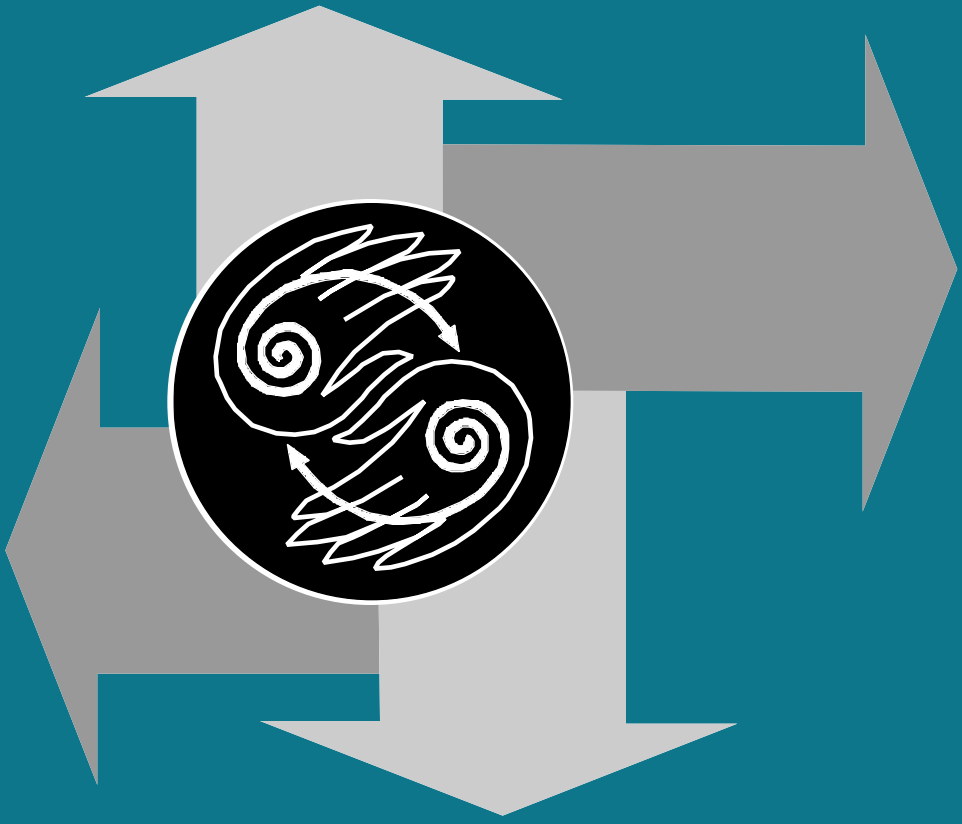
The Maastricht Treaty and the Winnipeg Principles on Trade and Sustainable Development



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The Maastricht Treaty and the Winnipeg Principles on Trade and Sustainable Development

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Executive Summary

The European Union (EU) represents a remarkable process of international political integration and a highly developed customs union. It reflects the dual goals of political integration and internal trade liberalization. Over the past 20 years, it has struggled to balance these goals with the needs of environmental management. This paper seeks to understand these processes by analyzing the European Union as transformed by the Maastricht Treaty in light of the Winnipeg Principles on Trade and Sustainable Development.

A brief overview of the constitutional development of the European Union, the development of the Winnipeg Principles and the manner in which the environment is taken into account by the Maastricht Treaty and in the European Community, form the background to a detailed assessment of the EU experience in relation to each of the Winnipeg Principles. This reveals that there is a remarkable degree of convergence between EU practice and each of the seven Principles. This suggests that the Principles have indeed identified critical areas of concern and represent a useful paradigm to assess other trade regimes.

The European Union has not been equally successful in addressing all of the areas covered by the Principles. Surprisingly, major problems remain with regard to the Principle of Efficiency, despite its central importance to the economic integration process. Significant steps have been taken to realize the Principle of Equity within the EU, although the external record remains quite limited. The elaborate European Community (EC) structure for environmental management has identified the importance of the Principle of Environmental Integrity even though difficulties persist in achieving the necessary measures. Both Subsidiarity and International Cooperation are central concerns of the EU. Significant problems remain with regard to the former Principle. The EU effort in relation to the Principle of Science and Precaution and Principle of Openness appears to be least satisfactory.

The mixed record of the European Union after the Maastricht Treaty in light of the Winnipeg Principles indicates some areas which may merit special attention both in the implementation process and in the Treaty review projected for 1996.

Acknowledgments

The opportunity to review the Maastricht Treaty in light of the Winnipeg Principles has brought me a number of new insights, indicating the cogency of the Principles and their usefulness as an analytical tool. This paper was improved on the basis of review by Nigel Haigh and Ernst-Ulrich Petersmann. I have benefited from the continuous exchange, including a detailed discussion of this manuscript, with IISD staff, in particular Aaron Cosbey and Nevin Shaw.

Introduction: The Maastricht Treaty and the Development of the European Community

The Maastricht Treaty, signed February 7, 1992 and formally known as the Treaty on European Union [1] is yet another piece in the complex legal structure which established the European Community. [2] The complexity of this structure arises from the fact that the countries concerned are seeking to achieve a difficult goal by deeply contradictory means. The goal is economic and political integration of more than 12 sovereign states. For this purpose they are using the instrument of international treaties to create an international organization which possesses many of the attributes of sovereignty while seeking to protect essential aspects of their own sovereign independence. International treaties are designed to achieve an explicitly defined, strictly limited transfer of sovereignty by the contracting parties, invariably states, to the international level. Yet the system of treaties establishing the European Union has created an international organization which has some of the classic attributes of sovereignty: citizenship, control over territory and recognition.

Sovereignty is in principle indivisible. States cannot be sovereign themselves and part of a sovereign entity but that appears to be what the Member States of the EC are trying to accomplish. [3] As the European Economic Community (EEC, widely known as the Common Market) was transformed into the European Community (EC) and transformed again into the European Union (EU), it acquired step by step attributes of sovereignty. Presumably at some point, there is a qualitative shift from the shared exercise of sovereign rights to shared sovereignty as in a federal state. The Member States of

1 *Treaty on European Union.* Luxembourg: Office for Official Publications of the European Communities, 1992.

2 Presumably, in case of doubt, the correct legal name is now "European Union," with the European Community forming one part of the EU. It remains to be seen whether this nomenclature, which requires some very fine legal distinctions every time one name or the other is used, is universally accepted. The name European Economic Community is formally eliminated from all legal texts (Art. G.A.). In this paper, since it is primarily concerned with the the European Community, the name European Union will only be used when it is clearly mandated by the context.

3 The German Constitutional Court circumvented this difficulty in its recent Maastricht decision by interpreting the EC as an organization for shared exercise of sovereign rights. While this may resolve some of the legal problems, it leaves the ambiguities concerning institutional dynamics unaffected.

the European Union have had an interest in blurring this distinction but it is by now hard to argue that development of the European Union has not come at the cost of a loss of sovereignty on the part of its Member States. In the future, allegiance to multiple sovereignties may prove important and provide answers to some of the most intractable problems of international relations. For now, no provisions exist which could accommodate such a contradiction.

The unavoidable contradictions and ambiguities of the EC Treaties have resulted in much confusion and lie at the heart of the controversy surrounding ratification of the Maastricht Treaty. They will probably also come to dominate the debate as an enlarged European Union prepares for the 1996 Conference to further revise the Treaties, as provided by the Maastricht Treaty. They are also reflected in the confusion surrounding the name of this body. The European Union created by the Maastricht Treaty does not supersede the European Community but rather envelopes it with an additional layer of international law. Thus the EC continues to exist within the EU, and sharp legal distinctions will continue to be made between the acts of the Union and those of the Community. These distinctions do not, however, correspond to an intuitively obvious difference so that common practice is likely to view all acts of the European Community as acts of the European Union and the latter name will replace the former in everyday usage even though acts of the Community will be more common than those of the Union which has been given limited institutional form. These ambiguities also contribute to uncertainties surrounding the continuing debate about Maastricht.

Proponents of Maastricht point to the limited nature of the transfer of sovereignty and emphasize the multiple controls over its exercise by the institutions of the EU. Opponents insist on the fact that the Union increasingly exercises full sovereign rights and is not subject to adequate democratic controls. In fact, although they appear mutually exclusive, both views may be accurate.

The key to the EC remains its institutional structure:

- A Commission of 17 members which is responsible for implementation of EC measures and has the sole right to propose measures for the Council to enact; [4]

4 EC Treaties Arts. 155-163. The Commission acts by simple majority of its members.

- A Council with a representative from each Member State which ensures coordination of the general economic policies of the Member States, has the power to take decisions and confers the necessary powers on the Commission to implement its acts; [5]
- A Parliament with 567 directly elected members (increasing in size with each accession) which discusses in open session the annual general report submitted to it by the Commission and has the power to vote censure by a two-third majority of votes cast against the Commission, requiring it to resign; the Parliament participates in EC legislation in accordance with various provisions of the Treaties; [6]
- A Court of Justice composed of 13 judges with wide jurisdiction over matters which pertain to the functioning of the EC; [7] and
- A Court of Auditors composed of 12 members which examines the accounts of all revenue and expenditure of the Community. [8]

These institutions, acting together in ways specified by the Treaties, can adopt legally binding decisions—a form of international legislation—which must be implemented without further review or ratification by any body of any Member State:

- Regulations which have general application and are binding in their entirety and directly applicable in all Member States;
- Directives which are binding, as to the result to be achieved, upon each Member State to which they are addressed, but leave the national authorities the choice of form and method of implementation;
- Decisions which are binding in their entirety upon those to whom they are addressed; and
- Recommendations and opinions which have no binding force. [9]

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5 EC Treaties Arts. 145-154. The Council acts by unanimity, simple majority of its members or by qualified majority with weighted voting which requires 6-8 members including the large states to form a majority. Voting requirements are determined by the Treaties.
6 EC Treaties Arts. 137-144.
7 EC Treaties Arts. 164-188.
8 EC Treaties, Arts. 206-206b.
9 EC Treaties, Art. 189.

The result of these numerous treaties and provisions is a complex and confusing organization which few fully understand. Countries outside the EC have particular difficulties since they never know where the rights of EC Member States end and the authority of the EC begins and in many areas of policy cannot determine with sufficient certainty with whom to negotiate, particularly since the distribution of roles continues to shift. [10] This difficulty is particularly acute when dealing with the interrelationship of two areas of policy, one of which (trade) is within the exclusive competence of the EC while the other (environmental management) represents a shared task of EC and Member States. [11]

The principal elements of the legal structure underpinning the EC are the original EC Treaties, [12] the Single European Act of 1986, [13] and the Treaty on European Union. They are supplemented by numerous "supplementary instruments:" both further treaties and EC Council Decisions; [14] by the accession agreements; [15] the Treaty establishing the European Economic Area with the countries of the European Free Trade Area; [16] the "Europe Agreements" which have been concluded with Poland, Hungary, (then) Czechoslovakia, Bulgaria and Romania, and a vast and rapidly expanding body of secondary legislation which details and amplifies the powers of the Community.

The Maastricht Treaty distinguishes between areas which fall within the exclusive competence of the Community and other areas (where the principle of subsidiarity is to apply) where competences are shared (Art. 3d). However, the Treaty does not explicitly enumerate either block of powers, leaving substantial ambiguity as to their extent. Indeed, the debate about ratification of the Uruguay Round indicates how mixed agreements covering both exclusive and shared competences can be used be the Member States to limit the Community's exercise of its exclusive powers.

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10 Haigh, Nigel. "The European Community and International Environmental Policy," in: *International Environmental Affairs,* Vol. 3 No. 2, p. 163.

11 See below Section 5.4.

12 A Treaty establishing the European Coal and Steel Community (April 18, 1951); Treaty establishing the European Economic Community (April 17, 1957); Treaty establishing the European Atomic Energy Community (March 25, 1957).

13 Single European Act (February 28, 1986).

14 The 1987 edition of the EC Treaties listed 49 such supplementary instruments.

15 Denmark, Ireland and the United Kingdom (1972), Greece (1979), Spain and Portugal (1985), Austria, Finland, Sweden and Norway (1994).

