THE CONVENTION ON THE FUTURE OF EUROPE: AN ENVIRONMENTAL PERSPECTIVE*

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1. Introduction

On each occasion that the EC/EU Treaty has been amended, the European Union's environmental dimension has been strengthened.¹ Each round of revisions has greatly enhanced the profile and the impact of the European Union's environmental policy. In 1957 the EEC Treaty did not mention the word 'environment'. Today, it stands up front, central to the Union's tasks and activities, its 'pervasiveness' captured by the environmental integration obligation 'showcased' in Part One of the EC Treaty.²

It would be readily understandable if, in the light of this, the environmental movement had approached the Convention on the Future of Europe with some complacency. Launched in February 2002, under the chairmanship of Valéry Giscard d'Estaing, the Convention submitted the final text of the draft Treaty establishing a Constitution for Europe on 18 July 2003. The Treaty is in three parts. Whereas, the first part sets out the Unions objectives and values, and lays the constitutional framework within which it is to operate, Part II is concerned with the Charter of Fundamental Rights of the Union, and Part III, the Union's policies.³ There will now be a reflection period prior to the launching of a traditional Intergovernmental Conference in 2004.⁴

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¹ See for a historical overview J.H. Jans, *European Environmental Law* (Groningen, 2000) chapter 1.

² Article 6 EC: '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.'

³ For the text of the final draft see: <http://european-convention.eu.int/DraftTreaty.asp?lang=EN>.

⁴ See, for details of this, and for progress to date: <http://european-convention.eu.int/> See also Friends of the Earth Europe's excellent Convention website, which brings together the relevant texts and viewpoints of the Green 8: <http://www.foeeurope.org/activities/convention/convention-article.htm> The 'Green 8' represents eight major international environmental organisations in Europe. These are Birdlife Europem Climate Action Network Europe, the European Environmental Bureau, Friends of the Earth Europe, Friends of Nature International, Greenpeace International, European Federation for Transport and Environment and Worldwide Fund for Nature. See the recent 'Green 8' text: 'Towards a Green EU Constitution: Greening the EU Constitution'

Operating in three phases (listening, deliberating and proposing), the Convention's methods were from the start celebrated as transparent, participatory and inclusive. Stepping back from an elite-driven intergovernmental model, the Convention embraced national and European parliamentarians, along with Member State representatives, and observers from the Economic and Social Committee and the Committee of the Regions. It reached out also to the accession states. A document search of the 'Futurum' website reveals several hundred submissions to the Convention on an environmental theme.⁵ These emanate from a range of environmental NGOs, including first and foremost the 'Green 8'.⁶

A first draft of the new constitutional treaty was published, in stages, during the first months of 2003. More than 1000 amendments to this were proposed by the members of the Convention. A second draft was published only a few weeks before the Praesidium's final report to the European Council. 'The rush with which the process will be finished really puts the transparent and participatory nature of the process into question.'⁷

For the environmental movement, these early drafts came as a nasty surprise. They caused widespread consternation, due to the manner in which they proposed a rolling back of the European Union's environmental dimension. Martin Rocholl of Friends of the Earth Europe has suggested that 'the Convention's Praesidium showed an astonishing ignorance towards environmental and sustainability issues'.⁸ At this time attention focussed upon the opening articles of the proposed text (Articles 1–16, Titles I, II and III), and in particular upon Articles 2 and 3 identifying the Union's values and objectives.

There was little in the first draft of the proposed constitutional treaty to reflect the Union's commitment to a high level of environmental protection. According to this, the Union was said to be founded upon values common to the Member States, and specifically upon 'the values of respect for human dignity, liberty, democracy, the rule of law and respect for human rights'.⁹ This mirrors closely the existing Article 6 TEU.¹⁰ As the Avosetta Group has noted, these values 'appear as purely anthropocentric . . . disregard[ing] the precarious situation of mankind in the biosphere'.¹¹ This group proposes the incorporation of an additional value, namely 'respect for the natural conditions of human life'.

More objectionably, the first draft appeared to dilute the Union's commitment to

(at: <http://www.eeb.org/publications/G8-IGC-EN-final-8-8-03.pdf>) proposing numerous debated amendments to the final draft.

⁵ http://europa.eu.int/futurum/index_en.htm This is somewhat misleading as the same document frequently appears eight times on behalf of the 'Green 8' mentioned above.

⁶ There are also submissions from the Council of European Environmental Law (CEDE) chaired by Alexandre Kiss, and Avosetta, a group of academic environmental lawyers. See: www.avosetta.org for the website of this 'small, informal group of lawyers whose main purpose is to further the development of environmental law in the European Union'.

⁷ Personal communication from Martin Rocholl of Friends of the Earth Europe (7.5.03).

⁸ 'The New EU Constitution: Disaster or Progress' at <http://www.foeeurope.org/activities/convention/convention-article-2.htm>.

⁹ Article 2 Draft Treaty establishing a Constitution for Europe.

¹⁰ The reference to human dignity is new.

¹¹ Memorandum of the Avosetta Group of 6 February 2003 at: http://europa.eu.int/futurum/forum_convention/documents/contrib/acad/0331_r1_en.pdf. See F. Ermacora, 'The Right to a Clean Environment in the Constitution of the European Union' in J.H. Jans (ed), *The European Convention and the Future of European Environmental Law* (Groningen, 2003) 29–43.

sustainable development. Relative to the current version of Article 2 EC, the references to sustainable development in this first draft seemed quite meagre. Sustainable development was to be based on economic growth, and the economic growth was to be balanced rather than sustainable. An up-front commitment to 'a high level of protection and improvement of the quality of the environment' was not included.¹²

2. The Integration Principle

Yet more disconcerting than the above, for the environmental movement, was the exclusion (or at the very least the down-grading¹³) as a *general* principle of EC law of the so called environmental integration obligation currently laid down in Article 6 EC. Since the integration principle was already part of the Charter of Fundamental Rights of the European Union (Article 37) and the Charter was to be integrated in the Draft Treaty establishing a Constitution for Europe (Article II-37), at the European Convention, one might have thought that there was no reason to maintain the integration principle as a general principle of European law.¹⁴

