The founding Treaties did not mention the environment. The environment first appeared in the Single European Act as a matter for ‘action’ and a component of the Community’s other policies. Environmental protection became a self-standing ‘policy’ under the Treaty of Maastricht, which required that it be integrated into the definition and implementation of other Community policies. This became a ‘principle’ under the Treaty of Amsterdam.

The environmental legislation enacted under the Treaties has mainly been programmatic, imposing obligations and targets on the Member States or on public authorities at national or local level. Less often does it create rights or obligations for companies or individuals, although environmental cases have raised important questions concerning locus standi and the direct effect of directives. So, in the main, the task of the Court of Justice has been to define the obligations assumed by the Member States for themselves and for the authorities under their control and, in so doing, to explain how the new norms of environmental law are to be fitted into the established hierarchy of Community norms. In all these developments, Gil Carlos Rodríguez Iglesias has played a leading role, both as President and as a Judge of the Court.

This article considers the way in which environmental cases have raised questions of locus standi and direct effect and thereafter the way in which the Court has brought environmental protection within the established jurisprudential scheme of the Treaty.

Locus standi and Direct Effect

The extent to which companies, individuals and interest groups should be able to use the courts to contest administrative decisions in the field of town and country planning, or to enforce what they conceive to be the environmental obligations of states or public authorities, is by now a familiar problem in national law. Striking the correct balance between effective judicial protection and separation of powers is not easy since the intervention of courts may delay (sometimes irrevocably) projects which others believe to be essential on social or economic grounds.

In the Greenpeace case, the question was whether Greenpeace was entitled to bring an action against the Commission to contest the funding by the Community of the

* David Edward – Judge of the European Court of Justice since 1992; Honorary Professor of the University of Edinburgh.
1 EEC Treaty, Article 130R. See also Article 100 A (3) and 100 A(4) added by the Single European Act.
2 Article 130R (2) as amended by the Treaty of Maastricht.
3 Article 6 EC.
construction of two power stations in the Canary Islands. The Court of First Instance held that Greenpeace did not satisfy the requirement of 'direct and individual concern' under Article 173 (now Article 230 EC), fourth paragraph, and its judgment was confirmed by the Court of Justice, albeit with some nuances. For the time being, in the absence of Treaty amendment, the judgment in Unión de Pequeños Agricultores effectively precludes similar challenges. As the Court has indicated, it is for the treaty makers and not the Court to decide whether the rules on locus standi should be relaxed.

A related problem, normally classified as one of direct effect, arose in three cases - the Großkrotzenburg power station case, Kraaijeveld and Inter-Environnement Wallonie. The doctrine of direct effect was initially developed by the Court of Justice, beginning with Van Gend en Loos, to address the problem of the extent to which companies and individuals can rely directly on the Treaty to assert their rights before national courts. In the Großkrotzenburg case the question was whether the Commission could bring an action against a Member State under Article 169 (now Article 226 EC) for failure to conduct the Environmental Impact Assessment (EIA) required by Directive 85/337 before permitting the construction of an additional unit of the Großkrotzenburg power station. The argument of the German government was that the Directive had not yet been implemented in Germany and, consequently, that the Commission could not rely directly on the provisions of the Directive since, in the absence of transposition, such provisions can have direct effect only where they confer specific rights on individuals. The Court rejected that approach, stressing that directives create obligations for the Member States. The essence of the Commission's complaint was that Germany had not fulfilled the obligation, flowing directly from Directive 85/337, to assess the environmental impact of the power station project. The question was therefore, not whether individuals may rely as against the State on provisions of an unimplemented directive, but whether the directive was to be construed as imposing an obligation on Germany to conduct an EIA before proceeding with the Großkrotzenburg project. So analysed, the Commission was clearly entitled to bring an action in respect of failure to fulfil that obligation.

