level the *habit of obedience* and the respect for the rule of law which traditionally is less associated with international obligations than national ones.'<sup>74</sup>

As such, this remarkable institution opens up the possibility of the judicialisation of environmental conflicts. However, the preliminary reference procedure cannot resolve all the problems. It has a decisive limitation: the operation of this procedure depends on a national court and the ECJ has no power to judge the invalidity or otherwise of a provision of national law. Therefore, the procedure cannot function without the close cooperation of the ECJ and

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<sup>71</sup> *Ibid.*, at I-1672, para.53.

<sup>72</sup> *Ibid.*, at I-1665, para.34.

<sup>73</sup> Shaw, above n.41, at 29, and for detail explanation, see Chapter 11.

<sup>74</sup> Weiler, above n.60, at 28.

national courts.<sup>75</sup> Insofar as the judicial linkage between the EC and the national level is concerned, it might be supposed that political intentions have a strong effect on judicial processes. The preliminary reference procedure depends on legally non-binding cooperation which might be influenced by political uncertainty. This circumstance is similar to that of an international regime which expects the compliance of parties without an effective enforcement mechanism. Although the parties in the EC's preliminary reference procedure are national courts, and hence stronger compliance can be expected owing to the common spirit of law, the ability of societal actors to bring a case against EC institutions before the ECJ should still be viewed as important. This strengthens the judicial review system in the EC environmental regime.

### 2.2.3 Parasitism on Market

As mentioned above, EC environmental actions have gained ground in the EC Treaty since the SEA. Before the SEA, there was no provision concerning the protection of the environment. Even after the SEA, however, the main concern of the EC has undoubtedly been the building of 'One Money and One Market'.<sup>76</sup> Nevertheless, EC environmental legislation has been constantly and regularly adopted. There were three EAPs before the SEA,<sup>77</sup> and, according to the Commission,<sup>78</sup> there were about 200 secondary laws on environmental measures by the beginning of the 5th EAP in 1992. Notwithstanding the circumstances making environmental legislation possible, it can be asked whether or not an environmental regime has existed in the process of European integration.

On the one hand, it must be noted that the very existence of environmental actions has been justified as supporting measures for creating, and making functional, the common market. Member States have, more or less, their own environmental regimes and some adhere to international environmental agreements. In addition to this, the obligation to fulfill the principle of subsidiarity has added to the difficulties of justifying EC environmental legislation.<sup>79</sup> Under these circumstances, EC environmental protection measures found justification as part of the

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<sup>75</sup> Shaw, above n.41, at 29.

<sup>76</sup> See Armstrong and Bulmer, *The Governance of the Single European Act* (Manchester University Press, 1998), at 205-6.

<sup>77</sup> The first is OJ 1973 C112/3; the second OJ 1977 C139/3; the third OJ 1983 C46/3.

<sup>78</sup> Towards Sustainability, OJ 1993 C138/5, at 11. The Commission looked into the fields covering the atmosphere, water, soil, waste, chemicals, biotechnology, product standards, environmental impact assessments and protection of nature. However, this survey is obviously arbitrary, because it depends on whether legislation for amendments are included, and how widely the environment is categorised for the reason that the related fields extend to agriculture, rural development, working conditions and so on. Krämer counts only 30 regulations or directives. See, L. Krämer, above n.44, at 26.

<sup>79</sup> For example, see Krämer, *ibid.*, at 113. Krämer shows other reasons for the justification. These reasons are 'Communication mechanism' for the exchange or transfer of expertise knowledge, legislative techniques, monitoring methods, administrative techniques and enforcement methods between the Member States (at 114), and cohesion obligations described by the Basic Treaties that should include 'environmental cohesion' (at 115).

creation of the common market.

On the other hand, the question also derives, in part, from the difficulty of defining an 'environmental issue-area'. What counts as environmental problems? Even after the EC set up its own environmental policy area in Article 174 EC, it was too vague to provide a solid definition of the term. For instance, should *working conditions* be categorised as environmental policy or social policy, in terms of the wording 'protecting human health' of Article 174(1) EC? Should *land uses* in relation to *fauna and flora* issues belong to an environmental, an agricultural or a rural developmental policy, in terms of the wording 'preserving, protecting and improving the quality of the environment' in the same Article? It is impossible to say that there has been no arbitrariness in the Commission's and the Council's definition of the concept of the environment, when the former exercises the initiative for proposals on environmental protection measures and the latter decides on the proposals.

Both the dependency on the objective of building the common market and the arbitrary nature of the Commission's initiatives plus the Council's decisions concerning environmental legislation gave rise to a dispute over the legal base between the Commission, the Council and Member States as to whether Article 94 (ex 100) EC for building the common market was appropriate for environmental legislation at the pre SEA stage.<sup>80</sup> Post-SEA a debate has arisen over whether Article 175 EC (environment), Article 95 EC (internal market) or other related Articles (for example, the common commercial policy or the agriculture) should be used.<sup>81</sup> The dispute around Article 94 (ex 100) EC at the pre SEA stage has been succeeded by the dispute around Article 95 (ex 100a) EC post-SEA, at least until the revision of the Basic Treaties at Amsterdam which extended the fields in which the QMV procedure can be used. In the time from the SEA to Amsterdam, it seems that the Commission had, in some cases, taken the strategic decision of using the QMV procedure in Article 95 EC rather than the unanimity procedure of Article 175 EC, in order to make passing environmental legislation easier. This strategy has brought about extensive disputes over legal bases for environmental legislation.

Thus, the very existence of an environmental regime in the EC can in itself be problematic. Is the regime independent from, or dependent upon, other regimes? Is it parasitic upon the common (and internal) market and other environment-related issue-areas like agriculture, transport or social policy, and so on? While effective environmental actions must be conditional on firmly established environmental norms, it can be said that the EC began to establish norms alongside the building of the common market. As will be argued in detail in section 3.1.4, it is the principles of environmental integration which have contributed into the transformation of the EC environmental regime from a parasitic regime to a comprehensive

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<sup>80</sup> For example, see Case 91/79, *Commission v. Italy* [1980] ECR 1099, at 1105, para.4.

<sup>81</sup> For example, see Case C-300/89, *Commission v. Council* [1991] ECR I-2867, and Case C-62/88, *Greece v. Council* [1990] I-1527.

regime spanning many others. This principles of environmental integration have become foundational for the development of an EC environmental regime.

### 2.3 New Governance Mode and the Role of Law

Notwithstanding the implementation deficit, the inadmissibility and the parasitic characteristics, the European integration process has accumulated environmental legal practices, fragile as they may be. In the process, political statements concerning environmental actions have often been issued and many secondary laws and a body of case law have resulted. Fundamental modifications of the Basic Treaties have occurred and norms concerning environmental protection have been created, shared and elaborated upon. When looking at norm evolution, trends in the 1990s to create a new perspective in environmental governance should be taken into consideration.

#### 2.3.1 The Fifth EAP

The 5th EAP<sup>82</sup> in 1992 offered a change of policy style and declared a departure from a command and control approach. This EAP admitted a ‘deficiency of existing strategies’ that have the characteristics of ‘too great a reliance on command and control type’ and a ‘preponderant recourse to Directives’.<sup>83</sup> It announced a shift ‘from top-down to bottom-up’ and the adoption of ‘performance targets as non-legal commitments’.<sup>84</sup> These new styles were to be reinforced, according to the EAP, through information-oriented policies aiming at a mutual learning effect<sup>85</sup> and ‘market-based instruments’.<sup>86</sup>

The 6th EAP<sup>87</sup> in 2001 made concrete the change of style in the 5th EAP. On the basis of the new style offered by the latter, the 6th EAP presented the strategies for dealing with climate change as an issue-area that is deserving of more attention<sup>88</sup> and reconfirmed the 5th EAP’s regulative principles.<sup>89</sup> Therefore, it may be said that despite the ambitious and innovative strategies of the 6th EAP, it was undoubtedly the 5th EAP that opened up a new perspective on environmental governance.

While this shift from top-down regulatory instruments to self-regulatory, economic and informative instruments certainly makes sense as regards very complicated and difficult

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<sup>82</sup> Towards Sustainability, OJ 1993 C138/5.

<sup>83</sup> *Ibid.*, at 80.

<sup>84</sup> *Ibid.*, at 12 and 13.

<sup>85</sup> *Ibid.*, at 13.

<sup>86</sup> *Ibid.*, at 16.

<sup>87</sup> *2010: Our future Our choice*, COM(2001)31 final.

<sup>88</sup> The 6th EAP says in the Explanatory Memorandum that: ‘Many of the conclusions and measures proposed in the Fifth Programme remain valid, but they are largely a question of implementation on the ground. More persistent and intractable problems, such as climate change, require a more concerted effort at Community level to lead the way.’ *Ibid.*, at 67.

<sup>89</sup> Amongst them, it is the principle of environmental integration that is the most strongly stressed. The principle is put at the centre of the programme in Article 2 (2) of the Decision of the EP and Council concerning the programme. See, *ibid.*, at 71.

environmental measures, it may be claimed that the new perspective is vulnerable in terms of implementation failures. The introduction of a more horizontal approach may, in practice, be mere acceptance of the status quo, in the sense that allowing flexibility for Member States to implement EC environmental measures seems to represent acceptance of an already established fact. In addition, the emphasis on public awareness and participation via the introduction of instruments for information and communication is obviously contradictory to the judicial practices that have strictly constrained the access of citizens to the ECJ. Nevertheless, these new strategies should be taken seriously when considering the implications of the new mode on environmental governance in terms of norm evolution through the interaction between normative discourses and framing in a specific issue-area. As will be shown below, the new mode has the potential to promote normative discourses more widely even though the contradiction between inadmissibility to the ECJ and the participatory perspective of this new mode unchallenged.

### 2.3.2 New Trends

For an overview of the new strategies of the 5th EAP the scheme presented by Lenschow regarding the mode of governance<sup>90</sup> is instructive. It is comprised of ‘structural elements’ and a ‘regulatory style’. The former is divided into ‘organisational features’ and ‘state-society relations’; the latter features an ‘intervention mode’ and a ‘routine procedure’. Along with this governance mode scheme, new strategies can be described, generally speaking, in the following way. On the one hand, the organisational features in structural elements change from the vertical to the *horizontal distribution of responsibilities*; state-society relations change from an ‘authoritarian role of the state’, ‘corporatism’, or ‘competitive pluralism’ to ‘*networks/partnership*’. On the other hand, the intervention mode in the regulatory style changes from a hierarchical/interventionist to a *co-operative style*; the routine procedure changes from a legalistic to a *flexible/pragmatic style* and from an adversarial to a *consensual style*.<sup>91</sup> These trends of transformation correspond to ‘the ongoing general as well as policy-specific (environmental) global discourse on governance’<sup>92</sup> and seem to be embodied in the 5th EAP. However, Lenschow points out that, generally speaking, the realisation of this trend of transformation is ‘only moderate’<sup>93</sup> and that a mix of old and new features can be recognised. Efforts and practices towards the transformation can only be identified within the Commission’s Environment DG and the Environment Committee in the European Parliament, in addition to which ‘neither the impact of organisational and procedural innovations, nor the shift towards

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<sup>90</sup> A. Lenschow, ‘Transformation in European Environmental Governance,’ in B. Kohler-Koch and R. Eising (eds), *The Transformation of Governance in the European Union* (Routledge, 2000), at 40.

<sup>91</sup> *Ibid.*, at 40.

<sup>92</sup> *Ibid.*

<sup>93</sup> *Ibid.*, at 49.

new policy instruments, nor the ‘constitutional’ status of new governance elements<sup>94</sup> is clear. Accordingly, this challenge to the mode of environmental governance must be said to remain ‘policy rhetoric’<sup>95</sup> in official documents. In support of this Lenschow mentions the negative role of the ECJ:

‘. . . the ECJ has contributed to the perpetuation of fragmented governance structures, an adversarial rather than consensual patterns of conflict resolution and exclusive network structures. . . For instance, by limiting the right of environmental organisations to legally pursue non-compliance with EC environmental law (admissibility to the Court is premised on a violation of individual rights), and thereby resisting a broad definition of ‘access to justice’, the ECJ has prevented the establishment of more open governance structures and practices.’<sup>96</sup>

Scott also offers an explanation of the transformation of the mode of governance.<sup>97</sup> She presents ‘five values’ for understanding the new trends: ‘flexibility’, ‘decentralisation’, ‘participation’, ‘reflexivity’ and ‘deliberation’.<sup>98</sup> Using these five values as measures, she reviews the IPPC Directive,<sup>99</sup> which is regarded as an example of a challenge to the new perspective. According to Scott, the IPPC Directive certainly presents a requirement to publish emission values, an obligation to carry out transboundary consultation, a periodical reporting requirement for reflexive modification and other devices for the promotion of mutual learning and deliberation and the new perspective represented by the 5th EAP has been put into practice by the IPPC Directive, although there is still a mixture of the command and control approach (or common standard setting at the EC level) and flexible/decentralised implementation.<sup>100</sup>

However, it should also be noted that the introduction of this perspective does not signify a discontinuity with the pre-5th EAP era in terms of institutional arrangements for environmental governance. As will be argued in Section 3.2.1, the directive-centred architecture of EC environmental law was equipped with a flexible, consensual and information-sharing mechanism even before the SEA.