16 Agreement establishing the European Economic Area (May 2, 1992).

As its title suggests, the Treaty on European Union is much more than a trade agreement. It establishes "Citizenship of the Union," extending to every person holding the nationality of a Member State. The rights of citizenship are, however, quite limited, including the right to move and reside freely, the right to vote in municipal elections and elections to the European Parliament at the place of residence irrespective of one's nationality, and the right to petition the European Parliament and to appeal to the Court of Justice. Illogically, however, the Treaty carefully avoids identifying the Parliament as composed of representatives of the citizens of the European Union—a formulation which would have implied the reality of EU sovereignty. Instead it says only that the Parliament is formed of "representatives of the people of the States brought together in the *Community*" [17], The Treaty also significantly amplifies the rules on trade laid down in the previous treaties, introducing a new article on capital and payments, and a title on economic and monetary policy. It is best known for these provisions.

Despite these far reaching provisions, it can be argued that the Treaty on European Union responds primarily to the logic of economic integration central to a process of political integration which was launched 30 years ago by means of the treaties. In other words, the entire structure of the Community reflects a dynamic of integration which is inextricably linked to the process of trade liberalization. This does not, however, imply that all free trade agreements will be subject to the same dynamic.

The original six members of the EEC represented a reasonably homogeneous group of countries in terms of their economic development. Only Southern Italy was at a disadvantage; in fact the relative disadvantage of Southern Italy was less pronounced in 1956 than in 1994. The success of the EEC depended on Franco-German cooperation. It represented a complex deal involving mutual economic advantage and political integration of Western Germany into Western Europe. With the addition of new members, some of which (Ireland, Greece and Portugal in particular) were noticeably weaker economically, this deal was supplemented by the expectation that economic resources would be transferred to the weaker countries in return for their adherence to the integrationist philosophy of the EC.

17 Art. 137 (emphasis added).

The EC was always conceived as a customs union. There have not been many true customs unions, and all of these have tended towards integration. Thus from the outset, the EEC Treaties envisaged more than a free trade area. The EC also reflected a broad political response to World War II and the pressures of the cold war. Consequently lessons from the EC for other trade regimes need to be drawn with caution. On the other hand, the EC can be viewed as a highly developed customs union which internally should, at a minimum, meet the requirements of any principles for trade and sustainable development. Moreover the EC conducts an external trade policy which should also be measured by this yardstick.

The Winnipeg Principles on Trade and Sustainable Development

Trade, environment and development form a complex triangle of relations. Environmental management is increasingly a form of economic policy; development policy has come to recognize that sustainability is an essential criterion for achieving long-term alleviation of basic human needs; and both environment and development look to trade as a means of furthering their goals and recognize the potential that trade can become a vehicle for undermining their aspirations. The relationship has become so close that the essential goals of each of these three policy areas can only be achieved with the active support and participation of those primarily concerned with the others.

Many misunderstandings persist concerning the appropriate response to these complex relationships. It appears desirable to base future policies in all three areas on a common foundation which recognizes the elements of complementarity and identifies areas where conflicts are most likely to occur or most difficult to manage. The formulation of a set of joint principles to govern these relationships appears a valuable contribution to the long-term debate about trade and sustainable development.

During late 1992 and 1993, the International Institute for Sustainable Development convened an international Working Group to seek principles essential for linking trade, environment and development. The group has unanimously endorsed seven principles which are intended to guide trade and trade-related environment and development policies, practices and agreements, to help ensure that they work to achieve sustainable development. [18] The seven Principles are seen as indivisible and the group explicitly rejected any attempt to "cherry pick," i.e., for individuals or groups to focus on certain principles which may be closer to their interests while disregarding those which pose difficulties. Consequently, progress towards meeting the requirements of the Winnipeg Principles must be measured in terms of all seven principles together. At the same time, different individuals or groups may use different entry points, depending on their point of departure. By seeking to reflect the entire linked agenda of trade, environment and development, the Principles also sought to

18 International Institute for Sustainable Development, *Trade and Sustainable Development Principles*. Winnipeg, 1994.

identify the manner in which wider concerns relate to the more specific interests of each concerned group.

This report analyzes the EC Treaties as modified by the Maastricht Treaty in light of the seven Winnipeg Principles. Each section is headed by an introduction to the Winnipeg Principles, followed by a discussion of relevant aspects of EC law and practice. It does not seek to undertake a full analysis of the Maastricht Treaty, nor even of its environmental implications. Nevertheless, the net which it casts is sufficiently wide to capture many essential features of the Treaty. It also provides an indication of the manner in which the three major dimensions of sustainable development—economic policy, environmental management and development—interact constructively.

The Winnipeg Principles identify three key assumptions on which they are based: the need for poverty alleviation; the importance of environmental policies; and the role of trade liberalization. These assumptions are also relevant for the EC, however to differing degrees. Internal trade liberalization is one of the central aspects of the European Community. As the wealthiest region of the world, the EC has a view of poverty alleviation which is significantly different than that of most other countries. [19] The relationship of the Maastricht Treaty to environmental policies requires some discussion.

19 See below Section 5.3.

Maastricht and Sustainable Development

The Maastricht Treaty indicates that the drafters were aware of environmental issues at the level of general aims and that the appropriate handling of environmental policy was an important consideration. It introduced several innovations relative to the original Treaties as modified by the Single European Act.

The aims of the Community evolved from the original formulation in 1956:

> "The Community shall have as its task, by establishing a common market and progressively approximating the economic policies of Member States, to promote throughout the Community a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living and closer relations between the States belonging to it," [20]

to

> "The Community shall have as its task, by establishing a common market and an economic and monetary union and by implementing the common policies or activities referred to in Article 3 and 3a, to promote throughout the Community a harmonious and balanced development of economic activities, sustainable and non-inflationary growth respecting the environment, a high degree of convergence of economic performance, a high level of employment and of social protection, the raising of the standard of living and quality of life and social cohesion among Member States." [21]

The drafters of the text manifestly wished to avoid an outright commitment to "sustainable development," preferring the oxymoron "sustainable growth" but modifying it with "respect for the environment" and recognition of the priority to be given to meeting human "needs."

Given the character of the EC Treaties, culminating in the Maastricht Treaty, their ambiguities and the need for interpretation, the aims are significant since they establish overarching principles for all elements of this complex legal structure. They provide binding criteria for its

20 EEC Treaty, Art. 2.
21 Treaty on European Unity, Art. G (EEC Treaty Art. 2, amended).

interpretation and most importantly for the resolution of conflicts between various policies, for example free movement of goods and environment (as in the Danish Bottle Bill case [22]) or competition and environment (as in the case of subsidies [23] or Assurpol [24]). This implies some lessons for other regimes, such as the GATT, which have been formed from a series of interlocking but not entirely congruent treaties: it suggests strongly the importance of incorporating essential aspects of sustainable development in both the goals and the operative articles governing the new World Trade Organization.

In addition, the Treaty on European Union defines a separate set of objectives for the Union (as distinct from the Community), namely:

> "— to promote economic and social progress which is balanced and sustainable, in particular through the creation of an area without internal frontiers, through the strengthening of economic and social cohesion and through the establishment of economic and monetary union, ultimately including a single currency in accordance with the provisions of this Treaty;
>
> — to assert its identity on the international scene, in particular through the implementation of a common foreign and security policy including the eventual framing of a common defense policy, which might in time lead to a common defense;
>
> — to strengthen the rights and interests of the nationals of its Members States through the introduction of a citizenship of the Union;
>
> — to develop close cooperation on justice and home affairs;
>
> — to maintain in full the *acquis communautaire* [25] and build on it with a view to considering, through the procedure referred to in Article N(2), to what extent the policies and forms of cooperation introduced by this Treaty may need to be revised with the aim of ensuring the effectiveness of the mechanisms and the institutions of the Community.

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22 Kromarek, Pascale. "Free Movement of Goods: The Danish Bottle Case", *Journal of Environmental Law,* Vol. 2 No. 1, pp. 89-107.

23 See below.

24 Bureau of National Affairs (1992), "EC Cites Environment in Exempting Insurance Scheme from Competition Rules," *International Environment Reporter* Vol. 15 No. 2 (January 29, 1992) p. 35.

25 The *acquis communautaire* is a technical term which refers to past agreements which are considered irreversible. In practice this construes the development of the Union as a political one way street.

> The objectives of the Union shall be achieved as provided in this Treaty and in accordance with the conditions and the timetable set out therein while respecting the principle of subsidiarity as defined in Article 3b [26] of the Treaty establishing the European Community."

The result of these interlocking texts is an attempt to use international treaties to create a constitutional document. Because this requires unanimous consent of all states, a certain ambiguity is unavoidable. This creates a text which is subject to interpretation and in particular which allows individual countries to emphasize certain parts which they feel more comfortable with. This classic tool of international negotiation holds the prospect of serious disagreement when applied to an instrument which is in practice supposed to serve constitutional purposes.

These various texts do not refer to poverty but in 1957 they mention "the standard of living" and in 1991 "the standard of living and the quality of life." They reflect the self-assurance of wealthy countries (or, after World War II, of countries which had once been wealthy and expected to succeed again), for whom poverty alleviation is not of paramount concern. This attitude has persisted beyond the accession of countries such as Ireland, Greece, Spain and Portugal in which poverty remains a widespread phenomenon. [27] Only the new Article 130u on development cooperation refers to poverty, implicitly suggesting that it is a phenomenon of developing countries. Indeed, many aspects of the EC Treaties are characterized by the assumption that some choices need not be made since sufficient resources are available to undertake quite contradictory policies. For example, the Common Agricultural Policy has sought to maintain low consumer prices and high producer prices simultaneously, a goal which has not always been achieved but where it succeeded this has been at the expense of highly distorting and vastly expensive policies which less wealthy countries could not afford to undertake. To some extent, this approach is epitomized by the strong emphasis on "growth" as the primary aim of economic policy. In a growing economy, it is easier to avoid difficult decisions concerning equity, distribution of wealth and the optimal use of scarce resources. [28]

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26 Art. 3b as amended by the Maastricht Treaty.

27 See below Section 5.3 on EC efforts to confront income disparities within and without the Union.

28 See Winnipeg Principles, p.20.

In addition to adjusting the aims of the Union and the Community to at least recognize the issues related to sustainability, the Maastricht Treaty also has an impact on EC environmental policy which has been more than 20 years in the making.

The EC and the Environment

1972 was the year in which international organizations needed to make their initial determination concerning the significance of the environmental agenda and their need to respond to it. Through the Stockholm Conference, the United Nations system concluded that the environment was marginal to its major priorities and could be entrusted to a newly created United Nations Environment Programme which was given vast responsibility, few resources and no authority. UNEP was not integrated into the UN development system which was emerging simultaneously, centered on the United Nations Development Programme. [29] The GATT established a Working Group on the environment which was not convened for the following 20 years. The European Community launched its environmental activities with a political mandate from the newly constituted meeting of heads of state and government (which was later formalized as the European Council) but with no particular legal authority in the Treaties.

The fate of each of these three initiatives reflects the different character of the institutions involved. UNEP developed far beyond reasonable expectations in response to a pressing agenda of international environmental issues but failed to have a significant impact on the UN system. GATT was not confronted with the full range of environmental issues until the early nineties when these suddenly threatened to upset the delicate balance of an institution long accustomed to effective action based on an uncertain institutional mandate. [30] The environmental activities of the EC expanded so strongly that they were given a clear legal mandate in the Single European Act which has been further elaborated in the Maastricht Treaty.

EC environmental policy is implemented by means of more than 300 legal instruments (primarily Directives) adopted over the past 20

29 Moltke, Konrad von and Ginny Eckert. "The United Nations Development System and Environmental Management," *World Development* Vol. 20 No. 4 (1992), pp. 616-626.

