Norm Evolution in EC Environmental Law

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The candidate confirms that the work submitted is his/her own and that appropriate credit has been given where reference has been made to the work of others.

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ABSTRACT

Can next generation experience the natural beauty of land, sea and sky in the heart of which former generation grew? Environmental protection is one of the most serious tasks that must be tackled for next generation. For this issue, how environmental norms evolve is an indispensable theme. Regarding this, the EC demonstrates interesting institutional practices. This thesis offers a conceptual framework for considering the development of EC environmental law. This development is considered in terms of normative discourse and a governance frame: 1) Law catalyses normative discourse in the creation, application and interpretation of norms; and laws in themselves are also normative discourse; 2) Governance frames are shared meanings of core norms, key concepts and regulative principles in a specific issue-area; 3) The accumulation of discourse around and/or of laws (re)creates a frame, and the discourse is contextualised with precedent frames. This interaction causes norms to evolve; 4) The concept of regime is referred to, aiming at describing institutional arrangements that support normative discourse and frames. Regimes are an institutional complex procedurally reproducing normative discourse and substantively establishing a policy agenda on which a frame is built. Thus, this thesis shows the development of EC environmental law as norm evolution in a regime through the interaction between normative discourse and a frame. Building on this conceptual framework, norm evolution in EC environmental law is outlined. Before the legal base for environmental secondary legislation was provided by the SEA in 1987, EC institutional practices had already brought about the ECJ's judgments concerning environmental matters, the legislation orientated towards environmental protection, and international environmental conventions, to which the EC is a party. On the basis of the normative discourse of these laws, a governance frame has been transformed from a market supporting to a holistic and ecosystem-oriented frame. Thus, this thesis demonstrates how law matters in terms of the evolution of environmental norms.

CONTENTS

ABBREVIATIONS

AG	Advocate General
AJIL	*American Journal of International Law*
CFI	Court of First Instance
CMLR	*Common Market Law Reports*
CMLRev.	Common Market Law Review
EAEC	European Atomic Energy Community
EAP	Environmental Action Programme
EC	European Community(or Communities)
ECJ	European Court of Justice
ECOSOC	Economic and Social Committee
EEC	European Economic Community
EELR	*European Environmental Law Review*
EJIR	*European Journal of International Relations*
ELJ	*European Law Journal*
EP	European Parliament
ERDF	European Regional Development Funds
EU	European Union
IGC	Intergovernmental Conference
IO	*International Organization*
HJMWP	*Harvard Jean Monnet Working Paper*
JEPP	*Journal of European Public Policy*
JCMS	*Journal of Common Market Studies*
QMV	Qualified Majority Voting
SEA	Single European Act
TEU	Treaty on the EU
UNCED	UN Conference on Environment and Development

TABLE OF CASES

TABLE OF LEGISLATION

Primary Legislation

EU Treaty:

EC Treaty:

Secondary Legislation

Regulation:

Directive:

PREFACE

It was the Single European Act (hereinafter: SEA) in 1987 that formed the legal base for EC environmental legislation. At that time, Article 174 EC provided three main objectives: 'to preserve, protect and improve the quality of the environment; to contribute towards protecting human health; to ensure a prudent and rational utilisation of natural resources.'[1] At least insofar as the setting of this legal base for enacting secondary legislation is regarded as the birth of EC environmental law, there was no environmental law before the SEA, and it was after the SEA that environmental protection became one of fields of EC law.

However, secondary legislation clearly orientated to environmental protection had already been enacted since the 70's, along with three of the Community's environmental action programmes (hereinafter: EAP) before the SEA; international environmental agreements had been concluded by the Community; and environmental matters had been brought before the European Court of Justice (hereinafter: ECJ). Despite the clear economic orientation of the building of the Common Market at the early stage of European integration project, EC environmental law has substantively been developed in the area of secondary legislation, international agreements and case laws. In this regard, it can be said that the environmental *acquis* has gradually been created through these precedent legal practices before a clear legal base was established in primary legislation. For now, the environmental protection has become one of the *main* fields of EC law established in Article 174, 175, 176 EC, on the basis of Article 6 EC that provides the principle of environmental integration for realising sustainable development.

Environmental problem-solving is now one of most serious tasks against which the contemporary society must tackle as soon as possible. The solving is also our responsibility for the future generation. In Europe, environmental issue-areas in general have come to be recognised more seriously,[2] especially along with the climate change taken attention to.[3] Of course, the mere increase of legislation and case laws does not

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[1] In the treaty reform in Maastricht, a clause for the promotion of international environmental cooperation was added to this Article.

[2] *The Global Assessment of the European Community Programme of Policy and Action, COM (99) 543*.

[3] *Environment 2010: Our future, Our choice*, COM(2001)31 final.

always lead to the alleviation of environmental deterioration. However, it is also undoubted that environmental problem-solving cannot be done collectively and effectively without shared environmental norms and their evolution. Taking this normative point of view seriously, this thesis will exposit as a whole that environmental law matters in terms of norm evolution. As noted above, the EC has certainly established environmental norms through day-to-day institutional practices in the course of European integration. In the sense that the institutional setting orientated towards the building of the Common Market has brought about an environmental norm relativising the very market concern, the experience of the EC is quite an interesting research theme in terms of the endogenous logic of institution. This thesis thus aims at clarifying how EC environmental law matters in the institutional practices bringing about environmental norm evolution.

For answering this question, this thesis attempts to offer a conceptual framework for considering the development of EC environmental law, and traces out the developmental process on the basis of this framework. Two sub-questions are addressed in this thesis: *what* does the development of EC environmental law means?; and *how* is EC environmental law developed? Accordingly, it is beyond the scope of this thesis to directly answer *why* the law has developed as it is. This thesis focuses on institutional practices in order to elucidate the developmental process of EC environmental law. However, this focussing does not mean to claim that institutional arrangement is the only and absolute cause of the law's development. Needless to say, it is not enough to focus on institutional practices in order to answer the third question of *why*. For that, other factors outside the institutional context should be considered. Nevertheless, the first question of *what* and the second question of *how* also seem to shed light upon the main question of how EC environmental law matters. The structure of this thesis is as follows: Chapter 1 presents a conceptual framework concerning how to trace out law's development; Chapter 2 examines the institutional setting in which law is developed; Chapter 3 traces out the development on the basis of the previous chapters. Through these considerations, this thesis sets out to illuminate the institutional practices that enable EC environmental law to play its own role for norm evolution, addressing the main question: how law matters for the serious problem of environment.

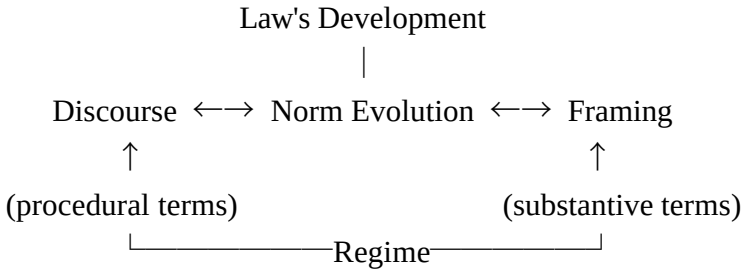
CHAPTER 1

Conceptual Framework

Introduction

This chapter offers a conceptual framework for considering the development of EC environmental law. On the one hand, this framework defines what this development means. On the other, it outlines how EC environmental law is developed through the institutional practices in the EC. EC environmental law is not regarded as demonstrating a merely competent relationship between the Member States and the EC; rather, it is emphasised that the law represents shared environmental norms, on the basis of which the EC establishes a collective cognition concerning environmental issues in general. In other words, the development of EC environmental law is regarded as *norm evolution*, in the process of which common meanings constituting the environmental issue-area are constructed. In this conceptual framework, norm evolution is assumed to occur through *discourse* and to be materialised as a *frame* to govern the environmental issue-area; the latter is seen to create the context of the former. The aim of this thesis is to examine the institutional practices concerning the interaction between this discourse and frame. Here law is understood in terms of that discourse. That is, law is seen as catalysing normative discourse; at the same time law is also regarded itself as normative discourse. The institutional arrangement that enables norms to evolve through discourse based on the frame is conceptualised as *regimes* that procedurally reproduce the discourse, and substantively establish a policy agenda on the basis of which EC environmental governance is framed. Thus, the conceptual framework of this thesis is seen in Diagram 1:

Diagram 1



1.1 Discourse

The social world is commonly experienced on the basis of shared meanings of concepts, which constitute the very world. It is an accumulation of the unviewable and endless discursive practices of countless individuals that creates, modifies and/or makes more precise the web of the meanings. As such, the discourse can be seen as inescapably interpenetrated with a precedently created world of meaning.[1] However, the meanings are constructed in intersubjective struggles or collaborations between countless individuals, and the meanings can therefore be transformed in the course of discourse. To put this another way, the social world is by no means formed with absolutely objective materials, which should exist irrespective of observers' subjectivity. The world that is the research object in social sciences consists of a web of meanings that can be recreated through discursive practices. Discourse can thus be regarded as (re)creating the common meanings which constitute the social world.

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

> 'The context about concepts is . . . not only between individuals and groups defending one meaning against another, but also between different ways of constructing 'the world' through different sets of languages. These different languages are not employed by actors in a sovereign way. It is the discursive web surrounding each articulation that makes the latter possible, on the one hand (otherwise, it would be meaningless), while the web itself, on the other hand, relies on its reproduction through these articulations.'[2]

Diez offers the concept of a 'discursive nodal point', aimed at describing the interconnectedness between discourses. This point goes beyond the control of any individuals. All of perceptions are objects of particular discourses that are bound with other discourses. All individuals can participate in discursive practices, but none of them can control what meanings the discourses weave as a whole. This web of discourses is 'held together by nodal points'.[3] Further to this, the change of institutions

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[1] For the constitutive role of the discourse for creating a social world, and its character to bind agents structurally, see the argument of Hunt and Wickham based on Foucault. A. Hunt and G. Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (Pluto Press, 1994), at 7-9.

[2] T. Diez, 'Speaking 'Europe': the politics of integration discourse' (1999) 6 *JEPP* 598, at 603.

[3] *Ibid*., at 608.

are important on account that they 'cannot be separated from the discourses they are embedded in'.[4] What should be taken into consideration is 'a change in the discursive construction of these institutions'.[5] It seems that Diez's viewpoint suggests an affinity between discourse analysis and legal interpretation. Law is certainly seen as a distinct discourse that is closed within the world of the lawyer. However, this discourse can be said, despite its legal exclusivity, to be simultaneously open to a wider context sociologically. With regard to this, the argument of Cotterrell should be borne in mind. Criticising Dwokin's view concerning the exclusivity of legal discourse, Cotterrell suggests that the closed system of legal discourse or a normative discursive unity should be examined in terms of its sociological conditions.[6] In this sense, law's potential to create shared meanings must be considered in terms of the concept of discourse.

Building on these viewpoints, it seems that law can be conceptualised in reference to the concept of discourse. On the one hand, law can be regarded as developed through *discourse* for the creation, application and interpretation of norms and instruments. This normative discourse in legislature, judiciary and execution is constrained with not only precedent legislation and case law but also with social (or pre-legal) norms. In these discursive spheres, law establishes the obligations given to Member States and the competent relationship between Member State and EC level. On the other hand, the legal texts of individual laws (legislation and case laws) themselves can also be regarded as the discourse contributing to weaving the *shared meanings* constituting our world normatively, in the sense that law is the outcome of collective decisions in a community. The former discourse (for norm creation, application and interpretation) can be called the *normative discourse around law*, and the latter (legal texts of individual laws) the *normative discourse of laws*.

These forms of discourse can further be divided into the political and the legal. Needless to say, the adjective 'political' has a very wide connotation, and its meaning can even be said to depend on individual writers. In this thesis, *political discourse* is defined as firstly and mainly orientated towards policy-goal-setting; *legal discourse* is defined as orientated towards norm-interpretation for the identification of legal obligation and its nonfulfillment. Here political discourse may become a disguised norm

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[4] *Ibid*., at 610.
[5] *Ibid*..
[6] For the argument on legal discursive closure, see R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Clarendon Press, 1995), at 91-110.

orientation for pursuing power/interest maximisation. However, such political discourse may also be constrained by social norms or precedent legal norms.

This understanding can be put into the context of a gradation from softer to harder laws. Political discourse can be understood as appearing as the document or wording which cannot be the object of judicial review.[7] This type of discourse may therefore be hortatory declarations, or softer forms of laws. However, as the degree of obligation and precision expressed by the document or wording is strengthened,[8] the political discourse also comes close to legal discourse. For instance, the principle of subsidiarity may have various meanings subject to the type of discourse. In political discourse, the subsidiarity is argued as the principle for empowerment of local communities, the promotion of a transnational local network, the retainment of competence by Member States or the federalisation of the EU. In legal discourse, the subsidiarity is interpreted as the principle for judging the validity of EC legislation or the common action formation at the EU level in terms of competence misuse.[9] Incidentally, the EU can be divided into two types of issue-areas: a political-discourse-dominant issue-area (*i.e.* CFSP) and the legal-discourse-dominant issue-area (i.e. competition policy).

Furthermore, *intermediate discourse* can be assumed, at which the political and the legal discourses intersect. What can be fallen into this type of discourse is primary and secondary legislation and international agreements. In the context of EC environmental law, there can be listed up Article 6, 174, 175, 176 EC, environmental Regulations or Directives and international environmental conventions. As a sphere of legal discourse, these texts of law exhibits judicially reviewable obligation of Member States and connection with other legal norms that may be precedent legislation, the constitutional traditions of Member States, or international legal norms. As a sphere of political discourse, these laws manifests collective recognition of public problems, policy goals

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

[8] For the concept of obligation and precision in this gradation, see K. W. Abbott, et al., 'The Concept of Legalization' (2000) 54 *IO* 401.

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

and some hortatory principles. Thus, political discourse and legal discourse can be seen to be woven into legislation.

Thus, six types of discourse can be assumed as shown in Diagram 2. ‘A’ is political discourse around law; ‘F’ is legal discourse of laws; ‘B’ and ‘E’ are intermediate discourse around law and of laws respectively. As will be argued in Chapter 3, EC environmental law can be interpreted as developed mainly through F (legal discourse of laws) and E (intermediate discourse of laws), being supported by other types of discourses.

Diagram 2

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

Diagram 3 shows one example putting this picture into the institutional context of the EU, according to the types of official documents. Although there are ambiguous or unclear borders in this categorisation, it seems to be helpful for understanding the discursive sphere institutionalised in the EU.

Diagram 3

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

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

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

> enlightened stewardship for the benefit of this and future generations. Solidarity must be shown with the poorer and less developed nations.'[10]

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

> '[I]t should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest (the protection of the environment in this Case – inserted) pursued by the Community.'[11]

It should also be noted that the same wording can be found in different discourses, and subject to the status of the document. This means that there are different discursive spheres, which are subject to the institutional context in which the document is submitted. For instance, the principle of environmental integration is different between Article 6 EC after Amsterdam and the 1972 EAP in the pre-SEA. The former says:

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

The latter is says:

> 'Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes'.[12]

While the former is an intermediate discourse of laws (E in Diagram 2) in the sense that it has part to identify the obligation of the EC, the latter is a political discourse around law (A in Diagram 2), aiming at the introduction of a new common policy strategy.

As for B and C in Diagram 2, it seems to necessary to give some explanation . That is, this discursive arrangement diagram pays attention to the pre-litigation procedure as the discursive sphere providing the intermediate and legal discourse around law. In this respect, Case C-365/97 *Commission* v. *Italy*[13] serves as a reference. The Court says

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[10] Declaration by the European Council on the environmental imperative, Dublin, 25 and 26 June, Bull. EC 6-1990, Annex II, point 1.36, at para.20.

[11] Case 240/83, *Procureur de la Republique* v. *Association de defense des bruleurs d'huiles usagees (ADBHU)* [1985] ECR 531, at 549, para.12.

[12] Programme of Action of the European Communities on the Environment, OJ 1973 C112/3, at 6.

[13] Case C-365/97, *Commission* v. *Italy* [1999] ECR I-1773.

that:

> 'the proper conduct of the pre-litigation procedure constitutes an essential guarantee required by the Treaty not only in order to protect the rights of the Member State concerned, but also to ensure that any contentious procedure will have a clearly defined dispute as its subject-matter.'[14]

According to this viewpoint, it can be said that the pre-litigation procedure is the institution for catalysing the normative discourse around law. This procedure obliges the Commission to issue a *formal notice letter* and a *reasons opinion.*[15] In this case, against the claim of the Italian government that the Commission did not provide a precise and clear formal notice letter, the Court argued that the letter is to 'delimit the subject-matter of the dispute, so that it cannot thereafter be extended', and accordingly that the letter 'cannot be subject to such strict requirements of precision'.[16] In contrast, the reasoned opinion provided in Article 226 EC 'must contain a coherent and detailed statement of the reasons'[17] for concluding that a state failed to fulfill its obligations. Thus, the formal notice letter may be fallen into the intermediate discourse around law; the reasoned opinion may be regarded as the legal discourse around law, in terms of precision for identifying the nonfulfillment of obligations. The political strategy of the Commission on the stage of the formal notice letter may not be denied, and this letter cannot therefore be said to present the legal discourse around law in a precise sense.