### 2.3.3 Role of Law

As noted above, the EC environmental regime is based upon formal institutions that enable judicial review of the legal obligations of EC institutions and Member States. Against this picture of the legal dimension of the regime, the governance mode has been altered towards a horizontal, networking, cooperative and consensus style. In this contrast between the regime and the mode of governance, the role of law should be considered in terms of regime

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<sup>94</sup> *Ibid.*

<sup>95</sup> *Ibid.*, at 58.

<sup>96</sup> *Ibid.*, at 49.

<sup>97</sup> Scott, above n.40.

<sup>98</sup> *Ibid.*, at 265-6.

<sup>99</sup> OJ 1996 L257/26.

<sup>100</sup> Scott, above n.40, at 265-272.

development, but how can the new mode of governance itself be interpreted from a legal point of view? Does the shift from a top-down regulatory instrument to a self-regulatory and communicative instrument mean the introduction of a post-legislative approach? Is the role of law in the regime denied in the transformation of environmental governance from a vertical or hierarchical to a horizontal or consensual instrument? Does the introduction of this new mode mean that the EC environmental regime has been de-legalised?

With these questions in mind, the arguments of Ladeur on EC environmental law regarding a new legal order<sup>101</sup> offer an instructive viewpoint. According to him, ‘new types of legal phenomenon that cannot be fitted into the notion of the construction of a European legal order within a European Federal State’<sup>102</sup> have emerged. This legal phenomenon is ‘heterarchical’, ‘transnational’, ‘co-operative’ and ‘horizontal’ rather than ‘supranational’ and calls into question the traditional close links between the state and law.<sup>103</sup> With respect to this phenomenon, a ‘non-traditional legal relationship must be assumed within the EC legal order, for the purpose of conceptualising ‘a “network-like” relationship between national, trans- and supra-national forms of legal integration in the EU’.<sup>104</sup> This can be called ‘a “third way” between the preservation of a national legal order and a relatively homogenous supranational order’.<sup>105</sup> A main practice in this ‘third way’ is the legal transplanting of environmental action among Member States which stimulates a mutual learning and adaptation process but does not lead to the uniformity of administrative law among Member States.<sup>106</sup> Through studying instances of the Environmental Impact Assessment Directive<sup>107</sup> and the IPPC Directive,<sup>108</sup> Ladeur offers the following viewpoint:

‘Many of the environmental reforms of the EC are not really European, in the sense that they have their own systematic framework to which Member States have to adapt. They are rather linked to a conception of reciprocal stimulation of change by transplanting new forms of environmental regulation from one country to the others. This is inevitable because Europe is composed of different legal systems, but there is no European legal system, as such.’<sup>109</sup>

From Ladeur’s study, it can be observed that the new mode of environmental governance is in line with ‘a shift from supranational to more transnational co-operative processes of legal integration’.<sup>110</sup>

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<sup>101</sup> Ladeur, above n.43.

<sup>102</sup> *Ibid.*, at 282.

<sup>103</sup> *Ibid.*, at 281, 283-4.

<sup>104</sup> *Ibid.*, at 283.

<sup>105</sup> *Ibid.*.

<sup>106</sup> *Ibid.*, at 293.

<sup>107</sup> OJ 1985 L175/40.

<sup>108</sup> OJ 1996 L257/26.

<sup>109</sup> Ladeur, above n.43, at 292.

<sup>110</sup> *Ibid.*, at 297.

The following view of Scott should also be considered for the purpose of approaching the legal consequences of the new governance mode. This mode brings about two legal practices: flexibility in implementation and constraints in procedure.<sup>111</sup> Under EC environmental governance, Member States are allowed to implement EC environmental law discretionally, but are restricted when it comes to procedures for implementation. By analysing the IPPC Directive,<sup>112</sup> she offers a model of '(procedurally constrained) flexibility in implementation model'.<sup>113</sup> In this model, the constraints of the procedure are interpreted to aim to realise the aforementioned 'participation', 'reflexivity' and 'deliberation'. This model seems to imply that, because of flexibility in implementation, the downstreaming of environmental standards may occur; however, because of strong procedural constraints, it can be expected that the participatory, reflexive and deliberative procedures will strengthen normative discourses and thereby help to develop environmental norms. In other words, proceduralisation can be expected to promote normative discourses by the accumulation of which environmental practices may be improved. In respect of this proceduralisation, Scott highlights its intrinsic value<sup>114</sup> by stating that the procedural intervention of the EC cannot be legitimatised without constitutional consideration. It depends on the ECJ whether the intrinsic value of proceduralisation can be recognised and concretised in the EC in a participatory, reflexive and deliberative way. In this view, the new governance mode for environmental protection is not a mere policy instrument aiming at mutual learning and norm-sharing in an issue-area. It also guides discourses on environmental governance towards a normative discourse on constitutional values.

These two concepts -- the shift from a supranational or vertical to a transnational or horizontal legal relationship (Ladeur) and the constitutionally prescribed proceduralisation with flexibility in implementation (Scott) – are both concerned with the sharing and elaboration of environmental norms. If this sharing does not occur in the course of transnationalisation and proceduralisation in EC environmental governance, the practices based on these conceptions will break down. If the procedure of a horizontal interaction produces no norm, or prompts no norm-sharing, the practices become nothing but the means to hide the naked economic interests of the common market. In contrast, if the orientation of horizontal mutual learning and the reflexive, deliberative practices of the participatory procedure can be based on highly developed norms and produce further norm sharing and elaboration, the change of the governance mode becomes the means to open a wider sphere of discourses, in which environmental norms may further evolve. The widening of the discursive sphere can lead to the development of an environmental governance frame which (re-)directs normative discourses and in which all actors

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<sup>111</sup> Scott, above n.40, at 259-260.

<sup>112</sup> OJ 1996 L257/26.

<sup>113</sup> Scott, above n.40, at 259.

<sup>114</sup> *Ibid.*, at 277-279.



must justify their own behaviour. It can be assumed that the more the discursive sphere is encouraged through the proceduralisation of the new governance mode, the more interaction between normative discourses and a governance frame is activated.

With respect to the normative implication of this, the role of law must be reconsidered. As argued in Chapter 1, law is not only an instrument to set up rules and sanctions and to establish the competent relationship between the EC and Member States, it also catalyses normative discourses, and laws are simultaneously themselves normative discourses. As Diagram 2 in Section 1.1 shows, the former is called the normative discourse around law, and the latter the normative discourse of laws, which means that legal texts contain the description of core norms supported by key concepts and regulative principles regarding how an issue-area should be governed. The two types of normative discourses together (re)create a governance frame, which opens a common meaning world that is normative due to the fact that the world is described by a normative discourse around law and of laws. From this standpoint, the role of law becomes more significant with the introduction of the new mode of environmental governance since law enables the new mode of governance to operate effectively in the light of the further evolution of norms.

In addition, the evolution of environmental norms also means the differentiation of the environmental regime from other regimes in the EC, especially from the common market regime. In other words, this evolution brings about the establishment of environmental norms independently of the norms of other regimes. Therefore, it is significant to consider how environmental norms have been established and shared in the developmental process of the EC environmental regime.

The EC environmental regime can be characterised in terms of formal institutions and weaknesses. In the regime a new mode of governance orientated towards a horizontal, networking and consensual style on the basis of the values of decentralisation, flexibility, participation, reflexivity and deliberation has been introduced step by step in place of a legalistic, hierarchical and top-down regulative approach. Against the contrast between this new mode of governance and the highly formalised regime, the role of law must be reconsidered in respect to its normative implications; law is not only an instrument to impose obligations, but also catalyses normative discourses that have the potential to cause further norm evolution.

It should be emphasised that the problems of the EC environmental regime concerning the implementation deficit and parasitic legislation have brought about conflicts between EC institutions, Member States and societal actors, but the highly formalised nature of the regime has transformed conflicts into *legal disputes* which are settled within the judicial system. In other words, the EC environmental regime has an institutional arrangement which can transform conflicts into the resources for further norm evolution on the basis of previous normative

discourses. It must be noted that an accumulation of secondary laws in the EC environmental regime has also helped the maturation and evolution of environmental norms through enriching the meanings of key concepts in the environmental issue-area, as will be noted. This norm evolution based on case law and secondary legislation is the foundation for promoting the effective operationalisation of the new mode of governance, whereby the weaknesses of the regime can be eradicated. Chapter 3 attempts to describe the process of environmental norm evolution that emerges through normative discourses.

### 3 Environmental Norm Evolution

Chapter 1 offered a conceptual framework regarding the development of law as *norm evolution* emerging from the interaction between *normative discourses* and a *frame* for governance. *Regimes* were conceptualised as an accumulation of institutions procedurally reproducing normative discourses and substantively establishing a policy agenda as the core for framing governance in a specific issue-area. In this framework, *law* was understood both as catalysing normative discourses and as a normative discourse itself. Chapter 2 characterised the EC environmental regime, focussing on the formal character and the weaknesses of the regime and showed that, under the transnationalised and proceduralised mode of EC environmental governance, what matters is to examine the role of law in terms of causing norms to evolve. Building upon these arguments, this Chapter attempts to describe the evolution of environmental norms in the EC environmental regime.

The focus is on case law, secondary legislation and international environmental agreements concluded by the EC as an international actor. Primary legislation, council resolutions, EAPs, European Council declaration and presidency conclusions are included as background information. This descriptive selection can be explained according to Diagram 2. In this institutional context of discourses in the EU, the intermediate discourse of laws (E: secondary legislation and international agreements) and the legal discourse of laws (F: case law) are focussed on, while other types of discourses are put into the background.

**Diagram 2**

	Political Discourse	Legal Discourse	
Discourse around Law	A	B	C
Discourse of Laws	D	E	F

This implies the following understanding in respect to discourses and their contribution to norm evolution in the institutional context of the EU. In the continuous gradation from political-

intensive to legal-intensive discourses in the EU institutional context, the ECJ and the legislature have been effective discursive spheres, in terms of supporting norm evolution. The case law of the ECJ, as the most legal-intensive discourse, established environmental protection as a core norm even before the SEA, even though there was no visible support from primary legislation and the only political discourse around law emerged in the form of EAPs (A in Diagram 2). On the basis of environmental norms established in the ECJ, secondary legislation (E in Diagram 2) has, as an intermediate discourse between the political and the legal, elaborated key concepts that create a governance frame which opens up a common meaning world in the environmental issue-area. International environmental agreements have, in addition, provided indispensable sources for environmental normative discourses in secondary legislation.

Thus, this Chapter surveys case law, following secondary legislation and international environmental agreements, while briefly mentioning other discourses (A, B, C and D in Diagram 2) throughout. First, by means of a chronological overview, it explores how the legal discourse of the ECJ has established environmental norms as the foundation for further evolution, especially highlighting the evolutionary process at the pre SEA stage. Second, the question of how further norm evolution has been brought about in secondary legislation is examined, with an emphasis on an elaboration of key concepts, which has pushed the transformation from a market-supporting to an ecosystem-oriented frame. Third, it is shown that the EC environmental regime has internalised international environmental norms, focussing on the significance of international agreements based on Article 235 (now 308) pre-SEA, and on the Rio process since the 1990s.

### **3.1 Case Law of the ECJ**

When attention is placed on courts as a discursive sphere, it should be noted that the judicial process cannot be operationalised without conflict. This conflict is manifested as disputes over legal norms. Judicial settlement is not merely about the interpretation of documents that may, or may not, be used by political actors in pursuit of their own interests. Rather, the judicial process of settling conflict is also to be interpreted as offering opportunities for norm-sharing or the elaboration of norms. Courts are a discursive sphere for reconfirming and refining a governance frame systematising core norms, key concepts and regulative principles through conflict.

#### **3.1.1 Basic Characters**

With regard to legal discourse in the ECJ, three points should be taken into consideration.

1) The following three actions are dominant in the EC judicial process: a) charges by the Commission against a Member State for infringement of an obligation, on the basis of Article 226 EC; b) disputes between the Commission, the Council, and Member States on the basis of

Article 230 EC, with respect to ‘the legality of acts’, ‘an essential procedural requirement’, ‘rule of law’ or ‘misuse of powers’; c) preliminary rulings, on the basis of Article 234 EC, by which a national court makes a reference to the ECJ, in which the conflict between societal actors, or between them and national governments, *may* be settled according to EC law. From these prevailing patterns, legal disputes between plaintiffs, defenders and interveners from EU institutions, Member State governments and societal actors are resolved and are thus brought into the legal discourse of the ECJ.