30 Moltke, Konrad von. "The Last Round: The General Agreement on Tariffs and Trade in Light of the Earth Summit," *Environmental Law* Vol. 23 (1993), pp. 51-531; Moltke, Konrad von. "The World Trade Organization: Its Implications for Sustainable Development," *Journal of Environment & Development* 3,1 (Winter 1994), pp. 43- 57.

years. [31] Its development is marked by a series of five consecutive multi-annual Action Programmes. Beginning with the first Action Programme which sought to give more specific form to a legally questionable political mandate, these documents have provided direction to EC environmental policy. Each of the Programmes has set out an ambitious agenda and while the implementation of the details has been quite poor, the general thrust of action has indeed followed the directions indicated. Thus, the recently adopted Fifth Action Programme, entitled "Towards Sustainability," can be taken as a strong indication of the direction of EC environmental policy even though its details are likely to prove difficult to implement. [32]

By now, EC environmental policy covers virtually every aspect of environmental management. Originally driven by sometimes hesitant recognition that the process of economic integration could not proceed without an accompanying program of environmental management, EC environmental policy has developed a dynamic of its own—abetted by the existence of unambiguous authority in the EC Treaties following the changes introduced in 1986 by the Single European Act, including a new Title on the environment (Art. 130r-130t) and some other Treaty amendments with environmental implications, in particular concerning harmonization. [33]

It is not easy to identify the motives of EC environmental policy. In an initial phase, they were primarily economical, reflecting the view that the elimination of economic barriers between the Member States (six until 1972, nine until 1973, 10 until 1981, 12 since 1986 and 15 from 1995) required measures to harmonize environmental policy. This view was reinforced by the need to draw on a narrow legal base until 1986, primarily Art. 100 (concerning the "approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market" and Art. 235 (a vague mandate which permitted the EC to take unspecified measures necessary to achieve the goals set out in Art. 2). For the purpose of Art. 235, the 1957 mandate to achieve "harmonious" development was interpreted to

31 See Haigh, Nigel. *Manual of Environmental Policy: the EC and Britain.* Harlow: Logman (looseleaf), 12.1. Keyes, Cameron. *The European Community and Environmental Policy. An Introduction for Americans.* Washington, D.C.: World Wildlife Fund, 1991.

32 Commission of the European Communities, *Towards Sustainability. A European Community Programme of Policy and Action in Relation to Environment and Sustainable Development.* Brussels: Commission, 1992.

33 Arts. 100-102.

imply attention to environmental issues beyond the simple harmonization of standards.

Formulation of a Title in the Treaties does not ensure action by the Community. The EC mandate for energy policy has been unambiguous from 1957 on, with special treaties for coal and nuclear power. Nevertheless, no effective EC energy policy has emerged. Indeed it has taken the pressure of an environmental issue—climate change—to move energy policy forward. Similarly transport policy, theoretically a matter of eminent concern for a Community in which barriers are falling, did not develop effectively until the completion of the single market despite a corresponding Title in the Treaties since 1957. Thus, it has been more than the simple logic of linking economic integration and the environment, or the expressed desire of governments, but the internal dynamic of environmental management itself which has impelled the EC to develop strong and frequently effective environmental policies. The provisions of the Single European Act concerning the environment were effective because they simply legitimized what was occurring anyhow. The need to develop environmental policies at EC level has been driven by the joint concerns of economic and political integration and the equally powerful pressure to find environmental measures at all levels at which they were needed, ranging from the local to the transnational. In the latter category, the EC represents a forum of convenience, the only international organization capable of undertaking systematic policy development.

The environmental provisions of the Maastricht Treaty build on the Single European Act although they are not only a development of its approach. While they show serious consideration of the need to reflect environmental concerns and the need to achieve greater sustainability, they also reflect some haste in drafting and relatively limited public discussion prior to their formal adoption. For example, while there is explicit though tortuous reference to sustainability in the aims of the EC, [34] this issue is not picked up in the operative articles concerning the environment. [35] This reinforces the impression that the reference to "sustainable growth" in the aims was largely declaratory and not meant to entail specific actions to operationalize it. [36]

34 See above Section 3.
35 Articles 130r-t.
36 Details of the Maastricht provisions concerning the environment are discussed below in relation to the Winnipeg Principles.

The Maastricht Treaty and the Principles on Trade and Sustainable Development

The Principles on Trade and Sustainable Development

The Winnipeg Principles are organized around seven principles: Efficiency and Cost Internalization; Equity; Environmental Integrity; Subsidiarity; International Cooperation; Science and Precaution; and Openness. This paper seeks to assess the Maastricht Treaty in light of these principles.

The ambiguities of the EC structure come into play when interpreting the Maastricht Treaty as an international trade agreement and seeking to assess it from the perspective of the Winnipeg Principles for Trade and Sustainable Development. At one level, the EC is simply the most highly developed trade regime. At another it is much more than a trade regime and, therefore, hardly to be assessed by the standards of international trade agreements. Moreover, the question arises whether to apply the standards of the Principles to internal trade between EC Member States or to external trade between the EC and non-Member States, a category which is additionally complicated by the existence of numerous classes of "non-Member States":

- Countries which are acquiring membership (a changing group, for example, during 1993/94 Austria, Finland, Norway and Sweden);
- Countries of the European Economic Area (the former EFTA countries) which are not negotiating membership (e.g., Norway from 1995 and Switzerland);
- Countries which have signed "Europe Accords" which include a commitment to seek membership in due course (countries of Central and Eastern Europe);
- Associated countries such as Turkey;
- African, Caribbean and Pacific (ACP) countries (mostly former colonies of EC Member States) which are included in the Lomé Accords;
- Countries with preferential trade agreements (e.g., Israel); and
- All other countries.

The existence of many categories of relationships reflects both the international importance of the EC and the unusual fact that it is a body with attributes of sovereignty which other countries can negotiate to join. It also reflects the fact that modern relationships in the interlocking global economy do not lend themselves to clean distinctions and bloc building. Many of the countries seeking association with the EC also have special trade agreements with the United States, either in the form of a free trade area (in the case of Israel) or through the Generalized System of Preferences (in the case of many ACP countries).

The internal relationships of the EC are unique, reflecting a 40-year process of integration. Consequently, this paper will focus initially on these internal relationships. The EC's external trade relationships are not qualitatively different from those of other Contracting Parties of the GATT. [37] They will be considered insofar as they offer particular insights into the application of the Winnipeg Principles. Environmental issues have played a role in all recent trade agreements the EC has entered into, in particular the most recent Lomé Accord, the European Economic Area and the Europe Agreements. [38] These environmental aspects have not yet received the attention they deserve.

Efficiency and Cost Internalization

Efficiency is a common interest for environment, development and trade policies. An activity is efficient if it uses the minimum amount of resources to achieve a given output, or alternatively, achieves maximum output from a given amount of resources. Increased efficiency is the *raison d'être* for trade liberalization.

Internalization of environmental costs is essential to achieve efficiency. Despite the substantial practical difficulties this entails, high priority should be attached to its implementation. As costs are progressively internalized, the contribution of all economic activity, including trade, to the efficient utilization of resources is enhanced.

The economic logic of the single European market and the thinking behind trade liberalization are much the same: to capture efficiency gains associated with comparative advantage and economies of scale

37 The EC is not formally a Contracting Party but it has equivalent rights.
38 See below.

by eliminating trade barriers. This is essentially what the original EEC Treaty expressed when it stated as its aim the promotion of "a harmonious development of economic activities, a continuous and balanced expansion, an increase in stability, an accelerated raising of the standard of living." To the extent that economic activity is more efficient, it may also utilize fewer natural resources, and to the extent that more economic resources are available, they also can be directed towards preserving environmental quality—provided necessary environmental policies are in place.

From an environmental perspective, there is a risk that such benefits as may be available will be swamped by the scale effects of economic growth and by distortions other than trade barriers which cause overconsumption of environmental goods. This is attributable to a significant degree to the fact that market prices poorly reflect the environmental "costs" of goods and services which are traded. The appropriate policy response to this situation is a mix of regulatory and other instruments which serve to rectify these distortions. These can take several forms: definition of quality objectives and critical loads for the environment; emission standards for certain processes; controls on the production and use of certain substances which are hazardous to the environment; establishment of procedural requirements; or the use of taxes, charges and other economic instruments to adapt the price signals which are provided. The EC has adopted a large number of these measures, frequently citing the need to maintain equal conditions for competition. [39]

The original text of the EC Treaties contained key provisions concerning the prohibition of subsidies which distort competition, [40] provisions concerning cartels and the abuse of market position [41] and the approximation of legislation of Member States. [42] It also contained an Article outlining derogations from the prohibition of restrictions on imports. [43] Among these are "the protection of health and life of humans, animals or plants."

Article 100 originally required unanimity in the Council for harmonization measures. It was adapted by the Single European Act

39 See Haigh, Nigel. *Manual of Environmental Policy: the EC and Britain*. Harlow: Logman (looseleaf).
40 Arts. 92-94.
41 Arts. 85-90.
42 Arts. 100-102.
43 Art. 36.

to provide for qualified majority voting and included special considerations for the harmonization of environmental and consumer protection measures. The new Article 100a also specified for these two policy areas that the Commission was to take "as a base a high level of protection" when submitting proposals to the Council (which was, however, not bound in the same manner in its decisions). It also allowed Member States to extend the derogations of Art. 36 to Art. 100 harmonization measures, adding protection of the environment or the working environment to the list in this case.

These provisions were left largely untouched by the Maastricht Treaty, although the procedure for majority voting was modified and rendered significantly more complex. [44] The major change concerned the introduction of provisions for the coordination of economic policy and the inclusion of provisions for the introduction of a single European currency. In economic policy terms, this represents a logical further step down the road towards full economic integration. It remains to be seen, however, whether the aims outlined in these sections [45] can be implemented in practice.

The EC has included the "polluter pays principle," essentially an economic principle of cost allocation, [46] in all of its Action Programmes on the environment and confirmed it in the text on environmental policy incorporated in the Single European Act. [47] Like most countries, it has struggled to implement it in practice, for example, in the area of agricultural or energy policy. As long as the gross economic distortions of the Common Agricultural Policy (CAP) persist, it is difficult to argue that vigorous pursuit of the polluter pays principle in agriculture will have much beneficial environmental impact because existing distortions outweigh the likely adjustments attributable to environmental cost internalization—although an alternative structure of the CAP might prove less environmentally damaging than the current system. On the other hand, should the

44 Wilkinson, David. "Maastricht and the Environment: The Implications for the EC's Environmental Policy of the Treaty on European Union," *Journal of Environmental Law,* Vol. 4 No. 2, pp. 221-239. See below.

45 Arts. 102a-109m.

46 Organization for Economic Cooperation and Development, Recommendation C(72) 128 of May 16, 1972 on "Guiding Principles Concerning the International Economic Aspects of Environmental Policies," and Recommendation C(74) 223 of Nov. 14, 1974 on "The Implementation of the Polluter Pays Principle," in: *OECD and the Environment*, Paris: OECD, 1986, p. 23-27.

47 Art. 100r.

current agricultural subsidies be reduced or dismantled, the need to incorporate the polluter pays principle in all aspects of agricultural management would become pressing because such environmental distortions would loom much larger in economic terms.

The EC's failure to develop coherent energy policies represents a significant setback in terms of applying the polluter pays principle. In theory, the EC has long had adequate authority to formulate energy policy, given the strong mandate for nuclear energy in the Euratom Treaty and the central importance of coal in the original EEC Treaties. In practice, the interests of Member States have diverged so much that compromises have not been possible. In many respects, energy policy indicates the limits of economic integration within the EC.

Several critical decisions have been taken which develop the application of EC rules concerning the functioning of the common market in the interest of protecting the environment:

- The EC Commission issued a series of "Communications" concerning interpretation of Article 92 as it applies to the environment. Beginning in 1974, and renewed several times subsequently [48], it announced that it will accept subsidies for environmental protection purposes up to a maximum of 15 percent of the net attributable investment expense, provided certain conditions were met. In effect, this interpretation accepts that some subsidies are essential to launch environmental policy even if this is contrary to strict application of the polluter pays principle. The Commission has also issued two Recommendations concerning the application of the "polluter pays principle." [49]
- In a ruling with regard to Danish regulations requiring the use of reusable bottles for certain beverages, the European Court of Justice found that while these represented an obstacle to trade, the attendant distortions were justifiable to achieve the desired environmental benefits. [50] In other words, a balancing of environmental policy goals and considerations of traditional economic efficiency was recognized as legitimate by the Court.

48 Most recently in 1994 with a further Communication on "state aids for environmental protection" (OJ C 71, 10.03.94).

49 Haigh, Nigel. *Manual of Environmental Policy: The EC and Britain.* Harlow: Logman (looseleaf), 12.1.

50 See fn. 21.

- The Commission has decided not to apply EC cartel rules to a newly created French environmental insurance pool, Assurpol, because of the overriding importance of the availability of insurance for this purpose. [51] In this instance, limited interpretations of cartel law (which seek to achieve efficiency by maintaining competition) were modified from an environmental policy perspective.

These measures, taken together, indicate that the Community has struggled to balance the goals of the single market with environmental management priorities while seeking to improve the internalization of environmental costs. Nowhere is this difficulty more evident than in the continuing debate about a carbon and energy tax as an instrument to promote energy efficiency—and thus contribute to meeting the Community's voluntary obligation concerning the limitation of carbon dioxide emissions. [52]

Equity

Equity relates to the distribution both within and between generations of physical and natural capital, as well as knowledge and technology. In the transition to sustainability, special obligations should be assumed by those, primarily in the developed world, who have used resources in the past in a manner which limits the options of current generations, particularly in developing countries. Trade liberalization can contribute to greater equity through the dismantling of trade barriers that harm developing countries.