The implications of the integration principle have been immense, at the political, administrative and judicial level.¹⁵ It has spawned or consolidated a vast range of initiatives concerned to ensure that the environmental dimension of Community activities are properly reflected in decision-making processes.¹⁶ At the level of the European courts, the principle has been key in justifying recourse to the mandatory requirement relating to environmental protection to justify a directly discriminatory barrier to trade.¹⁷ Likewise, it has emerged as an important factor in justifying the application of the precautionary principle outside of the environmental sphere.¹⁸ It has been used also in the interpretation of Directive 90/50 on public service contracts,

¹² See, for example, submission of Green 8 in relation to Article 3. This proposed the reintroduction of a reference to 'a high level of protection and improvement of the quality of the environment' and for a stronger version of the principle of inter-generational equity. Thus, they proposed that the text (Article 3(2)) read as follows: 'The Union shall work for a Europe of sustainable development based on . . . a high level of protection and improvement of the quality of the environment . . . to meet the needs of the present generation with respect for the rights of future generations.' See, in the final version, Article 3(3) and p 327 below.

¹³ At the time of the first draft it was not yet possible to ascertain whether this principle would take its place in the environment title under the new constitution, as opposed to up-front, as a basic principle of the Union in Article 6 EC. See also the Resolution of the Avosetta Group adopted at their conference 11–12 October 2002, Amsterdam, published in Jan H. Jans (ed), op cit, n 11 at 117.

¹⁴ See discussion at p 327 below.

¹⁵ See, on the integration principle the comprehensive study of N. Dhondt, *Integration of Environmental Protection into other EC Policies; Legal Theory and Practice* (Groningen, 2003).

¹⁶ This is not the place to explore this subject fully. See the study of Dhondt, op cit; A. Nolkaemper, 'Three Conceptions of the Integration Principle in International Environmental Law'; A. Lenschow, 'New Regulatory Approaches to "Greening EU Policies"' (2002) 8(1) ELJ 19; and Kraemer, Klasing, Wilkinson and von Homeyer, 'EU Environmental Governance: A Benchmark of Policy Instruments' at: <http://www.environment.fgov.be/Presidency/Govern/Key%20Points%20for%20Discussion.pdf>

¹⁷ ECJ Case C-379/98, *PreußenElektra* [2001] ECR I-2099.

¹⁸ And in particular in relation to the protection of public health. See T-74, 76, 83, 85, 132, 137, 141/00 *Artegodan GmbH and Others v Commission* judgment of 27 November 2002, para 183, defining the precautionary principle as a general principle of Community law 'requiring the competent authorities to take appropriate measures to prevent potential risks to public health, safety and the environment, by giving precedence to the requirements related to the protection of those interests over economic interests'. This suggests that the principle may be deployed as a sword as well as a shield. The judgment builds upon Case T-13/99, *Pfizer* [2002] ECR II-3305.

leading to the conclusion that this does not exclude the possibility of using environmental criteria in identifying the economically most advantageous tender.¹⁹

The exclusion of the environmental integration obligation from the opening part of the proposed constitutional treaty led to disagreement between environmental activists and environmental academics. While all bemoaned its apparent fate, there was no consensus on how to proceed in the face of this adversity. The 'Green 8' proposed an amendment to the then Article 8 of the proposed text. This established a number of fundamental principles binding upon the European Union, namely the familiar principles of subsidiarity, proportionality and 'loyal cooperation'.²⁰ More particularly, they argued in favour of the introduction of a principle of policy coherence and for the re-introduction of environmental integration as a means of achieving this.²¹ Avosetta, by way of contrast, resisted the notion that the environmental integration obligation should find expression in Article 8. They did so first in the name of coherence! Article 8 (as was), they rightly argued, is concerned with 'vertical' (multiple levels) and not 'horizontal' (multiple policies) coherence. In addition, and more importantly, they pointed out that coherence is a 'formal' rather than a 'material' principle, and that as such it would allow the setting aside of environment protection requirements, where these are inconsistent with other policies. This formal principle favours coherence but does yield normative hierarchy. Thus, they argued, that were the existing Article 6 to be dropped, it would be preferable to see the integration obligation re-located to the environment chapter. It is notable that in one recent case, the European Court of First Instance appeared to view the integration obligation relating to health in the same way as that relating to environment, though the former, unlike the latter, finds expression only in the Treaty title relating specifically to public health.²²

In the final version of the draft Treaty establishing a Constitution for Europe the integration principle was added, more or less on the final days of the Convention's deliberations, to Title I 'Clauses of General Application' of Part III.²³ In Article III-4 we can therefore read the familiar text: 'Environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities referred to in this Part, in particular with a view to promoting sustainable development.' Indeed, Article III-4 reproduces, word for word, the existing Article 6 EC. While this is not to be found in Part I of the Treaty—thereby reducing its visibility, and its 'exclusivity'—it is nonetheless to be included in the treaty.

However, one major question is how does the integration principle in Part III relate

¹⁹ Case C-513/99, *Concordia Bus Finland* [2002] ECR I-7213, para 57. It added the proviso that these environmental criteria must be linked to the subject matter of the contract, do not confer an unrestricted freedom of choice on the authority, are expressly mentioned in the contract documents or the tender notice, and comply with all the fundamental principles of Community law, in particular the principle of non-discrimination.

²⁰ This latter is presumably meant to encapsulate that which is currently laid down in Article 10 EC.

²¹ They propose that Article 8(5) be rewritten as follows: 'In accordance with the principle of policy coherence, environmental protection requirements must be integrated into the definition and implementation of the Union policies and activities referred to in Part 3, in particular with a view to promoting sustainable development.'

²² Joined Cases T-74, 76, 83, 84, 85, 132, 137 and 141-00, *Artegodan GmbH & Others v Commission* judgment of 26 November 2002, para 183.