The fact that the above three actions are dominant in environmental cases means that the following are very rare or substantively impossible: a dispute between Member States on the basis of Article 227 EC<sup>115</sup> and litigation by individuals or associations to bring EU institutions before the ECJ on the basis of Article 230 EC. This reveals serious problems in the sphere of legal discourses: the indifference of Member States despite their monitoring ability and constraints on societal actors despite their willingness to participate in legal discourses in the ECJ. Above all, the inadmissibility issue in Article 230 EC can be pointed to as one of the essential problems in the EC environmental regime in terms of the democratic potential that private (but public interest oriented) actors’ litigation has in causing norms to evolve, as argued in Section 2.2.2. Notwithstanding these defects, it should be noted that the three dominant patterns have contributed to environmental norm sharing and elaboration, as will be examined

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<sup>115</sup> Krämer says this ‘has never happened in environmental matters’. L. Krämer, *Focus on European Environmental Law*, Second Edition (Sweet & Maxwell, 1997), at 130. As a rare case, Sands shows Case 141/78 *French Republic v. United Kingdom* ([1979] ECR 2923), which concerns conservation of the marine fishing resources. See P. Sands, ‘The European Court of Justice: An Environmental Tribunal?’ in H. Somsen (ed) *Protecting the European Environment: Enforcing EC Environmental Law* (Blackstone, 1996), at 25. However, it cannot be said that this case is an *environmental* case. The focal point is not an environmental norm, but overcoming unilateral actions between Member States. The case is as follows: A French trawler, boarded by UK fishery officers, was brought before a national court in the UK and convicted of infringing the Fishing Nets (North-East Atlantic) Order 1977. For the UK, this Order is from the North-East Atlantic Fisheries Convention signed in London in 1959. The aim is to preserve fish stocks by prohibiting the use of small-mesh nets, which are particularly harmful to the biological resources of the sea. On the basis of Article 227, the French government brought the UK government before the ECJ, claiming that the UK had failed to fulfill its obligations under the EC treaty by bringing into force the Fishing Nets (North-East Atlantic) Order of 1977 without the pre-notification and consultation required by the 1976 Council Resolution in the Hague (para.11) and Regulation No.101/76 (para.7). The Order was concerned with a matter reserved for the competence of the EC. The French government at first brought this matter before the Commission, and the latter issued a reasoned opinion claiming that the UK government was in breach of the obligations of EC Treaty. On account of the non-compliance of the UK to the opinion, the French government brought the former before the ECJ, on the basis of Article 227. The ECJ judged that the UK government failed to fulfill the duties of pre-notification and consultation with other Member States, referring to the cooperation principle of Article 10 (ex 5) EC (paras.8-12). This case shows that Member States are obliged to consult with other Member States in advance when applying their own international agreements. What should also be noted is that Article 10 EC rejects unilateral actions on the basis of the international agreements of individual Member States. Case C-388/95, *Belgium v. Spain* [2000] ECR I-3123 stands as another example of Article 227, but this also is not an *environmental* case.

below.

2) Environmental legislation in the EC has frequently faced potential or explicit disputes over base dispute, as argued in Section 2.2.3. Even after the SEA, which clearly provided the legal base for EC environmental legislation, a dispute has been brought before the ECJ, on the basis of Article 230 EC, as will be seen below. Generally speaking, for environmental legislation in the pre-Amsterdam stage, it was easier to refer to the objective of the building of the internal market in Article 95 (ex 100a) EC than to the environmental clause in Article 175 (ex 130s) EC. The reason for this is because QMV was available in the decision-making procedure of the former. In addition, this market-related legislation route was also important for the active participation of the EP in the decision-making process.

However, the conflict around the parasitic nature of environmental concern on the building of the common (and internal) market cannot be regarded as a mere struggle over competence. It has also become the means by which common meanings on the environment can be precisely elaborated and widely shared. The legal discourse surrounding legal base disputes in the ECJ has contributed to environmental norm evolution in terms of framing for governance. That is, it has stimulated the sharing and elaboration of common meanings regarding environmental core norms, key concepts and regulative principles. Above all, this type of dispute has promoted the development of the principle of environmental integration, which prompts the transformation of an environmental regime from the market-supporting to the comprehensive.

3) The reforms of the EC Treaty in Maastricht provided for a ‘lump sum or penalty payment to be paid by the Member States’ in Article 228 EC. Before that, the EC judicial system was essentially not an *order with a potential sanction*, but provided an *interpretation without a sanction*. Sanctions applied because of non-compliance with ECJ judgments were only expected in the domestic institutional context of Member States. While the doctrines of direct effect and supremacy certainly make the EC legal order close to a federalised one, they have to be buttressed by the voluntary collaboration of national judicial actors through the preliminary reference procedure. Insofar as this dependency is concerned, the EC judicial system was still in line with the international judicial system before the big reform of 1992. It was dependent upon the political will of Member States, and without their legal and administrative system, the enforcement of a judgment cannot be secured. The judicialisation of the EC environmental regime may be said to have been based to a large degree on the voluntary participation. The introduction of a financial penalty has qualitatively changed the character of the ECJ.<sup>116</sup> The

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<sup>116</sup> Compare *Crete II* and Case C-75/91, *Commission v. Netherlands* [1992] ECR I-549, which is a case concerning the Netherlands’ breach of obligation due to Article 228 (non-compliance with the judgment of the ECJ in Case 236/85) before Maastricht. That is, no financial penalty was incurred.

first case where the Article 228 sanction was applied is Case 387/97 *Commission v. Greece* (Crete II).<sup>117</sup> Claiming that Greece did not implement the necessary measures to comply with the judgment of the ECJ (Case C-45/91), the Commission brought Greece before the ECJ on the basis of Article 228. The ECJ ordered Greece to pay a penalty payment of EUR 20000 for each day of delay in implementing the measures. In this case, the ECJ aimed to ‘remedy the breach of obligations as soon as possible’<sup>118</sup> and the criteria for calculating the amount of payment was ‘the duration of the infringement, its degree of seriousness and the ability of the Member State to pay’.<sup>119</sup>

While this introduction of financial sanction is revolutionary in terms of the character of the EC legal order, it must be noted that the evolution of environmental norms had already been established long before this big change at the systemic level, as will be argued below. In the first place, an interpretation without a sanction does not necessarily lead to the, frequently assumed, view that in comparison with a domestic judicial system, international tribunals in general do not have any real power. It should be noted that legal discourses in the ECJ becomes a node in which each national legal experience is intertwined.<sup>120</sup> Therefore, what matters is how the legal discourse promotes the evolutionary process of transnational environmental norms.

Based on this preliminary understanding, the following is a short chronological survey of ECJ case law. The emphasis is mainly on: 1) how far the protection of the environment has been regarded as a core norm on the basis of which the ‘environment’ has come to be recognised as being general interest and as the grounds for legally protected individual rights; 2) what role the principle of environmental integration has played in terms of the development of the EC environmental regime.

### 3.1.2 Pre-SEA

At the level of primary law, environmental protection was established as one of EC’s objectives following the SEA. Nevertheless, environmentally-oriented legislation had been adopted before the SEA. At that time, three EAPs had already been established and provided crucial political discourses around law. In the 1st EAP,<sup>121</sup> the legal grounds for environmental action were found in the Preamble of the Rome Treaty, the interpretation of Article 2 EC and the declaration in the 1972 Paris Summit. However, the first two seem to be too economically-oriented to establish a particular norm for environmental protection. According to the Preamble, the Community must aim at ‘the constant improvement of the living and working conditions of their peoples’ and ‘the harmonious development of their economies’. In Article 2 EC, the

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<sup>117</sup> Case C-387/97, *Commission v. Greece* July 4 2000.

<sup>118</sup> *Ibid.*, para.90.

<sup>119</sup> *Ibid.*, para.92.

<sup>120</sup> See, C. Kilpatrick, ‘Community or Communities of Courts in European Integration?: Sex Equality Dialogues Between UK Courts and the ECJ’ (1998) 4 *ELJ* 121.

<sup>121</sup> OJ 1973 C112/3.

following task was put forth:

‘to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an accelerated raising of the standard of living and closer relations between the States belonging to it’.

It may be observed from the above that environmental norms were not foremost in the building of the common market. Compared with these, the declaration of the Paris Summit was certainly more forthright in advancing the establishment of EC environmental norms. It said that:

‘economic expansion is not an end in itself . . . As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment so that progress may really be put at the service of mankind.’<sup>122</sup>

Nevertheless, it cannot be said that pre-SEA the establishment of an *EC* environmental regime was an obvious objective. It was the legal discourses in the ECJ that largely contributed to the activation of environmental normative discourse, supporting and substantiating political discourses in the Commission and political leaders. At this point, four pre-SEA cases are reviewed.

#### **Cases 3, 4, 6/76, Cornelis Kramer and others**<sup>123</sup>

This Case is based on the preliminary ruling procedure concerning criminal prosecutions brought against Dutch fishermen who were accused of breaching the rules of the Netherlands for the conservation of fishing resources. The rules issues from the North-East Atlantic Fisheries Convention, signed at London on 24 January 1959. The contracting parties were all of the Member States of the EEC as was, except Italy and Luxembourg, and seven non-member countries. The Convention sought the conservation of fish stocks in the North-East Atlantic.<sup>124</sup> The issues that the Dutch national court referred to the ECJ concerned whether there was a competent relation between an international agreement of individual Member States and the Community<sup>125</sup> and whether the provisions of the agreement were consistent with the Community rules of the common market, especially whether the fishing quotas stipulated in the Convention constituted a quantitative restriction in trade between Member States.<sup>126</sup> Accordingly, this Case was mainly concerned with Community competence regarding commitments resulting from international agreements signed by some of the Member States. The Case was also concerned with the EC common fisheries policy.

However, the following statement by the ECJ in its judgment may be seen as a first step towards establishing an EC environmental norm:

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<sup>122</sup> *Ibid.*

<sup>123</sup> Cases 3, 4, 6/76, *Cornelis Kramer and others* [1976] ECJ 1279.

<sup>124</sup> *Ibid.*, para.3.

<sup>125</sup> *Ibid.*, para.9.

<sup>126</sup> *Ibid.*

‘In this connexion, the nature and the circumstances of ‘production’ of the product in question, fish in the present case, should also be taken into consideration. Measures for the conservation of the resources of the sea through fixing catch quotas and limiting the fishing effort, whilst restricting ‘production’ in the short term, are aimed precisely at preventing such ‘production’ from being marked by a fall which would seriously jeopardize supplies to consumers.’<sup>127</sup>

Despite calls for stabilising the product supply for consumers, this statement may be interpreted as implying the idea of sustainable development. In the sense that the quantitative restrictions on intracommunity trade were validated on account of the conservation of biological marine resources, this Case can be regarded as the one of earliest dealing with environmentally-oriented norms and relativising and constraining market-building concerns.

What should also be noted in this Case is that the Court refers to the principle of cooperation in Article 10 (ex 5) EC. The Court says:

‘Member States participating in the Convention and in other similar agreements are now not only under a duty not to enter into any commitment within the framework of those conventions which could hinder the Community in carrying out the tasks . . .’<sup>128</sup>

It can be said that this cooperation principle plays a crucial role in structuring normative discourses in the institutional context of the EC environmental regime.<sup>129</sup>

#### **Case 21/76 Bier**<sup>130</sup>

This Case is based on a dispute concerning the jurisdiction of national courts in transboundary environmental pollution.<sup>131</sup> The facts are as follows. The undertaking of horticulture in the Netherlands was injured by a French mining company’s discharge of chlorides into the Rhine and the Dutch brought an action before the Court of Rotterdam (Court of First Instance). However, because the Court rejected jurisdiction the Dutch plaintiff lodged an appeal with the Gerechtshof in the Hague (Appeal Court), and this Court took up the preliminary reference procedure.

The focal point concerned the interpretation of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The Article in question, Article 5(3) of the Convention, states that ‘a person domiciled in a Contracting State may, in

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<sup>127</sup> *Ibid.*, paras.56-9.

<sup>128</sup> *Ibid.*, paras.44-5.

<sup>129</sup> See Section 2.1, note 5.

<sup>130</sup> Case 21/76, *Handelskwekerij G.J.Bier B.V. v. Mines de Potasse d’Alsace S.A.* [1976] ECR 1735.