Thus, the aim of this thesis is to grasp the evolution of environmental norms in the EC by examining these forms of discourse. As will be argued later, the intermediate and the legal discourse of laws (E and F in the diagram above) must be taken into account in order to trace out the developmental process of EC environmental law. In any event, taking this discoursal point of view means that legal practices are put into a theoretical context of discourse that is assumed to (re)create the shared meanings comprising the social world. For the purpose of approaching norm evolution in the environmental issue-area, the shared meanings must be specified in terms of environmental governance. Next, the concept of framing is examined.

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[14] *Ibid.*, para.35.
[15] For the pre-litigation procedure, see Section 2.1 in Chapter 2.
[16] Case C-365/97, para.23 and 26.
[17] *Ibid.*, para.26.

1.2 Framing

As noted above, the social world can be jointly experienced on the formation of the shared meanings of fundamental concepts, which comprise the very world. Shared meanings enable the social world to emerge as an objective (or more precisely, intersubjective) world. This general view can be applied to considering how a specific issue-area emerges to be collectively recognised. It is the *frame*[18] that enables this. As a coherent system of shared meanings, it establishes governance in a specific issue-area. Public problem-solving is conditional on the formation of frame to recognise a situation as problematic. As such, a frame differentiates an issue-area from others. For instance, the formation of an environmental frame established the very EC environmental issue-area, differentiating it from market-building issues.

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

> core norms (*i.e.* environmental protection as a public interest, environmental regulation without disguised protectionism, individual environmental rights or value of nature per se etc.);
>
> key concepts (*i.e.* value limit, pollution, the Market in relation with the environment, environment as a whole, biodiversity or ecosystem etc.) and
>
> regulative principles (*i.e.* sustainable development, environmental integration, polluter-pay or precaution etc.).

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

On the other hand, a frame can be assumed to emerge through *discourse*. With the exchange and accumulation of discourse, the shared frame between Member

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[18] For the concept of the frame, see Y. Surel, 'The role of cognitive and normative frames in policy-making' (2000) 7 *JEPP* 495 and B. Kohler-Koch, 'Framing: the bottleneck of constructing legitimate institutions' (2000) 7 *JEPP* 513. For the critical view against frame analysis, see R. A. Payne, 'Persuasion, Frames and Norm Construction' (2001) 7 *EJIR* 37.

governments, the EU institutional actors and societal actors creates a common meaning world in an environmental issue-area. Through this creational process, the common definition of problems and solutions concerning this issue-area is established. From this standpoint, EC environmental law must be considered in terms of discourse. In this thesis, it is assumed that the accumulation of discourse enables a frame to be created, deepened or transformed. In this regard, the role of law is taken seriously with reference to the concept of discourse. Law catalyses normative discourse, and law itself is also normative discourse, as noted in the previous section. Conversely, the frame is assumed to be prescribed by normative discourse that are contextualised by a precedent web of shared meanings. In this way, normative discourse is constitutive for creating and modifying the frame.

What, then, is the institutional arrangement which supports discourse and framing? It must be conceptualised what enables them to operate. In this regard, this thesis refers to the concept of regime. Regimes are understood as an accumulation of institutions enabling the interaction between discourse and framing, both in procedural and in substantive terms. As such, regimes are regarded as an arena in which norms evolve, and at the same time is seen as institutionalising a frame.

1.3 Regime

Studies based on the concept of *regime* have been one of remarkable trends in international relations since the 70's.[19] Its main target is to put research objects into the international phenomena of a 'more narrow than international structure' and a 'more wider than formal organisation'.[20] Along with realist-coloured concerns,[21] the concept of more than a mere international structure and less than a formal organisation is offered to ask how states in general constrain their own practices by their own agreements, despite their strong orientation towards the interest and power maximisation. According to Krasner, 'the regime concept . . . has attracted a number of scholars who have been primarily identified with the realist tradition', not the scholars who have invoked

[19] S. Haggard and B. A. Simmons, 'Theories of International Regimes' (1987) 41 *IO* 491, at 491.
[20] *Ibid*., at 492.
[21] S. D. Krasner, 'Regimes and the Limits of Realism: Regimes as Autonomous Variables' (1982) 36 *IO* 497, at 497.

ideational transnationalism.[22]

At first sight, it therefore seems odd that this concept is applied to the institutional context of the EU. Needless to say, the EU is a highly organised international institution, and interstate politics in the EU are regulated by its highly federal-like constitutionalised system.[23] While the arguments of liberal intergovernmentalism,[24] which stresses the preference of the big powers in the EU, are reasonable, EU interstate politics cannot be viewed as the same as an international one in terms of a high degree convergence of the Member States' expectations, owing to the highly legalised and judicialised system. The EU must be clearly more than an international regime.[25]

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

> 'Regimes can be defined as sets of implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge in a given area of international relations'.[26]

As such, regimes can be regarded as prescribing international governance in a specific issue-area. On the basis of this definition, it is possible to extend the meaning of regimes. First of all, the area where there are sets of 'principles, norms, rules, and decision-making procedures' is not necessarily limited within 'a given area of international relations', although this limitation becomes important when trying to specify a unit of international cooperation more than mere structure and less than formal organisation. It can be supposed that all social relations, insofar as they produce stable order, are reproduced with 'principles, norms, rules, and decision-making procedures', which can make 'actors' expectations converge'. Second, for the reason that organs with organisationally differentiated forms – such as legislative, judicial or executive bodies – are not referred to at all in Krasner's definition, all of institutional arrangements can be observed from the concept of regime. What matters is not the

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[22] *Ibid.*.
[23] J. H. H. Weiler, *The Constitution of Europe: Do the new clothes have an emperor? And other essays on European integration* (Cambridge University Press, 1999).
[24] A. Moravcsik, *The Choice for Europe: Social Purpose & State Power from Messina to Maastricht* (Cornell University Press, 1998).
[25] For example, see M. Zürn and D. Wolf, 'European Law and International Regimes: The Features of Law Beyond the Nation State' (1999) 5 *ELJ* 272.
[26] S. D. Krasner, 'Structural Causes and Regime Consequences: Regimes as Intervening Variables' (1982) 36 *IO* 185, at 186.

organisational form of the organs carrying out individual function, but the institutional context that makes 'actors' expectations converge'. Third, it is plausible to extend this concept as follows:[27] each regime in its respective specific issue-areas can be subsumed within one regime in a wider issue-area; for example, there can be the regime *A* consisting of regime a_1, a_2, . . a_n. The EU is a good example. For instance, the EC environmental regime consists of a water regime, an air regime, an urban regime, and so on. This environmental regime is, however, one of elements of the more comprehensive regime of the First Pillar in the EU, and this bigger regime, based on the EC Treaty, is subsumed in the 'single institutional framework'[28] of the EU.

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

Further to this, drawing on the concept of framing, regimes can be a coupling point between governance and legal studies. Any frames hold normativity, being based on social and/or legal norms. Even purely cognitive frames for governance are interpenetrated with normativity, for the reason that framing materialises into any legal form, such as legislation, agreements, statements and so on. Irrespective of softer and harder laws, these laws must first be seen in the light of normativity. For the reason that

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[27] This arguments are owing to the suggestion by Dr. Jo Hunt, the University of Leeds, at the research meeting for my MA thesis.
[28] Article 3 TEU.

any regimes are formed in a specific issue-area, these regimes can be regarded as institutionalising the frame for governance. All regimes are also formed with legal forms noted above. In other words, regimes emerge as a bundle of agreements towards public problem-solving in a specific issue-area. Therefore, regime development must be seen to be accompanied by norm-building and framing. To study regimes means to examine what institutional arrangement promotes and supports what norm and frame. In this respect, the regime concept offers the point of convergence between governance and legal studies.

The conceptualisation by Armstrong and Bulmer is instructive for putting the concept of regime into the research context of this thesis. They apply the regime into an institutionalist work aiming at a politico-legal approach. Building on Krasner's definition, they regard the concept as follows:

> 'Governance regimes each reflect one admixture of rules, procedures and norms embedded within the systemic context. Procedurally, each governance regime comprises the prevailing admixture of institutions, rules and norms together with the relevant policy 'players'. . . The prevailing admixture varies over time: system-wide reforms may have repercussions on the governance regime, such as through the EP being granted rights to participate in legislation by co-decision: an overarching norm such as subsidiarity may have to be given serious consideration; or court rulings may clarify relevant legal bases and policy procedures.'[29]

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

On the other, Toope[30] offers a 'constructivist incarnation' of the regime concept. Stressing the role of routine dialogue and information-sharing among states, Toope insightfully explains a constructivist understanding of regime theory:

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[29] K. A. Armstrong and S. J. Bulmer, *The governance of the Single European Market* (Manchester University Press, 1998), at 72.

[30] S. J. Toope, 'Emerging Patterns of Governance and International law' in M. Byers (ed) *The Role of Law in International Politics* (Oxford University Press, 2000).

> 'Regime theory, especially in its constructivist incarnation, helps to explain how binding legal norms may emerge from those patterns of expectation developed through the increasing co-ordination of discussions and actions amongst States. Common endeavour, even common debate, can give rise to shared meanings which crystallize into norms. States participating in such regimes 'learn', and the learning affects not only their appreciation of self-interest, but may even come to alter the self-perception and identification of the State.'[31]

According to this understanding, regime formation can be seen as accompanying the building process of 'shared meanings which crystallize into norms'. This view emphasises the intersubjectivity of frame for governance in an issue-area. The regime approach attempts to grasp an evolutionary process of the frame in the course of regime development.

Building on these viewpoints concerning the evolutionary process of norms and frames in a specific issue-area, this thesis defines the concept of regime as follows: *regimes* have two dimensions: One is the procedural dimension of arranging who participates in the creation, application and interpretation of norms and instruments to govern a specific issue-area; the other is the substantive dimension respecting the policy agenda and the core norm that both differentiate a specific issue-area from the whole problematic situation. In short, regimes are an accumulation of procedural institutions on the basis of specific policy agendas and norms. This regime constitutes the governance materialised as the policy programme that is a coherent system of goals, principles and instruments. According to this conceptualisation, the regime building means to institutionalise the intersubjective frame for governance. There is no regime without this shared frame between the actors in a specific issue-area. The EU can be understood as consisting of many regimes. These regimes are, though each has different procedures, 'embedded within the systemic context'[32] prescribed by the Basic Treaties.

Conclusion

From all of the arguments noted above, a conceptual framework for considering law's development in EC environmental law is formulated as follows: The development

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[31] *Ibid*., at 105.
[32] Armstrong and Bulmer, *supra* n. 29, at 72.

of law means norm evolution that can be found in the change or deepening of framing governance in a specific issue-area; it is the regime that promotes and supports this development in procedural and substantive terms; the regime stably reproduces normative discourses around law and of laws in the procedural terms, and establishes, in the substantive terms, a policy agenda as a core on which the shared frame is built; accordingly, the regime can be regarded as an arena in which norm evolution takes place.

In terms of ontological premises, this framework may be put into the theoretical context of social constructivism[33] in the sense that: *framing*, which sets up the common understanding regarding how to view and act in the world, is assumed to constrain, and be also constrained by, *discourse*; conversely, discourse is assumed to play a constitutive role for framing that can be said to form a common meaning world with which the collective recognition of our society is constrained; and *norm* is seen to be shared meanings evolving from the interaction between discourse and framing. In methodological terms, this thesis claims that the research project based on this conceptual framework can be regarded as a kind of institutionalist work[34] in the sense that the endogenous institutional dynamics was primarily focussed on and empirical materials were specified according to the institutional context in the EU, in order to discover how normative discourse is reproduced, and how a frame is established.

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

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[33] For social constructivism in the theoretical context of politico-legal studies, see A.-M. Slaughter, A. S. Tulumello and S. Wood, 'International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship' (1998) 92 *AJIL* 367 and J. Shaw and A. Wiener, 'The Paradox of the European Polity' (1999) *HJMWP* No.10/99 http://www.jeanmonnetprogram.org/papers/99/991001.html.

[34] For institutionalism in the context of EU legal and governance studies, see *supra* n.29 and K. A. Armstrong, 'Regulating the free movement of goods: institutions and institutional change', in J. Shaw and G. More (eds), *New Legal Dynamics of European Union* (Clarendon Press, 1995).

CHAPTER 2
EC Environmental Regime

Introduction

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

The topics of this Chapter are as follows: Two general features of the EC environmental regime are pointed out: the formal institutions in the procedural terms (Section 2.1), and the weaknesses concerning implementation deficit, inadmissibility of citizens into the ECJ and parasitic policy agenda settings on market building (Section 2.2); and it is considered how law plays its own role in this regime, in which the new mode of environmental governance has been introduced, responding to the ineffectiveness of command and control approach (Section 2.3). What follows is an overview of this Chapter.

First, EC environmental actions are founded *not* on political commitments difficult to be reviewed judicially, *but* on formal institutions based on general principles of EC law and the decision-making procedures that are set up at a systemic level – the procedural institutions that are applied to other regimes comprising the EC as a whole, although the rules of the procedures are different, depending on various issue-areas. Member governments and the institutional actors like the Commission, the Council and the EP have thus legal obligations that are reviewed by the ECJ. Lump sum sanctions are also arranged for non-compliance with the judgments of the ECJ. Further to this, environmental policy agendas established within the regime are so various and comprehensive that the regime can

easily be differentiated from any international environmental regimes that often deal with a single issue, like a specific media or territory. Thus, the EC environmental regime seems to be completely equipped with vertically-arranged institutions for the creation, application and enforcement of norms over almost all issue-areas related with the environmental protection. From this institutional landscape, EC environmental governance appears to be structured by a systemic context within a federalised polity.

Second, despite the high degree of formalisation that can be differentiated from other international regimes, it can be said that some weak points have been seen in the developmental process of EC environmental regime. Overall, the following three points can be listed: 1) an implementation deficit of secondary law at the Member State level; 2) hard conditions for societal actors like environmental NGOs to bring a case before the ECJ; 3) a dependency of environmental legislation on other common policy sectors, especially on the building of the Common Market, in terms of a legal base. In other words, the following circumstances have been found more or less as weaknesses: The effectiveness of the regime depends on the political will of Member States, which may often attempt to minimise their legal obligations; Participation of societal actors in the EC judicial process is strictly constrained; There was no legal base for environmental legislation until the SEA, and the institutional inertia[1], depending on the legal base of other issue-areas, has remained even after the SEA. Certainly, some of them have been improved, subject to each stage of the pre-SEA in 1987, after Maastricht in 1993 and after Amsterdam in 1999. Each reform of the primary law has gradually provided the constitutive foundation for the environmental regime, and has somewhat alleviated these weak points. Nevertheless, each weakness can be said to still remain.

Third, a new mode of EC environmental governance is considered, placing attention on its expectable function to stimulate normative discourse and framing. Despite the weak points noted above, EC environmental actions have certainly been accumulating legal practices along with the reformative process of primary law. Through the practices, normative discourse *around* and *of* secondary laws and case laws have been irreversibly accumulated. As will be argued in Chapter 3, this discourse has undoubtedly enabled the frame for EC environmental governance to be elaborated: the frame that systematises the common meanings of core norms, key concepts and regulative principles in the environmental issue-area. This framing

[1] For this concept, see K. A. Armstrong and S. J. Bulmer, *The governance of the Single European Market* (Manchester University Press, 1998), at 220.

based on the pile-up of the normative discourse should be taken seriously in a new mode of environmental governance highlighting flexible, decentralised, participatory, reflexive and deliberative arrangements.[2] This new mode can be interpreted as emphasising the role of law as discourse that contributes to frame development.

2.1 Formal Institutions

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

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

Thus, it can be said that the main instruments are harder laws, which clearly identify the legal obligations of EC institutions and Member States, and which must therefore be able to be interpreted exclusively by the ECJ. Softer laws, such as the political statements in EAPs, Council resolutions, Commission recommendations, and the declaration of the European Council, are basically supportive. In this sense, the EC environmental regime can be said to be founded on highly formal institutions,

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

in terms of which the regime should be differentiated from other international regimes mainly depending on informal institutional settings.

The formal institutionalisation of the environmental regime means that the regime is embedded into the systemic context concerning both norm-making process in legislature and enforcement mechanism in judiciary. As such, the EC environmental regime is, along with other individual regimes comprising the EC as a whole, founded on the general principles of EC law, and is prescribed in procedural terms. As for the general principles, there are legal certainty, non-discrimination, free movement of goods, freedom of competition, proportionality, transparency, fundamental rights and so on.[3] As for the legislative procedure, environmental secondary legislation has the following two patterns. One is the QMV procedure of Article 175 (1) EC based on Article 251 EC, in which the EP and the Council take the co-decision procedure. This means that the EP can reject the common position of the Council. The other is the procedure of Article 175 (2) EC, which requires the Council to act unanimously and only to consult with the EP: the procedure which concerns financial measures, town planning and the choice of energy sources. The co-decision procedure of the former is the outcome of the Treaty revision in Amsterdam of 1997. At the SEA stage, environmental measures required the Council to act unanimously. While the Treaty reform in Maastricht enabled the Council to act by the QMV based on Article 252 EC, the influence of the EP was constrained to a proposal of amendment against the common position of the Council.