²³ Also included here is a commitment to the integration of consumer protection requirements, and to ensuring equal opportunities between men and woman, and the combating discrimination on a wide range of grounds. As regards the latter, see Article III-3 which covers sex, race, ethnic origin, religion or beliefs, disability, age, or sexual orientation.

to the integration principle in Part II (Article II-37). As mentioned above, the Charter of Fundamental Rights of the Union will be integrated in Part II. The wording of Article II-37 is however slightly different from Article III-4. First, it refers only to Union policies and not to 'policies and activities'. Second, it does not explicitly require integration as regards 'the definition and implementation' of Union policies, thus rendering more uncertain its status vis-à-vis Member States. Third, integration is, according to the Article II-37, to be ensured in accordance with the principle of sustainable development, as opposed to with a view to promoting sustainable development (Article III-4).

Whatever the consequences of these differences might be, it is in the light of this all that the final version of the proposed constitutional treaty may be viewed as something of a victory for the environmental movement. Certainly, it attests to the hard work, and careful and continuous scrutiny, of the Green 8. Though, as we will see below, there are still important areas of concern, one other crucial amendment was achieved.

Article 3(3) establishing the Union's objectives provides as follows (in paragraph 3):

The Union shall work for a Europe of sustainable development based on balanced economic growth, a social market economy, highly competitive and aiming at full employment and social progress, and with a high level of protection and improvement of the quality of the environment. It shall promote scientific and technological advance.

Moreover, in its relations with the wider world, the Union shall contribute (*inter alia*) to the 'sustainable development of the earth'.²⁴ Compared to earlier drafts the notion of 'sustainable development' has been given a more prominent role in the European Constitution to be.

3. Environmental Competence

Part I, Title III of the proposed constitutional treaty concerns the Union's competence, and Part I, Title V, the exercise of this competence. Environment is explicitly listed as an area of shared competence.²⁵ In this regard, '[w]hen the Constitution confers on the Union a competence shared with the Member States in a specific area, the Union and the Member States shall have the power to legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised, or has decided to cease exercising, its competence'.²⁶

It is submitted that this provision must be seen as a codification and not as a modification of the law. European Environmental policy as a *shared* and not as an *exclusive* Community policy is widely accepted in literature.²⁷ In the area of external

²⁴ Article 3(4). The phrase 'sustainable development of the earth' is rather an odd one, but the underlying idea is, it would seem, clear.

²⁵ Conservation of marine biological resources under the common fisheries policy as an area of exclusive competence, though more generally conservation of marine biological resources is an area of shared competence. See Articles 12 and 13.

²⁶ Article 11(2).

²⁷ See A. Epiney, 'Division of Competence between Member States and the EC' in J.H. Jans (ed), *op cit*, n 11 at 43-52.

environmental competences the Treaty stipulates the shared nature of the Community competences. Article 175(4) provides that the Community competence to negotiate and conclude international treaties 'shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements'. Recent case law of the ECJ however confirmed that when external environmental activities can be characterised as falling within the Community's common commercial policy, there is an exclusive Community competence.²⁸ The case law of the Court of Justice also shows that the exercise by the Community of a shared competence can pre-empt the Member States in exercising theirs. The notorious *Walloon Waste* case is still an excellent example in this respect: the 'complete' harmonisation provided by the 'old' transboundary waste directive pre-empted the Belgian authorities.²⁹

This provision in the draft Constitution is indicative of the difficulties associated with codifying complex and nuanced arrangements which have grown up pragmatically, largely on the basis of the case law of the European Court. According to this case law, Member States may, in certain circumstances, continue to exercise competence in areas of shared competence, even after the Community has intervened. Typical in this respect—though not invariable³⁰—is the example of minimum harmonisation.³¹ Where the Community adopts a minimum harmonisation measure,³² Member States may adopt stricter measures in the relevant sphere, so long as these stricter measures do not clash either with the Community measure or with other Community law obligations, including the free movement obligations.³³ Formally, perhaps, one might argue that the Community has only exercised its competence up to the line constituted by the minimum harmonisation. Beyond that line, therefore, Member States retain competence. This would be in keeping with the premises of the constitutional treaty in this regard. This reading would, however, be somewhat artificial. It fails to capture the *overlapping* nature of Community and Member State competences; their co-existence within a given substantive sphere. The constitutional text seems to draw a picture with 'bright lines'; shared competences rest with Member States until the Community exercises them, at which point they transfer over to the realm of the Union. This fails to capture the reality of shared and overlapping competences, whereby Community and Member State intervention co-mingle in a given policy sphere, the lines between them being blurred and hard to draw.

²⁸ Case C-281/01, *Commission v Council* (Energy Star), judgment of 12 December 2002, not yet reported in the ECR.

²⁹ Case C-2/90, *Commission v Belgium* [1992] ECR I-4431. See, by way of contrast, more recently, Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV & Others v Minister van Volkshuisvesting* [1998] ECR I-4075.

³⁰ Case C-169/89, *Criminal proceedings against Van den Burg* [1990] ECR I-2143 and Case C-1/96, *The Queen/Minister of Agriculture, Fisheries and Food ex parte Compassion in World Farming* [1998] ECR I-1251.

³¹ It is also the case that much Community legislation is 'framework' in nature, in keeping with the proportionality principle. This leaves Member States considerable flexibility in its implementation. 'Implementation' is, as such, not a mechanical act of transposition or translation. Thus, Member States retain considerable competence even after the Union has exercised its shared competence.

³² Which, according to Article 176 EC, it does when the measure takes Article 175 EC as its legal basis; cf. Case C-318/98, *Fornasar* [2000] ECR I-4785, para 46. By the way, the Avosetta group proposed to redraft Article 176 EC (and Article 95(4–6) EC in a more clearer way. See their Resolution in J.H. Jans (ed), op cit, n 11 at 121. In this contribution we will not entertain this aspect any further.

³³ Case C-389/96, *Aher-Waggon* [1998] ECR I-4473.