The approach of concentrating on the obligations of Member States rather than the rights of individuals was taken further in Kraaijeveld. The case again concerned the obligation under Directive 85/337 to conduct an EIA before embarking on a major project - in this instance the construction of a dyke which the Dutch authorities proposed to build to protect land against storm tides. The consequence of building the dyke

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6 Case C-431/92 Commission v Germany (Großkrotzenburg power station) [1995] ECR I-2189.
8 Case C-73/96 Inter-Environnement Wallonie ASBL v Région Wallonie [1997] ECR I-7411.
11 Case C-431/92, note 6 above, points 24-26.
would have been to cut off Kraaijeveld from access to navigable waterways. The question at issue was not whether Kraaijeveld could prevent the building of the dyke altogether, but rather the prior question whether the authorities could proceed with the building of the dyke without first conducting an EIA the result of which might have been to show that the project should not be carried out at all, or at least not in that way. The Dutch government raised a number of questions as to the interpretation of the Directive (discussed below). On the question of direct effect, the Court held that „where the Community authorities have, by directive, imposed on Member States the obligation to pursue a particular course of conduct, the useful effect of such an act would be weakened if individuals were prevented from relying on it before their national courts“.12 Thus, the issue is not whether the individual has a right to a particular result, but whether the courts can require the state to comply with its obligation to follow the correct procedure.

Inter-Environnement Wallonie concerned the scope of the definition of „waste“ in Directive 75/442 as amended by Directive 91/156.13 Before the time limit prescribed for transposition of the amending directive, the Walloon Regional Council had adopted a Decree which defined „waste“ differently from the Directive 75/442. The Belgian government, supported by France and the United Kingdom, argued that until the period prescribed for transposition of a directive had expired, Member States were free to adopt national rules which are at variance with it.

Following the same line as in Großkrotzenburg and Kraaijeveld, the Court held that a directive creates an obligation of result for Member States as soon as it is notified. While that result need not be produced immediately, since there is a time limit for transposition, Member States must nevertheless refrain from taking any measures liable seriously to compromise the result prescribed.14 Whether or not these cases are really about ‘direct effect’,15 they show that the environmental directives can be a useful testing ground for a range of problems concerning the effective enforcement of directives.

The Environment and Free Movement of Goods

When the founding Treaties were written in the 1950s, environmental protection was not a matter of political significance, and even the Euratom Treaty contained few provisions that would, in today’s terms, be regarded as ‘environmental’. The Spaak Report which led to the EEC Treaty stressed the primary aim of creating a common market in goods as an essential element in overcoming Europe’s lack of competitiveness as

12 Case C.72/95, note 7 above, point 56.
14 Case C-129/96, note 8 above, points 40-45.
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compared in particular with the USA. So it is not surprising that, by the time environ-
mental protection became a matter of serious public concern, there was already a sub-
stantial body of case law limiting any action on the part of Member States that might
hinder the free movement of goods.

By the early 1980s in the run up to the Single European Act, there was considerable
concern, particularly in Denmark, about the absence from the Treaty of any provisi-
ons about environmental protection. The problem for the Court was to find a way of
reconciling environmental considerations with the scheme of the Treaty and the estab-
lished case law on free movement of goods.

In the two Waste Oils cases decided in 1983 and 1985 (before the Single European Act)
the Court had to consider the extent to which environmental protection could be in-
voked to justify French legislation whose effect was to restrict free movement of goods
in the form of waste oils. In the first case the French government pointed out that the
need to protect the environment was specifically referred to in the preamble to Direc-
tive 75/439 on the disposal of waste oils. Consequently, it argued, a restriction on the
export of waste oils was justified. The Court however held that „the environment is
protected just as effectively when the oils are sold to an authorised disposal or rege-
nrating undertaking of another Member State as when they are disposed of in the
Member State of origin“. An unqualified restriction on export therefore constituted a
breach of Article 34 (now Article 29 EC).

The judgment in the second case, ADBHU,19 marks a significant change of attitude,
or at least of expression. The issue was whether Directive 75/439 was invalid in that
it required prior approval for cross-frontier movements of waste oils, so focussing the
potential incompatibility of the aims of environmental protection on the one hand and
those of the internal market and free competition on the other. The Council and Com-
mission argued that the restriction involved in a system of approvals was justified since
it „pursues an aim of general interest by seeking to ensure that the disposal of waste
oils is carried out in a way which avoids harm to the environment“.