As will be noted in Chapter 3, this gradually improved institutional limitation has affected environmental norm evolution, by bringing about legal base disputes due to the parasite character of the EC environmental legislation on the market building. As for the enforcement mechanism, firmly established procedures can be found:[4] the *administrative phase*, in which the Commission attempts to redress the infringements of Member States, by alerting the latter through the Article 226 letter (formal notice letter) and the reasoned opinion issued against the Member States in question; the *judicial phase* based on the action of the Commission against a Member State in Article 226 EC, the action of a Member State in Article 227 EC when the Commission takes no action, and the action of the Commission in Article 228 EC when this guardian of Basic Treaties finds non-compliance of a Member State with the judgment of the ECJ. For the judicial review system in the EC, the

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[3] See J. Shaw, *Law of the European Union*, Third Edition (Palgrave, 2000), at 333.
[4] *Ibid.*, at 302-3.

principle of co-operation provided in Article 10 EC is significant in terms of the prevention of conflict between Member States, and between the national and EC laws concerning matters that Treaties cannot assume in advance.[5] Further to these legislative and judicial institutional arrangements, it should be kept in mind that the principle which was established by the ECJ in cases other than the environmental protection matter can be applied to the environmental regime. The doctrine of direct effect and individual rights based on Directives are examples of this.[6]

As the most important instruments for the environmental action, secondary laws cover many areas for the environmental protection. On the one hand, there are many issue-areas, by the comprehensiveness of which the EC environmental regime should be differentiated from international environmental law, which takes a sector-by-sector approach. According to the classification of EUR-Lex on the EU website,[7] the EC environmental regime consists of the following constituent regimes: nuclear safety and radioactive waste; water protection and management; monitoring of atmospheric pollution; prevention of noise pollution; chemicals, industrial risk and biotechnology; management and efficient use of space, the environment and natural resources; conservation of wild fauna and flora; waste management and clean technology. On the other hand, there are quite a few measures for the free access of citizens into environmental information as well as eco-label, eco-audit and management, and so on. Moreover, environmental concerns in secondary laws spread to issue-areas such as agriculture, social policy related to working conditions and human health, transport, regional structural policy, development cooperation, and so on. This interpenetration of environmental concerns is based on Article 6 EC, which provides the principle of environmental integration.

In addition, it must also be noted that, although this highly formal regime has been established step by step since the SEA in 1987 through the reforms of the Basic Treaties, many secondary laws and case laws in relation to environmental protection

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[5] *Ibid.*, at 297-300. Also see K.-H. Ladeur, 'Flexibility and "Co-operative Law": The Co-ordination of European Member States' Laws - The Example of Environmental Law', in G. de Búrca and J. Scott (eds) *supra* n.2, at 284-5. For early environmental Cases based on this cooperation principle, see Cases 3, 4, 6/76, *Cornelis Kramer and others* [1976] ECJ 1279, para.44-5, and Case 141/78, *France* v. *United Kingdom* [1979] ECR 2923, para.8-12.

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

[7] See, http://europa.eu.int/eur-lex/en/lif/ind/en_analytical_index_15.html.

had already been produced before the SEA. The EC environmental regime is thus based on an accumulation of these precedent legal practices and institutional changes.

However, the following problems have been noticed in the EC environmental regime: 1) deficits in implementation of secondary laws on the Member State level; 2) inadmissibility to the ECJ as a barrier for societal actors to demand judicial protection at the EC level; 3) parasitism on other regimes, especially on the market building, in respect of legal bases for legislation. The aforementioned reformative process owing to primary legislation has been the process of overcoming the problems of the EC environmental regime. Although the reformation has somewhat mitigated these problems, it cannot be said that they have completely been solved. Let alone, the inadmissibility problem is still a noticeable shortcoming of this regime, even after the Amsterdam stage. Imagine the following circumstances: the implementation is subject to indeterminacy of the political will of each Member State; it would be an exceptional case that individual citizens demanding judicial protection could access the ECJ; and environmental norms are legitimised insofar as they support the market building. The circumstances should be regarded as weaknesses in the regime.

2.2 Weaknesses

These have been improved not only by the reformation at primary law level. As will be argued in Chapter 3, an accumulation of case laws and secondary laws as normative discourse has also brought about evolving environmental norms in advance of big changes of Treaties. The evolution can be said to contribute to the improvement of the problematic circumstances. While conflicts have taken place around the weaknesses, the institutional context of the EC environmental regime has brought about norm evolution, especially through judicialised responses against the very conflicts, as will be argued in Chapter 3. In the following sections, the weaknesses are considered in detail in advance.

2.2.1 Deficits in Implementation

In 1998, the Commission submitted the Special Report concerning the implementation of water pollution Directives.[8] The Report shows examples of current implementation failures of the Member States to fulfill their obligations

[8] Special Report No 3/98 concerning the implementation by the Commission of EU policy and action as regards water pollution, OJ 1998 C 191/2.

concerning the Directives. According to this Report, 20 Directives concerning water quality have been adopted since 1973.[9] Among these Directives, the Report paid special attention to the following three Directives: Council Directive on urban waste water treatment (UWWT Directive),[10] on the protection of waters against pollution caused by nitrates from agricultural sources (nitrates Directive)[11] and on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture.[12]

From these surveys, the Report shows that 'numerous instances of non-conformity with, non-application or incorrect application of the Directives'.[13] In this Report, the Commission lists Greece, Spain, Italy, Belgium, Netherlands, Portugal, Austria, France and Finland, especially concerning failures in transposing the water-related Directives into their national laws.[14] Nine in fifteen Member States were named! Observing each Directive individually for instance, the UWWT Directive has not been transposed by Germany, Greece, Spain and Italy, and the nitrates Directive has not transposed by Austria and Finland. Adding to this, neither was it correctly transposed by Belgium, Greece, Spain, Italy, Netherlands, Portugal, nor was it correctly applied in France.[15] Furthermore, there have been serious nonfulfillments concerning the reporting requirement. For example, according to the Report, the Commission has not received the implementation programme report prescribed in Article 17 of the UWWT Directive. Needless to say, the negligence in reporting signifies the nonfulfillment of the obligation this Directive imposes member states, and leads to the impossibility of the Commission to assess the progress of the policies.[16]

Taking these deficits in implementation seriously, Krämer examines each type in detail.[17] According to him, they can be categorised into three types; late or omitted transposition, incomplete or incorrect transposition and incorrect application in practice. Among the examples that he lists, of particular importance is the

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[9] *Ibid*., at para.2.
[10] Council Directive 91/271/EEC concerning urban waste water treatment, OJ 1991 L 135/40.
[11] Council Directive 91/676/EEC concerning the protection of waters against pollution caused by nitrates from agricultural sources, OJ 1991 L 375/1.
[12] Council Directive 86/278/EEC on the protection of the environment, and in particular of the soil, when sewage sludge is used in agriculture, OJ 1986 L 181/6.
[13] *Supra* n.8, at para.13.
[14] *Ibid*., at para.13-14.
[15] *Ibid*., at note 9 and para.12-15.
[16] *Ibid*., at para.15.
[17] Krämer, *supra* n.6.

nonfulfillment concerning the planning obligations[18] for setting clean-up plans, monitoring plans and other related programmes concerning waste, air, water etc. on a national level. Krämer's argument about the causes of these failures should be taken seriously. According to him, there are conflicts between the national and EC legal order, and the conflicts can be ascribed to not only the differences of legal systems, but also the lack of the political will of the Member States accompanying with xenophobia or the dislike for Brussels-made standards.[19]

This remark becomes more serious when the institutional arrangements for the implementation of EC law are considered. It is well known that it is impossible for EC law to be implemented without the legal and administrative systems of the Member States. The primary reason is because of limited administrative resources at the EC level. This dependency can be shown in the legal form of Directives (Article 249 EC), which must be transposed into the legal orders of the Member States. The following statement of the ECJ demonstrates the difficulty of keeping the essential aims of Directives:

> 'the Court has held that the implementation of a directive in national law does not necessarily require the provisions of the directive to be adopted formally and verbatim in an express legislative provision designed for that purpose'.[20]

It is important to note that even Regulations (Article 249 EC), which ought to be applied directly into national legal orders, must be supported by the additional measures of the Member States. Krämer says that, because there must be additional work in giving authorisation and licence, undertaking surveillance and monitoring, and doing reporting requirements, '. . . the regulations are not directly applicable but require Member States to take the necessary steps.'[21]

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

2.2.2 Inaccessibility

Against these failures in implementation, the EC legal order has a remarkable institution: the judicial review system set up mainly by Article 226, 227, 228, 230

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[18] *Ibid*., at 8-10, 135-6.
[19] *Ibid*., at 6, 11, 18.
[20] Case C-131/88, *Commission* v. *Germany* [1991] ECR I-0825, para.7.
[21] Krämer, *supra* n.6, at 119.

and 234 EC. This should differentiate this First Pillar's legal order of the EU from any other international institutions.[22] Article 226 and 227 EC bestow the Commission and the Member States the competence to take an action against a Member State failing to fulfill the obligations prescribed by EC law before the ECJ. It means that the principle of reciprocity seen in the public international legal order is overcome in the EC legal order.[23] Article 228 EC establishes sanctions to impose 'the amount of the lump sum or penalty payment' on a Member State which 'fails to take the necessary measures to comply with the Court's judgment'.[24]

However, this judicial system has limits. Weiler points out the political nature of the procedure, the limitation of human resources to monitor the violations and infringements, the inappropriateness of the procedure to apply to small violations, as well as a lack of real enforcement.[25] In the context of environmental law, Krämer criticises the judicial system as follows:

> 'It is doubtful whether at present the public interest "protection of the environment" is sufficiently safeguarded by the judicial system set up under the EC Treaty. Indeed, Member States do not make use of their prerogative under Article 170 (now 227 – inserted) of the EC Treaty in environmental matters. And the Commission is overburdened with the task of both promoting an environmental policy together with Member States and their administrative bodies, and at the same time bringing legal actions against Member States and their administrative bodies under Article 169 (now 226 – inserted) for failures to comply with the policies and rules on the protection of the environment.'[26]

In this regard, Article 230 should become significant, because it gives 'any natural or legal person' the possibility for instituting proceedings before the ECJ. Theoretically, this provision enable societal actors, like an environmental NGO, to bring an action against EU institutions before the ECJ when they find a nonfulfillment of obligations concerning environmental protection. If the Commission monitoring the implementation of EC environmental law relies on societal actors' participation because of its lack of administrative resources, the access of societal actors into the ECJ should save the Commission's work. This

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[22] J. H. H. Weiler, *The Constitution of Europe: Do the new clothes have an emperor? And other essays on European integration* (Cambridge University Press, 1999), at 26-29.
[23] See, Shaw, *supra* n.3, at 312.
[24] The characteristics of these judicial system in the context of environmental law will be examined in more detailed in section 3.1.1.
[25] Weiler, *supra* n.22, at 27. As for the political nature, Weiler comments that 'the Commission may have appropriate non-legal reasons not to initiate a prosecution.' *Ibid*.
[26] Krämer, *supra* n.6, at 315-6.

provision is also noteworthy in terms of widening the sphere of discourse. Citizens' proceedings becoming a daily phenomenon means that societal actors can participate in normative discourse at the judiciary of EC level.

However, the admissibility of societal actors through this provision has strictly been constrained. This is the so-called barrier of Article 230,[27] which places conditions of 'direct and individual concern' on the *locus standi* of individuals. In order to access the ECJ, individuals or the associations of societal actors have to demonstrate that they have a clear and enough 'direct and individual concern' regarding the case in question. In this respect, the ECJ has interpreted the 'concern' very strictly. 'The Court's case laws have been criticised as unnecessarily restricting the access of individuals,'[28] and this attitude is no exception concerning environmental matters.

The representative case regarding this strict interpretation is the Greenpeace Case.[29] Environmental associations -- Greenpeace International et al -- claimed that the construction of electrical power stations (in the Canal Islands of Spain) failed to undertake an environmental impact assessment,[30] despite receiving a grant from the ERDF (European Regional Development Funds). They demanded the Commission to offer more information and to suspend the plans. After an unfruitful meeting with the Commission, the associations brought the case before the CFI. However, the CFI dismissed this action as inadmissible. The groups again brought the suit before the ECJ, appealing against the adjudication of the CFI, and requested the Court to declare the admissibility of the groups in this case. One of issues in this case concerned whether individuals or societal actors can take the EU institutions before the ECJ, when a Member State that is granted financial aid from the funds of the EC fails to fulfill the obligations derived from the EC law concerning environmental matters.

Greenpeace et al argued for the justification of citizens' access to the ECJ, referring to current developments in environmental legal practices on the national, the EU and international levels. They mentioned the widening of procedural rights to citizens on environmental matters in Member States, the development of

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[27] *Ibid*., at 315.
[28] Shaw, *supra* n.3, at 528, and for a detail commentary regarding locus standi of individuals, see Chapter 15.
[29] Case C-321/95P, *Greenpeace and others* [1998] ECR I-1651.
[30] In this case, the following Directive was called into question. Council Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, OJ 1985 L 175/40.

international environmental law,[31] and the development of the EC environmental law including statements in the 5th EAP.[32] However, the attitude of AG Cosmas on individuals' locus standi was obstinate. If societal actors cannot bring the Commission before the ECJ when the Commission granted financial aid to the Member State that failed to fulfill the obligation of environmental protection, is there any avenue for judicial protection? Under the circumstances, there is nothing to do but wait for other Member States' litigation. However, is there any Member State which will monitor the failures in implementation except its own business? Notwithstanding, AG Cosmas stated in this case as follows:

> '. . . the fact that legality must be observed per se within the Community, including the obligation to protect the environment, does not automatically confer on a natural or legal person a right or legal interest enforceable by an action under the fourth paragraph of Article 173 (now 230 – inserted) of the Treaty. The Community legal order does not recognize an *actio popularis* in environmental matters either. It is not, therefore, possible to rely, as the sole ground for claiming locus standi, on the legal vacuum which would be likely to be created by the fact that certain infringements by the Commission cannot with certainty be remedied if the task of submitting them for judicial review is entrusted exclusively to the Member States and the Community institutions, which do not in practice have an interest in that regard.'[33]

Accordingly, Article 234 EC is important. It is a reference procedure called preliminary rulings, by which a national court can ask the ECJ concerning an interpretation of EC law which is in relation to, and may be in conflict with, national law. As such, this procedure opens up the opportunity for individual citizens or environmental NGOs to indirectly access the ECJ via a national court. With respect to this procedure, what should be focused on is the doctrine of direct effect, according to which EC law gives citizens rights that must be protected when the law is in conflict with a Member State's law that infringes the rights, or when a Member State fails to fulfill the obligations of the secondary laws which give citizens rights. Because of the linkage between the procedure and the direct effect doctrine, individuals or societal actors, like environmental associations, may bring a conflict

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[31] The trends that Greenpeace et al raised are principle 10 of the Rio Declaration; the Council of Europe Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment; recent judgments of the Court of Human Rights in Strasbourg; the system of administrative review introduced by the World Bank as from 1993 in the case of activities which pose a threat to the environment. See, *supra* n.29, para.22.

[32] *Ibid*. Also see, Opinion of AG Cosmas for the Case, at I-1662, para.27.

[33] *Ibid*., at I-1672, para.53.

into the ECJ, and may rely on the interpretation of the ECJ for demanding redress against the infringements of the individual rights that EC environmental law gives individuals. For example, in the Greenpeace Case aforementioned, the Commission suggested the use of this preliminary reference procedure to the plaintiff.[34]

Preliminary rulings play a crucial role in 'the organic connection between the Court of Justice and the national courts'.[35] Weiler assesses the significance of the procedure in terms of legal order's characteristics as follows:

> 'The combination of the "constitutionalization" and the system of judicial remedies to a large extent *nationalized* Community obligations and introduced on the Community level the *habit of obedience* and the respect for the rule of law which traditionally is less associated with international obligations than national ones.'[36]

As such, this remarkable institution opens up the judicialisation of environmental conflicts. However, the preliminary reference procedure cannot resolve all of the problems. It has a decisive limitation: the operation of this procedure depends on a national court, and the ECJ has no power to judge the invalidity of a provision of national law. Therefore, this procedure is an institution that cannot function without the closer cooperation of the ECJ and national courts.[37] Insofar as the judicial linkage between the EC and national level is concerned, it might be supposed that a kind of politically-motivated intention would become influential: an intention never directed by legal provisions. In other words, the preliminary reference procedure is the institution that depends on legally non-binding cooperation which might be influenced by political uncertainty. The circumstance would be similar with an international regime, which expects the compliance of parties without an effective enforcement mechanism. Although the parties in the EC's preliminary reference procedure are national courts and hence more strong compliance can be expected owing to the common spirit of the rule of law, it must be said that the chance of societal actors to bring a case against EC institutions before the ECJ is still important. This strengthens the judicial review system in the EC environmental regime.

2.2.3 Parasitism on Market

As mentioned already, since the SEA, EC's environmental actions gained

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[34] *Ibid*., at I-1665, para.34.
[35] Shaw, *supra* n.3, at 29, and for detail explanation, see Chapter 11.
[36] Weiler, *supra* n.22, at 28.
[37] Shaw, *supra* n.3, at 29.

ground in the EC Treaty. Before that, there was no provision concerning the protection of the environment. Even after the SEA, the main concern of the EC was undoubtedly the building of 'One Money and One Market'.[38] However, EC environmental legislation had been adopted constantly and prolifically from the pre SEA stage. There were three EAPs before the SEA,[39] and, according to the Commission,[40] there were about 200 secondary laws on environmental measures by the beginning of the 5th EAP in 1992. Notwithstanding the circumstances in which constant and prolific legislation was possible, the following question can be raised: has an environmental regime existed in the process of European integration?