4. Hierarchy of Norms

In relation to the exercise of competence, a number of issues of significance in the environmental sphere may be usefully flagged up.

First, is the proposal to adjust the terminology used in relation to Community acts. This is based upon a distinction between legislative and non-legislative acts. The former will include European laws (the equivalent to current regulations) and European framework laws (the equivalent to current directives). Regulations, by way of contrast will be non-legislative for the implementation of 'certain specific provisions of the Constitution'.³⁴ Such regulations will take one of two forms. They may be binding in their entirety and directly applicable in all Member States. Alternatively, they may be binding as to the result to be achieved, on all Member States to which they are addressed, but leave to the Member States the form and means of achieving the result envisaged. Thus, in the same way as there will be two forms of legislative act (the equivalent to current regulations and directives), there will also be two forms of implementing act, although in the latter case, each will be called a 'regulation'.

The concept of a 'European decision' is henceforth to be confined to binding non-legislative instruments. These may be generally applicable or may be more confined in their personal scope.

Second, the proposed text is premised upon a new distinction between delegated regulations and implementing acts.³⁵ This is of the utmost importance in the environmental sphere, in view of the framework nature of much legislation and the traditionally important role played both by Member States in implementation, and by European 'comitology' committees. Though technical—and unclear—these provisions will play a critical role in determining the horizontal and vertical balance of power in environmental law-making.

Implementation is said to be the prerogative of the Member States, other than where 'uniform conditions' for implementing binding Union acts are needed.³⁶ In the latter case (implying action by the Union), implementing powers may be conferred upon the Commission or, in the circumstances laid down, upon the Council of Ministers. Union implementing acts will take the form of implementing regulations (either one of the two variants set out previously) or implementing decisions, in accordance with the schema set out above. The relevant European laws, providing for European implementation, shall lay down in advance rules and general principles for the mechanisms for control by Member States of Union implementing acts.³⁷ In keeping with current arrangements, this may be regarded as a somewhat opaque reference to the elaborate 'comitology' machinery which has grown up.³⁸ Famously, this permits the

³⁴ Article 32(1).

³⁵ See Article 35 on delegated regulations and Article 36 on implementing acts.

³⁶ More precisely, Article 36(2) provides: 'Where uniform conditions for implementing binding Union acts are needed, those acts may confer implementing powers on the Commission, or, in specific cases duly justified and in the cases provided for in Article 39, on the Council of Ministers.'

³⁷ Article 36.

³⁸ Decision 1999/468, OJ [1999] L184/23; see also the Proposal for a Council Decision amending Decision 1999/468/EC laying down the procedures for the exercise of implementing powers conferred on the Commission; COM(2002) 719 final. See on the duty to give reasons if and when the institutions want to derogate from the criteria in the Second Comitology Decision: ECJ judgment of 21 January 2003, Case C-378/00 *Commission v*

Council some oversight over the Commission's exercise of its implementing powers. Clearly though, the notion of control mechanisms is sufficiently open-ended to permit evolution in this respect.

'Delegation' is said to be concerned with reconciling the democratic legitimacy associated with legislation with the need for flexibility. It permits the delegation by the legislature, to the Commission, of powers to enact regulations 'in order to supplement or amend certain non-essential elements of the law or framework law'.³⁹ In so far as it is concerned with amendment, it is clearly distinguished from implementation above. In so far, however, as it is concerned with 'supplementing' rather than 'amending', the line between supplementing and implementing may be difficult to draw. Yet this distinction is significant, given that in principle implementation—unlike delegation—is to be the prerogative of the Member States (not the Community institutions), other than where there is a need for uniform conditions for implementation.

The vision of delegation contained in the Treaty, is clearly predicated upon a principal/agent model. This follows not merely from the requirement that the objectives, content, scope and duration be explicitly defined by the legislature (the principal), but also from the 'conditions of application' to which delegation shall be subject to, according to the terms of the relevant legislation. 'They may consist of the following possibilities':⁴⁰

- the European Parliament and the Council may decide to revoke the delegation;
- the delegated regulation may enter into force only if no objection has been expressed by the European Parliament or the Council within a period set by the law or framework law;

In the exercise of these oversight functions, the European Parliament is to act by a majority of its members, and the Council by a qualified majority vote. In so far as the Council enjoys this direct oversight function, there is clearly the danger that changes in the political mood of the Union might lead it to block the exercise of delegated powers.

Thus, the contrast with 'implementation' lies not only in terms of the scope of the delegation (non-essential elements only), but also with the nature of the political oversight function laid down. This may be *ex ante* (option one above) and/or *ex post* (option two above). Significantly, this implies a greater role for the European Parliament, so long the loser in the realm of comitology. In keeping with the principal/agent model which underpins the concept of delegation, the proposed text endorses an ultimate control-from-above approach to accountability. Yet in areas of complexity, uncertainty and rapid change (environment being a paradigm case), the extent to which control of this kind can be meaningfully realised is open to doubt.⁴¹ It is to be regretted that while the European Union has emerged as a hotbed of experimenta-

Council and EP, not yet reported in the ECR. The judgment concerned the partial annulment of Regulation 1655/2000 on a financial instrument for the environment.

³⁹ Article 35(1).

⁴⁰ Article 35(2). A third mechanism proposed in the original version has been dropped. This provided for the automatic lapsing of the provisions of the delegated regulation, after the period laid down in the law or the framework law. In this event, it was to be open to the European Parliament and the Council, on a proposal from the Commission, to extend their application. Though less explicit than in the earlier draft, this would seem to leave open the possibility for the simultaneous application of the two mechanisms.