<sup>131</sup> Sands says this Case is the first that explicitly addressed environmental matters. See above n.115, at 24. However, what is understood as the first environmental cases depends on one’s definition of environmental matters. For example, agriculture and fishing are related to environmental problems. It appears that all cases orientated towards establishing environmental norms are categorised as ‘environmental cases’. In this respect, *Kramer*, noted above, can be said to be an environmental case, and consequently *Bier* may not be said to be the *first* environmental case in the EC.



another Contracting State, be sued . . . in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred'.<sup>132</sup> What was in question was whether the place meant 'the place where the damage occurred' (Erfolgsort) or 'the place where the event having the damage as its sequel occurred' (Handlungsort).<sup>133</sup>

Intervenors were as follows: the French government who argued that jurisdiction should be at the court where the act was done; the Dutch government who argued the opposing view; and the Commission who argued that it depends on circumstances.

Written observations lodged with the ECJ made it apparent that two principles were at issue: 1) the principle of the rational administration of justice, which was claimed by the French government, and 2) compensation for the procedural disadvantage of the injured party in transboundary environmental pollution, which was argued by the Dutch government. As the Dutch government claimed, there are difficulties in identifying a clear relationship between the act and the damage in cases of international environmental pollution. In respect of the development of environmental norms, the following remark of the Dutch government is of particular interest:

'As part of the legal policy to be followed in environmental matters, the injured party should be put in a strong position, in particular by placing him in a favourable situation from the point of view of procedure'.<sup>134</sup>

The conclusion of the ECJ was that the Brussels Convention enables injured parties to bring a suit before courts in both the place where the act was done and the place where the damage occurred. This means that plaintiffs have the freedom to select which courts they may call upon, that of their country or that of another. The judgment stated that ' . . . the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it'.<sup>135</sup> In the Opinion attached with this Case, Advocate General (hereinafter: AG) Capotorti examined several Member States' legal experiences with regard to this type of conflict.<sup>136</sup> The examination of the legal systems of Germany, France, Italy, the Netherlands, Belgium and the UK showed a practice by the EC to seek 'a systematisation'<sup>137</sup> of the legal practices of the Member States. The judgment also stated that:

'In these circumstances, the interpretation (giving plaintiffs the freedom to select courts -- inserted) . . . has the advantage of avoiding any upheaval in the solutions worked out in the various national systems of law, since it looks to unification, in conformity with Article 5(3) of

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<sup>132</sup> Case 21/76, above n.130, at 1749.

<sup>133</sup> *Ibid.*, at 1745, para.6 and at 1741-2.

<sup>134</sup> *Ibid.*, at 1741.

<sup>135</sup> *Ibid.*, at 1747, para.19.

<sup>136</sup> *Ibid.*, at 1752-7.

<sup>137</sup> *Ibid.*, at 1747, para.23.

the Convention, by way of a systematisation of solutions which, as to their principle, have already been established in most of the States concerned.<sup>138</sup>

As the Opinion of AG Capotorti acknowledged,<sup>139</sup> the environmental damage where the *Handlungsort* is different from the *Erfolgsort* is hard to be defined and compensated. This early EC environmental case should be remembered because the procedural disadvantage of the injured party was problematised through the ECJ's effort to systematise Member States' experiences. Here the common understanding was established that environmental damages *should* be redressed in a single systematised judicial process and that the procedural disadvantage of the injured party should be taken into consideration.

#### **Case 91/79 Commission v Italy<sup>140</sup>**

In this Case, the Italian government challenged the legitimacy of the EC's competence concerning environmental measures and the strict application of Directives by calling into question the understanding that Directives should, as a harder law, be differentiated from softer international conventions.

This Case was, on the basis of Article 226 EC, brought before the ECJ by the Commission which alleged that the Italian government failed to take the necessary domestic measures according to the Detergents Directive.<sup>141</sup> This Directive was adopted on the basis of Article 94 EC and requires Member States to take measures for restricting the non-biodegradability of detergents, with a view to eliminating the technical barriers which impede the functioning of the common market. It should be noted that this Directive was adopted during the course of the 1st EAP.<sup>142</sup>

The arguments of the Italian government were as follows. First, the objective of the Directive had already been achieved by national measures before the Directive entered into force. For example, the Italian government claimed that 'the Italian Law No 125 of 3 March 1971 provided for a rate of biodegradability of not less than 80%' (the rate of biodegradability given in the Directive is not less than 90%).<sup>143</sup>

Second, the Italian government submitted the draft law before the Senate, although at that time the legislative process was suspended by a political crisis.<sup>144</sup> Accordingly, the infringement of Italian government was just about the required time-limit during which national measures

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<sup>138</sup> *Ibid.*

<sup>139</sup> 'The injured party, who must establish the unlawful act, is automatically deemed the weaker party and as such worthy of protection in the choice of the court having jurisdiction.' *Ibid.*, at 1758.

<sup>140</sup> Case 91/79, *Commission v. Italy* [1980] ECR 1099.

<sup>141</sup> OJ 1973 L347/51.

<sup>142</sup> Above n.121.

<sup>143</sup> Case 91/79, above n.140, at 1103 and 1112.

<sup>144</sup> *Ibid.*, at 1102.

must be taken. The government claimed that such a delay should never imply a complete refusal of the obligations this directive imposes.<sup>145</sup>

Third, Directives in general do not necessarily oblige Member States to adopt laws or administrative provisions. What matters is the result to be achieved, as stated in Article 249 EC.<sup>146</sup> Considering this point together with the first and second, it is clear that there was not ‘any lack of usual diligence’.<sup>147</sup>

Finally, but most importantly, the Italian government challenged, though only moderately, the validity of the EC’s competence concerning environmental measures. Drawing upon the obvious fact that the Rome Treaty does not make provisions for the environment, the government claimed that Article 94 EC could not be the legal base of the Detergents Directive. For this reason, environmental secondary legislation is in the nature of an international convention.<sup>148</sup> The wording of the ECJ’s judgement stated that the Italian government ‘feels . . . that the subject-matter of the directive lies “at the fringe” of Community powers and that it is actually a convention drawn up in the form of a directive.’<sup>149</sup>

Against these arguments of the Italian government, the ECJ established that Directives are not an international convention and that environmental measures at the EC level are valid. First, according to the ECJ, any decisions adopted within the EC’s institutional framework ‘cannot be described as an “international agreement”’.<sup>150</sup> Therefore, specific national circumstances cannot be referred to as valid reasons for an infringement. The comments in the Opinion of AG Mayras is interesting, with regard to how to differentiate between international law and EC law. AG Mayras interpreted the claim of the Italian government as follows:

‘. . . the Court is asked to fall into line with the view of the majority of academic writers on international law that the assessment of the international liability of a State must take into account the factual circumstances which brought about the breach of its obligations.’<sup>151</sup>

Recalling earlier established case law, AG Mayras stressed ‘the specific object of the procedure’ the aim of which is ‘to ensure the uniform application of Community law in all Member states’ and ‘to give a solid basis to the free movement of goods, the foundation of the Community’.<sup>152</sup> For this reason, AG Mayras concluded that ‘the taking into account of the circumstances explaining factually the reasons existing in a country for its failure are incompatible with the

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<sup>145</sup> *Ibid.*, at 1103.

<sup>146</sup> *Ibid.*, at 1111.

<sup>147</sup> *Ibid.*, at 1102.

<sup>148</sup> *Ibid.*, at 1110.

<sup>149</sup> *Ibid.*, at 1105, para.4.

<sup>150</sup> *Ibid.*, at 1105, para.7. See also Case 38/69, *Commission v. Italy* [1970] ECR 47.

<sup>151</sup> *Ibid.*, at 1113.

<sup>152</sup> *Ibid.*.

very nature of the procedure'.<sup>153</sup> Moreover, 'the Member States are obliged to ensure the full and exact application of the provisions of any directive'<sup>154</sup> and "Similar" and "identical" are not synonymous.'<sup>155</sup>

Second, the validity of EC's environmental measures was confirmed as an objective of the building of the common market. The ECJ confirmed that Article 94 EC is the valid legal base for the measures, because:

'[p]rovisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.'<sup>156</sup>

The ECJ argued that the Detergents Directive is not only in line with the 1st EAP, which the Italian government suggested was a fringe issue, but is also in line with the General Programme for the elimination of technical barriers to trade (adopted by the Council in 1969).<sup>157</sup>

In the sense that this Case confirmed the hardness of environmental Directives despite the fragile legislative context of the pre-SEA milieu, its significance cannot be ignored. According to the ECJ, EC environmental law should not be seen from the viewpoint of international law. It is not an agreement among sovereign states the implementation of which can, to some degree, be flexible subject to domestic legal systems and political circumstances. This judgment was also applied in the first financial penalty Case noted above (*Crete Case II*).<sup>158</sup> Almost a decade of delay in the Greek government's obligatory measures regarding the chaotic dumping of military and hospital waste materials into the river Kouroupitos was in part due to public opposition to the building of a mechanical recycling and composting plant as well as a landfill site in this area. However, the ECJ stated that:

'it is settled case-law that a Member State may not plead internal circumstances, such as difficulties of implementation which emerge at the stage when a Community measure is put into effect, to justify a failure to comply with obligations and time-limits laid down by Community law.'<sup>159</sup>

Notwithstanding the proactive attitude in Case 91/79, it must be borne in mind that EC action in the sphere of environmental protection was on the whole directed towards the elimination of disparities between Member States, disparities which could distort the functioning of the common market. In this sense, it has to be said that the environment was at

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<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*, at 1105, para.6.

<sup>155</sup> *Ibid.*, at 1112.

<sup>156</sup> *Ibid.*, at 1106, para.8.

<sup>157</sup> *Ibid.*

<sup>158</sup> Case C-387/97. See above n.117.

<sup>159</sup> *Ibid.*, para.70.

this stage not yet constituted as a value independent from market concerns, although its normative basis was established.

**Case 240/83 ADBHU<sup>160</sup>**

In contrast to the above, this Case recognised environmental protection as an essential objective of the EC which can legitimately restrict the principle of freedom of trade. In the sense that the legal discourse of the ECJ had provided this recognition already before environmental clauses were established by the SEA, this Case is significant. The focal point was the validity of the Waste Oils Directive<sup>161</sup> orientated towards the building of the common market. The Directive requires Member States to take necessary measures for the safe collection and disposal of waste oils, preferably by recycling. For this purpose, the Directive allows Member States to give out to tender the permission to deal with waste oils and to assign zones in which the permitted undertakings can do this. Moreover, the permitted undertakings receive indemnity ‘financed in accordance with the ‘polluter pays’ principle’.<sup>162</sup>

The conflict of this Case emerged in France between a public prosecutor and an association for waste oil burners, over the French law which was set up in order to implement the Waste Oils Directive. The prosecutor applied to Tribunal de Grande Instance de Créteil (Regional Court in France), claiming that the aims and objectives of the association were unlawful in terms of French law because the association was involved in the unapproved burning or disposal of waste oils. Against the claims of the prosecutor, the association raised, before the same French regional court, the question of ‘the validity of the Directive in terms of certain fundamental principles of EEC law’.<sup>163</sup> On the basis of the preliminary reference procedure, the French court referred to the ECJ with questions about the conformity of the Waste Oils Directive with ‘the principles of freedom of trade, free movement of goods and freedom of competition, which are established by the EEC Treaty’.<sup>164</sup> The point was raised that, while this Directive allows Member States to set up ‘permission’, ‘zones’ and ‘subsidies’ for undertakings approved by public authorities, these may infringe the principles of the Treaty. The parties that submitted observations were the Commission, who had ‘no doubt that the protection of the environment against the risk of pollution constitutes an object of general interest which the Community may legitimately pursue’;<sup>165</sup> the Council, who stressed the compatibility of the Directive with the principles for the market building practices;<sup>166</sup> the French government, who

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<sup>160</sup> Case 240/83, *Procureur de la République v. Association de défense des brûleurs d’huiles usagées (ADBHU)* [1985] ECR 531.

<sup>161</sup> OJ 1975 L194/23.

<sup>162</sup> Case 240/83, above n.160, at 547, para.3.

<sup>163</sup> *Ibid.*, at 547, para.5.

<sup>164</sup> *Ibid.*, at 548, para.6.

<sup>165</sup> *Ibid.*, at 541.

<sup>166</sup> *Ibid.*, at 544.

claimed absolute discretion of Member States concerning the operation of the Directive;<sup>167</sup> the German government, who validated the Directive and French law from a technological point of views;<sup>168</sup> and the Italian government, who recognised the compatibility, because there were ‘no barriers restricting exports of such products to other Member States’.<sup>169</sup>

In an answer to the question, the ECJ offered a view that relativises the principle of freedom of trade as follows:

‘In the first place it should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired.’<sup>170</sup>

According to the ECJ, environmental protection is ‘one of the Community’s essential objectives’<sup>171</sup> which can limit the principle of freedom of trade so long as the principles of proportionality and non-discrimination are observed.<sup>172</sup> In this legal discourse, environmental protection was regarded as a valid ground for the restriction of the free trade principle. However, it should be added that the principle of the free and fair competition was preferred over the principle of freedom of trade in the building of the common market.<sup>173</sup> Accordingly, this Case should not be interpreted as illustrating that environmental values were regarded as absolutely relativising, or going beyond, market building concerns. On the contrary, the market was still weighed in terms of the principle of free and fair competition.