On the one hand, it must be noted that the very existence of environmental actions had been justified as the supporting measures for creating, and making functional, the Common Market. Member States have, more or less, their own environmental measures and some international environmental agreements. Further to this, the obligation to fulfill the principle of subsidiarity has added to the difficulties of justifying EC environmental legislation.[41] Under these circumstances, there was only a limited way that measures for the environmental protection would be justified as one of the EC's actions: the creation of the Common Market.

On the other hand, the question is also, in part, derived from the difficulty to define an 'environmental issue-area'. What are environmental problems? Even after the EC set up its own environmental policy area in Article 174 EC, it was so vague as to hold too many things within this scope. For instance, should *working conditions* be categorised as an environmental policy or a social policy, in terms of

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[38] See Armstrong and Bulmer, *The Governance of the Single European Act* (Manchester University Press, 1998), at 205-6.

[39] The first is Programme of Action of the European Communities on the Environment, OJ 1973 C112/3; the second is European Community Action Programme on the Environment (1977 to 1981), OJ 1977 C139/3; the third is A European Community Policy and Action Programme on the Environment (1982 to 1986), OJ 1983 C46/3.

[40] Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, OJ 1993 C138/5, at C138/11. The Commission looked into the fields covering the atmosphere, water, soil, waste, chemicals, biotechnology, product standards, environmental impact assessments and protection of nature. However, this survey is obviously arbitrary, because it depends on whether legislation for amendments are included, and how widely the environment is categorised for the reason that the related fields extend to agriculture, rural development, working conditions and so on. Krämer counts only 30 regulations or directives. See, L. Krämer, *supra* n.6, at 26.

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

the wording ‘protecting human health’ of Article 174(1) EC? Should *land uses* in relation with *fauna and flora* issues be lumped into an environmental, an agricultural or a rural developmental policy, in terms of the wording ‘preserving, protecting and improving the quality of the environment’ in the same Article? It cannot be rejected that there has been the arbitrariness for the Commission and the Council to define the concept of the environment, when the former exercises the initiative for proposals on environmental protection measures, and the latter decides on the proposals.

Both the dependency on the objective of the building of the Common Market and the arbitrary nature of the Commission’s initiatives and the Council’s decisions for environmental legislation have brought about a legal base dispute between the Commission, the Council and Member States, the focal point of which has concerned: Whether Article 100 (now 94) EC for the Common Market building is appropriate for environmental legislation at the pre SEA stage;[42] Which articles are suited for environmental legislation, Article 175 EC for environment, or Article 95 EC for the Internal Market or other related Articles (for example, the common commercial policy or the agriculture) at the after SEA stage.[43] The dispute around Article 94 (ex 100) EC at the pre SEA stage has been succeeded by the dispute around Article 95 (ex 100a) EC after the SEA stage, at least until the revision of the Basic Treaties in Amsterdam, which extended the fields in which the QMV procedure is available. From the SEA to the Amsterdam, it seems that the Commission had, in some cases, taken the strategy of making a choice for the QMV procedure in Article 95 EC rather than the unanimity procedure of Article 175 EC, in order to make environmental legislation easier. This strategy has brought about extensive legal base disputes concerning environmental legislation.

Thus, the very existence of an environmental regime in the EC can in itself become problematic. Is the regime independent from, or dependent upon, other regimes? Is it parasitic upon the Common (and Internal) Market and other environment-related issue-areas like the agriculture, the transport or the social policy regime and so on? While firmly established environmental norms must be conditional on effective environmental actions, the EC began the establishment of the norms along with the building of the Common Market. As will be argued in detail in section 3.1.4, it is the principle of environmental integration that has contributed to the transformation of the EC environmental regime from a parasite

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[42] For example, see Case 91/79, *Commission* v. *Italy* [1980] ECR 1099, at 1105, para.4.
[43] For example, see Case C-300/89, *Commission* v. *Council* [1991] ECR I-2867, and Case C-62/88, *Greece* v. *Council* [1990] I-1527.

regime to a comprehensive regime over all of others. This remarkable regulative principle has become foundational for the development of the EC environmental regime that causes environmental norm to evolve.

2.3 New Governance Mode and Role of Law

Notwithstanding the implementation deficit, the inadmissibility and the parasite characteristics, the European integration process has certainly been accumulating environmental legal practices, fragile as they may be. In the process, political statements concerning environmental actions have often been issued. Many secondary laws and case laws have been produced. Fundamental modifications of the Basic Treaties has been done in any event. There has certainly been the creation, sharing and elaboration of norms towards the environmental protection. When this normative point of view is focussed on in the study of EC environmental law, the trends of the EC environmental governance in 1990's must be taken into consideration. These trends aims at a new perspective in environmental governance.

2.3.1 The Fifth EAP

The 5th EAP[44] in 1992 offered a change of policy style, and declared the departure from a command and control approach. This EAP admitted a 'deficiency of existing strategies' that have the characteristics of 'too great a reliance on command and control type' and a 'preponderant recourse to Directives'[45] It announced a shift 'from top-down to bottom-up', and the adoption of 'performance targets as non-legal commitments'.[46] These new styles are reinforced, according to the EAP, through information-oriented policies aiming at a mutual learning effect,[47] and 'market-based instruments'.[48]

The 6th EAP[49] in 2001 basically succeeds the change of style in the 5th EAP. On the basis of new style offered by the latter, the former presents the strategies for dealing with climate change as an issue-area that should be paid more attention to[50]

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[44] Towards Sustainability: A European Community Programme of Policy and Action in Relation to the Environment and Sustainable Development, OJ 1993 C138/5.
[45] *Ibid*., at 80.
[46] *Ibid*., at 12 and 13.
[47] *Ibid*., at 13.
[48] *Ibid*., at 16.
[49] *2010: Our future Our choice*, COM(2001)31 final.
[50] The 6th EAP says in Explanatory Memorandum that: 'Many of the conclusions and measures proposed in the Fifth Programme remain valid, but they are largely a question of implementation on the ground. More persistent and intractable problems, such as climate change, require a more concerted effort at Community level to lead the way.' *Ibid*., at 67.

and reconfirms the 5th EAP's regulative principles that need strengthening.[51] Therefore, what opened up a new perspective on the mode of environmental governance is undoubtedly the 5th EAP, despite the ambitious and innovative strategies of the 6th EAP.

While this shift from top-down regulatory instruments to self-regulatory, economic and informative instruments certainly makes sense for the adjustment of the EC environmental measures towards very complicated and difficult matters concerning this issue-area, it may still be claimed that this new perspective is vulnerable in terms of implementation failures. The introduction of the more horizontal approach may in practice be mere acceptance of the status quo, in the sense that the flexibility of Member States in implementing EC environmental measures seem to be a compromise of an already established fact. In addition, the emphasis on public awareness and participation by the introduction of informative and communicative instruments is obviously contradictory to the judicial practices that strictly constrain the open access of citizens to the ECJ. Nevertheless, these new strategies should be taken seriously when considering the implication of the new mode on environmental governance in terms of norm evolution through the interaction between normative discourse and framing in a specific issue-area. As will be reviewed below, the new mode has potential to promote normative discourse both more widely and constantly, although the contradiction between inadmissibility into the ECJ and the participatory perspective of this new mode continues to be unchallenged.

2.3.2 New Trends

For an overview of the new strategies of the 5th EAP, the scheme presented by Lenschow regarding the mode of governance[52] is instructive. It is comprised of 'structural elements' and a 'regulatory style'. The former is divided into 'organisational features' and 'state-society relations'; the latter features an 'intervention mode' and a 'routine procedure'. Along with this governance mode scheme, new strategies can be described, generally speaking, in the following transformation: On the one hand, the organisational features in structural elements change from the vertical to the *horizontal distribution of responsibilities*;

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[51] Among them, it is the principle of environmental integration that is more strongly stressed. The principle is put into the centre of the programme in Article 2 (2) of Decision of the EP and Council concerning the programme. See, *ibid*., at 71.

[52] A. Lenschow, 'Transformation in European Environmental Governance,' in B. Kohler-Koch and R. Eising (eds), *The Transformation of Governance in the European Union* (Routledge, 2000), at 40.

State-society relations change from the ‘authoritarian role of the state’, ‘corporatism’, or ‘competitive pluralism’ to ‘*networks/partnership*’; On the other hand, the intervention mode in the regulatory style changes from a hierarchical/interventionist to a *co-operative style*; The routine procedure changes from a legalistic to a *flexible/pragmatic style*, and from an adversarial to a *consensual style*.[53] These trends of transformation correspond to ‘the ongoing general as well as policy-specific (environmental) global discourse on governance’.[54] The intention of this transformation seems to be in the document of the 5th EAP.

However, Lenshow points out that, generally speaking, its realisation is ‘only moderate,’[55] and states that a mix of old and new features can be recognised. Efforts and practices towards the transformation have only just been found within the Commission's Environment DG and Environment Committee in the European Parliament, whereas ‘neither the impact of organisational and procedural innovations, nor the shift towards new policy instruments, nor the ‘constitutional’ status of new governance elements are unambiguous’.[56] Accordingly, this challenge to the transformation of environmental governance mode must be said to remain just ‘policy rhetoric’[57] in the official documents. As a background of this stagnation, Lenschow mentions the negative role of the ECJ:

> ‘. . . the ECJ has contributed to the perpetuation of fragmented governance structures, an adversarial rather than consensual patterns of conflict resolution and exclusive network structures. . . For instance, by limiting the right of environmental organisations to legally pursue non-compliance with EC environmental law (admissibility to the Court is premised on a violation of individual rights), and thereby resisting a broad definition of ‘access to justice’, the ECJ has prevented the establishment of more open governance structures and practices.’[58]

The challenge against the failure in implementation by the new governance mode is impeded by the inadmissibility. Lenschow’s remarks should be kept in mind.

The transformation of a governance mode can also be understood succinctly

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[53] *Ibid*., at 40.
[54] *Ibid*.
[55] *Ibid*., at 49.
[56] *Ibid*.
[57] *Ibid*., at 58.
[58] *Ibid*., at 49.

from Scott's explanation.[59] She offers 'five values' for clearly understanding new trends: 'flexibility', 'decentralisation', 'participation', 'reflexivity' and 'deliberation'.[60] Using these five values as measures, she reviews the IPPC Directive,[61] which is regarded as an example of the challenge towards the new perspective. From her analysis, the materialisation of the following values can be seen: the requirement of publishing emission values; the obligation of transboundary consultation; a periodical reporting requirement for reflexive modification; other devices for the promotion of mutual learning and deliberation. There is, though, a mixture of the command and control approach (or common standard setting at the EC level) and a flexible/decentralised implementation with regard to 'flexibility' and 'decentralisation'.[62] Despite its moderate state, it can be seen that the new perspective has certainly been put into practice during the 5th EAP and the IPPC Directive's practices. It should also be noted that the introduction of these new trends do not signify the discontinuity between before and after the 5th EAP, in terms of institutional arrangements for environmental governance. As will be argued in Section 3.2.1, the Directive-centred architecture of EC environmental law was already equipped with a flexible, consensual and information-sharing mechanism even before the SEA.

2.3.3 Role of Law

As noted above, the EC environmental regime is based upon formal institutions that enable the judicially reviewable legal obligations of EC institutions and Member States. Against this picture of the legal dimension of the regime, the governance mode has moderately been transformed towards a horizontal, network, cooperative and consensus style. In this contrast between the regime and the governance mode, the role of law should therefore be considered in terms of regime development. How can the new mode in itself be interpreted from a legal point of view? Does the shift from a top-down regulatory instrument to a self-regulatory and communicative instrument mean the introduction of a post-legislative approach? Is the role of law in the regime denied in the transformation of environmental governance from a vertical or hierarchical to a horizontal or consensual instrument? Does the introduction of this new mode mean that the EC environmental regime has been de-legalised?

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[59] Scott, *supra* n.2.
[60] *Ibid*., at 265-6.
[61] Council Directive 96/61/EC on Integrated Pollution Prevention and Control (IPPC), OJ 1996 L 257/26.
[62] Scott, *supra* n.2, at 265-272.

With these questions in mind, the arguments of Ladeur's case study on EC environmental law regarding a new legal order[63] offers an instructive viewpoint. According to him, there have emerged 'new types of legal phenomenon that cannot be fitted into the notion of the construction of a European legal order within a European Federal State'.[64] This legal phenomenon is 'heterarchical', 'transnational', 'co-operative' and 'horizontal' rather than a 'supranational' legal relationship, which calls into question the traditional close links between the state and law.[65] With respect of this phenomenon, a 'non-traditional legal relationship must be assumed within the EC legal order, for the purpose of conceptualising 'a "network-like" relationship between national, trans- and supra-national forms of legal integration in the EU'.[66]

This can be called 'a "third way" between the preservation of a national legal order and a relatively homogenous supranational order'.[67] A main practice in the third way of the legal order is 'legal transplants' of an environmental action among Member States, which stimulate a mutual learning and adaptation process, but do not lead to the uniformity of administrative law among Member states.[68] By studying instances of the Environmental Impact Assessment Directive[69] and the IPPC,[70] he offers the following viewpoint:

> 'Many of the environmental reforms of the EC are not really European, in the sense that they have their own systematic framework to which Member States have to adapt. They are rather linked to a conception of reciprocal stimulation of change by transplanting new forms of environmental regulation from one country to the others. This is inevitable because Europe is composed of different legal systems, but there is no European legal system, as such.'[71]

From this study of Ladeur, it can be observed that the new mode of environmental governance is in line with 'a shift from supranational to more transnational co-operative processes of legal integration'.[72]

The following view of Scott should also be considered for the purpose of

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[63] Ladeur, *supra* n.5.
[64] *Ibid*., at 282.
[65] *Ibid*., at 281, 283-4.
[66] *Ibid*., at 283.
[67] *Ibid*.
[68] *Ibid*., at 293.
[69] Council Directive 85/337/EEC.
[70] Council Directive 96/61/EC.
[71] Ladeur, *supra* n.5, at 292.
[72] *Ibid*., at 297.

approaching the legal consequences of the new governance mode. The mode in the EC brings about two legal practices: flexibility in implementation and constraints in procedure.[73] Under EC environmental governance, Member States are allowed to implement EC environmental law discretionally, but are simultaneously restricted from the procedures of implementation. By analysing the IPPC Directive,[74] she offers the model of 'the community's (procedurally constrained) flexibility in implementation model'.[75] In this model, the strongly constrained procedure aims at realising the aforementioned 'participation', 'reflexivity' and 'deliberation'.

Accordingly, this model implies that, because the EC level intervenes in standard-setting or a decision of the allowable level of emission as little as possible, the downstream of standards seems to be strengthened; however, because Member States are strongly constrained in procedural terms, it can be expected that the participatory, reflexive and deliberative procedures will develop environmental norms through the widening and strengthening of normative discourse. In other words, the proceduralisation can be expected to bring about the possibility of further promoting normative discourse on the basis of the precedent discourse.

In respect of this proceduralisation, Scott highlights its intrinsic value[76] by stating that the procedural intervention of the EC level into Member States cannot be legitimatised without constitutional consideration. The intrinsic value of proceduralisation is in relation with whether or not procedural practices should be protected constitutionally. It therefore depends on the role of the ECJ whether the intrinsic value can be recognised and concretised in the EC in a participatory, reflexive and deliberative way. In this view, the new governance mode for the environmental protection, therefore, is not mere a policy instrument aiming at mutual learning and norm-sharing in an issue-area, this new mode also guides discourse on environmental governance towards the normative discourse on constitutional values.

These two concepts: the shift from a supranational or vertical to a transnational or horizontal legal relationship (Ladeur) and the constitutionally prescribed proceduralisation with flexibility in implementation (Scott), must be placed under a common precondition: the sharing and elaboration of environmental norms. If this sharing cannot be found in the course of transnationalisation and proceduralisation in EC environmental governance, the practices based on these conceptions will

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[73] Scott, *supra* n.2, at 259-260.
[74] Council Directive 96/61/EC.
[75] Scott, *supra* n.2, at 259.
[76] *Ibid.*, at 277-279.

break down. If the procedure of a horizontal interaction produces no norm, or prompts no norm-sharing, the practices become nothing but the means to hidden the naked economic interests of the Common Market.

In contrast, if the orientation of horizontally mutual learning, and the reflexive, deliberative practices of the participatory procedure can be based on highly developed norms, and produce in itself further norm sharing and elaboration, the change of the governance mode becomes the means to open a wider sphere of discourse, in which environmental norm may further evolve. The widening process of the discursive sphere could lead to the development of an environmental governance frame, which (re-)directs normative discourse, and in which all actors must justify their own behaviour. It can be assumed that the more the discursive sphere is arranged through the proceduralisation of this new mode, the more interaction between normative discourse and a governance frame is activated.

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

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

Conclusion

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

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

It must be noted that an accumulation of secondary laws and case laws in the EC environmental regime has maturated the evolution of environmental norms. It is shared norms that are the foundation of promoting the effective operationalisation of the new mode whereby the weaknesses of the regime are removed. Chapter 3 attempts to describe the process of environmental norm evolution that emerges through normative discourse.