⁴¹ Breyer, Sunstein and Stewart, *Administrative Law and Regulatory Policy* (Aspen Law and Business, 2002).

tion in the structuring of administrative discretion, the constitutional text looks set to ignore this, in favour of a appealingly simple, but ultimately unproductive, principal/agent approach.⁴²

Indeed, even when the constitutional text comes to the issue of transparency, it contains no specific obligations for the Commission in the exercise of its delegated or implementing powers. It, like the other Union institutions, will be obliged to conduct its work 'as openly as possible'.⁴³ However, while there is an explicit requirement that the European Parliament and the Council meet in public, *when discussing a legislative proposal*, no specific provision is made in relation to the transparency of administrative proceedings. Likewise, in relation to participatory democracy, this principle is laid down in general terms, and does not establish any specific requirements in relation to the adoption of delegated or implementing acts.⁴⁴ The working group on complementary competences 'generally approved' of the idea set forth in a paper submitted to the Convention, that a specific legal basis be inserted into the Treaty for the adoption of rules on 'good administration, efficiency and openness' for the EU institutions.⁴⁵ Nonetheless, this does not seem to have found favour with the Convention as a whole.⁴⁶

It is notable also in this respect that the Convention did not endorse the suggestion of the working group on 'Complementary Competences' that, in view of the common interest in the quality of national administration of EU legislation, the Union should be authorised to assist Member States by facilitating exchange of information and persons related to administration of EU law, and to support common training and development programmes.⁴⁷ To this end, the Working Group proposed that this be added as an additional area of 'supporting measures' under Article 15 of the constitutional text. It is, of course, the case that Community directives in the environmental sphere frequently constrain Member States in their manner of implementation. They contain a plethora of provisions setting out participation and transparency requirements at the national level, and instituting comprehensive reporting obligations. Such requirements have tended to be strengthened over time. The directive on environmental impact assessment is indicative in this respect. Not only is the role of public participation reinforced in the amended version, but the related directive on strategic environmental impact assessment contains novel and far-ranging consultation obligations, obliging Member States, *inter alia*, to consult with relevant non-governmental organisations. Notwithstanding a continuing emphasis upon the proportionality of Union legislation, and upon the primary role to be played by Member States in its implementation, the principles according to which implementation is to be achieved remains to be determined on a case by case basis.

⁴² One of the crucial questions in terms of Union implementation/delegation will be the relative degree of decision-making autonomy enjoyed by the Commission. To the extent that Member State control over Union implementation would seem to imply the continuation of comitology structures, the Commission may well prefer to see matters defined in legislation as 'supplementing' rather than 'implementing', and hence subject to ex post and ex ante control, rather than participation in committee governance.

⁴³ Article 49(1).

⁴⁴ See Article 34.

⁴⁵ Working Group V at p 17.

⁴⁶ See though the discussion at pp 334–5 below on Community level access to environmental information.

⁴⁷ Working Group V at p 18.

5. Protocol on Subsidiarity and Proportionality

Still on the theme of competences, one of the most interesting aspects of the proposed constitutional text concerns the amendments to the existing Protocol on the application of the principles of subsidiarity and proportionality. Based upon an inter-institutional agreement drawn up at the Edinburgh summit at the end of 1994, the proposed protocol seeks to strengthen this principle. As an area of shared competence, subsidiarity is applicable to the environmental sphere. It has been since its inception. That said, very often the reasons set out justifying compliance with this principle on the part of environmental legislation are very thin; a general allusion to transboundary spill-overs here, and to the equalisation of conditions of competition there. Yet the implications of this principle in the environmental sphere are hotly contested.⁴⁸ In that the new protocol is intended to reinforce the institutional mechanisms for overseeing compliance with subsidiarity, the Commission would do well to take seriously its obligation to include a *detailed* statement in its legislative proposals, such as to facilitate compliance with this principle.

The model established by the protocol rests upon greater involvement of national parliaments. Thus, the Commission, European Parliament and the Council are to send their legislative proposals, resolutions and common positions to the national parliaments of the Member States. Any such parliament may, within six weeks, send to the institution concerned, a reasoned opinion stating why it considers that the proposal in question does not comply with the principle of subsidiarity. The relevant institution will 'take account' of such reasoned opinions. Where the national parliaments making such submissions 'represent at least one third of all the votes allocated to the Member States' national Parliaments and their chambers' the Commission shall review its proposal. After such review, the commission may maintain, amend or withdraw its proposal, giving reasons for its decision.⁴⁹

Also novel is the explicit recognition in the protocol of the jurisdiction of the European Court of Justice on grounds of infringement of the principle of subsidiarity. This is stated to be largely limited to actions brought by the Member States, although where appropriate, and in accordance with domestic constitutional rules, these will be launched at the request of a national parliament. Significantly, the draft also anticipates that the Committee of the Regions may enjoy standing in this respect, as regards legal acts upon which it was consulted.

The draft protocol raises many issues and questions of legal interpretation.

First, it would seem that a strengthening of subsidiarity comes at the price of proportionality. Contrary to the text of the existing protocol, the draft has little to say on this latter principle. Differing at least to an earlier version, the Protocol now provides that any legislative proposal should contain a detailed statement making it possible to appraise compliance with proportionality as well as subsidiarity. Nonetheless, gone it would seem is the elaboration of what this entails, both procedurally⁵⁰ and in terms of legal form. This includes the stated preference for framework direct-

⁴⁸ See W. Wils, 'Subsidiarity: Taking People's Concerns Seriously?' (1994) 6 JEL 85-91.

⁴⁹ It would seem that a similar procedure to be put in place to allow national parliaments to issue reasoned opinions on Council common positions or in respect of amendments proposed by the European Parliament has been dropped.

⁵⁰ Though we are left with an annual reporting obligation on the part of the Commission (only).

ives (bearing in mind that, according to the current draft, directives will henceforth be known as framework laws), the idea that Community law should leave as much scope for national decision as is possible, and wherever possible provide alternative ways for the achievement of its objectives.⁵¹ Article 9(4) in Part I of the constitutional treaty is itself skeletal in the extreme, providing merely that 'the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Constitution'.

In keeping with this, it is plain that as the protocol currently stands, the oversight mechanism constituted by it, through recourse to national parliaments, is limited to the sphere of subsidiarity and not proportionality. This 'early-warning' system⁵² could easily and usefully be extended to cover the intensity (proportionality) as well as the need for (subsidiarity) Community action.