While domestic equity is a fundamental goal of governments everywhere, policies to achieve it are hard to implement. In seeking to promote greater equity it is possible to strive for growth to generate additional resources for distribution, or to seek better distribution of existing resources, but the two are not mutually exclusive. While there may be trade-offs in the short run, success in the long run depends on pursuing both policies simultaneously.

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51 Bureau of National Affairs, "EC Cites Environment in Exempting Insurance Scheme from Competition Rules," *International Environment Reporter* Vol. 15 No. 2 , January 29, 1992, p.35.

52 Commission of the European Communities, *The Climate Challenge. Economic Aspects of the Community's Strategy for Limiting CO_2 Emissions (European Economy 51)*. Brussels: Commission of the European Communities, 1992.

The original European Economic Community was a relatively homogeneous group of six countries emerging from the devastation of World War II, most of which had significantly disadvantaged regions. Issues of equity were not foremost in the minds of those responsible for the Community's construction and were not a dominant theme for the initial phases of implementation of the Treaties. All Member states were still struggling to reestablish viable economies, all had citizens who were poor and pockets of hunger and deprivation existed, but none would have viewed itself as "developing" in the modern sense of the term.

The second phase of the Community's construction was defined by the German "economic miracle." For a period of several years, essentially lasting until the late seventies, Germany assumed the role of "paymaster" to the Community, tolerating a significant net transfer of resources to other Member States in return for the benefits of an increasingly open market and the international integration offered by the Community to a country uncertain of its position on account of the actions of its predecessor state and the difficulties imposed by division. This period included the accession of Denmark, Ireland and the United Kingdom, with Ireland in particular deriving large per capita net transfers of resources from Community funds.

The issue of internal equity was paradoxically raised by the United Kingdom under Margaret Thatcher. Never an enthusiastic supporter of European integration, Prime Minister Thatcher was confronted with a situation where the United Kingdom, the weakest of the large economies in the Community of nine members, was the only large net contributor to EC funds next to Germany, mostly on account of the impact of the Common Agricultural Policy. After long and acrimonious negotiations, a settlement was reached which limited the potential net contribution from the United Kingdom.

This set the stage for further enlargement by three countries (first Greece and then Spain and Portugal) which were economically less strong than the others. In an alliance with Ireland and Italy, representing the interests of its Southern regions, and building on the precedent set by the United Kingdom, these countries have established the (unwritten) principle that integration must be accompanied by transfers of resources from the wealthier to the poorer countries. Apart from the continuous annual process of EC budget negotiation, this principle was operationalized at each successive stage of EC development. The establishment of the

European Exchange Rate Mechanism (ERM) in 1976 was accompanied by "side payments" (to Ireland in particular to facilitate its participation.) It was recognized that the ERM was potentially burdensome to Ireland's economy since critical variables of fiscal and economic policy would increasingly be determined in relation to the priorities of the central, highly developed, internationally trading economies rather than the "remote," rural, significantly less developed economy of Ireland.

A number of Community Funds have been established which became the instruments of these transfers, sometimes serving parallel policy goals, sometimes acting mainly as a vehicle for financial transfers between governments. Among the most important are those mentioned expressly in the Single European Act (European Agricultural Guidance and Guarantee Fund, Guidance Section, European Social Fund, European Regional Development Fund). The Common Agricultural Policy and the Mediterranean Plan generally pursue independent policy objectives even while effectuating a transfer of resources, while EC Regional Policy long served as an equilibrator of budgets rather than as a tool of regional policy in the normal sense of the term.

Adoption of the Single European Act in 1986 was accompanied by a significant strengthening of these funds. In particular the European Regional Development Fund was given a clear mandate: "to help redress the principal regional imbalances in the Community through participating in the development and structural adjustment of regions whose development is lagging behind and in the conversion of declining industrial regions." [53] (Art. 130c). As a result—and because it no longer needed to carry the main burden of achieving budgetary balance—the Regional Fund has developed in a manner more consistent with its ostensible purpose. Despite this trend, the need for unanimous consent means that all countries must receive some support and standards applied for assistance from the Fund differ from one country to another. Certain regions of Germany, Denmark and the Benelux countries which are disadvantaged in comparison to other parts of their respective country but quite wealthy in a broader EC context (let alone a global one) are eligible for assistance from the Regional Fund.

53 Art. 130c.

The Maastricht Treaty has continued this tradition of efforts to achieve "equity" between Member States. The Structural Funds were to be doubled in real terms between 1987 and 1993, implying large transfers, especially as a proportion of GDP of the less prosperous Member States. [54] The Treaty also declared the intention to "take greater account of the contributive capacity of individual Member States in the system of own resources, and of examining means of correcting, for the less prosperous Member States, regressive elements existing in the present own resources system" [55]—essentially a commitment to ensure net resource transfers to the poorer countries. Title XIV of the Treaties on "Economic and Social Cohesion" was developed further, opening the possibility of a future reorganization and recognizing the possibility of developing other actions to achieve the goal of "reducing disparities between the levels of development of the various regions and the backwardness of the least-favoured regions, including rural areas." [56]

The Maastricht Treaty provided for the establishment of a "Cohesion Fund" to support "projects in the fields of environment and trans-European networks in the area of transport infrastructure." The Cohesion Fund is designed to give the economically weaker Member States additional support to facilitate their participation in Community environmental and transport policies. Article 130d provides for the creation of the Cohesion Fund, in connection with a Protocol on Economic and Social Cohesion, stipulating that only those Member States with a per capita GNP of less than 90 percent of the EC average [57] will be entitled to support. However, only countries which have adopted programs "leading to the fulfillment of the conditions of economic convergence" will be eligible. In other words, access to the Cohesion Fund is conditional on making progress towards meeting the conditions required for participation in the Single European Currency, rendering the implied deal explicit.

A Cohesion Fund Instrument was put in place to bridge the gap between signing the Maastricht Treaty and its entry into force, effectively using existing Community procedures to achieve the desired result. Initial experience with the Cohesion Fund suggests

54 Protocol on Economic and Social Cohesion.
55 Protocol on Economic and Social Cohesion.
56 Art. 130a. (Identical with the text of Art. 130a in the SEA, except for the addition of the last three words).
57 Currently Greece, Ireland, Portugal and Spain.

that, left without explicit guidance, the vast majority of projects will deal with transport and of these the majority will involve road building. Twenty-six out of 33 initial Cohesion Fund projects, representing 85 percent of total funds, were for transport. [58]

In the area of environmental legislation, the EC has also developed instruments which provide special consideration for less developed Member States, for example, by accepting faster implementation in the wealthier states (and by implication slower action by the others), by explicitly allowing Member States to adopt measures which are more stringent than those mandated by the Community (and again implicitly recognizing that EC standards are not at the high level desired by some Member States) and by explicitly differentiated obligations. This is most dramatically illustrated by the Directive on large combustion plants which provides for sulfur dioxide emission reductions averaging 42 percent across the EC by 1998 and 57 percent by 2003. States like Belgium, Germany, France, and the Netherlands have reduction goals of 50 to 70 percent. Britain is to reduce by 40 and 60 percent respectively. Ireland and Portugal, however, can increase emissions significantly, in the Portuguese case by 135 percent in 1998, dropping to 79 percent in 2003. [59]

The relatively consistent evolution of EC support for economically weaker Member states has been perturbed by the political changes in Europe related to the end of the Soviet empire. The EC and the EFTA countries established the European Economic Area, a formal mechanism to coordinate with the Community. Several of these countries have become members of the EU, all of which would be classified among the wealthiest countries of the Union. More significantly, the countries of Central Europe are also moving towards membership, all of which would be among the weakest countries economically. Moreover, they all have low wages and excess production capacity in industries which are in structural decline within the Union as well—consequently pressing for government support to slow the decline or at least to cushion its impact. The interests of many of these industries are vigorously represented in the decisions made by the Union which make supporting the countries of

58 *Europe environment* No. 414, 20 July 1993, p. I.3.

59 Directive on the limitation of emissions of certain pollutants into the air from large combustion plants (88/609/EEC, OJ L336, 07.12.88). See also Haigh, Nigel. "New Tools for Air Pollution Control," *International Environmental Affairs* Vol. 1 No. 1, Winter 1989, pp. 26-37.

Central Europe particularly difficult. The Maastricht Treaty was motivated at least in part by a desire to take some major decisions before the Central European countries' applications could be considered, thus effectively enlarging the *acquis communautaire*, existing EC law which applicants traditionally have been given no derogations from when seeking membership.

The ambivalence of the EU towards the countries of Central Europe is vividly illustrated by the series of "Europe Agreements" concluded bilaterally with each of them. While these Agreements map out steps towards initiation of an accession process (scheduled by the end of the decade but unlikely to occur by then) and provide some promises of assistance along that pathway, they are distinctly restrictive when it comes to short- or medium-term market access for goods from the countries of Central and Eastern Europe, arguably the most important measure to facilitate their early transition to viable market economies. In these areas, internal interest groups have come to dominate an EC decision-making process which is relatively closed [60] and therefore, particularly vulnerable to "capture" by well organized lobbies.

Finally, the transformation of Central and Eastern Europe has also included German unification with its attendant economic disruption. The fact that a major portion of what was previously the strongest economy of the Union now is its weakest segment has far-reaching implications, including the lack of ability of Germany to continue to anchor economic and fiscal policy to the same extent as before, the nature of transfers, and the balance of development efforts within the Union. While initially few visible changes have occurred, it remains likely that further tensions within the structure outlined by the Maastricht Treaty will emerge.

The EC concern for equity has not thus far extended to the distribution of resources within Member States. In this sense, the treaties have been traditional in their approach, considering only Member States as legitimated actors. In particular, centralized countries with strong regional interests (Spain, the United Kingdom, and to a lesser degree France) have been very resistant to any Union-level attempt to strengthen the position of regions within their countries.

60 See below Section 5.7.

The Maastricht Treaty makes a first break with this limitation by including an Agreement on Social Policy concluded by 11 of the Member States (the exception being the United Kingdom). The language of this Agreement is inclusive, that is, it is formulated in a manner which effectively integrates it with the EU structure except that the United Kingdom does not participate in its operation. The Agreement has as its purpose "the promotion of employment, improved living and working conditions, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion" (the latter a term translated from French with a meaning akin to discrimination). The aims of this Agreement, which builds upon a "Social Charter" adopted in 1989, are joint responsibility of the Union and Member States, that is, no clear attribution of roles is undertaken. This is left to future determination through secondary legislation, although the Union is to play a supportive, and thus by implication not a leading, role.

The Social Charter and the attempt to incorporate its essential provisions in the Maastricht Treaty were among the most controversial aspects of the negotiations, largely because of resistance by the Conservative government in the United Kingdom which finally was allowed to opt out of them. Presumably a different government would reevaluate this position.

The Maastricht Treaty also addressed the issue of external support for less wealthy countries by adding a Title on development cooperation to the Treaty structure. EC policy is defined as "complementary" to the policies of Member States. Its aim is notably different from that of the Union itself, being defined as fostering "sustainable economic and social development of the developing countries, and more particularly the most disadvantaged among them; the smooth and gradual integration of the developing countries into the world economy; the campaign against poverty in the developing countries." While unobjectionable as a text, this provision raises two questions: why the goal of development assistance is "sustainable development" while the goal of the Union itself is defined as "sustainable and non-inflationary growth respecting the environment" [61] or simply as "the principle of sustainable growth" (Declaration on Assessment of the Environmental Impact of Community Measures); and what is meant by "the" campaign against poverty. The discrepancy between the articulated

61 Art. 2.

goals within the Union and for its development policies is disturbing and liable to draw into question its commitment to sustainability in either instance.