CHAPTER 3

Environmental Norm Evolution

Introduction

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

The focus is on case laws, secondary legislation and international environmental agreements concluded by the EC as a single international actor. Primary legislation, council resolutions, EAPs, European Council declaration and presidency conclusions are put into the background. This descriptive selection is in the diagram of Section 1.1. In this institutional context of discourse in the EU, E (secondary legislation and international agreements) and F (case laws) are focussed on, while other types of discourse are put into the background.

Diagram 2 (reinserted)

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

This implies the following understanding in respect to discourse and its contribution to norm evolution in the institutional context of the EU. In the continuous gradation from political-intensive to legal-intensive discourse in the EU institutional context, the ECJ and the legislature have been effective discursive spheres, in terms of supporting norm evolution. Case laws of the ECJ have, as the most legal-intensive

discourse, established environmental protection as a core norm even before the SEA, even though there was no visible support from primary legislation and was only the political discourse in EAPs (A in the diagram above). On the basis of environmental norms that the ECJ set up, secondary legislation (E in the diagram above) has, as an intermediate discourse between the political and the legal, elaborated key concepts that create the governance frame opening up a common meaning world in an environmental issue-area. International environmental agreements have provided indispensable norm sources for environmental normative discourse in secondary legislation.

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

3.1 Case Law of the ECJ

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

3.1.1 Basic Characters

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

consideration.

1) The following three patterns are dominant in the judicial process: a) the Commission's charge against a Member State for infringement of an obligation, on the basis of Article 226 EC; b) disputes between the Commission, the Council, and Member States on the basis of Article 230 EC, with respect to 'the legality of acts', 'an essential procedural requirement', 'rule of law' or 'misuse of powers'; c) preliminary rulings, on the basis of Article 234 EC, which is the procedure of the national courts' reference to the ECJ, in which the conflict between societal actors, or between them and national governments, *may* be settled according to EC law. From these prevailing patterns, legal disputes are stirred up between plaintiffs, defenders and interveners coming from EU institutions, Member State governments and societal actors, arguing their own stand with their own implied interests. These disputes are thus brought into the legal discourse in the ECJ.

The fact that these three patterns are dominant in environmental cases means that the following patterns are very rare or substantively impossible: a dispute between Member States in Article 227 EC;[1] the litigation by individuals or

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

associations to bring EU institutions before the ECJ in Article 230 EC. This reveals a serious problem in the climate of legal discourse: the indifference of Member States despite their monitoring ability; and constraints on societal actors despite their willingness to participate in legal discourse in the ECJ. Above all, the inadmissibility issue in Article 230 EC can be pointed out to be one of the essential problems in the EC environmental regime, in terms of the democratic potential that private (but public interest oriented) actors' litigation causes norms to evolve, as argued in Section 2.2.2. Notwithstanding these defects, it should be noted that the three dominant patterns have contributed to environmental norm sharing and elaboration, as will be examined below.

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

However, the conflict around the parasitic nature of environmental concern on the building of the Common (and Internal) Market cannot be regarded as a mere struggle for competences. It has also become the opportunity on which common meanings of the environment can be precisely elaborated and widely shared. The legal discourse on legal base disputes in the ECJ have contributed to environmental norm evolution in terms of framing for governance. That is, it has stimulated the sharing and elaboration of common meanings regarding environmental core norms, key concepts and regulative principles. Above all, this type of dispute has promoted the development of the principle of environmental integration, which implies an ecosystem-oriented holistic frame.

3) The reforms of the EC Treaty in Maastricht of 1992 has provided a 'lump sum or penalty payment to be paid by the Member States' in Article 228 EC. Before that, the practice of the EC judicial system was essentially not an *order with* a *potential sanction*, but an *interpretation without* a *sanction*. The sanction against non-compliance with the ECJ judgment was only expected in the domestic institutional context of Member States. While the doctrines of direct effect and

supremacy certainly make the EC legal order close to a federalised one, these have to be buttressed by the voluntary collaboration of national judicial actors through the preliminary reference procedure. Insofar as this dependency is concerned, the EC judicial system was still in line with the international judicial system before the big reform. It is dependent upon the political will of Member States, and without their legal and administrative system, the enforcement of judgment cannot be secured. The judicialisation of the EC environmental regime must be said to have been based to a large degree on the voluntary participation. The introduction of a financial penalty has qualitatively changed the basically international character of the ECJ.[2] The first case where the Article 228 sanction was applied is Case 387/97 *Commission* v. *Greece* (Crete II).[3] Claiming that Greece did not implement the necessary measures to comply with the judgment of the ECJ (Case C-45/91), the Commission brought Greece before the ECJ on the basis of Article 228. The ECJ ordered the Greece to pay a penalty payment of EUR 20000 for each day of delay in implementing the measures. In this Case, the ECJ offers the view concerning the aim of financial penalty (to 'remedy the breach of obligations as soon as possible')[4] and the criteria for calculating the amount of payment ('the duration of the infringement, its degree of seriousness and the ability of the Member State to pay').[5]

Notwithstanding, it must be noted that the evolution of environmental norms had already been established long before this big change at the systemic level, as will be argued below. In the first place, an interpretation without a sanction does not necessarily lead to the stereotyped view that, in comparison with a domestic judicial system, international tribunals in general are a mere decoration with no real power, and the EC is no exception. It should be noted that legal discourse in the ECJ becomes a node by which each national legal experience is intertwined.[6] Therefore, what matters is how the legal discourse promotes the evolutionary process of transnational environmental norms.

Based on this preliminary understanding, the following is a short chronological survey of ECJ's case laws. The emphasis is mainly on: 1) how far the 'protection of environment' has been regarded as a core norm, on the basis of which the

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

[3] Case C-387/97, *Commission* v. *Greece* July 4 2000.

[4] *Ibid.*, para.90.

[5] *Ibid*., para.92.

[6] See, C. Kilpatrick, 'Community or Communities of Courts in European Integration?: Sex Equality Dialogues Between UK Courts and the ECJ' (1998) 4 *ELJ* 121.

'environment' has come to be recognised as general interest and as the ground for legally protected individual rights; 2) what role the principle of 'environmental integration' has played in terms of the development of the EC environmental regime.

3.1.2 The Pre SEA Stage

At the primary law level, it was from the SEA that environmental protection was established as one of EC's objectives. Nevertheless, an environmentally-oriented legislation had been adopted before the SEA. At that time, three EAPs had already been established, and there was considerable political discourse around law. In the 1st EAP,[7] the ground of the environmental action was found in the Preamble of the Rome Treaty, the interpretation of Article 2 EC and the declaration in the 1972 Paris Summit. However, the two formers seem to be too economically-oriented to establish a differentiated norm for environmental protection. The wording of the Preamble is that:

> 'the constant improvement of the living and working conditions of their peoples' and 'the harmonious development of their economies'.

In Article 2 EC, the following task was put forth:

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

From these wordings, environmental norms must be said to have been put in the backseat of the building of the Common Market. Compared with these, the declaration of the Paris Summit was certainly more proactive for the establishment of EC environmental norms. It said that:

> 'economic expansion is not an end in itself . . . As befits the genius of Europe, particular attention will be given to intangible values and to protecting the environment so that progress may really be put at the service of mankind.'[8]

Nevertheless, it cannot be stated that the establishment of an *EC* environmental regime was so obviously orientated. It was legal discourse in the ECJ that contributed to the normativity of the environment as if to support and substantiate political discourse, such as the initiative of the Commission and the declaration on the high level meeting of political leaders. At this point, four cases on the pre-SEA

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[7] Programme of Action of the European Communities on the Environment, OJ 1973 C112/3.
[8] *Ibid.*.

stage are reviewed.

Cases 3, 4, 6/76, Cornelis Kramer and others[9]

This Case is based on the preliminary ruling procedure concerning criminal prosecutions brought against Dutch fishermen that were accused of breaching the rules of Netherlands for the conservation of fishing resources. The rules were due to the North-East Atlantic fisheries convention, signed at London on 24 January 1959. The contracting parties were all of the member states of EEC, except Italy and Luxembourg, and seven non-member countries. The convention sought the conservation of fish stocks in the North-East Atlantic.[10] The issue that the national court referred to the ECJ was: 1) a competent relation between an international agreement of individual Member States and the Community;[11] 2) consistency between the provision of the agreement and the Community rules of the Common Market, especially concerning whether the cap on catch quotas for conservation of fishing resources on the basis of the convention was a quantitative restriction in trade between member states.[12] Accordingly, this Case was mainly concerned with Community competence regarding commitments made from international agreements signed by some of the Member States. The case was also concerned with the EC common fisher policy.

However, the following statement in the judgment may be seen as a first step to establish EC environmental norm:

> ‘In this connexion, the nature and the circumstances of 'production' of the product in question, fish in the present case, should also be taken into consideration. Measures for the conservation of the resources of the sea through fixing catch quotas and limiting the fishing effort, whilst restricting ‘production’ in the short term, are aimed precisely at preventing such ‘production’ from being marked by a fall which would seriously jeopardize supplies to consumers.’[13]

Despite calls for stabilising the product supply for consumers, these statements can easily be seen to lead to the thought of sustainable development. In the sense that the quantitative restrictions on intracommunity trade were validated on account of conservation of biological resources in the sea, this case can be regarded as the one of earliest case dealing with environmentally-oriented norms relativising and

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[9] Cases 3, 4, 6/76, *Cornelis Kramer and others* [1976] ECJ 1279.
[10] *Ibid.*, para.3.
[11] *Ibid.*, para.9.
[12] *Ibid.*
[13] *Ibid.*, para.56-9.

constraining market building concerns.

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

> 'member states participating in the convention and in other similar agreements are now not only under a duty not to enter into any commitment within the framework of those conventions which could hinder the community in carrying out the tasks.'[14]

It can be said that this cooperation principle plays a crucial role in structuring normative discourse in the institutional context of the EC environmental regime.[15]

Case 21/76 Bier[16]

This Case is based on a dispute concerning the jurisdiction of national courts in transboundary environmental pollution; an another early case of the ECJ that addressed an environmental issue.[17] The fact is as follows. The undertaking of horticulture in the Netherlands was injured by a French mining company's discharge of chlorides into the Rhine, and brought an action before the court of Rotterdam (Court of first instance). However, because the court rejected jurisdiction, this Dutch plaintiff lodged an appeal with the Gerechtshof of the Hague (Appeal Court), and this court took up the preliminary reference procedure.

The focal point concerned the interpretation of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters. The wording in question was Article 5(3) of the Convention which says 'a person domiciled in a Contracting State may, in another Contracting State, be sued . . . in matters relating to tort, delict or quasi-delict, in the courts for the place where the harmful event occurred'.[18] What was in question was whether the place means 'the place where the damage occurred' (Erfolgsort) or 'the place where the event having the damage as its sequel occurred' (Handlungsort).[19]

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[14] *Ibid.*, para.44-5.
[15] See Section 2.1, note 5.
[16] Case 21/76, *Handelskwekerij G.J.Bier B.V.* v. *Mines de Potasse d'Alsace S.A.* [1976] ECR 1735.
[17] Sands says this Case is the first that explicitly addressed environmental matters. See *supra* n.1, at 24. However, what is understood as the first environmental cases depends on one's definition of environmental matters. For example, agriculture and fishery are related to environmental problems. It seems to be possible that all cases orientated towards establishing environmental norms are categorised into environmental cases. Insofar as so, the *Kramer* Case noted above can be said to be an environmental case, and this *Bier* Case may not be said to be the *first* environmental case in the EC.
[18] Case 21/76, *supra* n.16, at 1749.
[19] *Ibid.*, at 1745, para.6 and 1741-2.

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

In discourse in the form of written observations lodged with the ECJ, what was significant was the comparative ponderation of two principles: 1) the principle of rational administration of justice, which was claimed by the French government; 2) compensation of procedural disadvantage of the injured party in transboundary environmental pollution, which was argued by the Dutch government. As the Dutch government claimed, there are difficulties in identifying the clear relationship between the act and the damage in international environmental pollution. With the development of environmental norms being considered, the following remark of the Dutch government is of particular interest:

> 'As part of the legal policy to be followed in environmental matters, the injured party should be put in a strong position, in particular by placing him in a favourable situation from the point of view of procedure'.[20]

The conclusion of the ECJ was that the Convention enables injured parties to bring a suit before courts in both places where the act was done and the damage occurred. It means that plaintiffs have the freedom to select which courts they may call upon, their country's or another. The judgment stated that '. . . the plaintiff has an option to commence proceedings either at the place where the damage occurred or the place of the event giving rise to it'.[21] In the Opinion attached with this Case, Advocate General (hereinafter: AG) Capotorti examined several Member States' legal experiences with regard to this type of conflict.[22] The examination of the legal systems of German, French, Italy, Netherlands, Belgium and UK may be thought of as the EC's practice to seek 'a systematisation'[23] of legal practices amongst the Member States. The judgment also stated that:

> 'In these circumstances, the interpretation (giving plaintiffs the freedom to select courts: inserted) . . . has the advantage of avoiding any upheaval in the solutions worked out in the various national systems of law, since it looks to unification, in conformity with Article 5(3) of the Convention, by way of a systematisation of solutions which, as to their principle, have already been established in most of the

[20] *Ibid*., at 1741.
[21] *Ibid*., at 1747, para.19.
[22] *Ibid*., at 1752-7.
[23] *Ibid*., at 1747, para.23.

States concerned.'[24]

As the Opinion of AG Capotorti acknowledged,[25] the environmental problem that the *Handlungsort* is different from the *Erfolgsort* is undoubtedly hard to be defined and compensated. This early environmental case in the EC should be remembered because the procedural disadvantage of injured parties was problematised through the ECJ's effort of pursuing the systematisation of Member States experiences. Here the common understanding was established that environmental damages *should* be redressed in a systematised judicial process, and that the procedural disadvantage of injured parties should be taken into consideration.

Case 91/79 Commission v Italy[26]

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

This Case was, on the basis of Article 226 EC, brought before the ECJ by the Commission, who alleged that the Italian government failed to take domestic measures according to the Detergents Directive.[27] This Directive was adopted on the basis of Article 94 EC, and requires Member States to take measures for restricting the non-biodegradability of detergents, with a view to eliminating the technical barriers which impede the function of the Common Market. It should be noted that the Directive was also adopted in the course of the 1st EAP.[28]

The arguments of the Italian government were as follows. First, the objective of the Directive had already been achieved by the national measures before the Directive entered into force. For example, the Italian government claimed that 'the Italian Law No 125 of 3 March 1971 provided for a rate of biodegradability of not less than 80%', although it is below 90% of the Directive.[29]

Second, the Italian government submitted the draft law before the Senate,

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[24] *Ibid*..
[25] 'The injured party, who must establish the unlawful act, is automatically deemed the weaker party and as such worthy of protection in the choice of the court having jurisdiction.' *Ibid*., at 1758.
[26] Case 91/79, *Commission* v. *Italy* [1980] ECR 1099.
[27] Council Directive 73/404/EEC on the approximation of the laws of the Member States relating to detergents, OJ 1973 L347/51.
[28] *Supra* n.7.
[29] Case 91/79, *supra* n.26, at 1103 and 1112.

although at that time the legislative process was suspended by a political crisis.[30] Accordingly, the infringement was just at the required time-limit during which national measures must be taken. Such a delay should never entail a complete refusal of the obligations this directive imposes.[31]

Third, Directives in general do not oblige Member States to adopt laws or administrative provisions. What matters is the result to be achieved, as is stated in Article 249 EC.[32] Considering this point together with the first and second, it is clear that there was not 'any lack of usual diligence'.[33]

Finally, but most importantly, the Italian government challenged, though only moderately, the validity of the EC's competence concerning environmental measures. Drawing upon the obvious fact that the Rome Treaty does not make provisions for the environment, the government claimed that Article 94 EC could not be the legal base of the Detergents Directive. For this reason, environmental secondary legislation is in the nature of an international convention.[34] The wording of Judgement says the Italian government 'feels . . . that the subject-matter of the directive lies "at the fringe" of Community powers and that it is actually a convention drawn up in the form of a directive.'[35]

Against these arguments of the Italian government, the ECJ established: 1) the hardness of Directive; and 2) the validity of environmental measures at the EC level. First, according to the ECJ, any decisions adopted in EC's institutional framework 'cannot be described as an "international agreement"'.[36] Therefore, the specific national circumstances cannot be referred to as valid reasons for the infringement. The comments in the Opinion of AG Mayras is interesting, with regard to how to differentiate between international law and EC law. The AG interpreted the claim of the Italian government as follows:

> '. . . the Court is asked to fall into line with the view of the majority of academic writers on international law that the assessment of the international liability of a State must take into account the factual circumstances which brought about the breach of its obligations.'[37]

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[30] *Ibid*., at 1102.
[31] *Ibid*., at 1103.
[32] *Ibid*., at 1111.
[33] *Ibid*., at 1102.
[34] *Ibid*., at 1110.
[35] *Ibid*., at 1105, para.4.
[36] *Ibid*., at 1105, para.7. See also Case 38/69, *Commission* v. *Italy* [1970] ECR 47.
[37] *Ibid*., at 1113.