The Court held, first, that „the principle of freedom of trade is not to be viewed in
absolute terms but is subject to certain limits justified by objectives of general inter-
est pursued by the Community provided that the rights in question are not substan-
tively impaired“; second, that „the Directive must be seen in the perspective of envi-
ronmental protection which is one of the Community’s objectives“ so that it was not
invalid in restricting free movement of goods; and third, that while such restrictions
may be justified, they must be proportionate and non-discriminatory.

This approach was followed in the Danish Beer Containers case.21 Denmark had en-
acted legislation which required all containers for beer and soft drinks to be returnab-

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18 Case 172/82, note 16 above, at point 14.
19 Case 240/83 Procureur de la République v Association de défense des brûleurs d’huiles usagées
(ADBHÜ) [1985] ECR 531.
20 Case 240/83, note 19 above, at points 10-15.
le and to be of a type approved by the Danish authorities. The purpose was environmental protection but the effect was to require anyone who wished to sell beer or soft drinks in Denmark to manufacture according to Danish standards - a consequence incompatible with the very purpose of the internal market.

The Court repeated the finding in *ADBHU* that protection of the environment is one of the Community's essential objectives and noted that this had been confirmed by the Single European Act. It was therefore legitimate in the interests of the environment to institute a system of deposit-and-return. On the other hand, to insist that all containers must comply with Danish approved specifications would involve foreign producers in substantial additional costs and such a requirement was disproportionate to the objective pursued.22

In the *Walloon Waste* case23 the Court went further than before in addressing environmental concerns, stressing the special characteristics of waste as a form of goods. "Accumulation of waste, even before it becomes a health hazard, constitutes a danger to the environment". A restriction on import of waste from other Member States into an already overloaded area of Belgium could therefore be justified by reference to the principle enshrined in Article 130R (now Article 174 EC) that environmental damage should as a matter of priority be remedied at source. In this connection the Court also referred to the obligations undertaken by the Community under the Basel Convention of 1989.24

More recently, in *Outokumpu*25 and *Preussen Elektra*,26 the Court has had to consider the extent to which Member States can offer incentives for the generation of electricity by environmentally friendly methods.

The background to *Outokumpu* was that Finland had established a rather complicated system of electricity duties which varied according to the method of generation so that a lower level of duty was imposed on electricity produced in Finland by environmentally friendly methods. Imported electricity on the other hand was subject to a flat rate excise duty calculated as an average of the electricity duties imposed on domestically produced electricity. The consequence was that even if the imported electricity had been produced by environmentally friendly methods in Sweden it was taxed more heavily than electricity produced by the same method in Finland.

The Court held, as was indeed obvious, that the tax was essentially discriminatory. While it might be difficult to demonstrate that imported electricity had been produced by environmentally friendly methods, the importer was denied even the possibility of doing so. The system of taxation was therefore incompatible with Article 95 (now Article 90 EC).27

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22 Case 302/86, note 21 above, points 8, 13, 17 and 21.
24 Case C-2/90, note 23 above, points 30-35.
27 Case C-213/96, note 25 above, points 38-41.
By comparison with Outokumpu, the judgment in Preussen Elektra can be seen as marking a transition from the traditional approach, focussing on the rules of the internal market, towards recognition of environmental protection as a primary Community objective. The case concerned a German law designed to promote the purchase of electricity from renewable energy sources and raised essentially two questions. The first was whether a statutory requirement imposed on electricity supply undertakings to purchase a proportion of their requirements from renewable sources constituted a state aid. The Court held that it did not because, although the legislation undeniably procured an advantage for the electricity generator, the funds for the purchase of electricity did not come from state resources.

The second question illustrated very clearly the potential incompatibility between environmental policies and the rules of the single market. The German legislation at issue required electricity supply undertakings to purchase from renewable sources within their area of supply. This was clearly a disincentive to the purchase of electricity from similar sources in other Member States and therefore, prima facie, incompatible with Article 30 (now Article 28 EC). However, the Court took note of a number of points that do not figure in the Outokumpu judgment.