The most important instrument of EC development assistance has been a series of four multilateral agreements with a group of African, Caribbean and Pacific (ACP) countries, former colonies of EU Member States for the most part, establishing a framework for assistance and preferential access to EC markets. These Agreements, known as Lomé Accords, have increasingly addressed environmental issues. [62] The Lomé Accords have included commodity funds (Stabex and Sysmin) and efforts to stabilize export earnings but have stopped well short of challenging the established interest groups of the EU, agriculture in particular. The recent extension of the Common Agricultural Policy to bananas is an excellent illustration of several contradictory trends. As the EU has expanded, its Member States have included a number of countries capable of producing tropical products. In the case of bananas, the areas within the EU which are capable of producing bananas are at a competitive disadvantage in comparison to several countries of Central America for reasons of climate and topography and the type of fruit they are able to produce. The tension between the two growing regions date back to the origins of the banana trade in the 19th century, so the EU is entering a sensitive field. By extending CAP discipline to bananas, the EC has established a guaranteed price well above world market prices, effectively raising the price of the fruit to consumers and utilizing import tariff revenues to subsidize high-cost internal producers. The likely result will be economic damage to traditional exporters of bananas to the EC, an incentive to grow bananas in areas not well suited to this crop, and ultimately the creation of a sizable banana surplus as production expands on account of the high guaranteed price. All of this is difficult to justify from the perspective of international equity and may be problematic from the perspective of environmental policy since it conflicts with the principle of efficiency by creating incentives to establish banana crops in places which would best be left uncultivated or otherwise used. In this regard, the effect of the banana subsidy is unlikely to differ from the overall effect of the CAP.

The Maastricht Treaty clearly identifies numerous aspects of equity related to the increasing integration of countries within the European Union, including the need to address the distribution of resources

62 Fourth Lomé Convention (Lomé, December 15, 1989).

within Member States. Its response to these issues is, however, ambivalent and the economic development of the EC since Maastricht underlines this ambivalence. In terms of global relations, this was clearly revealed by the United Nations Conference on Environment and Development at which the Community made only very limited and not precisely articulated commitments relating to development assistance. Several Member States made similarly unclear declarations. Emblematic of this approach was Chancellor Helmut Kohl who embraced the goal of development assistance at a level of 0.7 percent of GNP but immediately qualified it by claiming special credit for German efforts in Central and Eastern Europe, essentially counting assistance linked to German unification against the 0.7 percent obligation. Measured against previous commitments to developing countries, this was a genteel way of declaring that no new funds would be forthcoming, and in practice the available funds have declined.

Environmental Integrity

Trade and development should respect and help maintain environmental integrity. This involves recognition of the impact of human activities on ecological systems. It requires respect for limits to the regenerative capacity of ecosystems, actions to avoid irreversible harm to plant and animal populations and species, and protection for valued areas. Many aspects of the environment—for example, species survival or the effective functioning of biological food chains—have values which cannot be adequately captured by methods of cost internalization, highlighting the need for other policy instruments.

The Maastricht Treaty studiously avoids any language which can be interpreted as an absolute standard of environmental integrity. The critical phrases are:

- "preserving, protecting and improving the quality of the environment" (Art. 130r.2) which implies that all three are equal goals to be balanced against one another in a given situation; and
- "a high level of protection taking into account the diversity of situations in the various regions of the Community," a phrase which has two qualifiers: "high" and "diversity." In particular, a "high level of protection" specifically does not permit an absolute interpretation and the diversity of situations can apply to both environmental, social and economic conditions, effectively suggesting that there are several criteria to be applied.

This reticence concerning environmental integrity is balanced to some degree by the Fifth Action Programme for the Environment which is in principle already based on the Maastricht Treaty although adopted before the latter came into force. [63] The Fifth Action Programme draws on 20 years of EC environmental policy and more than 300 legal instruments. These are reflected in the seven themes and targets of the program. For each of these areas, the Programme lays down major objectives (see Table 1).

Table 1: Objectives of EC Environmental Policy

Theme or Target	Objective
Climate Change	No exceedence of absorbing capacity of planet earth for carbon dioxide
	No emissions of ozone depleting substances
Acidification and Air Quality	No exceedence ever of critical loads and levels
	All people should be effectively protected against recognized risks from air pollution
	Permitted concentration levels of air pollutants should take into account the protection of the environment
	Extension of the list of regulated substances which cause pollution and danger to public health and the environment
Protection of Nature Biodiversity	Maintenance of biodiversity through sustainable development and management in and around natural habitats of European and global value and through control of use and trade of wild species
Management of Water Resources	Sustainable use of freshwater resources; demand for water should be in balance with its availability
	To maintain the quality of uncontaminated groundwater
	To prevent further contamination of contaminated groundwater
	To restore contaminated groundwater to a quality required for drinking water production purposes

63 Commission of the European Communities. *Towards Sustainability. A European Community Programme of Policy and Action in relation to the Environment and Sustainable Development*. Brussels: Commission of the EC, 1992.

Theme or Target	Objective
	To maintain a high level of ecological quality of surface waters with a biodiversity corresponding as much as possible to the unperturbed state of a given water
	Reduction of discharges of all substances to marine water, which due to their toxic persistence or accumulating impact could negatively affect the environment, to levels which are not harmful to a high standard of ecological quality of all surface waters
The Urban Environment	No person should be exposed to noise levels which endanger health and quality of life
Coastal Zones	Sustainable development of coastal zones and their resources in accordance with the carrying capacity of coastal environments
Waste Management	Rational and sustainable use of resources
	Prevention of waste (closing of cycles)
	Maximal recycling and reuse of material
	Safe disposal of any waste which cannot be recycled or reused, following ranking order: - combustion as fuel - incineration - landfill

The Maastricht Treaty gives additional legal weight to Community Environment Programmes since it makes express provisions for "general action programmes setting our priority objectives to be obtained" and creates an obligation for the Council to "adopt the measures necessary for the implementation of these programmes," although in principle such an obligation exists already and the Council is unlikely to allow so vague a stipulation to force its hand. [64] While the Fifth Action Programme reflects the principles underlying the Maastricht Treaty it is uncertain whether it could have been adopted in the same form once the Maastricht Treaty is in force.

64 Art. 130s(3).

Implementation of all of these objectives is unlikely to occur rapidly. Nevertheless, even a strong move towards implementation could cause noticeable impacts on trade. Two examples may illustrate this point. The EC has linked adoption of a carbon and energy tax to adoption of comparable measures in the major trading partners of the OECD. This can be interpreted as a blocking move since tax systems differ widely between OECD countries and there is no evidence which indicates that a change in the marginal tax rate on the order of magnitude proposed would alter that picture, particularly since many manufacturers can be assumed to have energy use reduction strategies they can implement. On the other hand, a significant carbon and energy tax could impact certain industries, particularly the producers of commodities and commodity industrial products. In this instance, lack of parallel action in other OECD countries would require a border adjustment much like that enacted to compensate for the US Superfund tax. Such an adjustment, while consistent with GATT principles, would run counter to the desire of trade policy makers to eliminate border measures of all kinds and there is scope for the development of nontariff barriers unless careful criteria are applied to prove actual economic impacts.

Similarly, the EC has begun to address the issue of packaging wastes, stimulated by German regulations, followed by French law which took a somewhat different approach. The German regulations require the achievement of specified rates of reuse and recycling of packaging materials while imposing on the manufacturer rather than the consumer the obligation to ensure that these rates are met. Such a shift in responsibility for the fate of packaging—essentially an issue which parallels the "mode of production" issues at the opposite end of the packaging life cycle—can create particular burdens on manufacturers outside the EC, as was well illustrated in the Danish Bottle Bill case. [65]

The EC has negotiated "Europe Agreements" with the countries of Central and Eastern Europe (CEE) which have indicated a desire to move towards membership (Czech Republic, Hungary, Poland, Slovak Republic) or to develop long-term association agreements with the EC (Bulgaria, Romania). These agreements are largely comparable. The principal goal of the Europe Agreements is to further the

65 See above footnote 22. Also Fishbein, Bette K. *Germany, Garbage and the Green Dot*. New York, NY: Inform, 1994.

integration of the economies of the respective countries of CEE with the EC by providing steps towards the free movement of goods, services and factors. While many tariffs and quotas are eliminated immediately, others are subject to a phase-in period of up to six years. These include many products whose production is particularly sensitive from an environmental perspective, and which are of particular economic importance to the economic development of the countries of CEE: coal, iron, steel, some chemicals, furniture, leather goods, footwear, glass, clothing and textiles. Agricultural products are excluded from the Agreements.

The Europe Agreements include a provision which requires the CEE country to approximate its laws with those of the Community and specify that this obligation extends, among other areas, to EC environmental policy.

The EC and the individual countries of CEE also agree to cooperate in the area of the environment, specifying a long list of areas which largely correspond to those covered by the Fifth Action Programme. This has the implicit effect of making the goals of the Action Programme guidelines for environmental policy development in CEE. However, initially no joint mechanisms have been developed to ensure implementation.

In addition, the Agreements specify a range of forms of cooperation between the EC and the relevant country, including information exchange, education and training, harmonization of legal standards, regional cooperation, the development of strategies to confront global challenges and research on environmental pollution.

A Protocol to the Europe Agreements provides special rules concerning cooperation with regard to the protection of transboundary aquatic resources. The protocol specifies that both parties will work to reduce water pollution and to establish an early warning system.

The Europe Agreements create extensive obligations for the countries of CEE with regard to environmental policy. These implications may be far-reaching. Although the General Agreement on Tariffs and Trade does not currently recognize that countries may distinguish between goods which are imported according to their mode of production, the European Agreements effectively provide the EC with a legal base to challenge imports from the countries of CEE if the requirements concerning environmental policy are not fulfilled. The

EC is providing modest financial assistance to the countries of CEE to assist in the adjustment process. In particular, the PHARE program is aimed at supporting the Czech, Hungarian, Polish and Slovak governments.

The situation is rather different with regard to the countries of the European Economic Area. Several of these countries have a number of environmental regulations which are more stringent than those of the EC, for example, a comprehensive ban on the import of cadmium or the import of products containing cadmium [66] (in other areas, the EC is more stringent). The countries of the EEA which are negotiating accession to the EC have requested derogations from EC environmental requirements which are less stringent than theirs, arguing, among other reasons, that EC policy is liable to evolve in the direction of their standards over time anyhow. The EC Commission originally indicated that it is not prepared to give derogations from the *acquis communautaire*, be they for weaker or for stronger environmental standards. [67] It modified its position when faced with the possibility that inflexibility on environmental standards could jeopardize public acceptance of EC accession in those countries.

Subsidiarity

Subsidiarity recognizes that action will occur at different political levels, depending on the nature of issues. It assigns priority to the lowest jurisdictional level of action consistent with effectiveness. International policies should be adopted only when this is more effective than policy action by individual countries or jurisdictions within countries.

Environmental policies can reflect differences in environmental conditions or development priorities. This may lead to different environmental standards within countries, at the national level or even among groups of countries, involving both higher and lower standards than those applied elsewhere. In the absence of agreements voluntarily accepted by all affected countries, where the

66 Moltke, Konrad von. *The Regulation of Existing Chemicals in the European Community—Possibilities for the Development of a Community Strategy for the Control of Cadmium*. Brussels: Commission of the European Communities, 1986.

67 "EC Enlargement: Commission Recommends Firm Stand on Environmental Matters," *Europe environnement* No. 414, 20 July 1993, pp. I.1-2.

environmental consequences remain within domestic jurisdictions, other countries should not use economic sanctions or other coercive measures to try to eliminate differences in standards. Where there are significant transborder environmental impacts, solutions (including international environmental agreements, the formulation of international standards, incentives for voluntary upgrading of standards and the possible use of trade measures) should be sought multilaterally.

The principle of subsidiarity was defined in large measure in relation to the debate about the Maastricht Treaty. It is formulated in Article 3b: "In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community." This is a definition subject to extensive interpretation which contains very restrictive language ("only and in so far") together with highly evaluative terms ("better" and "sufficiently"). Despite these uncertainties, there can be no doubt that the Maastricht Treaty fully recognizes the need for incorporating this principle. However, the Treaty does not specify unambiguously which are the "blocks of competence" of the Community and of the Member States. [68] A former president of the European Court has commented that "the paragraph on subsidiarity is a disgraceful piece of sloppy draftsmanship, so bad that one must assume it to be deliberate." [69]

As the debate in Europe about Maastricht unfolded, the subsidiarity principle became the focus of much attention. It served two essential and loosely related purposes. It was designed to assuage the fears of citizens in all Member States (although only those in Denmark, Ireland and France got to express them) that the Treaty would transfer too much authority to a remote and bureaucratic institution, effectively undermining vital elements of local and national control. The principle of subsidiarity also served to review Community policies with a view to weeding out measures, including numerous

68 Commission of the European Communities, "The principle of subsidiarity" *Communication of the Commission to the Council and the European Parliament,* SEC(92) 1990 final, October 27, 1992, p. 3f.