Second, it remains unclear as to whether the proposed protocol is intended to deprive all but the specified institutions of standing to challenge Community acts on subsidiarity grounds. Recall that the current draft singles out only the Member States and, in more limited circumstances, the Committee of the Regions. It thus excludes certain of those considered as 'privileged applicants' under Article 230 EC (proposed Article III-270(4)) as it currently stands, notably the European Parliament whose status was consolidated by changes introduced at Nice.

Third, the draft protocol is clear that national parliaments do not enjoy any independent right of standing before the European Court.⁵³ The most that could be argued in this respect is that the Protocol would impose a procedural obligation on Member States *to consider* whether it is appropriate, and in accordance with domestic constitutional rules, to institute any action requested by a national parliament.⁵⁴

Finally, the protocol imposes obligations upon the various Community actors at different stages of the legislative process. They are to take account of the reasoned opinions of national parliaments, or the fullest account in the case of the European Parliament and the Council, pending a Conciliation Committee meeting. As noted, the Commission will be obliged to review its proposal where at least one third of national parliaments submit reasoned opinions. As things currently stand it would not be open to any actor to seek review of any proposal, common position, or resolution, on the basis of a failure to comply adequately with these duties. This flows from the absence of binding legal effects associated with measures of this kind. They do not constitute 'acts' within the meaning of Article 230 EC. The question nonetheless

⁵¹ Currently the Protocol provides: '(6) The form of Community action shall be as simple as possible, consistent with satisfactory achievement of the objective of the measure and the need for effective enforcement. The Community shall legislate only to the extent necessary. Other things being equal, directives should be preferred to regulations and framework directives to detailed measures. Directives as provided for in Article 189 of the Treaty, while binding upon each Member State to which they are addressed as to the result to be achieved, shall leave to the national authorities the choice of form and methods. (7) Regarding the nature and the extent of Community action, Community measures should leave as much scope for national decision as possible, consistent with securing the aim of the measure and observing the requirements of the Treaty. While respecting Community law, care should be taken to respect well established national arrangements and the organisation and working of Member States' legal systems. Where appropriate and subject to the need for proper enforcement, Community measures should provide Member States with alternative ways to achieve the objectives of the measures.'

⁵² Working Group I, Comments on the Draft Protocol on the Role of National Parliaments, p 14.

⁵³ This is true under Article 230 EC generally. The same is true also for subnational governments.

⁵⁴ Para 8.

remains as to whether a failure to comply properly with one or more of these procedural obligations, would constitute a breach of an essential procedural requirement, such to vitiate the legal measure adopted. Relevant also is the standard of review adopted by the European Court. The grounds for challenge here would not be subsidiarity as such, but breach of a procedural obligations designed to ensure its observance. It is not hard to see that the latter could occur in the absence of a breach of the former. In this respect, the fact that national parliaments are entirely non-privileged actors under Article 230 EC would not seem to preclude their standing, at least in so far as they were responsible for the submission of reasoned opinions. This flows from the special status accorded by the European Court to actors with special authority to participate in the procedures leading to the adoption of the contested decision.⁵⁵

6. The Democratic Life of the Union

6.1 Participatory Democracy

While the Commission is to retain the sole right of initiative in the environmental sphere,⁵⁶ the draft treaty contains one significant initiative in this respect. Article 46(4), in the context of participatory democracy, provides:

A significant number of citizens, no less than one million, coming from a significant number of Member States may invite the Commission to submit any appropriate proposal on matters where citizens consider that a legal act of the Union is required for the purpose of implementing this Constitution. A European law shall determine the provisions for the specific procedures and conditions required for such a citizens' initiative.

There is much in the provisions on participatory democracy to appeal to the environmental movement, and the response of the G8 has been positive in the main. The relevant provisions are under-specified and their effectiveness will depend upon their detailed elaboration. Nonetheless, they attest to the Union's growing commitment to transparency, consultations and civil dialogue. Thus, Article 46 provides that '[t]he Union Institutions shall, by appropriate means, give citizens and representative associations the opportunity to make known and publicly exchange their views on all areas of Union action', that '[t]he Union Institutions shall maintain an open, transparent and regular dialogue with representative associations and civil society', and that '[t]he Commission shall carry out broad consultations with parties concerned in order to ensure that the Union's actions are coherent and transparent'.⁵⁷

6.2 Access to Information

One aspect of participatory democracy has been improved and that concerns access to (environmental) information at the EU level. Article I-49(3) of the draft Constitution

⁵⁵ For a discussion of the relevant case law see P. Craig and G. de Búrca, *Text, Cases and Materials on EU Law*, 3rd edn (OUP, 2002).

⁵⁶ See generally Article 25(2).

⁵⁷ In the Communication titled *Towards a Reinforced Culture of Consultation and Dialogue*, the Commission has established some general principles and minimum standards for the consultation of interested parties by the Commission, COM(2002) 704 final.

provides that ‘any citizen of the Union, and any natural or legal person residing or having its registered office in a Member State shall have a right of access to documents of the Union Institutions, *bodies and agencies* in whatever form they are produced’.⁵⁸ The existing Article 255 EC (and its implementing measure Regulation 1049/2001⁵⁹ of the Council, Commission and EP) only deals right of access to European Parliament, Council and Commission documents. Broadening the scope of the obligation to ‘bodies and agencies’ must be welcomed.⁶⁰ At least one major problem regarding access to information has not been solved by the draft Constitution and that is the practice of the Commission not to make available to interested citizens information regarding the use of infringement-proceedings against the member states.⁶¹ In this respect a reference to Article 4(4)(c) of the Aarhus Convention⁶² is applicable. It provides that ‘a request for environmental information may be refused if the disclosure would adversely affect:

[...]

The course of justice, the ability of a person to receive a fair trial or the ability of a public authority to conduct an enquiry of a criminal or disciplinary nature’.