Nevertheless, it can be stated that the conflict around environmental measures did affect the meaning of the common market. This Case demonstrated that, insofar as the fairness of competition is observed, freedom of trade can be restricted in the general interest of the environment. In this sense, the Case can be seen as an instance in which the meanings of key concepts, such as the market, have been affected by legal discourses on environmental norms. In this way, this Case established environmental protection as a core norm that the EC is obliged to serve.

### 3.1.3 Post-SEA

The EC environmental measures had a weak foundation before the SEA, but even after the establishment of environmental clauses by the SEA, the unanimity procedure was required for environmental legislation. Nevertheless, environmental norm-making by the 1985 IGC has in an obvious way provided environmental objectives and regulative principles on environmental

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<sup>167</sup> *Ibid.*, at 545.

<sup>168</sup> *Ibid.*.

<sup>169</sup> *Ibid.*.

<sup>170</sup> *Ibid.*, at 549, para.12.

<sup>171</sup> *Ibid.*, at 549, para.13.

<sup>172</sup> *Ibid.*.

<sup>173</sup> See the Opinion of AG Lenz, *Ibid.*, at 535.

governance. This pro-environment tendency was also reconfirmed at the 1990/91 IGC, which produced the Maastricht Treaty, in which environmental protection was inserted into the Preamble of the TEU. Along with the trends encouraging primary environmental legislation, the ECJ has offered pro-environmental interpretations. These interpretations can be divided into the environmental protection as a general objective, and the individual rights derived from EC environmental legislation.

### 3.1.3.1 General Objectives

With regard to the general objectives of environmental governance, two cases can be raised. One is the *Peralta Case*,<sup>174</sup> in which the tension between the principle of freedom to provide maritime transport services and restrictions for preventing pollution was problematised. In this Case, the ECJ ascertained that Article 174 EC ‘defining the general objectives of the Community’<sup>175</sup> can be applied in order to restrict the principle of freedom to provide services, although the ECJ did not provide the detailed interpretation of this Article, claiming that the responsibility for its realisation was the task of the Council.

The other Case is *Cali v. SEPG*<sup>176</sup> which tackled the issue of compatibility between anti-pollution surveillance granted by a national authority and the elimination of an abuse of power. In this Case, the ECJ acknowledged the special character of environmental protection as follows: ‘the exercise of powers relating to the protection of the environment . . . are typically those of a public authority’,<sup>177</sup> and state practices of environmental protection can therefore escape the breach of competition law.

### 3.1.3.2 Environmental Rights

With regard to individual environmental rights, in Case C-131/88,<sup>178</sup> which dealt with the infringement by Germany of obligations concerning the Groundwater Directive,<sup>179</sup> the ECJ demonstrated that the Directive does offer individuals environmental rights. The wording of the judgment is as follows:

‘The directive at issue in the present case seeks to protect the Community’s groundwater in an effective manner by laying down specific and detailed provisions requiring the Member States to adopt a series of prohibitions, authorization schemes and monitoring procedures in order to prevent or limit discharges of certain substances. The purpose of those provisions of the directive is thus to create rights and obligations for individuals.’<sup>180</sup>

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<sup>174</sup> Case C-379/92, *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453.

<sup>175</sup> *Ibid.*, at I-3505, para.57.

<sup>176</sup> Case C-343/95, *Diego Cali & Figli Srl v. Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECR I-1547.

<sup>177</sup> *Ibid.*, at I-1588, para.23.

<sup>178</sup> Case C-131/88, *Commission v. Germany* [1991] ECR I-0825.

<sup>179</sup> OJ 1980 L20/43.

<sup>180</sup> Case C-131/88, at I-867, para.7.

This interpretation was reconfirmed in Case C-361/88,<sup>181</sup> which dealt with the failure of Germany to fulfill its obligations to transpose the Sulphur Dioxide Directive<sup>182</sup> into the national legal order. Remarking on how the Directive should be transposed, the ECJ stated:

‘it (transposition of a directive into domestic law: inserted) does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.’<sup>183</sup>

The ECJ went on:

‘It (Article 2 of the sulphur dioxide directive -- inserted) implies, therefore, that whenever the exceeding of the limit values could endanger human health, the persons concerned must be in a position to rely on mandatory rules in order to be able to assert their rights.’<sup>184</sup>

What deserves attention is the fact that the two Directives above, which were interpreted as creating environmental rights for individuals in these Cases, were adopted pre-SEA and showed that despite the lack of primary legislation for environmental protection, secondary legislation supporting the common market was interpreted in a manner so as to create environmental rights through ECJ case law.

### **3.1.4 The Principle of Environmental Integration**

Notwithstanding the pro-environmental interpretation of the ECJ, the basis of environmental legislation was still weak on the following accounts: the unanimity procedure required in the environmental clause of Article 175 EC and the strong orientation of Member States towards the development of their economies. It can be seen that, even after the SEA, it was difficult for the EC to build an environmental governance frame which relativised economic-oriented concerns. In this situation, it is the principle of environmental integration that contributed to regime development, in terms of creating a frame for environmental governance.

While this principle was, at the primary law level, provided in Article 130r (2) (now 6) EC by the SEA, it had already been alluded in the 1st EAP. The wording of the Programme is as follows:

‘Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes’.<sup>185</sup>

Although there was no evident wording in the Principles section of the 2nd EAP,<sup>186</sup> the 3rd EAP

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<sup>181</sup> Case C-361/88, *Commission v. Germany* [1991] ECR I-2567.

<sup>182</sup> OJ 1980 L229/30.

<sup>183</sup> Case C-361/88, above n.181, at I-2601, para.15.

<sup>184</sup> *Ibid.*, para.16.

<sup>185</sup> Above n.121, at C112/6.

<sup>186</sup> OJ 1977 C139/3.



provided for ‘integration of the environmental dimension into other policies’.<sup>187</sup> However, in the 4th EAP, which was adopted at the same time as the SEA, the integration principle was again elaborated in detail.<sup>188</sup> In Article 130r (2) (now 6) EC, the principle was expressed that:

‘[e]nvironmental protection requirements shall be a component of the Community’s other policies.’

In the elaboration of the 4th EAP, this principle was regarded as providing a more proactive environmental measure than EC primary law, as well as providing a holistic participatory approach to environmental issues. The 4th EAP stated that:

‘all economic and social developments throughout the Community, whether undertaken by public or private bodies or of a mixed character, would have environmental requirements built fully into their planning and execution’.<sup>189</sup>

While this proactive stance in the 4th EAP did not extend beyond the rhetoric of political discourse, the more ambiguous wording in EC primary law has been interpreted by the ECJ as a basis for validating the parasitic legislation of environmental measures. The legal discourse in the ECJ has enabled EC environmental legislation to be adopted on the legal bases of other issue-areas, in particular, on the legal base for the building of the internal market (Article 95 EC). Moreover, in legal base disputes, the position of the environment as against the market has been strengthened through the demarcation of core norms. Two environmental cases are discussed below followed by an examination of the post-Amsterdam situation.

#### **Case C-62/88 Commission v Greece**<sup>190</sup>

This Case concerns a reference by the Greek government to the ECJ on the basis of Article 230 EC regarding a Regulation dealing with the disaster of the Chernobyl nuclear power station.<sup>191</sup> This Regulation requires Member States to impose strict limits on imports of agricultural products from non-Member States due to the possibility of radioactive contamination.

The Regulation was adopted on the basis of Article 133 EC providing the common commercial policy, in which the QMV procedure is available. The Greek government claimed that the adoption was an infringement of the Rome Treaty (in this Case, including the EAEC Treaty) on account of a non-justifiable legal base and that the Regulation should be based on environment-related clauses, for which unanimity is required. The focal point was whether the legal base for limiting agricultural trade derived from Treaty Articles on common commercial policy or environmental policy.

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<sup>187</sup> OJ 1983 C46/3, at C46/2 in part of the Council Resolution concerning this Programme.

<sup>188</sup> OJ 1987 C328/5, at 9-13.

<sup>189</sup> *Ibid.*, at 9, point 2.3.2.

<sup>190</sup> Case C-62/88, *Greece v. Council* [1990] I-1527.

<sup>191</sup> OJ 1987 L371/14.

The ECJ recognised that the choice of legal base ‘may influence the content of the contested measure’<sup>192</sup> because procedural requirements are different.<sup>193</sup> According to the ECJ, the main purpose of the Regulation is ‘to regulate trade between the Community and non-member countries’,<sup>194</sup> despite the fact that a commercial policy for the trading of agricultural products can be implemented to ensure consumer health.<sup>195</sup> In contrast, Article 30 et seq EAEC has a main purpose of governing ‘the basic standards for protection of the health of the general public against the dangers arising from ionising radiation’.<sup>196</sup> The ECJ’s argument was that, although one of the objectives of environmental protection is to set the permitted maximum levels of radioactive contamination, this does not necessarily remove the Regulation from the sphere of common commercial policy.<sup>197</sup> On the contrary, Articles 174 and 175 EC leave intact other provisions of primary law, ‘even if the measures to be taken under the [ . . . ] provisions pursue at the same time any of the objectives of environmental protection’.<sup>198</sup>

In this respect, the principle of environmental integration was referred to, with a view to excluding all other provisions with environmental concerns from being based on Article 175 EC. The ECJ stated that this interpretation:

‘ . . . is confirmed by the second sentence of Article 130r(2) EEC (now Article 6 EC -- inserted), . . . that provision, which reflects the principle whereby all Community measures must satisfy the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements.’<sup>199</sup>

Here the integration principle was referred to in an effort to justify environmental measures, by basing them on provisions (in this Case commercial policy), other than environmental clauses.

### **Case C-300/89 Commission v Council<sup>200</sup>**

This Case is another legal base dispute concerning the programme Directive<sup>201</sup> that

<sup>192</sup> Case C-62/88, at I-1548, para.10.

<sup>193</sup> In this Case, the procedures in question are as follows: Article 133 EC on a common commercial policy requires the QMV procedure without the involvement of the EP and the ECOSOC. Article 31 EAEC demands the QMV procedure with the opinion of the ECOSOC and the consultation with the EP. Article 175 EC on an environmental policy requires the Council to act unanimously, consulting the EP and the ECOSOC, but the Council is entitled to define what measures can be decided by QMV. Article 308 EC also requires the Council to act unanimously, consulting the EP, in cases where actions at the EC level are necessary to attain one of the objectives of the EC but the Treaty of the EC has not provided the necessary powers.

<sup>194</sup> *Ibid.*, at I-1549, para.16.

<sup>195</sup> *Ibid.*, at I-1549, para.14.

<sup>196</sup> *Ibid.*, at I-1550, para.17.

<sup>197</sup> *Ibid.*, at I-1550, para.18.

<sup>198</sup> *Ibid.*, at I-1550, para.19.

<sup>199</sup> *Ibid.*, at I-1550, para.20.

<sup>200</sup> Case C-300/89, *Commission v. Council* [1991] ECR I-2867.

<sup>201</sup> OJ 1989 L201/56.

derived from the Titanium Dioxide Directive.<sup>202</sup> This programme Directive requires Member States to set up programmes for the reduction of waste discharges and to submit reports on these programmes to the Commission. The Council adopted this programme Directive on the basis of Article 175 EC, despite the fact that the Commission had based its proposal on Article 95 EC. The Commission brought an action before the ECJ, asking for the annulment of this Directive.

Like Case C-62/88 above, the question of the legal base was significant due to the procedures which applied to Articles 95 and 175 EC. The former makes QMV and the involvement of the EP possible, but the latter requires unanimity and only consultation with the EP. At first, the Commission had proposed this Directive on the basis of Article 94 and 308 EC. After the SEA entered into force, the Commission amended the base to Article 95 EC and in the legislative process, the EP voiced the opinion, on the side of the Commission, that the legal base should be Article 95 EC.

The claim of the Commission was that ‘the directive, although contributing to environmental protection, has as its ‘main purpose’ or ‘centre of gravity’ the improvement of conditions of competition in the titanium dioxide industry.’<sup>203</sup> Article 1 of the Directive ‘lays down procedures for harmonizing the programmes for the reduction and eventual elimination of pollution from existing industrial establishments and is intended to improve the conditions of competition in the titanium dioxide industry.’ The Directive establishes a harmonised treatment of waste, imposes a prohibition of the dumping and injection of waste and lays down maximum values for harmful substances from the titanium dioxide industry. The Commission thus argued that these measures mainly surround the establishing and functioning of the internal market. The Commission said that ‘the requirements of environmental protection form an integral part of the harmonizing action to be taken on the basis of Article 100a’<sup>204</sup> (now 95 EC) and that this Article ‘constitutes a *lex specialis* in relation to Article 130s’ (now 175 EC), and the latter is not ‘intrinsically’ directed towards the attainment of the establishment and functioning of the internal market.<sup>205</sup> Against these arguments, the Council contended that the centre of gravity should be placed in the area of environmental concern.<sup>206</sup> The Court recognised that ‘the directive is concerned, indissociably, with both the protection of the environment and the elimination of disparities in conditions of competition’<sup>207</sup> and ruled in favour of the Commission.