Recalling earlier established case laws, the AG stressed 'the specific object of the procedure' the objective of which is 'to ensure the uniform application of Community law in all Member states' and 'to give a solid basis to the free movement of goods, the foundation of the Community'.[38] For this reason, the AG concluded that 'the taking into account of the circumstances explaining factually the reasons existing in a country for its failure are incompatible with the very nature of the procedure'.[39] Moreover, 'the Member States are obliged to ensure the full and exact application of the provisions of any directive'.[40] In the Opinion, the AG said '"Similar" and "identical" are not synonymous.'[41]

Second, the validity of EC's environmental measures was confirmed on the objective of the building of the Common Market. The ECJ confirmed that Article 94 EC is the valid legal base for the measures, because:

> '[p]rovisions which are made necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonization of national provisions on the matter, competition may be appreciably distorted.'[42]

The ECJ argued that the Detergents Directive is not only in line with the 1st EAP, which the Italian government suggested as a fringe issue, but also in line with the General Programme for the elimination of technical barriers to trade (adopted by the Council in 1969).[43]

In the sense that this Case confirmed the hardness of environmental Directives despite the fragile legislative context of the pre SEA stage, its significance cannot be ignored. According to the ECJ, EC environmental law should not be seen from the viewpoint of international law. It is not an agreement among sovereign states the implementation of which can, to some degree, be flexible subject to domestic legal systems and political circumstances. This judgment was handed over to the first financial penalty Case noted above (*Crete* Case II).[44] Almost a decade of delay in the Greek government's obligatory measures against the chaotic dumping of military and hospital waste materials into the river Kouroupitos was in part due to public opposition to the building of a mechanical recycling and composting plant as well as

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[38] *Ibid*.
[39] *Ibid*.
[40] *Ibid*., at 1105, para.6.
[41] *Ibid*., at 1112.
[42] *Ibid*., at 1106, para.8.
[43] *Ibid*.
[44] Case C-387/97. See *supra* n.3.

a landfill site in this area. The opposition was brought before competent administrative and judicial authorities.[45] However, the ECJ stated that:

> 'it is settled case-law that a Member State may no plead internal circumstances, such as difficulties of implementation which emerge at the stage when a Community measure is put into effect, to justify a failure to comply with obligations and time-limits laid down by Community law.'[46]

Notwithstanding the proactive attitude in Case 91/79, it must also be borne in mind that the EC's action for environmental protection could be taken so long as it is directed towards the elimination of disparities between Member States, which may distort the function of the Common Market. In this sense, it has to be said that the Environment was at this stage not yet constituted as a value independent from market concerns, although its basic normativity was established.

Case 240/83 ADBHU[47]

In contrast, this Case recognised environmental protection as an essential objective of the EC, which can restrict the principle of freedom of trade. In the sense that there had been this recognition already before environmental clauses were established by the SEA, this Case is significant. The focal point was the validity of the Waste Oils Directive[48] orientated towards the building of the Common Market. The Directive requires Member States to take necessary measures for the safe collection and disposal of waste oils, preferably by recycling. For this purpose, the Directive allows Member States to give one or more undertakings the permission to deal with waste oils, and to assign zones in which only permitted undertakings can treat them. Moreover, the permitted undertakings receive indemnity 'financed in accordance with the 'polluter pays' principle'.[49]

The conflict of this Case emerged in France between the Public Prosecutor and the Association for waste oil burners, over the French law which was set up in order to implement the Waste Oils Directive. The Prosecutor applied to Tribunal de grande instance de Créteil (Regional Court in French), claiming that the aims and objectives of the Association were unlawful in terms of the French law, because the Association was involved in the unapproved burning or disposal of waste oils. Against the claims of the Prosecutor, the Association raised before the same French

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[45] *Ibid.*, para.69.
[46] *Ibid.*, para.70.
[47] Case 240/83, *Procureur de la République v. Association de défense des brûleurs d'huiles usagées (ADBHU)* [1985] ECR 531.
[48] Council Directive 75/439/EEC on the disposal of waste oils, OJ 1975 L194/23.
[49] Case 240/83, *supra* n.47, at 547, para.3.

regional court the question of 'the validity of the Directive in terms of certain fundamental principles of EEC law'.[50] On the basis of the preliminary reference procedure, the French court referred to the ECJ, with questions about the conformity of the Waste Oils Directive with 'the principles of freedom of trade, free movement of goods and freedom of competition, which are established by the EEC Treaty'.[51] The point was raised that, while this Directive allows Member States to set up 'permission', 'zones' and 'subsidies' for undertakings approved by public authorities, these may infringe the principles of the Treaty. The parties that submitted observations were the Commission, who had 'no doubt that the protection of the environment against the risk of pollution constitutes an object of general interest which the Community may legitimately pursue';[52] the Council, who stressed the compatibility of the Directive with the principles for the Market building practices;[53] the French government, who claimed absolute discretion of Member States concerning the operation of the Directive;[54] the German government, who validated the Directive and the French law from technological point of views;[55] and the Italian government, who recognised the compatibility, because there were 'no barriers restricting exports of such products to other Member States'.[56]

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

> 'In the first place it should be observed that the principle of freedom of trade is not to be viewed in absolute terms but is subject to certain limits justified by the objectives of general interest pursued by the Community provided that the rights in question are not substantively impaired.'[57]

According to the ECJ, the environmental protection is 'one of the Community's essential objectives',[58] which can limit the principle of freedom of trade so long as the principles of proportionality and non-discrimination are observed.[59] In this legal discourse, environmental protection was regarded as a valid ground for the restriction of the free trade principle. However, it must also be added that the principle of free and fair competition was preferred over the principle of freedom of

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[50] *Ibid*., at 547, para.5.
[51] *Ibid*., at 548, para.6.
[52] *Ibid*., at 541.
[53] *Ibid*., at 544.
[54] *Ibid*., at 545.
[55] *Ibid*..
[56] *Ibid*..
[57] *Ibid*., at 549, para.12.
[58] *Ibid*., at 549, para.13.
[59] *Ibid*..

trade in the building of the Common Market.[60] Accordingly, this Case should not be interpreted that environmental values was regarded as absolutely relativising, or going beyond, market building concerns. On the contrary, the Market was still weighed in terms of the principle of free and fair competition.

Nevertheless, it can be stated that the conflict around environmental measures affected the meanings of the Common Market. This Case demonstrated that, insofar as the fairness of competition is observed, freedom of trade can be restricted in the general interest of the environment. In this sense, the Case can be seen as the instance in which the meanings of key concepts such as the Market have been affected by legal discourse on environmental norms. Also, it must be noted that the environmental protection was established in this Case as a core norm that the EC is obliged to serve.

3.1.3 After the SEA Stage

The EC environmental measures had a weak foundation before the SEA. Even after the establishment of environmental clauses by the SEA, they required the unanimity procedure for enacting environmental legislation. Nevertheless, this environmental norm-making by the 1985 IGC has in an obvious way provided environmental objectives and regulative principles on environmental governance. This pro-environment tendency was also reconfirmed at the 1990/91 IGC, which produced the Maastricht Treaty, in which the wording of environmental protection was inserted into its Preamble TEU. Along with these trends at the legislature for the primary law, the ECJ has offered pro-environmental interpretation. It can be categorised into two: the environmental protection as a general objective and the individual rights derived from the EC environmental legislation.

3.1.3.1 General Objectives

With regard to general objectives, two cases can be raised. One is the *Peralta* Case,[61] in which the tension between the principle of freedom to provide maritime transport services and its restrictions for preventing the pollutive behaviour was problematised. In this Case, the ECJ ascertained that Article 174 EC ‘defining the general objectives of the Community’[62] can be applied in order to restrict the principle of freedom to provide services, although the ECJ avoided the detailed interpretation of the environmental Article, claiming that the responsibility for its concretisation is the task of the Council.

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[60] See the Opinion of AG Lenz, *Ibid*., at 535.
[61] Case C-379/92, *Criminal proceedings against Matteo Peralta* [1994] ECR I-3453.
[62] *Ibid*., at I-3505, para.57.

The other Case is *Cali* v. *SEPG*,[63] in which the compatibility between the preventive anti-pollution surveillance granted by a national authority and the elimination of the abuse of dominant position was called into question. In this Case, the ECJ acknowledged the special character of environmental protection as follows: 'the exercise of powers relating to the protection of the environment . . . are typically those of a public authority',[64] and state practices of environmental protection can therefore escape the breach of competition law.

3.1.3.2 Environmental Rights

With regard to individual environmental rights, in Case C-131/88,[65] which dealt with the infringement by Germany of obligations concerning the Groundwater Directive,[66] the ECJ demonstrated that Directives in general can offer individuals environmental rights. The wording of the judgment is as follows:

> 'The directive at issue in the present case seeks to protect the Community's groundwater in an effective manner by laying down specific and detailed provisions requiring the Member States to adopt a series of prohibitions, authorization schemes and monitoring procedures in order to prevent or limit discharges of certain substances. The purpose of those provisions of the directive is thus to create rights and obligations for individuals.'[67]

This interpretation was reconfirmed in Case C-361/88,[68] which also dealt with the failure of Germany to fulfill its obligations to transpose the Sulphur Dioxide Directive[69] into the national legal order. The Case offered the prescription on how the Directive should be transposed. According the ECJ:

> 'it does indeed guarantee the full application of the directive in a sufficiently clear and precise manner so that, where the directive is intended to create rights for individuals, the persons concerned can ascertain the full extent of their rights and, where appropriate, rely on them before the national courts.'[70]

What deserves attention is the fact that the two Directives (the 1979

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[63] Case C-343/95, *Diego Cali & Figli Srl* v. *Servizi ecologici porto di Genova SpA (SEPG)* [1997] ECR I-1547.
[64] *Ibid*., at I-1588, para.23.
[65] Case C-131/88, *Commission* v. *Germany* [1991] ECR I-0825.
[66] Council Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances, OJ 1980 L20/43.
[67] Case C-131/88, at I-867, para.7.
[68] Case C-361/88, *Commission* v. *Germany* [1991] ECR I-2567.
[69] Council Directive 80/799/EEC on air quality limit values and guide values for sulphur dioxide and suspended particulates, OJ 1980 L229/30.
[70] Case C-361/88, *supra* n.68, at I-2601, para.15.

Groundwater Directive and the 1980 Sulphur Dioxide Directive), which were interpreted as creating environmental rights for individuals in these Cases, were adopted on the pre-SEA stage. Despite the lack of primary legislation for environmental protection, secondary legislation supporting the Common Market was interpreted in a manner so as to create environmental rights through the legal discourse in the ECJ.

3.1.4 The Principle of Environmental Integration

Notwithstanding the pro-environmental interpretation of the ECJ, the basis of environmental legislation was still weak on the following accounts: the unanimity procedure required in the environmental clause of Article 175 EC; the strong orientation of Member States towards the development of their economies; the potential of disguised protectionism in the environmental measures of Member States that impede the function of the Internal Market. For the EC, it can be seen that, even after the SEA, it was still difficult to build an environmental governance frame that can relativise economic-oriented concerns on market building. In this situation, it is the principle of environmental integration that contributed to regime development, in terms of framing for environmental governance.

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

> 'Effects on the environment should be taken into account at the earliest possible stage in all the technical planning and decision-making processes'.[71]

Although there was no evident wording in the Principle section of the 2nd EAP,[72] the 3rd EAP provided for 'integration of the environmental dimension into other policies'.[73] However, in the 4th EAP, which was adopted at the same time with the SEA, the integration principle was again elaborated in detail.[74] In Article 130r (2) (now 6) EC, the principle was expressed such that:

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

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[71] *Supra* n.7, at C112/6.
[72] European Community Action Programme on the Environment (1977 to 1981), OJ 1977 C139/3.
[73] A European Community Policy and Action Programme on the Environment (1982 to 1986), OJ 1983 C46/3, at C46/2 in part of the Council Resolution concerning this Programme.
[74] A European Community Policy and Action Programme on the Environment (1987 to 1992), OJ 1987 C328/5, at 9-13.

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

> '. . . as soon as possible in a more generalized way so that all economic and social developments throughout the Community, whether undertaken by public or private bodies or of a mixed character, would have environmental requirements built fully into their planning and execution'.[75]

While this proactive stance in the 4th EAP was still not beyond the rhetoric of political discourse, the more ambiguous wording in the primary law has been interpreted by the ECJ as the basis for validating the parasitic legislation of environmental measures. The legal discourse in the ECJ has enabled EC environmental legislation to be adopted on the legal bases of other issue-areas, in particular, the legal base for the building of the Internal Market in Article 95 EC. Moreover, in legal base disputes, the position of the Environment against the Market has also been strengthened in the way of demarcating each core norm. To continue, the following two Cases are reviewed, and the situation after Amsterdam is then discussed.

Case C-62/88 Commission v Greece[76]

This Case is derived from the question of the Greek government to the ECJ on the basis of Article 230 EC, concerning the Regulation dealing with the disaster of the Chernobyl nuclear power station.[77] This Regulation requires Member States to impose strict limits on the import of agricultural products from non-member states. Depending on the levels of radioactive contamination, the limits are imposed on the products influenced by the accident at the Chernobyl nuclear power station.

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

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[75] *Ibid*., at C328/9, point 2.3.2.
[76] Case C-62/88, *Greece* v. *Council* [1990] I-1527.
[77] Regulation (EEC) No.3925/87 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station, OJ 1987 L371/14.

common commercial policy or the environmental policy.

The ECJ recognised that the choice of legal base 'may influence the content of the contested measure' [78] because procedural requirements are different. [79] According to the ECJ, the main purpose of the Regulation is 'to regulate trade between the Community and non-member countries',[80] despite the fact that a commercial policy for the trading of agricultural products can be implemented for the health of consumer.[81] In contrast, Article 30 et seq EAEC has a main purpose to govern 'the basic standards for protection of the health of the general public against the dangers arising from ionising radiation'.[82] The ECJ's argument was that, although one of objectives in environmental protection is to set the permitted maximum levels of radioactive contamination, this does not necessarily remove the Regulation from the sphere of common commercial policy.[83] On the contrary, Article 174 and 175 EC leave intact the other primary law's provisions, 'even if the measures to be taken under the [. . .] provisions pursue at the same time any of the objectives of environmental protection'.[84]

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

> '. . . that interpretation is confirmed by the second sentence of Article 130r(2) EEC (now Article 6 EC: inserted), . . . that provision, which reflects the principle whereby all Community measures must satisfy the requirements of environmental protection, implies that a Community measure cannot be part of Community action on environmental matters merely because it takes account of those requirements.'[85]

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

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[78] Case C-62/88, at I-1548, para.10.
[79] In this Case, the procedures in question are as follows: Article 133 EC of a common commercial policy requires the QMV procedure without the involvement of the EP and the ECOSOC. Article 31 EAEC demands the QMV procedure with the opinion of the ECOSOC and the consultation with the EP. Article 175 EC of an environmental policy requires the Council to act unanimously, consulting the EP and the ECOSOC, but the Council is entitled to define what measures can be decided by the QMV. Article 308 EC also requires the Council to act unanimously, consulting the EP, in the case where there is no provision in the Treaties but any measures are necessary in order to attain objectives of the Treaties.
[80] *Ibid*., at I-1549, para.16.
[81] *Ibid*., at I-1549, para.14.
[82] *Ibid*., at I-1550, para.17.
[83] *Ibid*., at I-1550, para.18.
[84] *Ibid*., at I-1550, para.19.
[85] *Ibid*., at I-1550, para.20.

Case, a commercial policy.

Case C-300/89 Commission v Council[86]

This Case is also a legal base dispute concerning the programme Directive[87] that is derived from the Titanium Dioxide Directive,[88] which requires Member States to set up programmes for the reduction of waste discharges and to submit reports on programmes to the Commission. The Council adopted this programme Directive on the basis of Article 175 EC, despite the fact that the Commission had based its proposal on Article 95 EC. Against the Council, the Commission brought an action before the ECJ, asking for the annulment of this Directive.

Like the Case noted above, the legal base was also taken seriously in terms of the procedures that differed between Article 95 and 175 EC. The former makes the QMV and involvement of the EP possible. In contrast, the latter requires unanimity and only consultation with the EP. At first, the Commission had proposed this Directive on the basis of Article 94 and 308 EC. After the SEA entered into force, the Commission amended the base to Article 95 EC. In the legislative process, the EP had voiced the opinion, on the side of the Commission, that the legal base should be Article 95 EC.

The claim of the Commission was that: 'the directive, although contributing to environmental protection, has as its 'main purpose' or 'centre of gravity' the improvement of conditions of competition in the titanium dioxide industry.'[89] Article 1 of the Directive 'lays down procedures for harmonizing the programmes for the reduction and eventual elimination of pollution from existing industrial establishments and is intended to improve the conditions of competition in the titanium dioxide industry.' The Directive establishes a harmonised treatment of waste, imposes a total prohibition, and lays down maximum values for harmful substances. The Commission thus argued that these measures are mainly a task of establishing and functioning the Internal Market. The Commission said that 'the requirements of environmental protection form an integral part of the harmonizing action to be taken on the basis of Article 100a'[90] (now 95 EC); this Article 'constitutes a *lex specialis* in relation to Article 130s' (now 175 EC), and the latter

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[86] Case C-300/89, *Commission* v. *Council* [1991] ECR I-2867.

[87] Council Directive 89/428/EEC on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, OJ 1989 L201/56.

[88] Council Directive 78/176/EEC on waste from the titanium dioxide industry, OJ 1978 L54/19.