This clause does not seem to include restrictions as practised by the Commission regarding documents pertaining to environmental infringement proceedings.

6.3 Access to Justice

There is, however, one important theme which is entirely absent from this commitment to participatory democracy; namely access to justice. The European Court of Justice has recently confirmed its restrictive stance on the question of ‘individual concern’, thereby all but excluding individuals and environmental groups from access to judicial review.⁶³ It had been hoped—and battled for on the part of the Green 8—that in keeping with the spirit of the Aarhus Convention, the Union would take this opportunity to relax its outrageously restrictive approach to standing. Also the Avossetta Group had advocated a loosening of the criteria of Article 230 EC. Avossetta proposed to redraft Article 230(4) EC in order to enhance the possibilities of NGOs and other concerned parties to bring an action before the ECJ for annulment of measures affecting the environment. They suggested either deleting the words ‘and

⁵⁸ Italics added by the authors.

⁵⁹ OJ [2001] L145/43.

⁶⁰ See J.H. Jans, ‘EU Environmental Policy and the Civil Society’, op cit, n 11 at 63–4. This may be thought to be driven by the case law of the European Courts in this respect. See, for example, Case T-188/97 *Rothmans International v Commission* [1999] ECR II-2463, in relation to access to comitology documents.

⁶¹ See on this issue L. Krämer, ‘Vertraulichkeit und Öffentlichkeit; Europäisches Vorverfahren und Zugang zu Informationen’ in L. Krämer (ed), *Recht und Um-Welt; Essays in Honour of Prof Dr Gerd Winter* (Groningen, 2003) 153–70.

⁶² Signed, but not yet ratified by the EC: see the proposal for a Council Decision on the signature by the European Community of the UN/ECE Convention on access to information, public participation and access to justice in environmental matters; COM/98/0344 final.

⁶³ See the ‘old’ environmental case law: Case C-321/95 P *Greenpeace v Commission* [1998] ECR I-1651 and T-219/95, *Danielsson a.o.* [1995] ECR II-3051. The approach of the Court is still pretty much the same, as can be distilled from Case C-50/00 P, UPA, ECR [2002] 6677 and Case C-142/00 P, *Commission v Netherlands Antilles*, not yet reported in the ECR.

individual' or replacing the term 'individual' with 'significant' in this paragraph.⁶⁴ This has not occurred. First of all there is no reference to access to justice in the provisions on participatory democracy. Secondly, although the text of Article 230(4) is to be changed, this change will not have a significant effect for the field of environmental protection. The new text (Article III-270(4) of the draft constitution reads: 'Any natural or legal person may, under the same conditions, institute proceedings against an act addressed to that person or which is of direct and individual concern to him, *and against a regulatory act which is of direct concern to him without entailing implementing measures*.'⁶⁵

This provision would have helped neither Greenpeace nor Ms. Danielsson in the cases mentioned above. Even under the new text of Article III-270(4) their actions for annulment of Commission *decisions* would—without any doubt—have been declared inadmissible. Therefore we must conclude that legal protection of individuals and NGO's to challenge acts of the European institutions which affect the environment remains problematic.

7. Policies: Nothing Changed, Nothing Gained

7.1 Articles 174–176 EC Remain Unchanged

The draft Constitutional Treaty leaves essentially unchanged Articles 174, 175 and 176 EC (proposed Articles III-129 and III-131). With respect to the environmental principles listed in Article 174 EC the Avosetta group had proposed the following amendments: (a) to include in Article 174 (1) fourth indent a reference to possible 'unilateral' measures. The text of Article 174 (1) fourth indent will then read as follows:

promoting measures at international level to deal with regional or worldwide environmental problems. Such measures may include unilateral ones, without prejudice to other international obligations'. (b) to include in Article 174(2) the principle of 'sustainable development'. (c) to include in Article 174(2) the principle of 'inter-generational equity'.

The text of Article 174(2, second sentence) should then read as follows:

It shall be based on the principle of sustainable development, the principle of inter-generational equity, the precautionary principle and on the principle that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.

They also were of the opinion that all decisions on environmental affairs (Articles 174–176 EC) should be taken by co-decision and that as a consequence the second paragraph of Article 175 should be deleted. National sovereignty in taxation matters proved to be an insurmountable obstacle in this respect.

⁶⁴ Resolution of the Avosetta Group adopted at their conference 11–12 October 2002, Amsterdam, published in J.H. Jans (ed), *op cit*, n 11 at 121. See also J.H. Jans, 'EU Environmental Policy and the Civil Society', *ibid* at 55–67, in particular para 4 of that contribution.

⁶⁵ Italics added by the authors.

7.2 Free Movement of Goods and Environmental Protection

An adequate balancing of trade and environmental interests still is one of the more problematic issues in European law. In essence, the problem can be analysed as follows. Environmental objectives can serve as a justification for Community and national measures affecting the proper functioning of the internal market. Looking at this from a constitutional perspective: environmental objectives are an exception to the main rule which is free movement. To bring environmental interests onto the same footing as trade interests, the Avosetta group proposed to include in the Treaty the following provision: 'Subject to imperative reasons of overriding public interest, significantly impairing the environment or human health shall be prohibited'. The Green 8 likewise propose that environmental protection be included in the new version of Article 50 (Article III-43). The intention of this is to ensure that environmental interests/protection has at least the same priority as free trade. Second, the intention is to give environmental protection direct effect, to oblige EU institutions as well as Member States and their citizens to refrain from taking decisions or undertaking activities which significantly impair the environment or human health, unless such impairment can be justified by an overriding public interest. The draft Constitution did not consider the issue at all.