As one of reasons for the act of annulment, the Court referred to the principle of environmental integration provided in Article 6 (ex 130r (2)) EC. According to the ECJ ‘[t]his

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<sup>202</sup> OJ 1978 L54/19.

<sup>203</sup> Case C-300/89, at I-2897-8, para.7.

<sup>204</sup> *Ibid.*, at I-2898, para.8.

<sup>205</sup> *Ibid.*.

<sup>206</sup> *Ibid.*, at I-2898, para.9.

<sup>207</sup> *Ibid.*, at I-2899, para.13.

principle implies that a Community measure cannot be covered by Article 130s (now 175 -- inserted) EC merely because it also pursues objectives of environmental protection.’<sup>208</sup> In addition, the ECJ stressed Article 95 (3) EC, which requires the Commission to be concerned about ‘environmental protection’ and to ‘take as a base a high level of protection’.<sup>209</sup> Thus, Article 6 and 95 (3) EC were referred to as the reasons why Article 95 EC (the Commission’s position) is also the proper legal base for environmental legislation, along with Article 175 EC (the Council’s position).

This case shows how normative discourses on the market and the environment have developed. It is not merely a question of procedural disputes over legal bases, nor is it a mere struggle over competence between the EC and the Member States. Disputes about legal bases should not be interpreted only from the viewpoint of the Commission’s strategy of legalising environmental protection by reference to the internal market and the QMV procedure. Through legal base disputes, legal discourses on the normative relationship between the market and the environment can be seen as bringing to the fore ideas regarding how the market should be embedded in a general social system, in which the environment constitutes a matter of significant public interest.

#### **After Amsterdam**

The Treaty reforms which took place in Amsterdam 1997 should be given special attentions because they establish the principle of sustainable development as one of the basic objectives of the EU.<sup>210</sup> Henceforward this principle is no longer ancillary to the economic principle.<sup>211</sup> On the contrary, it is part of the constitutional values to which the EU has consulted itself. In relation to this, Amsterdam provided the principle of environmental integration with independent status in Article 6 EC.<sup>212</sup> According to Grimeaud, this has become ‘a general principle of EC law as opposed to a principle of EC environmental law alone’.<sup>213</sup> Responding to primary legislation, ‘the environmental integration process’<sup>214</sup> began at the Cardiff European

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<sup>208</sup> *Ibid.*, at I-2901, para.22.

<sup>209</sup> *Ibid.*, at I-2901, para.24.

<sup>210</sup> The Preamble of the TEU states that: ‘Determined to promote economic and social progress for their peoples, taking into account the principle of sustainable development and within the context of the accomplishment of the internal market and of reinforced cohesion and environmental protection’. Article 2 TEU prescribing the basic purposes of the EU also says: ‘to achieve balanced and sustainable development’.

<sup>211</sup> Grimeaud points out that it is no longer ‘a mere appendix to Communities policies on economic integration’. D. Grimeaud, ‘The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?’ (2000) 9 *European Environmental Law Review* 207, at 216.

<sup>212</sup> Article 6 EC says: ‘Environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities referred to in Article 3, in particular with a view to promoting sustainable development.’ It is clear that Article 6 has elaborated this principle in comparison with Article 130r (2).

<sup>213</sup> See, Grimeaud, above n.211, at 216.

<sup>214</sup> *Ibid.*, at 213. Also see, 2334th Council meeting - Environment, Press Release Brussels (08-03-2001) - Press: 93 - Nr: 6752/01.

Council of June 1998, where the European Council demanded that the Commission and the Council create concrete measures for realising this principle.<sup>215</sup>

With regard to the principle of environmental integration after Amsterdam, the following two Cases should be noted. the *First Corporate Shipping Case*<sup>216</sup> and the *PreussenElektra Case*.<sup>217</sup> were brought about under this ‘environmental integration process’ directed by political discourses in the European Council. In the former, the discretionary economic concern of Member States was judged as invalid with reference to the designation of ‘special areas of conservation’ in the Habitats Directive.<sup>218</sup> In the latter, state aid in favour of renewable energy suppliers was validated against EC competition law, although proportionality was stressed. Both Cases help to show that environmental protection is an essential concern of the EU. More significantly, the Opinion of the Advocate General, in both Cases,<sup>219</sup> pointed out the pro-environmental tendency of the Amsterdam Treaty and highlighted the significance of Article 6 EC which is orientated towards the principle of sustainable development.<sup>220</sup> The Opinion attached to the *PreussenElektra Case* states that, ‘in particular with a view to promoting sustainable development’. . . ‘Article 6 is not merely programmatic; it imposes legal obligations’, and suggests that the EC has to fight against threats to ‘the ecosystem as a whole’.<sup>221</sup> In the *First Corporate Shipping Case*, AG Léger regards the principle of sustainable development as ‘a fundamental concept of environmental law’, referring to the 1987 Brundtland Report, and he emphasised the principle of environmental integration in terms of realising the principle of sustainable development.<sup>222</sup>

During the process of this legal discourse, environmental protection no longer remained a mere ancillary norm for the support of market building and it now constitutes its own norm that is independent from market concerns. Fair market competition and environmental protection are independent norms that should be balanced against one another as obligations of the EC. However, it must also be said that in these two Cases, there was no significant change from previous legal discourses. On the contrary, it has been a gradual process that has changed the

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<sup>215</sup> *Ibid.*, at 212-3. Grimeaud criticises the lack of specific timetables and indicators (*Ibid.*, at 215). According to Grimeaud, Article 6 EC is just a procedural requirement in policy-making and should never be founded on substantive requirements. ‘From the substantive and judicial perspectives, such a commitment does not provide a basis for calling for specific environmental or greening outcomes’ (*Ibid.*, at 217). It should be noted, however, that the basic values implied in the procedural requirement may create a normative context to restrain policy-makers.

<sup>216</sup> Case C-371/98, *R v. Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd* [2000] ECR I-9235.

<sup>217</sup> Case C-379/98, *PreussenElektra AG v. Schleswag AG* [2001] ECR I-2099.

<sup>218</sup> OJ 1992 L206/7.

<sup>219</sup> The Opinions are by AG Léger for Case C-371/98 delivered on 7 March 2000 and by AG Jacobs for Case C 379/98 delivered on 26 October 2000.

<sup>220</sup> Case C-371/98, Opinion, para.57. Case C 379/98, Opinion, paras.233-234.

<sup>221</sup> Case C-379/98, Opinion, para.231.

<sup>222</sup> Case C-371/98, Opinion, para. 56.

status of environmental regime from a parasite regime to an independent regime. These two Cases place previous legal discourses into the new normative context, which is elaborated in Article 6 EC.

### 3.2 Secondary Legislation

This section attempts to outline norm evolution in EC environmental legislation by examining the policy sectors of pollution prevention in industrial activities and nature conservation in developmental activities. The emphasis is mainly on norm evolution post-SEA and the examination reveals further evolution in environmental norms against a backdrop of an accumulation of interpretative practices through legal discourses.

As argued above, this focus implies that secondary legislation has, as the intermediate discourse of laws (E in Diagram 2), not only a legal, but also a political discursive character in the sense that it includes a hortatory and general policy goal oriented statement against which it is difficult to clearly identify a legal obligation. This dimension of intermediate discourses is apt to become both environmentally proactive and ambitious. As such, secondary legislation enables political discourses to be put into a legal discursive context and simultaneously has the potential to transform preceding discursive contexts that have gradually been formed through legal discourses. Thus, the corpus of this intermediate discourse of laws can be expected to help provide a preceding governance frame with renewed key concepts and regulative principles on the basis of judicially reviewable core norms. In other words, the text of laws as a normative discourse determines, to a large degree, how to frame governance in a specific issue-area.

#### 3.2.1 Basic Architecture of Directives

As noted above, despite the lack of clear environmental clauses in the EC Treaty, environmental legislation has accumulated since the 1st EAP in 1972. This has been mainly on the basis of Article 94 EC, other environment-related Articles (such as common commercial or agricultural policy clauses) and Article 308 EC. The former two give the EC powers with regard to the building of the common market and Article 308 EC prescribes an implied, or general legislative, power to attain the objectives of the Treaty.<sup>223</sup> However, due to primary environmental legislation provided by the 1985 IGC, the *main* legal base for environmental secondary legislation has been shifted from these Articles on the market building and implied powers, to environmental Articles – (174, 175, 176 EC), although legislation based on market concerns have still been used due to institutional inertia.<sup>224</sup>

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<sup>223</sup> For the significance of this Article as a general legislative power, see, J. Shaw, *Law of the European Union*, Third Edition (Palgrave, 2000), at 216-221.

<sup>224</sup> For example, concerning Article 95 EC (approximation of laws for the Internal Market) see Directive 88/77/EEC OJ 1988 L36/33 (measures against the emissions from diesel engines), Directive 89/428/EEC OJ 1989 L201/56 (harmonization of the programmes for waste from the titanium dioxide industry), Directive 97/68/EC OJ 1998 L59/1 (measures against the emissions from non-road mobile machinery), and Directive 2000/25/EC OJ 2000 L173/1 (action against

Needless to say, this major change in primary law is crucial in the sense that it has created environmental basic laws as a normative foundation for secondary legislation. Basic regulative environmental principles – such as the prevention of pollution at source, environmental integration and the polluter-pay principle – which had already been prescribed in the 1st EAP<sup>225</sup> were also incorporated into the text of the EC Treaty. These principles are elaborated potentially not only through political discourses but also through legal discourses. Notwithstanding this major change at the primary law level, it should be noted that the basic characteristics of EC environmental governance have not changed fundamentally since the years prior to the SEA and even after Amsterdam, insofar as the basic architecture regarding obligatory arrangements against Member States is concerned.<sup>226</sup> The directive-centred architecture can be summed up in the four points:

- 1) A framework setting for guiding national level measures by providing the ambiguous concepts of *limit values* and *environmental quality standards*<sup>227</sup> or of *priority natural habitat types*, *priority species* and *special areas of conservation*.<sup>228</sup> This framework enables Member States to derogate from some of their obligations.
- 2) An annex-model<sup>229</sup> for the flexible adaptation to technological progress, as well as for the gradual adoption of stricter substantive obligations;
- 3) A system of environmental information sharing through reporting requirements about management plans, programmes and monitoring of Member States, and through the

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emissions from agricultural or forestry tractors); concerning Article 133 EC (common commercial policy), see Regulation (EEC) No.3925/87 OJ 1987 L371/14 (the conditions of imports of agricultural products from third countries influenced by the accident at the Chernobyl); concerning Article 80(2) EC (transport policy), see Directive 93/75/EEC OJ 1993 L247/19 (minimum requirements for vessels carrying dangerous or polluting goods). For the institutionalist account of this institutional inertia, see K. A. Armstrong and S. J. Bulmer, *The governance of the Single European Market* (Manchester University Press, 1998), at 220.

<sup>225</sup> The 1st EAP, above n.121, at C112/6.

<sup>226</sup> However, there is a difference between before and after the SEA in respect of whether these basic characteristics are mainly orientated towards relativising the command and control approach of environmental legislation. See the argument in Section 2.3.2.

<sup>227</sup> For example, see the 1980 sulphur dioxide Directive (OJ 1980 L229/30) and the 1996 IPPC Directive (OJ 1996 L257/26).

<sup>228</sup> See the 1979 wild birds Directive (OJ 1979 L103/1) and the 1992 Habitats Directive (OJ 1992 L206/7).

<sup>229</sup> This may be in line with the Framework-Protocol-Model in international environmental laws, which is defined as the combination of the general framework by a treaty and the detailed substantive, or procedural prescription, by protocols. Brunnée and Toope emphasise its significant role for regime development. See, J. Brunnée and S. J. Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' (1997) 91 *AJIL* 26. They state that '[o]ne of the strengths of the framework-protocol model is that it accommodates and promotes the important interplay between contextual and normative elements of regime formation and development. While serving to consolidate a regime into legally binding form, the model retains contextual elements, allowing for the dynamism and fluidity so valued by regime theory and by what we have called international ecosystem law' (at 57).

intermediation of the Commission;<sup>230</sup>

- 4) Institutional arrangements to promote cooperation among Member States, and between the Commission and Member States through transboundary consultation and through a technical Committee comprised of the Commission and Member States.<sup>231</sup>

Insofar as these four points are concerned, no change can be found in the architecture, despite reforms of primary law.