[89] Case C-300/89, at I-2897-8, para.7.

[90] *Ibid.*, at I-2898, para.8.

Article is not ‘intrinsically’ directed towards the attainment of the establishment and functioning of the Internal Market.[91] Against these arguments, the Council contended that the centre of gravity should be placed in the area of environmental concern.[92] The Court recognised that ‘the directive is concerned, indissociably, with both the protection of the environment and the elimination of disparities in conditions of competition’.[93] The Court declared the Commission the winner.

What should be considered is that, as one of reasons that the act of the Council should be annulled, the Court referred to the principle of environmental integration provided in Article 6 (ex 130r (2)) EC, which means, according to the ECJ, that ‘[t]his principle implies that a Community measure cannot be covered by Article 130s (now 175: inserted) EC merely because it also pursues objectives of environmental protection.’[94] In addition, the ECJ stressed Article 95 (3) EC, which requires the Commission to concern ‘environmental protection’ and to ‘take as a base a high level of protection’.[95] Thus, Article 6 and 95 (3) EC were referred to as the reason why Article 95 EC (the Commission's position) is also proper as a legal base of environmental legislation, along with Article 175 EC (the Council's position).

This case notes how normative discourse on the Market and the Environment ha developed. It is not merely a procedural dispute concerning legal bases, nor is it a mere competence struggle between the EC and Member States. Disputes about legal bases cannot be interpreted only from the viewpoint of the Commission's strategy regarding how environmental protection can easily be legalised by referring to Internal Market concerns and hence the QMV procedure. Through this legal base dispute, legal discourse on the normative relationship between the Market and the Environment can be seen in the following light: To deal with waste issues with Article 95 EC never means that environmental concerns are subsumed under market concerns. On the contrary, this implies an idea regarding how the Market should be embedded into the general social system, in which the Environment constitutes a public interest.

After Amsterdam

The Treaty reforms in Amsterdam of 1997 should be given a special attention because of establishing the principle of sustainable development as one of the basic

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91 *Ibid.*.
92 *Ibid.*, at I-2898, para.9.
93 *Ibid.*, at I-2899, para.13.
94 *Ibid.*, at I-2901, para.22.
95 *Ibid.*, at I-2901, para.24.

objectives of the EU.[96] This principle is no longer a principle ancillary to an economic point of view.[97] On the contrary, it is the term expressing one of constitutional values to which the EU should devote itself. In relation to this principle, the Amsterdam provided the principle of environmental integration with independent status in Article 6 EC.[98] According to Grimeaud, this principle has become 'a general principle of EC law as opposed to a principle of EC environmental law alone'.[99] Responding to primary legislation, 'the environmental integration process'[100] started in the Cardiff Council of June 1998. The European Council demanded that the Commission and the Council create concrete measures for realising this principle.[101]

With regard to the integration principle of the after Amsterdam, the following two Cases should be noted. They were brought about under this 'environmental integration process' directed by political discourse in the European Council: the *First Corporate Shipping* Case[102] and the *PreussenElektra* Case.[103] In the former, the discretional economic concern of Member States was judged as invalid, with reference to the designation of 'special areas of conservation' in the Habitats Directive.[104] In the latter, state aid in favour of renewable energy suppliers was, in general, given validity against the strong competition law of the EC, although the

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

[97] Grimeaud points out that it is no longer 'a mere appendix to Communities policies on economic integration'. D. Grimeaud, 'The Integration of Environmental Concerns into EC Policies: A Genuine Policy Development?' (2000) 9 *EELR* 207, at 216.

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

[99] See, Grimeaud, *supra* n.97, at 216.

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

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

[102] Case C-371/98, *R* v. *Secretary of State for the Environment, Transport and the Regions, ex parte First Corporate Shipping Ltd*, November 7 2000.

[103] Case C-379/98, *PreussenElektra AG* v. *Schleswag AG*, March 13 2000.

[104] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L206/7.

proportionality was stressed as the absolute criteria. Both Cases show that environmental protection is an essential concern of the EU. More significantly, the Opinion of Advocate General, in both Cases,[105] pointed out the pro-environmental tendency of the Amsterdam Treaty, and highlighted the significance of Article 6 EC, which is orientated towards the principle of sustainable development.[106] The Opinion attached to the *PreussenElektra* Case states that, 'in particular with a view to promoting sustainable development', 'Article 6 is not merely programmatic; it imposes legal obligations'; and suggests that the EC has to combat against the 'threat to the ecosystem as a whole'.[107] In the *First Corporate Shipping* Case, AG Léger regards the principle of sustainable development as 'a fundamental concept of environmental law', referring to the 1987 Brundtland Report, and emphasised the principle of environmental integration, in terms of realising the principle of sustainable development.[108]

During the process of this legal discourse, environmental protection no longer remained a mere ancillary norm for the support of market building. It now constitutes its own norm that is independent from market concerns. The fair market competition and the environmental protection are respectively independent norms that should be balanced as obligations of the EC in itself. However, it must also be said that, in these two Cases of the ECJ, there was no big change from precedent legal discourse. On the contrary, there has been the gradual process that has changed the status of environmental regime from a *parasite* regime to a *comprehensive* regime over all of other regimes. These two Cases place the precedent discourse into the new normative context, which is elaborated in Article 6 EC.

3.2 Secondary Legislation

This section attempts to outline norm evolution in EC environmental legislation, by narrowing down the policy sectors of pollution prevention in industrial activities and nature conservation in developmental activities. The emphasis is mainly on norm evolution after the SEA. This evolution has been built on the foundation that has been established through legal discourse in the ECJ. What is assumed is further evolution in a backdrop of an accumulation of interpretative

[105] The Opinions are by AG Léger for Case C-371/98 delivered on 7 March 2000 and by AG Jacobs for Case C 379/98 delivered on 26 October 2000.
[106] For the opinion of Case C-371/98, see at para.233, 234. For the opinion of Case C 379/98, see at Section I – The relevant Community law background.
[107] The Opinion of Case C-379/98, para.231.
[108] Case C-371/98, Opinion of AG, at Section I.

practices through the legal discourse.

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

3.2.1 Basic Architecture of Directives

As noted above, despite the lack of clearly environmental clauses in the EC Treaty, environmental legislation has been accumulated since the 1st EAP in 1972. This has been mainly on the basis of Article 94 EC, other environment-related Articles (such as common commercial or agricultural policy clauses) and Article 308 EC. The former two provide the EC the power with regard to the building of the Common Market, and Article 308 EC prescribes the implied, or general legislative, power for the objectives of the Treaty.[109] However, due to primary environmental legislation by the 1985 IGC, the *main* legal base for environmental secondary legislation has been shifted from these Articles for the market building and implied powers, to environmental Articles – 174, 175, 176 EC), although legislation based on market concerns have still been seen as if the institutional inertia operates.[110]

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[109] For the significance of this Article as a general legislative power, see, J. Shaw, *Law of the European Union*, Third Edition (Palgrave, 2000), at 216-221.

[110] For example, concerning Article 95 EC: approximation of laws for the Internal Market) see Council Directive 88/77/EEC on the approximation of the laws of the Member States relating to the measures to be taken against the emission of gaseous pollutants from diesel engines for use in vehicles, OJ 1988 L36/33, Council Directive 89/428/EEC on procedures for harmonizing the programmes for the reduction and eventual elimination of pollution caused by waste from the titanium dioxide industry, OJ 1989 L201/56, Directive 97/68/EC on the approximation of the laws of the Member States relating to measures against the emission of gaseous and particulate pollutants from internal combustion engines to be installed in non-road mobile machinery, OJ 1998 L59/1, and Directive 2000/25/EC on action to be taken against the emission of gaseous and particulate pollutants by engines

Needless to say, this major change in the primary law is crucial in the sense that it has created environmental basic laws as a normative foundation for secondary legislation. Basic regulative environmental principles – i.e. the prevention at source, the environmental integration and the polluter-pay – which had already been prescribed in the 1st EAP[111] were also incorporated into the text of the EC Treaty. These principles are elaborated potentially not only through political discourse, but also through legal discourse. Notwithstanding this fact, it should be noted that EC environmental governance basically has the same characteristics as those between the pre-SEA and after the SEA (and after Amsterdam), insofar as the basic architecture regarding obligatory arrangement against Member States is concerned.[112] The Directive-centred architecture can be summed up in the four points:

1) A framework setting for guiding national level measures, by providing the ambiguous concepts of *limit values* and *environmental quality standards*[113] or of *priority natural habitat types*, *priority species* and *special areas of conservation*;[114] This framework, however, enables Member States to derogate from part of their obligations.

2) An annex-model[115] for the flexible adaptation to technological progress, as

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intended to power agricultural or forestry tractors and amending Council Directive 74/150/EEC, OJ 2000 L173/1; concerning Article 113 EEC (now 133 EC: common commercial policy), see Regulation (EEC) No.3925/87 on the conditions governing imports of agricultural products originating in third countries following the accident at the Chernobyl nuclear power station, OJ 1987 L371/14; concerning Article 84(2) EEC (now 80(2) EC: transport policy), see Council Directive 93/75/EEC concerning minimum requirements for vessels bound for or leaving Community ports and carrying dangerous or polluting goods, OJ 1993 L247/19. For the institutionalist account of this institutional inertia, see K. A. Armstrong and S. J. Bulmer, The governance of the Single European Market (Manchester University Press, 1998), at 220.

[111] The 1st EAP, *supra* n.7, at C112/6.

[112] However, there is difference between the pre and after the SEA, in respect of whether these basic characteristics are mainly orientated towards relativising the command and control approach of environmental legislation. See the argument in Section 2.3.2.

[113] For example, see the 1980 sulphur dioxide Directive and the 1996 IPPC Directive. Council Directive 80/799/EEC on air quality limit values and guide values for sulphur dioxide and suspended particulates, OJ 1980 L229/30; and Council Directive 96/61/EC on Integrated Pollution Prevention and Control (IPPC), OJ 1996 L257/26.

[114] See the 1979 wild birds Directive and the 1992 Habitats Directive. Council Directive 79/409/EEC on the conservation of wild birds, OJ 1979 L103/1; the IPPC Directive, L257/26.

[115] This may be in line with the Framework-Protocol-Model in international environmental laws, which is defined as the combination of the general framework by a treaty and the detailed substantive, or procedural prescription, by protocols. Brunnée and Toope emphasise its significant role for regime development. See, J. Brunnée and S. J. Toope, 'Environmental Security and Freshwater Resources: Ecosystem Regime Building' (1997) 91 *AJIL* 26. They state that '[o]ne of the strengths of the framework-protocol model is that it accommodates

well as for the gradual adoption of stricter substantive obligations;

3) A system of environmental information sharing through reporting requirements regarding the management plans, programme and monitoring of Member States; and through the intermediation and organisation of the Commission;[116]

4) Institutional arrangement to promote the cooperation among Member States, and between the Commission and Member States through transboundary consultation and through a technical Committee comprised of the Commission and Member States.[117]

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

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

3.2.2 Elaboration of Key Concepts

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and promotes the important interplay between contextual and normative elements of regime formation and development. While serving to consolidate a regime into legally binding form, the model retains contextual elements, allowing for the dynamism and fluidity so valued by regime theory and by what we have called international ecosystem law' (at 57).

[116] For example, see Article 7 and 8 of the 1980 Sulphur Dioxide Directive and Article 16(1) of the 1996 IPPC Directive. The reporting requirements aiming at mutual learning and monitoring of the Commission on implementation by Member States are found without exception. This requirements were amended for more effective practices in the way of answering the Commission's questionnaires by Council Directive 91/692/EEC standardizing and rationalizing reports on the implementation of certain Directives relating to the environment, OJ 1991 L377/48. However, Krämer points out the serious implementation deficits of this requirement. See, Krämer, *supra* n.1, at 16.

[117] For example, see Article 4(4) of the 1976 Bathing Water Directive and Article 3(3) of the 2000 Integrated Water Framework Directive. Council Directive 76/160/EEC concerning the quality of bathing water, OJ 1976 L31/1; Directive 2000/60/EC establishing a framework for Community action in the field of water policy, OJ 2000 L327/1.

Legislation provides key concepts with legal definitions. The latter enables the former to become constitutive factors of a governance frame, which creates a world of common meanings in a specific issue-area. In the EC environmental regime, *animals*, *lands* and *forest* are no longer mere economic resources for economic development, or economic goods traded at market, but are the invaluable basis of biological diversity that should be protected by public authorities.[118] *Air*, *water* and *soil* are seen as interconnected, and are as such recognised as an issue requiring an integrated approach for limiting new and existing installations.[119] An ecosystem-oriented definition is imposed on the Community's water world.[120] Sustainable development is more precisely defined in terms of this ecosystem orientation.[121]

When tracing out the evolutionary formation of an environmental world of common meanings, the following key concepts may serve as good examples. In the 2000 Integrated Water Framework Directive, *pollution* is legally defined as follows:

> It 'means the direct or indirect introduction, as a result of human activity, of substances or heat into the air, water or land which may be harmful to human health or the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems, which result in damage to material property, or which impair or interfere with amenities and other legitimate uses of the environment.'[122]

While the 1996 IPPC Directive uses wording such as 'the quality of the environment'[123], this Integrated Water Framework Directive establishes the definition of *pollution* more precisely, and replaces the wording to 'the quality of aquatic ecosystems or terrestrial ecosystems directly depending on aquatic ecosystems.'

The ecosystem has become defined in detail by the legislation during the 1990s.

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[118] Council Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1992 L206/7; Council Directive 97/62/EC adapting to technical and scientific progress, amending Directive 92/43/EEC on the conservation of natural habitats and of wild fauna and flora, OJ 1997 L305/42; and Regulation (EC) No2494/2000 on measures to promote the conservation and sustainable management of tropical forests and other forests in developing countries, OJ 2000 L288/6.

[119] The IPPC Directive, OJ 1996 L247/26.

[120] The Integrated Water Framework Directive, OJ 2000 L327/1.

[121] Council Regulation (EC) No 2493/2000 on measures to promote the full integration of the environmental dimension in the development process of developing countries, OJ 2000 L288/1.

[122] The Integrated Water Framework Directive, OJ 2000 L327/1, at Article 2(33).

[123] The IPPC Directive, OJ 1996 L257/26, at Article 2(2).

The definition is given by the Convention on Biological Diversity, of which the EC is a party as follows:

> it 'means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit'.[124]

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

In relation to this ecosystem orientation, the 2000 Integrated Water Framework Directive has created the single water world of the EU, which is interpreted from the interconnectedness between surface water, groundwater, inland water, river, lake, transitional water, artificial water and so on.[125] The focal point in this constitution of water as a whole is the 'international river basin district'.[126] This Directive aims at promoting transboundary environmental actions on the basis of this conception. The water in the EU is no longer the sum total of Member States' water. On the contrary, the single water world of the EU now comes to exist as the accepted discourse on environmental norms.

This integrated approach has clearly been demonstrated in the IPPC Directive.[127] In this Directive, air, water and soil are no longer different medias. On the contrary, they comprise a whole that should be addressed in all sectors of industrial activities (i.e. energy, metal production or processing, mineral industries, chemical industries, waste management, and others).[128]

In the Habitats Directive, 'a coherent European ecological network of special areas of conservation' has been planned under the title of Nature 2000.[129] The habitats that should be protected specially is defined as follows:

> 'natural habitats means terrestrial or aquatic areas distinguished by geographic, abiotic and biotic features, whether entirely natural or semi-natural'.[130]

This Directive assumes that the EU's *nature* is a whole without being distorted by national borders. In this way, the concept of environment that was a mere external constraint against the Common Market has now been given rich meaning. The environment has been elaborated as the common heritage that the EC and Member

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[124] Council Decision 93/626/EEC concerning the conclusion of the Convention on Biological Diversity, OJ 1993 L309/1, at Article 2 of the Convention.
[125] The Integrated Water Framework Directive, OJ 2000 L327/1, at Article 2.
[126] *Ibid*., at Article 3(3).
[127] The IPPC Directive, OJ 1996 L257/26.
[128] *Ibid*., at Annex I.
[129] The Habitats Directive, OJ 1992 L206/7, at Article 3(1).
[130] *Ibid*., at Article 1(b).

States are obliged to protect.

Furthermore, the 2000 Regulation on developmental policy[131] aims at concretising Article 6 EC, which provides basic regulative principles. This Regulation attempts to realise these principles in development cooperation with developing countries. Financial aid is validated through the realisation of the principle of sustainable development. The strategies to realise this principle are based on the principle of environmental integration. These two principles can no longer be seen as policy rhetoric or an excuse to enact environmental legislation on other issue-areas. On the contrary, these principles are used for validating financial aid of developmental policies linked with external environmental policies. Interestingly, this Regulation is based on Article 175 and 179 EC.

Most important is that sustainable development is defined as a legalised principle in Article 2 of the Regulation. It says:

> '"sustainable development" means the improvement of the standard of living and welfare of the relevant populations within the limits of the capacity of the ecosystems by maintaining natural assets and their biological diversity for the benefit of present and future generations.'[132]

In this definition, there are no suggestions that economic growth and environmental protection should be balanced. Needless to say, issues such as 'the standard of living and welfare of the relevant populations' do not necessarily entail econo-centristic orientation. Including the reinterpretation of a well-known dichotomy between the economy and the environment, this definition is a step towards the legal discourse on 'the limits', 'ecosystems', 'natural assets', 'biological diversity', and 'the benefit of present and future generations'. A focal point is how the discourse on these topics can, as a legal discourse, creates normative contexts in which not only EU institutions but also Member States governments are restrained. In legislation, regulative principles and key concepts, which are based on core norms, create a common meaning world, and set up coherent strategies that should be shared among participants of the EC environmental regime.