69 Lord McKenzie Stuart, quoted in *Financial Times* December 7, 1992, p.7.

environmental measures, which were felt to be undesirable for a number of reasons.

The attempt to use the principle of subsidiarity to reduce the Community role in environmental affairs is not well grounded in the Treaty. Environmental policy is now firmly embedded throughout the Treaties. Moreover, the principle of subsidiarity has been an integral part of EC environmental policy since the First Action Programme effectively enunciated it. [70] While it can be argued that not all environmental measures properly respected this principle in practice, the use of Directives to achieve environmental goals in the Community further shields most measures from review since the Directive is an instrument of subsidiarity. It defines the objectives of a measure but leaves Member States relatively free in the choice of the appropriate means, in other words it recognizes that the role of the EC is to define objectives but that these are actually better implemented by the Member States than by the Community. It can be argued, however, that some Directives are so detailed in their technical prescriptions that they leave little scope for Member States discretion.

The issue of centralization of powers is a much more serious one. The problems associated with the practical implementation of the principle of subsidiarity are vividly illustrated by a Communication of the Commission to the Council and the European Parliament on the principle. [71] The Commission is anything but contrite about its role, complaining that the principle is used to blame the Commission in an "unfair" manner when "it is doing no more than fulfill the two prime tasks assigned to it by the Treaty." It emphasizes that "subsidiarity cannot be used to bring the Commission to heel by challenging its right of initiative and *in this way altering the balance established by the Treaties.*" (emphasis in original).

70 Approved 22.11.1973 (OJ C112, 20.12.73). See Haigh, looseleaf, page 2.5: "The principle of the appropriate level. In each category of pollution, it is necessary to establish the level of action (local, regional, national, community, international) best suited to the type of pollution and to the geographical zone to be protected."

71 Commission of the European Communities. "The Principle of Subsidiarity" *Communication of the Commission to the Council and the European Parliament*, SEC(92)1990 final, 27.10.92.

The Commission's position on subsidiarity is a procedural rather than a substantive one, creating the impression that willingness to permit greater flexibility in the formulation of Community law is not present. The Commission statement represents an argument between EC institutions—primarily the Commission and the Member States represented in the Council—rather than a central concern about the structure of government in the Community as a whole. This impression is reinforced by the fact that the Commission interprets the principle mainly as governing relations between the EC and Member States and does not extend beyond the national level to regional and community governance. Indeed, one irony of the EC debate about subsidiarity is that the country most concerned to preserve the principle is the United Kingdom, which is among the most centralized of Member States in its internal governance structure.

Thus the focus of the debate about subsidiarity is different in individual Member States. While in Denmark, the central issue is community control, in the United Kingdom it is a matter of national sovereignty. In responding exclusively to the latter concern, the Commission strongly reinforces the fears of citizens in other countries. It is to some extent a victim of its own structure as a supranational organization with Member states as the principal actors. Nevertheless a close reading of the various texts concerning subsidiarity in the European Community leaves a distinct impression that the process of transfer of powers to the Community is a one way street, with powers flowing from Member States to the EC. Once transferred, the doctrine of *acquis communautaire* and the particular focus of Community experts accustomed to treaty rather than constitutional law, serve to render discussion of redistribution relatively futile. The debate about subsidiarity has been correspondingly acrimonious, continuing through several Summit meetings in 1992 and 1993 and leading to an inter-institutional agreement between the European Parliament, the Council and the Commission. This "commits the Commission to include a justification under the principle of subsidiarity for any legislative proposal it makes and to draw up an annual report for the Parliament and the Council on compliance with the principle. The Parliament is to hold a public debate on that report." [72]

72 Haigh, Nigel. "The Environment as a Test Case for Subsidiarity," *Environmental Liability* No. 1, 1994.

The Maastricht Treaty stipulates that Community environmental law "shall not prevent any Member State from maintaining or introducing more stringent protective measures. Such measures must be compatible with this Treaty. They shall be notified to the Commission" (Art. 130t). This stipulation represents one of the few substantive provisions to operationalize subsidiarity in the Treaty (although it is not discussed in the Commission's Statement on the principle) and reflects the need to allow some variation in environmental policies to reflect local conditions. The criterion of compatibility with the Treaty is, however, subject to interpretation. Presumably a ban on cadmium in individual Member States, and comparable measures being defended by the Scandinavian applicant countries, is not compatible with the Treaty. Denmark has such a ban in place but has been unable to enforce it in practice against products entering the country from other EC countries. Faced with widely differing policies concerning the control of cadmium, the Commission has for several years been seeking to develop an EC position on the substance which is acceptable to both producer countries (such as Germany or the United Kingdom) and non-producer countries (such as Denmark). [73]

In practice, EC environmental legislation has already often respected the principle of subsidiarity, most dramatically in the directive on large combustion plants which permits Spain to undertake lesser reductions in acidifying emissions than most other countries and actually provides for an increase in sulfur dioxide emissions in Portugal, Greece and Ireland. [74] It also provided Spain and Portugal with a special derogation from the otherwise firm obligation to use best available technology for any new major combustion plants. Spain used the occasion of the Maastricht Treaty to remove the possibility of a further tightening of emissions through future directives by obtaining a Declaration which stipulates that "changes in Community legislation cannot undermine the derogations granted to Spain and Portugal until 31 December 1999" under the Directive. [75] This quite extraordinary act of preemption of the Community legislative process by marginal notes to a treaty between the Member States indicates how powerful the EC legislative process is, the extent to which individual Member States already feel unable to control it and how sensitive environmental issues have become within the EC.

73 Action Programme to Combat Pollution by Cadmium (OJ C30, 04.02.88).
74 Directive on the limitation of emissions of certain pollutants into the air from large combustion plants (88/609/EEC, OJ L336, 7.12.88).
75 Declaration on the Directive of 24 November 1988 (Emissions).

Article 130t provides for deviation from a Community norm in one direction only: upwards. To balance this determination, the Treaty incorporates a special provision for situations where costs of EC environmental measures are "deemed disproportionate for the public authorities of a Member State," the Council "shall lay down appropriate provisions in the form of temporary derogations and/or financial support from the Cohesion Fund." This provision is likely to prove difficult to interpret since it provides an ambiguous standard which triggers required action, effectively allowing conflicting interpretations of the nature of the contractual obligation. It is also restricted to public authorities and thus does not apply to private actors whereas, according to the polluter pays principle, normally it will be private actors (consumers) who should ultimately pay environmental costs. The provision identifies this difficulty by specifically stating that it is "without prejudice to the polluter pays principle," adding yet another level of complexity to its interpretation.

At no time has the principle of subsidiarity been considered in relation to the exclusive powers of the Community. The definition provided in the Maastricht Treaty explicitly restricts its application to shared powers. As the Community grows, it may nevertheless become necessary to consider whether certain Community powers do not need to be reassigned to other levels of government. This relates, for example, to external trade relations, an area which has accrued largely to the Community by virtue of its authority over the customs tariff. Nevertheless, situations may arise where Member States have strong regional obligations which are not congruent with those of all Community members and which may, therefore, require application of the principle of subsidiarity to areas of exclusive Community authority as well as those with shared responsibility. Such a move would presumably be strongly resisted as running counter to the doctrine of *acquis communautaire*.

The Maastricht Treaty does not address how to manage conflicts between policies (such as trade) which are the exclusive competence of the Community and policies (such as the environment) which are subject to the principle of subsidiarity. In this respect, it still reflects the shortcomings of international regimes in general which do not provide mechanisms to deal with policy conflicts. The central issue is whether such conflicts are to be handled by the institutions of the Community itself or require some form of special cooperation between EC and Member states. The relationship between trade and environment at Community level is further burdened by the fact that

trade policy is handled through the Article 113 Committee (which is linked to the economic authorities of Member States) whereas environmental policy is the domain of the Council (which is managed by the foreign affairs divisions). Ultimately, these issues are likely to require the intervention of the Court of Justice to determine just how far EC jurisdiction extends (and, by implication, how severely national sovereignty has been limited) and whether a more highly developed process to coordinate between the Council and the Article 113 Committee needs to be devised.

The Maastricht Treaty creates a new consultative body, the Committee of the Regions, which is designed to bring closer cooperation between the European Community and subnational levels of government in the Member States. To this extent, it recognizes the tension which is expressed by the principle of subsidiarity.

The Committee of the Regions is designed to provide an avenue to allow direct participation of regional interests in Community decision-making. It responds to a continuing difficulty experienced by several Member States. Those with strong regional bodies (Belgium, Germany and Italy) have recognized that increased powers for the EC inevitably represents a shift towards the federal level in the internal balance of powers between regions and national authorities. In each of these countries, international relations remains the domain of the federal authorities which thereby control relations with the EC while the subject matter covered by the EC increasingly concerns issues—such as environmental management, social and cultural policy—which are generally the responsibility of the regional authorities. Several of the more centralized Member States (France, Spain and the United Kingdom in particular) have strong regional movements which challenge the central authority. These countries presumably view the Committee of the Regions as a way to better integrate these movements in a forum they will continue to control.

The Committee of the Regions is not composed of representatives of the regions. The Treaty is silent on the matter of qualifications of the members. Countries will nominate the members, leaving full discretion to the national authorities concerning the appropriate selection process. In a country like Germany, with a constitutional body representing the *Länder*, nominations will be controlled by representatives of the *Länder*. In a country like France, with regional government which is firmly integrated into the national structure,

nominations will in practice be controlled by the national government. The Treaty does not provide much information about the new Committee's responsibilities which are construed in exact parallel to those of the Economic and Social Committee, a body whose role within the EC has declined in proportion to the increase in authority of the European Parliament. Neither the Economic and Social Committee nor the Committee of the Regions are considered to be institutions of the EC. [76] They are advisory bodies of the Council and the Commission. [77]

International Cooperation

Sustainable development requires strengthening international systems of cooperation at all levels, encompassing environment, development and trade policies. Where disputes arise, the procedures for handling them must be capable of addressing the interests of the environment and the economy together. This may involve changes to existing rules, changes to existing dispute settlement mechanisms, or the creation of new mechanisms.

International disputes must be resolved internationally. This requires open, effective and impartial dispute settlement procedures that protect the interests of weaker countries against the use of coercive political and economic powers by more powerful countries. Unilateral action on transboundary environmental issues—an option generally available only to a few large countries—should be considered only when all possible avenues of cooperative action have been pursued. Trade sanctions are the least desirable policy option, signifying failure by all parties concerned. The most desirable forms of international cooperation will avoid conflicts, by working to improve human well-being and the environment internationally, and by improving the functioning of the global trading system.

The Maastricht Treaty represents the most intensive form of multilateral international cooperation which currently exits. With an elaborate institutional structure and involving substantial transfers of sovereignty, the EC now occupies a unique position between sovereign states and international organizations, in many respects,

76 Defined by Art. 4 to be the European Parliament, the Council, the Commission, the Court of Justice and the Court of Auditors.

77 "The Council and the Commission shall be assisted by an Economic and Social Committee and a Committee of the Regions acting in an advisory capacity." (Art. 4.2).

more like the former but structurally comparable to the latter. It has developed a wide range of internal procedures to support the level of cooperation necessary to render the organization effective. The EC is in many ways unique and direct analogies from its practices to other forms of international cooperation are problematic. Nevertheless, its procedures can be viewed as indicative of the kinds of solutions which may need to be considered in other fora as international cooperation develops.

The EC has legislative authority in the sense that it can create binding law through the sole action of its own institutions. These institutions reflect a changing balance of interests as the EC has evolved, with Member States still firmly in control of all vital decisions. The reality of EC legislation has left the Community with little choice in the matter of languages. A fundamental principle of government is that legislation must be comprehensible to those to whom it applies. Consequently every enlargement of the Community has added to its linguistic complexity. By now, all legislative acts and many other documents, are debated, decided and published in nine languages (Ireland having agreed to allow Gaelic, formally an official language of the Community, not to be used). This linguistic complexity is in sharp distinction to general diplomatic practice where many activities are conducted in a limited number of languages.

The European Parliament has evolved, along with the Community, from a consultative body composed of representatives of national parliaments to a directly elected body, and to an active participant in certain aspects of the legislative process.

The Court of Justice has acquired significant authority despite the absence of strong sanctions to enforce its rulings. It relies on the general interest of Member States in the Community to override possible disadvantages associated with a specific ruling. The Maastricht Treaty establishes a Court of First Instance which reviews cases brought before the Court and enlarges the rights of private citizens to bring forward cases.