A related problem in the European trade and environment debate concerns the wording of Article 30 EC. Above we pointed to the recent case law of the ECJ, where the integration principle has been used by the Court to justify recourse to the mandatory requirement relating to 'environmental protection' to justify a directly discriminatory barrier to trade.⁶⁶ Amongst other authors, Winter pointed to earlier case law of the ECJ which regarded environmental protection as a unique category of legal justification besides Article 30 EC but limited its application to measures which did not distinguish between domestic and foreign products.⁶⁷ Winter argued that as a result the notion of 'life of humans, animals or plants' in Article 30 EC was somewhat overstretched. In view of this mismatch between 'wording and meaning', Winter proposed to insert into Article 30 EC the words, 'and of the environment' after 'the protection of health and life of humans'. In the draft Constitution however the text of Article 30 EC (proposed Article III-43) remains untouched.

8. Conclusion

The draft constitutional text submitted to the Council on 20 June 2003 is by no means ideal from an environmental perspective.* The Green 8 regret, for example, the annexing of a protocol amending the Euratom Treaty. They highlight—with regret—certain issues discussed above, notably those pertaining to access to justice,

⁶⁶ ECJ Case C-379/98, *PreußenElektra* [2001] ECR I-2099. One can also make a reference to Case C-67/97 *Ditlev Bluhme* [1998] ECR I-8033 and, much earlier, Case C-2/90 *Commission v Belgium* [1992] ECR I-4431.

⁶⁷ G. Winter, 'Environmental Principles in Community Law' in J.H. Jans (ed), *op cit*, n 11 at 1–25, in particular at 14.

* *Supra* n 4. 'Towards a Green EU Constitution' for an excellent overview of the deficiencies and detailed suggestions for improvement. Much of this focuses upon Part III concerning the policies and functioning of the Union, and proposes the integration of an environmental dimension into other Union policies such as agriculture, energy and transport.

and to the need revise the Part III policies to reflect the Union's overarching goal of sustainable development. They propose the inclusion of a protocol on sustainable development. That said, what we see now is markedly better than that which was put forth in the original draft text. The environmental changes instituted along the way are immensely significant. Without them, the integration obligation would have been lost, and the environmental dimension of sustainable development diluted.

These successes were achieved due to the open and participatory nature of the Convention, and the professionalism and organisation of a range of environmental groups, notably the Green 8. These groups combined traditional activism at the Convention (handing out flyers, and anti-Euratom buttons), with careful and continuous monitoring of the proceedings. The results of this monitoring was made available through continuously updated websites and information briefings. Such was the scale and intensity of the proceedings that, absent this level of coordination and organisation, transparency would have been an illusion.

It is notable that the Convention led to the establishment of important alliances; both within the environmental movement and across different spheres of interest. Thus, for example, the activities of 'Act4Europe' bear mention in this respect.⁶⁸ This includes trade unions representatives, social and environmental organisations, human rights, and development, groups. In an exercise of 'benchmarking of the Convention', Act4Europe issued an 'end-of-term report card' assessing the outcome of the Convention against their key demands set forth in a common statement on 24 June 2002, and against the current *acquis*.⁶⁹ Test two was concerned with sustainable development and the overall assessment is bleak.⁷⁰ The report card nonetheless concludes with the following statement:

The working-methods of a European Convention have been a major improvement compared with the traditional method of Inter-Governmental Conferences. We would like to acknow-

⁶⁸ <http://www.act4europe.org/code/en/hp.asp>.

⁶⁹ See: <http://www.act4europe.org/code/en/civi.asp?Page=94>.

⁷⁰ 'Test 2: Incorporate the Lisbon and Gothenburg agreements within the Treaties in order to guarantee a sustainable development in which social and environmental dimension have an equal weight to the economic dimension. Assessment: No progress. The Treaty remains too focused around the single market and economic goals, without recognising fully that the economy should be a tool for the promotion of social integration and the protection of the environment within the European Union.' After eight months of campaigning, at the closing stages of its work, the Convention restored the concept of sustainable development as it was laid down in the Amsterdam Treaty. We support the proposal of Commissioner Wallström to add a Protocol on Sustainable Development to the Constitution and have published amendments to strengthen the proposed text.

Article I-14 (the coordination of economic and employment policies) does not secure coordination *between* economic, employment, and social policies. Such coordination between policies is a necessary element if the social objectives of Lisbon are to be realised. Furthermore, in order to ensure sustainable development it is also necessary that policy coordination should incorporate the environmental dimension as added by the Gothenburg Summit.

The current principle of integrating the environment into all Union policies, the basic requirement in making sustainable development work, was not given the prominent place it had in the Amsterdam Treaty. However, it has now been placed under the horizontal principles at the beginning of Part III on 'The Policies and Functioning of the Union'. We will campaign to ensure that this new place will lead to more and not less respect for this important principle in the EU's daily practice.

A major flaw in the Convention's proposal is that it leaves many ageing EU policies in Part III untouched. As a result, the objectives laid down in several of the policy chapters, such as agriculture, transport, economic and social cohesion, and internal market contradict the sustainable development requirements of the Union.

The proposal to annex the 50-year-old Euratom Treaty, as a Protocol, to the new Constitution is entirely unacceptable as it retains a preferential financial and institutional framework for nuclear power, which has no support among many Member States and a large majority of European people.

ledge the many efforts made by Convention members who spoke out for and supported demands from civil society organisations. However, in the future, we believe transparency could be further improved and the dialogue with civil society has to be better organised and more regular.

As suggested by this, few would dispute that the Convention process constituted a radical improvement on traditional inter-governmentalism. Equally, though, few would deny that the process was far from ideal from the perspective of participatory democracy. Ioli Christopoulou, then of WWF (Europe), like many others, singled out two factors to exemplify these shortcomings.⁷¹

First, only one civil society hearing was held by the Convention throughout the entire process; this in June 2002. Additional hearings, later in the day following the publication of the first draft text, would have provided high-profile and effective opportunities for civil society organisations to feed their perspectives and expertise into the decision-making process. Certainly, alternatives were available and were exploited, notably in the form of contact with individual Convention members.

Second, most would agree that the pace of the Convention process, particularly during the first half of 2003, was absurdly fast. This rendered the task of monitoring and effective participation extremely demanding; not merely for civil society groups, but for Convention members themselves.

⁷¹ Personal communication of 29 June 2003.