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[131] Council Regulation (EC) No 2493/2000, OJ 2000 L288/1. This Regulation follows the 1997 Regulation on environmental measures in developing countries in the context of sustainable development (Council Regulation (EC) No 722/97 on environmental measures in developing countries in the context of sustainable development, OJ 1997L108/1) that expired on 31st December 1999, and provides the financial aids of 93 million euro for developing countries from 2000 to 2006.

[132] *Ibid*., at Article 2. This definition can also be found in Regulation (EC) No 2494/2000 on measures to promote the conservation and sustainable management of tropical forests and other forests in developing countries, OJ 2000 L288/6.

3.2.3 Ecosystem Orientation

The development and elaboration process can be summerised as a trend towards a holistic and ecosystem-oriented frame.[133] This trend can be paraphrased as moving *from market-oriented values to the intrinsic values of ecosystems per se*. This framing change was impossible without the evolution of a common meaning world consisting of environmental norms, concepts and regulative principles noted above. The accumulation of legal definitions such as pollution, international river basin, biological diversity, habitats, sustainable development and so on can be argued to bring about a new collective understanding concerning the ecosystem-oriented arrangement of rights/obligations.

In this regard, the argument of Brunnée and Toope is insightful. Transborder environmental degradation brings about a potential and/or a real conflict between states. International cooperation for environmental protection can thus be recognised as an attempt to take away the causes of potential conflict, and to continue to maintain security. Brunnée and Toope apply the non-military sense of the concept 'security' to international environmental issues.[134] Environmental issues are a kind of security problem. The prevention of potential conflicts between states may undoubtedly be said to be one of the main functions of the EC environmental regime. However, Brunnée and Toope also propose 'an expansive understanding of environmental security with the particular emphasis on protection of the environment itself'.[135] According to them, only focussing on the potential state conflict 'may detract from the goal of security'[136] because such an understanding often changes transboundary environmental issues into 'matters of purely national concern'.[137] They call for the expansion of the concept 'environmental security' into the security of population. Environmental degradation is not only a security problem in interstate conflict, but also a problem for the quality of life of inhabitants. Accordingly, international environmental governance should be not only for the prevention of the interstate conflict, but also for the internal matters of each state. Brunnée and Toope state that: 'concern for the environment per se and the interests of people might push states towards more cooperative strategies.'[138] This is in relation with necessary replacement of focus from the allocation of resources to the preservation of ecosystem integrity. Their following remarks are crucial for

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[133] Brunnée and Toope, *supra* n.115, at 41-2.
[134] *Ibid*., at 26-7.
[135] *Ibid*., at 27.
[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.

assessing the development of the EC environmental regime:

> 'Through the promotion of various environmental regimes, the goal is to move the normative evolution along a path from preoccupation with the allocation of resources toward ecosystem integrity, without ignoring the continuing power of states to shape the ultimate elaboration of international legal regimes. Therefore, in speaking of ecosystem orientation, we wish to highlight the need to reorient international law. It must move from a perception that environmental degradation is legally relevant only where sovereign interests of states are affected, toward a framework that also evaluates state conduct according to ecological criteria. It is in this sense, then, that we have called for the development of an "international ecosystem law".'[139]

From their viewpoint of international ecosystem law, the EC environmental regime can be said to have great prospects. Although (or because) there are admittedly serious problems, like the implementation deficit[140] and insufficient compatibility between environmental measures and development activities, such as projects financed by the ERDF,[141] the environmental governance frame has evolved to having an affinity for ecosystem integrity. The argument of Brunnée and Toope makes sense in the light of EC's current environmental regime. What should be borne in mind here is that the elaborating process of a common meaning world (that is, the deepening of framing) has proceeded through the intermediate discourse of laws, on the basis of legal discourse of laws in the ECJ. This new frame can be expected to promote more environmentally-proactive normative discourse, alleviating the serious problems of this regime.

3.3 International Agreements

The role of international environmental agreements should be noted for norm evolution in EC environmental law. During the pre SEA stage, international environmental norms had been incorporated into the EC legal order on the basis of Article 235 EC (now 308 EC), and became an indispensable foundation of norm evolution.[142] While international agreements have been adopted on the basis of

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[139] *Ibid*., at 27-8.

[140] See Section 2.2.1. And also see Krämer, *supra* n.1, at 7-19.

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

[142] The instances of this Article 235 international environmental agreements are: Council

Article 174(4) EC after the Treaty reform in Maastricht of 1992, it is the Rio process-related international instruments (Agenda 21, Biodiversity, Climate Change and so on) that made a decisive impact on the development of the EC environmental regime.

3.3.1 Article 235 International Agreements

To provide an example of the former, the 1982 International Convention on Migratory Wild Animals expresses 'the ever-growing value of migratory wild animals from environmental, ecological, genetic, scientific, aesthetic, recreational, cultural, educational, social and economic points of view', and prescribes the responsibility of the States that 'must be the protectors of the migratory species of wild animals that live within or pass through their national jurisdictional boundaries'.[143] In addition, the 1982 European Wildlife and Natural Habitats Convention gives the overall base line for protecting wildlife habitats that have their own value, and whose protection should be obligation of the States. Its Preamble says 'wild flora and fauna constitute a natural heritage of aesthetic, scientific, cultural, recreational, economic and intrinsic value that needs to be preserved and handed on to future generation'.[144]

This Wildlife Convention's architecture for governance is similar to the EC environmental Directives in terms of planning requirements,[145] reporting requirements,[146] standing committee[147] and so on. The perceptions and norms expressed by the Convention can be seen to contribute to the creation of a legally

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Decision 77/585/EEC concluding the Convention for the protection of the Mediterranean Sea against pollution and the Protocol for the prevention of the pollution of the Mediterranean Sea by dumping from ships and aircraft, OJ 1977 L240/1; Council Decision 77/586/EEC concluding the Convention for the protection of the Rhine against chemical pollution and an Additional Agreement to the Agreement, signed in Berne on 29 April 1963, concerning the International Commission for the Protection of the Rhine against Pollution, OJ 1977 L240/35; Council Decision 82/461/EEC on the conclusion of the Convention on the conservation of migratory species of wild animals, OJ 1982 L210/10; Council Decision 82/72/EEC concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats OJ 1982 L38/1; Council Decision 81/462/EEC on the conclusion of the Convention on long-range transboundary air pollution, OJ 1982 L171/11; Council Decision 83/101/EEC concluding the Protocol for the protection of the Mediterranean Sea against pollution from land-based sources, OJ1983 L67/1; Council Decision 84/358/EEC concerning the conclusion of the Agreement for cooperation in dealing with pollution of the North Sea by oil and other harmful substances, OJ L188/7.

[143] Council Decision 82/461/EEC on the conclusion of the Convention on the conservation of migratory species of wild animals, OJ 1982 L210/11, at Preamble.

[144] Council Decision 82/72/EEC concerning the conclusion of the Convention on the conservation of European wildlife and natural habitats, OJ 1982 L38/1, at Preamble.

[145] *Ibid*., at Article 3 and 4.

[146] *Ibid*., at Article 9(2).

[147] *Ibid*., at Article 13.

prescribed natural habitats of the EU, and provide a bridge between the 1979 Wild Birds Directive and the 1992 Habitats Directive in the discourse on the European natural habitats. For the reason that the nature conservation is far from market concerns, these Article 235 Conventions should be noticed as the driving force of behind the institutional dynamics for norm evolution on the pre-SEA stage.

3.3.2 The Rio Process

As part of the remarkable environmental trends outside the EU during the 1990's, the UNCED in Rio of 1992 should be taken seriously. In a country rich in natural (or genetic) resources, the Rio Declaration[148] and Agenda 21[149] were produced, and important environmental conventions[150] – Climate Convention, Convention on Biological Diversity and Forest Principles – were adopted. The EC committed itself as *one unit* to this international environmental process.[151] While there have been many actions after that, not only at the U.N. level but also at the European level, the Rio process must be said to have substantively influenced the EC environmental regime. Undoubtedly, climate, biological diversity and forest have become since then the fundamental objectives of EC environmental governance. As the Council Resolution and Common Position endorsed Agenda 21 as an important obligation,[152] this historical action programme gives the EC environmental regime its primary impetus for norm evolution. The main concern of the 5th EAP is how to put these international commitments into practice.

Moreover, the 27 principles of the Rio Declaration[153] have founded the EC environmental regime regarding its regulative principles. What is remarkable in the context of this Chapter is: 1) sustainable development in Principle 1, which says:

> 'Human beings are at the centre of concerns for sustainable development. They are

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

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

[150] For the outcomes of the 1992 Rio Summit, see http://www.infohabitat.org/agenda21.

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

[152] *Ibid*. See also the Council Common Position on 17 April 1997, OJ 1997 C 157/12.

[153] The Rio Declaration, *supra* n.148.

> entitled to a healthy and productive life in harmony with nature;'

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

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

The former is fundamental for the latter in terms of normative implications. After the Rio, concern for the environment has been orientated towards poverty and equality. The idea that these two concerns should be related to each other[154] is never unknown before this summit. However, it is the Rio declaration and Agenda 21 that have decisively raised the awareness that the two should be, and are, considered as inseparable. In the Rio, the inseparability between the environment and the poverty/equality was expressed as the *principle of sustainable development*, which now seems to have become more than simply buzzword.

The EC environmental regime is no exception to this trend of sustainable development, as argued above concerning the *First Corporate Shipping* Case and the *PreussenElektra* Case, the Convention on Biological Diversity and the 2000 Regulation on developmental policy. In addition to these, the process of realising the Kyoto Protocol[155] and forestry protection strategies[156] should be stressed in terms of proactive environmental discourse within the institutional context of the EC environmental regime. The principle of sustainable development as a fundamental regulative principle will continue to be important for legal and political environmental discourse in the EC environmental regime.

Conclusion

With a view to tracing out norm evolution in the EC environmental regime, this Chapter considered the following: 1) the laying down of norm evolution in legal discourse in the ECJ, mainly illuminating the pre SEA stage; 2) the further evolution of norms in intermediate discourse of secondary laws, emphasising the

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

[155] See *Partnership for integration; a strategy for integrating environment into EU policies*, COM (98) 333.

[156] See Council Resolution on a forestry strategy for the European Union, OJ 1999 C 56/1.

ecosystem-oriented elaboration of key concepts after the SEA stage; 3) international environmental agreements of the EC that have supported and promoted discourse in secondary legislation, highlighting both the Article 235 international agreements on the pre SEA stage and the Rio process since the 1990's. This tracing-out was carried out against the background of the development of other types of discourse such as primary law, EAPs and others, which were discussed throughout each section.

In sum, this Chapter argued that the attempt to describe norm evolution offers an overall picture of the process which was laid down by legal discourse of case laws of the ECJ (F in the diagram 2), and was developed through intermediate discourse of secondary laws (E in the diagram 2) that was supported by international agreements. This process looks as if the relatively political-intensive, policy-goal setting, and judicially unreviewable form of discourse in a part of primary legislation, EAPs and others is grounded on, and is transferred into, relatively legal-intensive discursive spheres (the legislature and, as the most legally intensive, the ECJ). This overview was presented by placing environmental case law and legislation into a conceptual framework, which highlights the fundamental role of discourse against framing governance. Legal and political discourse on environmental norm were seen to bring about the differentiation of the environmental regime from other regimes, or more precisely, the development from a parasitic regime on others to a comprehensive regime over others, owing to the principle of environmental integration.

The limitations of legal discourse in an environmental issue-area is that the legal definition of, for example, *limit value* or *good water status* easily leads to the conclusion that we can discharge anything if it is below the standard. Therefore, legal discourse should be supplemented with political discourse that makes possible the commitments beyond legal obligations. We would say that, even if legal obligations are a standard X, we should go beyond the standard X! However, the political discourse also has the limitation that it can always avoid being pinned down to legal obligations, and it is never reviewed at the court. In the political discourse, decision-makers can say something that sounds good without commitment, in order to acquire their (maybe temporary) legitimacy.

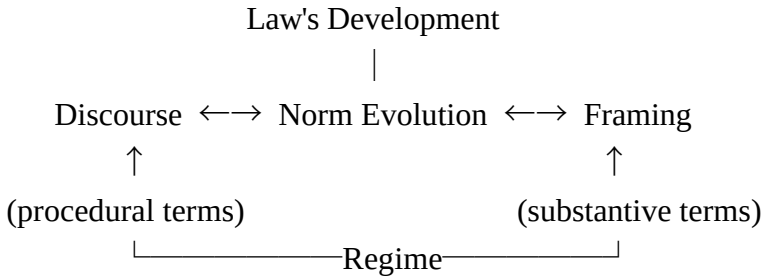
Thus, the accumulation of discourse of case laws and secondary legislation must be taken seriously. Regime development, with which normative discourse is promoted, simultaneously causes the deepening process of a governance frame systematising core norms, key concepts and regulative principles. In the EC environmental regime, the intersubjectively constituted common understanding the

frame opens up has been realised by case law, as the legal discourse of laws, and been developed further by legislation, as the intermediate discourse of laws. These types of discourse have also structured other types of discourse, such as the political discourse around law and the legal discourse around law.

CONCLUSION

This thesis is summerised as follows. It first offered a conceptual framework which considers the development of EC environmental law. This was shown in the diagram 1 (reinserted: See Chapter 1):

Diagram 1



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

Normative discourse was understood to be catalysed by the creation, application and interpretation of norms. The text of individual laws were also in themselves regarded as normative discourse. The former is normative discourse around law, and the latter is normative discourse of laws. This normative discourse was further divided into the political and the legal, in terms of susceptibility to judicial review. Further to this, a median area was assumed between the political and the legal. Thus, six categories of normative discourse were offered, as shown in the diagram 2 (reinserted: See Chapter 1 and Introduction of Chapter 3).

Diagram 2

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

As Chapter 3 argued, this thesis focussed on F (legal discourse of laws) and E (intermediate discourse of laws) for the reason that EC environmental law can be interpreted to be developed through F and E, during the period of no legal base in the Basic Treaties. *Framing* was regarded as building, in a specific issue-area, a coherent system of core norms substantiating the behavioural code, key concepts

expressing the problematic situation, and regulative principles showing the strategy of problem-solving. This governance frame was seen to form the discursive context, and was simultaneously thought of to be developed through discourse. *Regimes* were seen to be an accumulation of institutions conceptualised as stably reproducing normative discourse in procedural terms and as establishing in substantive terms a policy agenda, on the basis of which framing is done. As such, regimes were understood to be an arena in which norm evolution occurs. This thesis described the development of EC environmental law according to this conceptual framework. It can be said that this framework also explains how law matters. In short, law brings about norm evolution that (re)creates a governance frame. To put this in theoretical terms, the accumulation of discourse brings about, and simultaneously is affected by, intersubjective meanings, which constitutes the social world.

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

Against the EC environmental regime like this, three weaknesses were examined: deficits in implementation at the national level; the limitations of societal actors' access into the ECJ; and the parasite character on market concerns. Under these circumstances, a new governance mode has been pursued since the 5th EAP. Its main aim is to minimise the uniform approach, based on legal instruments, and to strengthen the procedural constraints concerning participation and information exchange. Under this horizontal and consensual approach, Chapter 2 pointed out that normative discourse comes to matter more in the light of norm evolution under proceduralisation; the role of law should be focused on in terms of normative discourse, which constitutes a frame governing a specific issue-area.

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

1) the establishment of environmental norm in several case laws before the SEA such as *Cornelis Kramer* in 1976, *Bier* in 1976, Case 91/79 *Commission* v. *Italy* and *ADBHU* in 1985, and after the SEA such as *Peralta* in 1994, *Cali* in 1997, Case C-131/88 *Commission* v. *Germany*, Case C-361/88 *Commission* v. *Germany,* Case C-62/88 *Commission* v. *Greece*, Case C-300/89 *Commission* v. *Council*, and after Amsterdam such as the *First Corporate Shipping* in 2000 and the *PreussenElektra* in 2001;

2) the emergence of *a holistic and ecosystem-oriented frame* in secondary legislation, drawing on the Habitats Directive (92/43/EEC), the IPPC Directive (96/61/EC), the Integrated Water Framework Directive (2000/60/EC), the developmental policy Regulation for the principle of environmental integration (No2493/2000) and so on;

3) the role of international agreements to which the EC is a party, briefly reviewing the Article 235 international agreements before the SEA and the Rio process in the 90's.

Building on the conceptual framework Chapter 1 offered, this generative process was shown as *norm evolution* in EC environmental law that can be described from *market-oriented values* to *ecosystem-oriented values*. This evolution corresponds to the framing change from a *market supporting* to a *holistic approach over all other regimes*.

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

Thus, this thesis approached how law matters. However, what must also be explained is why norm evolution has not been brought about more extensively, and what is the possibility that the sound evolution of environmental norms could be distorted structurally? In this respect, more research must be conducted. However, the conceptual framework of this thesis may have the potential to extend such

research projects studying the role of law with respect to norm evolution being realised into a governance frame in a specific issue-area.

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