Nevertheless, post-SEA important differences have emerged in terms of precise key concepts based on core norms. The legislative process, in which political and legal discourses intersect, is the developmental process of a collective recognition regarding problems and norms in a specific issue-area. Precisely speaking, this process includes: the establishment of a core norm that should be shared for problem-solving or problem-finding, setting up a key concept that defines and explains policy-objects to be governed, and the provision of a regulative principle that should guide the choice of policy instruments or strategies. As such, the legislative process itself also means the developing and reforming of a governance frame in a specific issue-area. Thus, legislation as the intermediate discourse of laws can be seen to (re)create a world of common meanings consisting of key concepts, core norms and regulative principles.

### 3.2.2 Elaboration of Key Concepts

Legislation provides key concepts with legal definitions. The latter enables the former to become constitutive factors of a governance frame, which creates a world of common meanings in a specific issue-area. In the EC environmental regime, *animals*, *lands* and *forest* are no longer mere economic resources for economic development, or economic goods traded at market, but are the invaluable basis of biological diversity that should be protected by public authorities.<sup>232</sup> *Air*, *water* and *soil* are seen as interconnected and are as such recognised as issues requiring an integrated approach for limiting new and existing installations.<sup>233</sup> An ecosystem-oriented definition is imposed on the Community's water world<sup>234</sup> and sustainable development is more precisely defined in terms of this ecosystem orientation.<sup>235</sup>

When tracing out the evolutionary formation of a common meaning world in an

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<sup>230</sup> For example, see Article 7 and 8 of the 1980 Sulphur Dioxide Directive (OJ 1980 L229/30) and Article 16(1) of the 1996 IPPC Directive (OJ 1996 L257/26). The reporting requirements aiming at mutual learning and the monitoring of implementation are found in EC environmental directives without exception. These requirements were amended for more effective practices through the Commission questionnaires. See Council Directive 91/692/EEC OJ 1991 L377/48. However, Krämer points out the serious implementation deficits of this requirement. See, Krämer, above n.115, at 16.

<sup>231</sup> For example, see Article 4(4) of the 1976 Bathing Water Directive (OJ 1976 L31/1) and Article 3(3) of the 2000 Integrated Water Framework Directive (OJ 2000 L327/1).

<sup>232</sup> The Habitats Directive (OJ 1992 L206/7) and the Tropical Forests Regulation (OJ 2000 L288/6).

<sup>233</sup> The IPPC Directive (OJ 1996 L257/26).

<sup>234</sup> The Integrated Water Framework Directive (OJ 2000 L327/1).

<sup>235</sup> Regulation for environmental integration in development policy (OJ 2000 L288/1).



environmental issue-area, the following key concepts may serve as good examples. In the 2000 Integrated Water Framework Directive, *pollution* is legally defined as:

‘the direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment.’<sup>236</sup>

While the 1996 IPPC Directive uses wording such as ‘the quality of the environment’<sup>237</sup>, the Integrated Water Framework Directive replaces this wording with ‘the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems’, thus establishing the definition of pollution more precisely.

The ecosystem has become defined in detail by legislation during the 1990s. The following definition of ecosystem is given by the Convention on Biological Diversity (of which the EC is a party):

it ‘means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit’.<sup>238</sup>

The world in this definition is now the object of obligatory protection by public authorities.

In relation to this ecosystem orientation, the 2000 Integrated Water Framework Directive has created a single EU water world which consists of interconnected areas of surface water, groundwater, inland water, river, lake, transitional water, artificial water and so on.<sup>239</sup> The focal point in this constitution of water as a whole is the ‘international river basin district’.<sup>240</sup> This Directive aims at promoting transboundary environmental actions on the basis of this conception. Water in the EU is no longer the sum total of the areas of water in Member States. Instead, the single water world of the EU now exists in discourses on environmental norms.

This integrated approach has clearly been demonstrated in the IPPC Directive.<sup>241</sup> In this Directive, air, water and soil are no longer different medias. On the contrary, they comprise a whole that should be addressed holistically in all sectors of industrial activities (i.e. energy, metal production or processing, mineral industries, chemical industries, waste management, and others).<sup>242</sup>

In the Habitats Directive, ‘a coherent European ecological network of special areas of

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<sup>236</sup> The Integrated Water Framework Directive (OJ 2000 L327/1), at Article 2(33).

<sup>237</sup> The IPPC Directive (OJ 1996 L257/26), at Article 2(2).

<sup>238</sup> The Convention on Biological Diversity (OJ 1993 L309/1), at Article 2.

<sup>239</sup> The Integrated Water Framework Directive (OJ 2000 L327/1), at Article 2.

<sup>240</sup> *Ibid.*, at Article 3(3).

<sup>241</sup> The IPPC Directive (OJ 1996 L257/26).

<sup>242</sup> *Ibid.*, at Annex I.

conservation' has been planned under the title of Nature 2000.<sup>243</sup> The natural habitats that should be protected in particular are:

‘terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural’.<sup>244</sup>

This Directive assumes that the EU's natural environment is a whole undistorted by national borders. In this way, the concept of environment, originally a mere constraint on the common market, has now been given richer meaning and has been defined as a common heritage that the EC and Member States are obliged to protect.

Furthermore, the 2000 Regulation on developmental policy<sup>245</sup> aims at concretising Article 6 EC which provides basic regulative principles. This Regulation attempts to realise these principles in cooperation with developing countries so that, for instance, financial aid is given on the basis of the principle of sustainable development. The strategies of realising this principle are based on the principle of environmental integration. The two principles of sustainable development and environmental integration can no longer be seen as policy rhetoric or an excuse to enact environmental legislation on other issue-areas. This Regulation is based on Article 175 EC (environment) and 179 EC (development cooperation) and these principles can, therefore, be said to link EC environmental measures at international level with financial aids in EC policies on development cooperation.

Most important is that in Article 2 of the Regulation, sustainable development is defined as a legal principle. According to this Article:

“sustainable development” means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations.<sup>246</sup>

In this definition there is no suggestion that economic growth and environmental protection should be balanced. Needless to say, issues such as ‘the standard of living and welfare of the relevant populations’ do not necessarily entail an economic orientation. Representing a reinterpretation of the familiar dichotomy between the economy and the environment, this definition is a step towards a legal discourse ‘limits’, ‘ecosystems’, ‘natural assets’, ‘biological diversity’ and ‘the benefit of present and future generations’. A focal point is how the discourse on these topics can, as a legal discourse, create normative contexts in which not only EU

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<sup>243</sup> The Habitats Directive (OJ 1992 L206/7), at Article 3(1).

<sup>244</sup> *Ibid.*, at Article 1(b).

<sup>245</sup> OJ 2000 L288/1. This Regulation follows the 1997 Regulation on environmental measures in developing countries in the context of sustainable development (OJ 1997L108/1) that expired on 31st December 1999, and provides financial aid of 93 million euro for developing countries from 2000 to 2006.

<sup>246</sup> *Ibid.*, at Article 2. This definition can also be found in the Tropical Forests Regulation (OJ 2000 L288/6).

institutions but also Member States governments are restrained. In legislation, regulative principles and key concepts, which are based on core norms, create a common meaning world and set up coherent strategies that should be shared among participants of the EC environmental regime.

### 3.2.3 Ecosystem Orientation

The development and elaboration process can be summarised as a trend towards a holistic and ecosystem-oriented frame.<sup>247</sup> This trend can be paraphrased as moving *from market-oriented values to the intrinsic values of ecosystems per se*. This frame change was impossible without the evolution of a common meaning world consisting of the environmental norms, concepts and regulative principles noted above. The accumulation of legal definitions of ‘pollution’, ‘international river basin’, ‘biological diversity’, ‘habitats’, ‘sustainable development’ and so on, can be argued to bring about a new collective understanding of the ecosystem-oriented arrangement of rights/obligations.

In this regard, the argument of Brunnée and Toope is insightful. Transborder environmental degradation brings about a potential and/or a real conflict between states. International cooperation on environmental protection can thus be recognised as an attempt to remove the causes of potential conflict and to maintain security. Brunnée and Toope apply the non-military sense of the concept ‘security’ to international environmental issues.<sup>248</sup> Environmental issues are a kind of security problem. The prevention of potential conflicts between states may undoubtedly be said to be one of the main functions of the EC environmental regime. However, Brunnée and Toope also propose ‘an expansive understanding of environmental security with particular emphasis on protection of the environment itself’.<sup>249</sup> According to them, focussing on potential inter-state conflict ‘may detract from the goal of security’<sup>250</sup> because such an understanding often changes transboundary environmental issues into ‘matters of purely national concern’.<sup>251</sup> They call for the expansion of the concept ‘environmental security’ into population security in the sense that environmental degradation is not only a security problem in interstate conflict, but is also a problem for the quality of life of inhabitants. Accordingly, international environmental governance does not only contribute to the prevention of the interstate conflict, but also concerns the internal affairs of each state. Thus, Brunnée and Toope state that: ‘concern for the environment per se and the interests of people might push states towards more cooperative strategies.’<sup>252</sup> This means a re-focussing of interest from the allocation of resources to the preservation of ecosystem integrity. Their following

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<sup>247</sup> Brunnée and Toope, above n.229, at 41-2.

<sup>248</sup> *Ibid.*, at 26-7.

<sup>249</sup> *Ibid.*, at 27.

<sup>250</sup> *Ibid.*

<sup>251</sup> *Ibid.*

<sup>252</sup> *Ibid.*

remarks are crucial for assessing the development of the EC environmental regime:

‘Through the promotion of various environmental regimes, the goal is to move the normative evolution along a path from preoccupation with the allocation of resources toward ecosystem integrity, without ignoring the continuing power of states to shape the ultimate elaboration of international legal regimes. Therefore, in speaking of ecosystem orientation, we wish to highlight the need to reorient international law. It must move from a perception that environmental degradation is legally relevant only where sovereign interests of states are affected, toward a framework that also evaluates state conduct according to ecological criteria. It is in this sense, then, that we have called for the development of an “international ecosystem law”.’<sup>253</sup>

From this view of international ecosystem law, therefore, the EC environmental regime may be said to have a great potential. Although (or because) there are admittedly serious problems, like the implementation deficit<sup>254</sup> and insufficient compatibility between environmental measures and development activities such as those financed by the ERDF,<sup>255</sup> the environmental governance frame has evolved in the way of orientating towards ecosystem integrity. The argument of Brunnée and Toope makes sense in the light of the EC’s current environmental regime. What should be borne in mind here is that the elaboration of a common meaning world (that is, the deepening of framing) has proceeded through the intermediate discourse of laws, on the basis of the legal discourse in the ECJ. This emerging frame can be expected to promote more environmentally-proactive normative discourses, alleviating the weaknesses of this regime.

### 3.3 International Agreements

International environmental agreements should be noted for their role in norm evolution in EC environmental law. During the pre SEA stage, international environmental norms had been incorporated into the EC legal order on the basis of Article 235 EC (now 308 EC) and were an indispensable foundation of norm evolution.<sup>256</sup> After the Treaty reform in Maastricht, while

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<sup>253</sup> *Ibid.*, at 27-8.

<sup>254</sup> See Section 2.2.1. And also see Krämer, above n.115, at 7-19.

<sup>255</sup> See *Greenpeace* Case noted in Section 2.2.2. And also see J. Scott, ‘Shared responsibility and the Community’s Structural Funds: a legal perspective,’ in U. Collier et al (eds) *Subsidiarity and Shared Responsibility: New Challenges for EU Environmental Policy* (Nomos, 1997).

<sup>256</sup> The instances of this Article 235 international environmental agreements are: the Convention for the protection of the Mediterranean Sea against pollution and the Protocol for the prevention of the pollution of the Mediterranean Sea by dumping from ships and aircraft (OJ 1977 L240/1); the Convention for the protection of the Rhine against chemical pollution and an Additional Agreement to the Agreement, signed in Berne on 29 April 1963, concerning the International Commission for the Protection of the Rhine against Pollution (OJ 1977 L240/35); the Convention on the conservation of migratory species of wild animals (OJ 1982 L210/10); the Convention on the conservation of European wildlife and natural habitats (OJ 1982 L38/1); the Convention on long-range transboundary air pollution (OJ 1982 L171/11); the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources (OJ1983 L67/1);

international agreements have been adopted on the basis of Article 174(4) EC , it is the Rio process-related international instruments (Agenda 21, Biodiversity, Climate Change and so on) that made a decisive impact on the development of the EC environmental regime.