The Council is the most traditional of the institutions of the EC in terms of forms of international cooperation. Nevertheless, even the Council has evolved a number of significant innovations, among them the Coreper, a body which permits intensive and continuous cooperation between Member States on all matters before the Council. It also benefits from the fact that representatives of Member States in the Council are in fact members of an EC institution. Their

votes are binding and not subject to review or change by their government. This permits the enforcement of decision deadlines as an effective tool of EC policy making.

The Commission is the institution most closely identified with the Community. It benefits from the existence of binding legislation which it enforces, the sole right to propose new legislation and the fact that the Community has its own sources of revenue (customs duties and a fixed portion of value added tax) which are no longer dependent on annual budget authorizations in the Member States.

As the EU confronts the prospect of further enlargement, with the possibility of more than 20 members within 10 to 15 years, the institutional viability of this structure is being considered. It was designed originally for a Community of six Member States with quite circumscribed responsibilities. Over the years, membership has expanded to 12 and the EU's responsibilities have grown apace.

In external relations, the EU acts much like a sovereign state. However, its own character as an international organization tends to render it more open to international cooperation. In practice, such cooperation is burdened with uncertainties related to the shifting competences between the EU and Member States. For example, in the stratospheric ozone regime, the EC was generally responsible for all aspects of the negotiation, with the significant exception of the creation and management of the Interim Fund established to facilitate participation by developing countries. [78]

Science and Precaution

The interrelated nature of trade, environment and development can give rise to conflicts in short run objectives, and policies designed to address these should be shaped by objective criteria. Science, in particular ecological science and the science of complex systems, can provide the basis for many necessary decisions, especially regarding the suitability of health, safety and environmental standards. Action to address certain problems, however, will still have to be taken in the face of uncertainty and scientific disagreement, particularly where mistakes have very serious consequences. It is, therefore, also essential in certain instances to adopt a precautionary and adaptive approach that seeks the prevention and easing of environmental stress well

78 See p.13 for a discussion of development cooperation.

before conclusive evidence concerning damage exists, and which adapts policy as new scientific information becomes available.

The Single European Act introduced a new Title concerning Research and Technological Development (Art. 130f-130q). The purpose of this area of policy was defined as strengthening "the scientific and technological basis of European industry and to encourage it to become more competitive at an international level." These Articles were further modified by the Maastricht Treaty. Some of the changes suggest that the 1986 text had been drafted with insufficient care. The aims were augmented by the provision that the Community was to promote "all research activities deemed necessary by virtue of other Chapters of this Treaty." [79] This corrected the obvious mistake that EC research policy was limited to industry and competitiveness. The Maastricht Treaty furthermore corrected a strange distribution of tasks between the Community and the Commission under the 1986 text. Research is now clearly defined as a shared responsibility of the Community and Member States.

The scientific basis of EC environmental legislation has been a matter of intense debate in one Member State—the United Kingdom. In particular, the House of Lords repeatedly criticized the Commission's proposals for the inadequacy of their scientific basis. The House of Lords is composed of hereditary and life peers, with many of the latter appointed on account of distinguished scientific achievement. Consequently, the House of Lords Committee responsible for scrutinizing EC proposals within the United Kingdom has developed a reputation as probably the most consistent and rigorous review body for EC environmental proposals outside the institutional structure of the Community.

For many years, the Community's environmental policy was built around the harmonization of Member State legislation. The existence of a measure in at least one Member State was the trigger for Community action (with an agreement that Member States would notify proposals to the Commission and not act on them for a reasonable period of time while the Commission considered its own actions). As long as the Community's policy was one of harmonization, there appeared to be no urgent need for an independent source of scientific information. In practice that was not

79 The term "Chapter" is strange in this context since it is inserted in a Title while there are "Chapters" only as subsections of "Titles."

the case since Member States could and did assess the significance of scientific evidence quite differently.

The acid rain debate in the Community was stalled for many years because several governments, led by the Federal Republic of Germany, denied the significance of the available scientific evidence; in a subsequent phase, the British government was isolated in this position. Later, the British and the German governments advocated the introduction of unleaded petrol for different reasons, based on different assessments of the scientific evidence. The German government sought the measure to permit the introduction of catalytic converters on automobiles because it wished to reduce acidifying emissions; it did not believe there was sufficient evidence that leaded petrol represented a public health hazard. The British government wished to see lead removed for reasons of public health but denied the need for catalytic converters. The uncertainties concerning the public health aspects persisted despite a Community-wide effort to measure blood lead levels. [80]

Measures to control the ocean dumping of waste from titanium dioxide production reflected differences in science assessment. The British government stated that "the net effect of the Commission's proposals would have been to increase pollution and impose unnecessary costs on the UK industry" (largely because of the need to dispose of the wastes on land.) [81] And the Community failed to respond to early U.S. assessments concerning stratospheric ozone depletion because it was taking advice from a very limited number of individual scientists who remained critical of key National Academy Reports. In none of these instances did the Commission develop an independent or open structure of science assessment.

Recently, based on the mandate of the Single European Act, the Community has become more proactive in matters of environmental policy, for example, developing its own assessments on whales, seal products and leg hold traps. The procedure for conducting science

80 Directive on biological screening of the population for lead (77/312/EEC, OJ L105 28.04.77).

81 Directive on waste from the titanium dioxide industry (78/176/EEC, OJ L54 25.02.78); Directive on procedures for harmonizing the reduction and elimination of pollution caused by waste from the titanium dioxide industry (89/428/EEC, OJ L201, 14.07.89), replaced by 92/112/EEC, OJ L409, 31.12.92 after the original Directive was declared void by the Court of Justice. Haigh, Nigel. Manual (see fn. X), p. 4.9-5.

assessments remains, however, ad hoc and is frequently open to criticism, as is shown in a long standing dispute between the United States and the European Community on bovine growth hormone.

The mandate in the Maastricht Treaty will probably not change the overall situation concerning research, science assessment and Community environmental policy. Because this is an area of shared responsibility, Community research is based on "multiannual framework programmes" and cofinancing arrangements which do not allow flexible programming of funds for shifting policy needs. Thus, the Community can support research on long-term policy developments such as climate change and the assessment of toxic substances while continuing to rely on ad hoc sources of information for the actual development of specific measures.

The Maastricht Treaty explicitly embraces the precautionary principle:

> "Community policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Community. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at the source and the polluter should pay. Environmental protection requirements must be integrated into the definition and implementation of other Community policies."

The precautionary principle was added to this text in the Maastricht Treaty which otherwise represents a refinement of language which could already be found in the Single European Act. Because this represents a new principle in EC law, few measures have thus far been adopted to give the precautionary principle practical form in EC environmental policy. [82]

Openness

Greater openness will significantly improve environmental, trade, and development policies. Just as access to information is a condition for effective participation by producers and consumers in markets, public participation, including open and timely access to information, underlies the formulation and practical implementation of

82 Even before the Maastricht Treaty, the introduction of CFC production limits was explicitly stated to be a precautionary measure.

environmental policies. It is also important in minimizing the risk of "protectionist capture," (that is trade policies will be manipulated to favour inefficient producers at the expense of others).

While it is widely recognized that openness and accountability should be enshrined in domestic processes, they tend to be abandoned when issues assume an international perspective. This ignores the changing nature of international affairs, characterized by, among other things, the increasing globalization of economic activity, and our increasing awareness of serious environmental problems which cannot be adequately addressed at the national level. Since action by individual governments will often have significant international effects, there is a need for internationally agreed criteria and mechanisms of participation, access to information and accountability at the international level.

Legislation in the European Community is dominated by experts, frequently government officials or government employed experts. It is not the result of a traditional democratic process despite the existence of the European Parliament and the increase in authority which the Maastricht Treaty brings to it. The complex structure created by the sequence of Treaties is incomprehensible to most who have no direct involvement in the Community, and even to some who are so involved.

Nowhere is the origin of the Community in traditional international treaties and the practice of diplomacy more evident than in the persistence of some extraordinary vestiges of secret action by Community institutions. A number of examples may suffice to illustrate this point.

The original Treaties assigned a controlling role to the Member States through the Council, the only body with authority to adopt new legislative instruments. However, the Treaties did not create a continuing institutional structure through which the Member States could effectively exercise their control. Member States were (and are) represented continuously at the Community through an ambassador, reflecting the traditional notions of diplomacy embodied in the Treaties. During the first months of existence of the EEC, the Member States formed a Council of Permanent Representatives (Coreper) which effectively took over the task of actually negotiating EC legislation once a proposal has been adopted by the Commission and transmitted to the Council for action. In 1965, the role of the Coreper was formalized when the separate institutions existing under

the three original EC Treaties were merged into a single Council and a single Commission. [83] The Maastricht Treaty fully integrates the Coreper into the Treaty structure, actually mentioning the Coreper ahead of the General Secretariat of the Council, the administrative unit of that body. The strength of the Coreper, initially not provided for by the Treaties, is one of the reasons why the Commission jealously guards its exclusive right to propose measures.

No minutes of deliberations of the Coreper are published. In practice this can mean that a proposal submitted by the Commission can be amended beyond all recognition and enacted into law without any publicly accessible record of its evolution. This has, indeed, occurred on numerous occasions. While information on this process can be obtained informally, the effect is to limit its availability to a relatively small group of experts. The new decision-making procedures set out in the Maastricht Treaty provide several opportunities for formal changes to Commission proposals and explicitly recognize the Commission's right to alter its proposals. Presumably this will also lead to greater publication of changes although new text inserted by the Council at the time of making its decision will remain outside public scrutiny. [84]

The secret ways of diplomacy extend to the Council itself, even though it is enacting new binding legislation which can and frequently does preempt national and subnational legislators. The minutes of the Council are not published, permitting the representatives of each country wide latitude in interpreting actions to suit their own political purposes. Moreover, in accordance with standard diplomatic practice, decisions are frequently accompanied by declarations made by one or several parties, often by the Commission and sometimes by the Council itself. These declarations are again not normally made public even though they are considered authoritative interpretations of the measures which have been adopted, particularly if they are made by many participants or left uncontradicted.

The Commission is responsible for the implementation of Community law. It takes declarations for the minutes into account when interpreting the meaning of Regulations or Directives or

83 Treaty establishing a Single Council and a Single Commission of the European Communities (signed in Brussels on 8 April 1965).

84 Such texts are normally negotiated in the Coreper ahead of Council meetings and could, therefore, be published.

deciding on appropriate enforcement actions. In some instances such declarations have been alleged to contradict the meaning of published texts. At the very least, this bizarre practice creates a situation where citizens affected by the law are unable to know its full meaning because vital information is not published. Two areas of Community policy illustrate the potential impact of this lack of elementary openness and accountability: agriculture and international trade.

The Common Agricultural Policy has become a millstone around the Community's neck. It absorbs a disproportionate share of the Community's funds, causes gross distortions in agricultural prices, imposes high prices on EC consumers, creates incentives to produce excessive quantities with attendant environmental penalties which are not internalized, creates tension with other food exporting countries and contributes to depressing world food prices with sometimes devastating results for small scale producers in developing countries. On the other hand, it has contributed—possibly in an inefficient manner, but nevertheless significantly—to the maintenance of the rural fabric; it has dealt with rural poverty. With so many disadvantages and a comparatively modest list of advantages, it may appear difficult to understand why the policy remains in place since its principal beneficiaries within the Community are farmers who constitute a small, and shrinking, minority of the population of most EC countries and has served a number of powerful economic interests, including export industries (beneficiaries outside the Community are primarily urban populations in countries which import subsidized food from the EC).

How can such a minority hold the entire Community of 12 countries to ransom? The answer lies both in domestic politics and in the structure of the Community. In domestic politics, rural constituencies have historically tended to be over-represented, particularly in conservative governments. At the EC level, the limited degree of openness allows a small, well organized minority to establish a stranglehold on Community policy. Apart from an extensive and highly professional lobbying effort at the seat of the Commission and Council in Brussels, representatives of the farm lobby can be found in all institutions and at all levels of the Community. This is particularly dramatic in the European Parliament, the one institution which might respond to broader public opinion. Representatives of the farm lobby can be found in all political groups, in all national delegations and in every committee of relevance to farming interests. The result is a Parliament which consistently votes for more regressive agricultural

policies than those proposed by the Commission, whereas in most other areas the Parliament tends to be more progressive and less concerned about diplomatic nicety than the other institutions.

The most important concession to openness in the Maastricht Treaty is the increase in the European Parliament's role in Community decision-making. The Parliament's deliberations are open and published and the Treaty expressly recognizes the right of every citizen of the European Union to petition the European Parliament.

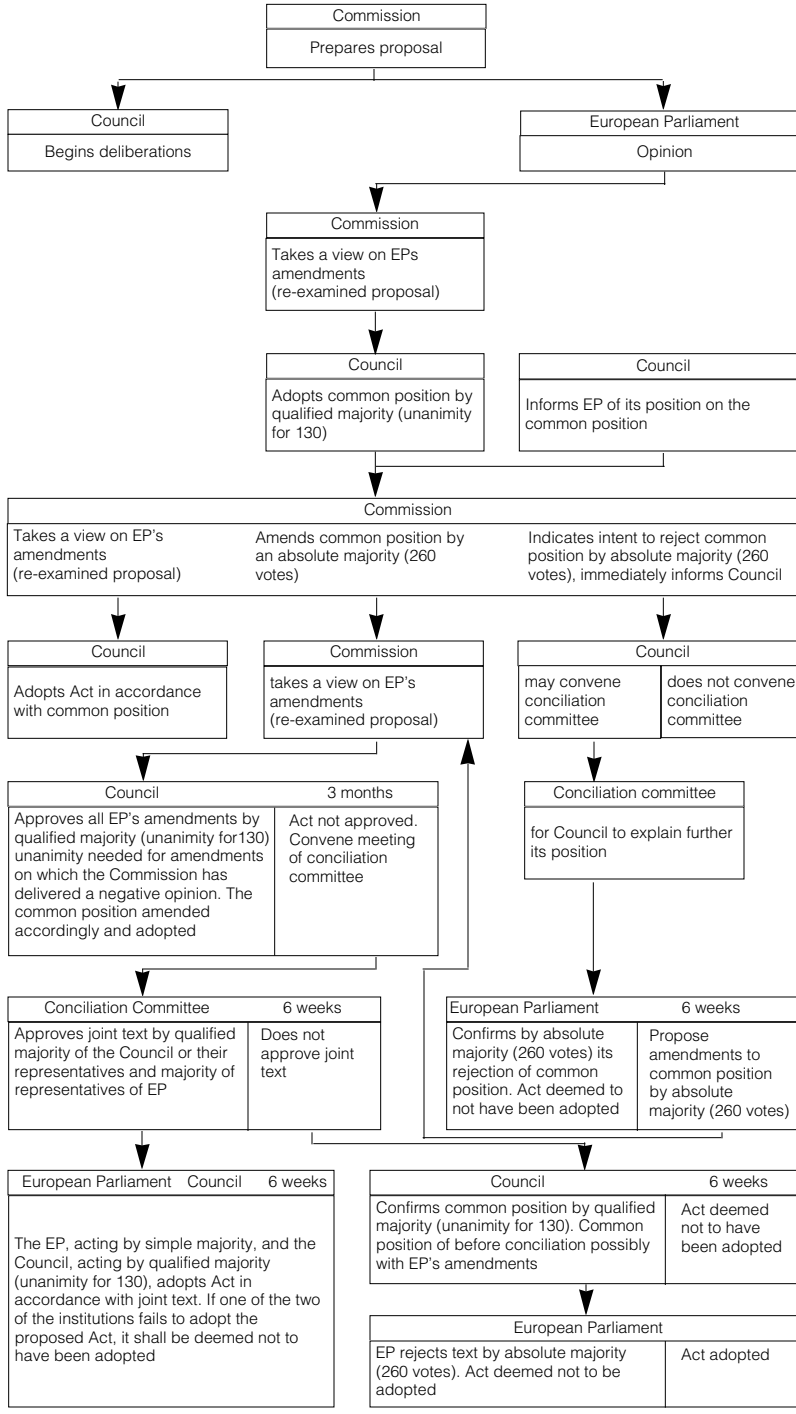
The Treaty provisions for greater participation of the Parliament in Community decision-making are highly complex and cannot be summarized briefly (See Table 2 for a schematic representation). Depending on the subject matter, the article of the Treaties which action is based upon and the outcome of intermediate stages in the process, the Parliament has additional rights which in some instances amount to a right of codecision (together with the Council, the central legislative body of the Community). [85] It is difficult, however, to view this complexity other than as an attempt by the Contracting Parties (in fact the Member States) to keep any loss of power of the Council in which they have control to an essential minimum. While real, the increase in authority of the Parliament is not necessarily accompanied by a decrease in authority of the Council. This may seem impossible at first glance but is nevertheless an appropriate assessment if the fact is kept in mind that the Community as a whole acquires significant new powers.

Increased complexity will also inevitably make it more difficult for those not directly involved to follow the steps of the legislative process, let alone influence it. The risk is that citizen participation in the Community will remain the domain of experts, with an attendant increase in influence on the part of well organized lobbies—agriculture, coal and steel in particular. This risk is illustrated, for example, in the relevant provisions of the Europe Agreements which show the influence of these groups in determining Community policy towards the countries of Central and Eastern Europe.

In trade policy, most important decisions are taken at the Community level. Article 113 provides for a common commercial policy, "Based on uniform principles, particularly in regard to changes in tariff rates, the conclusion of tariff and trade agreements, the achievement of uniformity in measures of liberalization, export policy and measures

85 Articles 189-191.

Table 2: The Role of European Parliament in Community Decision-making



to protect trade such as those to be taken in case of dumping or subsidies." It specifies that the Commission shall conduct negotiations with third countries. This provision differs from the general allocation of negotiating powers for international agreements (Art. 228) since it creates specific authority in the area of trade where otherwise, the Commission is more closely tied to instructions of the Council, and frequently the country which chairs the Council would speak for the Community in international meetings. A special committee appointed by the Council—known as the Article 113 Committee—is created by the Treaty to "assist the Commission in this task and within the framework of such directives as the Council may issue to it." The European Parliament is explicitly excluded from participation in trade negotiations, except when institutional provisions are involved.

This structure effectively removes trade negotiations from the direct purview of national authorities. In practice, it means that international trade agreements are not automatically submitted to a national parliament for ratification (although some countries have consultative procedures in place to permit parliaments to review pending EC decisions) unless they are negotiated as "mixed agreements" involving matters which fall within the competence of both the EU and Member States. The Maastricht Treaty explicitly excludes participation of the European Parliament in the conclusion of trade agreements, with the exception of those which establish "a specific institutional framework by organizing co-operation procedures." [86] Through the Council, the governments of the Member States have significant sway over trade issues with less democratic control than for other areas of policy. Combined with the secrecy of Council proceedings, they can effectively control the procedure without clear accountability for the outcome.

Following adoption of the Fifth Action Programme on the Environment, the Commission has established a "General Consultative Forum on the Environment" and other "ad hoc dialogue groups" to improve implementation and enforcement of EC environmental policy and to promote a greater sense of responsibility among the principal actors. Three such groups now exist:

- A Consultative Forum to provide for consultation and information exchange between the industrial/production

86 Article 228 (3).

sectors, the business world, regional and local authorities, professional associations, trade unions, environmental and consumer organizations and relevant parts of the Commission. [87]

- An Implementation Network comprising representatives of relevant national authorities and of the Commission. This grew out of an informal network of authorities responsible for industrial installations.
- An Environmental Policy Review Group comprising representatives of the Commission and the Member States at Director-General level. This group has met several times but its deliberations have not been made public in any form.

The Council and the Commission have also agreed upon a code of conduct which starts with the statement that "the public will have the widest possible access to the documents held by the Commission [88] and the Council." [89] As with all codes granting public access to official documents, there are exceptions and much will depend on how these are interpreted in practice. The Council Decision states that "access to a Council document may be refused in order to protect the confidentiality of the Council's proceeding" which suggests that important Council minutes will continue to remain secret. [90] The Netherlands has challenged the Council Decision before the European Court because they believe it to be too restrictive.

87 The rules governing the forum are set out in Commission Decision 93/701 (OJ L328, 29.12.93).
88 Commission Decision (together with a code of conduct), (J L46, 18.2.94).
89 Council Decision (OJ L340, 31.12.93).
90 Summaries based on information provided by the Institute for European Environmental Policy, London.

The Maastricht Treaty: What is Trade and What is Integration?

The Maastricht Treaty shows that many of the issues covered by the Winnipeg Principles are also of fundamental importance for the Treaty structure. In general, the response to structural issues relating to subsidiarity and openness is least satisfactory. Nevertheless, it remains unclear how much of this concern is based on the political impulse to integrate the Community and how much derives from the need to manage an increasingly open market. While the two are inescapably interlocked within the EC, other trade regimes will not be seeking comparable levels of political integration, thus making it difficult to draw direct lessons from the EC experience. On the other hand, trade liberalization is a critical factor of economic integration and economic integration implies at least a degree of policy integration, if only to be able to continue to ensure basic market disciplines. Consequently, all trade regimes must confront some issues of policy integration sooner or later, albeit not at the same level of intensity as the EC. Given the high degree of political integration (even "union") which is sought in the EC, its response to many of the fundamental issues raised by the Winnipeg Principles can be viewed as a benchmark against which to assess responses of other regimes which focus more exclusively on the trade aspects.

The Treaty certainly confirms the relevance of the issues raised by the Winnipeg Principles; at the same time, it would be dangerous to draw too many institutional conclusions from the EC experience. The complex institutional structure available in the Community allows a differentiated approach and an effort to integrate environment, development and economic integration to a degree not normally possible in international organizations.

The difficulties the EC has encountered—and will continue to encounter—in seeking to develop a constitutional framework based on international treaties exist in an accentuated form for other international organizations. It is difficult to ensure proper coordination and integration of EC policies, despite a single institutional structure, necessary resources and a strong legal base. These difficulties will be much more acute in most other international fora where each treaty is typically conceived, negotiated and implemented in relative isolation from other treaties. Even the United Nations "system" is in reality based on a large number of discrete international treaties which have created many institutions, each with

its own governance structure and development dynamic. Coordination is virtually impossible in such a system, and issues such as environment or development which require high levels of policy coordination to succeed have a particularly difficult time receiving adequate attention.

The rapid internationalization of economic relations, research and the media has created a situation where the institutions of governance lag far behind the realities created by people all over the world. Economic policy (including trade and development) and environmental management have become the fulcrum on which these issues of governance are being confronted. The need for an integrated approach to these issues is manifest, indeed, most countries will fail in their efforts to ensure sustainable development unless they also discover new forms of international governance. The Winnipeg Principles imply an ambitious agenda for action. The EC experience provides some lessons on the options which are available.

In all instances, the need for international action implies some loss of control by thus far sovereign states. The alternative is not between loss of control or not, but between a more orderly or a more anarchical development of international governance. The EC represents a conscious move towards the creation of an institutional structure capable of capturing some of the benefits of international action while ensuring a more orderly development.

For virtually all areas covered by the Winnipeg Principles, the existence of a stable institutional structure encompassing all aspects within a largely uniform system represents perhaps the most important strength of the EC approach. This enables the institutions to address some of the linkages between trade, environment and development at the international level at which they occur.

The multilateralist order which grew out of the economic crisis of the 1930s and the tragedy of World War II has eroded even as the end of the Cold War has created unprecedented new tasks. Structures which reflected a world revolving around a limited number of major powers are now swamped by the participation of large numbers of countries and the emergence of new global and regional powers. The new order must address not only the overriding issues of peace and security but foster an international economy even while it creates essential market disciplines at the international level. It must contribute to the reduction of global inequalities and help manage the vast new agenda of environmental concern.

The multilateralist order was not designed to confront these challenges. The next few years will see the emergence of major new international institutions, such as the World Trade Organization, which not only create new rules but also actively participate in their implementation. New levels of international accountability are likely to develop.

The European Community grew out of the same origins as the broader international structure but unlike most international organizations, it has proven dynamic and capable of continuous transformation. It has thus been able to address many of the issues now arising on a global scale, albeit at the more limited regional level and with a relatively homogeneous group of countries.

The Winnipeg Principles provide a measure for the success of the European Union in addressing the complex of issues relating to sustainable development within a framework of trade liberalization. The appropriateness of the Principles for this analysis provides a strong indication that they will also prove valuable in assessing other international regimes in the spheres of trade and sustainable development. Presumably, only regimes which meet basic criteria based on the Winnipeg Principles promise to provide the kind of international governance which is required at the end of the 20th century.

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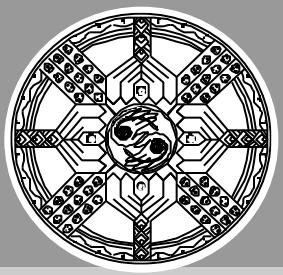

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