### 3.3.1 Article 235 International Agreements

An example of Article 235 international agreements is the 1982 International Convention on Migratory Wild Animals which expresses ‘the ever-growing value of migratory wild animals from environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic points of view’, and states that States ‘must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries’.<sup>257</sup> In addition, the 1982 European Wildlife and Natural Habitats Convention provides a baseline for protecting wildlife habitats that have their own value and whose protection should be obligation of the States. The Preamble states that ‘wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generations’.<sup>258</sup>

This Wildlife Convention’s architecture for governance is similar to the EC environmental Directives in terms of planning requirements,<sup>259</sup> reporting requirements,<sup>260</sup> a standing committee<sup>261</sup> and so on. The cognitive frame and norms expressed by the Convention can be seen to contribute to the creation of legally prescribed natural habitats in the EU and provide a bridge between the 1979 Wild Birds Directive and the 1992 Habitats Directive in the discourse on European natural habitats. For the reason that nature conservation is far from market concerns, these Article 235 conventions should be noted as being a significant driving force behind environmental norm evolution on the pre-SEA stage.

### 3.3.2 The Rio Process

As part of the remarkable environmental trends outside the EU during the 1990s, the UNCED in Rio of 1992 should be taken seriously. At Rio, the Rio Declaration<sup>262</sup> and Agenda 21<sup>263</sup> were produced and important environmental conventions<sup>264</sup> – the Climate Convention, the

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the Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances (OJ L188/7).

<sup>257</sup> The Convention on the Conservation of Migratory Species of Wild Animals (OJ 1982 L210/11), at Preamble.

<sup>258</sup> The Convention on the Conservation of European Wildlife and Natural Habitats (OJ 1982 L38/1), at Preamble.

<sup>259</sup> *Ibid.*, at Article 3 and 4.

<sup>260</sup> *Ibid.*, at Article 9(2).

<sup>261</sup> *Ibid.*, at Article 13.

<sup>262</sup> See The United Nations Conference on the Environment and Development: The Rio Declaration on Environment and Development, <http://www.infohabitat.org/agenda21>, [accessed Sept. 2000].

<sup>263</sup> See The United Nations Conference on Environment and Development: Agenda 21, <http://www.infohabitat.org/agenda21>, [accessed Sept. 2000].

<sup>264</sup> *Ibid.*

Convention on Biological Diversity and Forest Principles – were adopted. The EC committed itself as *one unit* to this international environmental process.<sup>265</sup> While there have been many actions following Rio, not only at the U.N. level but also at the European level, the Rio process must be said to have substantially influenced the EC environmental regime. Undoubtedly, the control and preservation of climate, biological diversity and forests have become since Rio fundamental objectives of EC environmental governance. Endorsed by a Council Resolution and a Common Position,<sup>266</sup> Agenda 21 has, as an historical action programme, has given the EC environmental regime primary impetus for norm evolution and the main concern of the 5th EAP was how to put these international commitments into practice.

Moreover, the 27 principles of the Rio Declaration<sup>267</sup> have founded the regulative principles of the EC environmental regime. What is remarkable in the context of this Chapter is: 1) sustainable development in Principle 1, which says:

‘Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature;’

2) environmentally integrated policies in Principle 4, which says:

‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’

The former is fundamental for the latter in terms of normative implications and after Rio, concern for the environment has been orientated towards human poverty and equality. The idea that these two concerns should be related to each other<sup>268</sup> is not unknown. However, it is the Rio Declaration and Agenda 21 that have decisively raised the awareness that the two should be, and are, considered as inseparable. In Rio, the inseparability between the environment and the poverty/equality was expressed as the *principle of sustainable development*, which now seems to have become more than simply buzzword.

The EC environmental regime is no exception to this trend of sustainable development, as

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<sup>265</sup> See Council Resolution, OJ 1993 C138/1. This resolution says: ‘Whereas the United Nations Conference on Environment and Development (UNCED) meeting in Rio de Janeiro, 3 to 14 June 1992, adopted the Rio Declaration and Agenda 21 which are aimed at achieving sustainable patterns of development worldwide as well as a declaration of forest principles; whereas important Conventions on climate change and biodiversity were opened for signature and were signed by the Community and its Member States; whereas the Community and its Member States also subscribed to Agenda 21 and the said Declarations’.

<sup>266</sup> *Ibid.* See also the Council Common Position on 17 April 1997, OJ 1997 C 157/12.

<sup>267</sup> The Rio Declaration, above n.262.

<sup>268</sup> See the 1972 United Nations Declaration on the Human Environment in Stockholm. Principle 1 of this declaration said that ‘Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations’. See J. Alder and D. Wilkinson, *Environmental Law and Ethics* (Macmillan, 1999), at 112.

argued above when discussing the *First Corporate Shipping Case*, the *PreussenElektra Case*, the Convention on Biological Diversity and the 2000 Regulation on developmental policy. In addition to these, the process of realising the Kyoto Protocol<sup>269</sup> and forestry protection strategies<sup>270</sup> should be stressed in terms of proactive environmental discourses within the institutional context of the EC environmental regime. The principle of sustainable development as a fundamental regulative principle will continue to be important for legal and political environmental discourses in the EC environmental regime.

With a view to tracing norm evolution in the EC environmental regime, this Chapter has considered the following: 1) the laying down of norm evolution in legal discourses in the ECJ, mainly with regard to the pre-SEA stage; 2) the further evolution of norms in intermediate discourses of secondary laws, emphasising the ecosystem-oriented elaboration of key concepts after the SEA; 3) international environmental agreements concluded by the EC that have supported and promoted discourses in secondary legislation, highlighting both the Article 235 international agreements pre-SEA and the Rio process since the 1990s. This tracing of norm evolution was carried out against the background of the development of other types of discourses, such as primary law, EAPs and others which were discussed throughout each section.

In sum, this Chapter has argued that the attempt to describe norm evolution offers an overall picture of a process which has been circumscribed by the legal discourse of ECJ case law (F in Diagram 2), and which has been developed through the intermediate discourse of secondary law (E in Diagram 2) and subsequently supported by international agreements. It appears that the relatively politically-intensive policy-goal setting and judicially unreviewable forms of discourses which are a part of primary legislation, EAPs, and others, is grounded on, and is transferred into, relatively legally-intensive discursive spheres (the legislature and, as the most legally intensive, the ECJ). This viewpoint has been reached by placing environmental case law and legislation into a conceptual framework which highlights the fundamental role of discourses in governance frames. Legal and political discourses on environmental norms have been seen to bring about the differentiation of the environmental regime from other regimes, or more precisely, the development from a regime parasitic on market concerns to an emerging ecosystem-oriented regime.

The limitations of legal discourses in an environmental issue-area is that the legal definition of, for example, *limit value* or *good water status*, easily leads to the conclusion that only minimum standards need to be achieved. Therefore, legal discourses should be

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<sup>269</sup> See *Partnership for integration*, COM (98) 333.

<sup>270</sup> See Council Resolution on a forestry strategy for the European Union, OJ 1999 C 56/1.

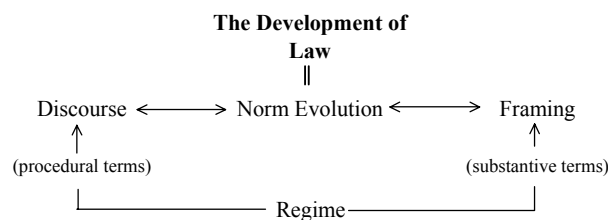
supplemented with political discourses that strongly encourage the commitments beyond legal obligations. A political discourse could claim that even if legal obligations lay down a standard of X, the Community norm is to surpass X. However, political discourses have the difficulty that they cannot be pinned down to legal obligations and they cannot be reviewed in Court. In political discourse, decision-makers can say something that sounds good but is without commitment in order to strengthen their popular support.

Thus, the accumulation of discourses surrounding case law and secondary legislation must be taken seriously. Regime development, through which normative discourses are promoted, simultaneously causes the deepening of a governance frame that systematises core norms, key concepts and regulative principles. In the EC environmental regime, the constructed frame of common understanding has been realised by case law as the legal discourse of laws and has been developed further by legislation, as the intermediate discourse of laws. These types of discourses have also structured other types of discourses, such as the political discourse around law and the legal discourse around law.

## Conclusion

This paper is summarised as follows. It first offered a conceptual framework which considers the development of EC environmental law. This was shown in Diagram 1 below:

**Diagram 1**



Here the development of law was understood as *norm evolution*, which is caused with *normative discourses*, and which creates, redirects or makes more precise a *frame* to govern a specific issue-area.

*Normative discourses* were understood to be catalysed by the creation, application and interpretation of norms. The texts of individual laws were also in themselves regarded as normative discourses. The former is the normative discourse around law and the latter is the normative discourse of laws. This normative discourse was further divided into the political and the legal, in terms of susceptibility to judicial review. Further to this, a median area was assumed between the political and the legal. Thus, six categories of normative discourses were offered, as shown in Diagram 2 below:



**Diagram 2**

	Political Discourse	Legal Discourse	
Discourse around Law	A	B	C
Discourse of Laws	D	E	F

As Chapter 3 argued, this paper focussed on F (the legal discourse of laws) and E (the intermediate discourse of laws) for the reason that EC environmental law can be interpreted as developed through F and E, during the period of no legal base in the Basic Treaties. *Framing* was regarded as building, in a specific issue-area, a coherent system of core norms substantiating the behavioural code, key concepts expressing the problematic situation and regulative principles showing the strategy of problem-solving. This governance frame was seen to form the discursive context and was simultaneously thought of as having developed through discourses. *Regimes* were seen to be an accumulation of institutions conceptualised as stably reproducing normative discourses in procedural terms and as establishing in substantive terms a policy agenda, on the basis of which framing takes place. As such, regimes were understood to be an arena in which norm evolution occurs. This paper described the development of EC environmental law according to this conceptual framework. It can be said that this framework also explains how law matters. In short, law brings about norm evolution that (re)creates a governance frame. To put this in theoretical terms, the accumulation of discourses brings about, and simultaneously is affected by, intersubjective meanings which constitutes the social world.

Building on this conceptual framework, Chapter 2 examined the general features of the EC environmental regime. In procedural terms the regime is based on formal institutions established by primary and secondary legislation, the general principles of which are commonly applied to other regimes in the EC. That is, it is not political agreements but legal provisions susceptible to judicial review that constitute the procedural setting. In particular, a centralised interpretation of norms by the ECJ has established the foundations for environmental norm evolution. In substantive terms, the EC environmental regime had no clearly recognised environmental policy agenda in the EC Treaty and was orientated towards the common market until the SEA. For harmonising conditions of competition in the common market, the command and control approach for standardising environmental regulations among Member States was the main approach until the 5th EAP.

Against the EC environmental regime described above, three weaknesses were examined: deficits in implementation at the national level; the limitations of societal actors' access to the ECJ; and the parasitic nature of environment legislation on market concerns. Under these circumstances, a new governance mode has been pursued since the 5th EAP. Its main aim is to

minimise the uniform approach based on legal instruments and to strengthen the procedural constraints concerning participation and information exchange. Under this horizontal and consensual approach, Chapter 2 pointed out that normative discourses come to matter more in the light of norm evolution under proceduralisation; the role of law should be focused on in terms of normative discourses, which constitutes a frame governing a specific issue-area.

With regard to this frame, Chapter 3 showed the generative process of EC environmental norms, examining the following:

- 1) the establishment of environmental norms through case laws pre-SEA, post-SEA, and after Amsterdam;
- 2) the emergence of *a holistic and ecosystem-oriented frame* in secondary legislation, drawing on the Habitats Directive, the IPPC Directive, the Integrated Water Framework Directive, the Developmental Policy Regulation for the principle of environmental integration and so on;
- 3) the role of international agreements to which the EC is a party, briefly reviewing the Article 235 international agreements pre-SEA and the Rio process in the 1990s.

Building on the conceptual framework Chapter 1 offered, this generative process was shown as norm evolution in EC environmental law that can be described as proceeding from market-oriented values to ecosystem-oriented values.

The fact that this evolution has happened mainly through the accumulation of the legal discourse of laws (F in Diagram 2) and the intermediate discourse of laws (E in Diagram 2) shows the endemic nature of institutional practices in the EC environmental regime. In other words, what plays a primary role for framing, thereby opening up a world of common meaning in the environmental issue-area, is not the political discourse around law and of laws, but rather the legal and the intermediate discourse of laws. It is the institutional arrangement of the EC environmental regime that enables this discursive dynamic. This regime provides EC law with an institutional context in which law can further the evolution of norms.

Thus, this paper has approached the question of how law matters. However, what must also be explained is why norm evolution has not taken place more extensively and what likelihood is the sound evolution of environmental norms being distorted structurally? In this respect, more research must be conducted. However, the conceptual framework of this paper may have the potential for application to research projects studying a role of law with respect to norm evolution and governance frames in a specific issue-area.

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