First, the Court noted the new structure of the Treaty and the importance attached to environmental protection. Until the Treaty of Maastricht, the Four Freedoms appeared in the Treaty as ‘The Foundations of the Community’. The Treaty of Maastricht (though not yet in force) removed this description so that the Four Freedoms are now ‘policies’ on a par with other policies including environmental protection. The Treaty of Amsterdam went further, elevating to the status of a ‘principle’ the requirement that environmental protection requirements be integrated into the definition and implementation of other Community policies.

Second, the Court noted the international obligations undertaken by the Community under the Kyoto Protocol. In that context the reduction in emissions of greenhouse gases through increased use of renewable energy sources must be regarded as a priority objective.

Third, liberalisation of the previously nationalised electricity industries was incomplete. This, as well as the need to give priority to renewable energy sources, had been recognised in the preamble to Directive 96/92 on the internal market in electricity.28

Fourth, given the nature of electricity and the difficulties inherent in identifying its source, the Commission had recognised that a system of certificates of origin was essential to make trade in electricity produced from renewable sources both reliable and possible in practice.

On that basis, the Court held that, in the current state of Community law concerning the electricity market, the German legislation could not be regarded as incompatible with Article 30.29

29 Case C-379/98, note 26 above, points 73-81.
Interpreting Environmental Directives

One of the characteristics of environmental directives is that, although they enunciate a number of laudable objectives, they are not, from a legal point of view, very precise in defining the criteria for their implementation. The task of the Court has been to make them into legal instruments capable of enforcement. It has done so by looking, not only at the terms of the directives, but also at their scheme and their purpose.

In *Kraaijeveld*, there were two problems of interpretation. The first concerned the provision in Directive 85/337 referring to ‘canalization and flood relief works’. According to the Dutch government the construction of dykes was not ‘canalization or flood relief works’, and consequently the directive did not apply at all. This, they said, was clear from the Dutch text which, as far as the Netherlands were concerned, was the only authentic text. The Court found that there were significant differences between the language versions so that it was necessary to go to the purpose and general scheme of the directive which was aimed, *inter alia*, at “projects likely to have significant effects on the environment by virtue of their nature, size or location”. The wording of the directive was therefore indicative of a wide scope and a broad purpose, and the expression ‘canalization and flood relief works’ should be construed as encompassing all works for retaining water, including the construction of dykes.

The second question of interpretation concerned the extent to which Member States are free to fix criteria for determining which projects falling under Annex II of the directive require an EIA. (Projects listed in Annex I always require an EIA.) The Commission argued that, even under Annex II, Member States must always assess projects individually to determine whether an EIA is required. The Court held that this would be inconsistent with the power of Member States to fix criteria for determining which projects would require an EIA. On the other hand, the criteria fixed by the Member States must not be such as to exempt whole classes of projects, such as dykes, from the need for assessment.

Finally, it is interesting to compare the Court’s approach in three cases concerning the designation of special protection areas (SPAs) under Directive 79/409 on the conservation of wild birds – *Leybucht Dykes*, *Santoña Marshes*, and *Lappel Bank*. The Leybucht is an area on the North Sea coast of Lower Saxony near the frontier with the Netherlands. Part of it, delimited by the line of a dyke, had been designated under the directive as an SPA. As part of a coastal defence project, it was proposed to construct a new dyke nearer the sea, so reducing the extent of the protected area. The first issue was whether Member States, having designated an SPA, are entitled there-

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30 Case C-72/95, note 7 above.
31 Case C-72/95, points 25-32.
32 Case C-72/95, points 49-53.
34 Case C-57/89 Commission v Germany (Leybucht Dykes) [1991] ECR 1-883.
36 Case C-44/95 Reg. v Secretary of State for the Environment (Lappel Bank) [1996] ECR I-3805.
after to reduce its extent, a question to which the terms of the directive did not provide an answer.

The German and United Kingdom governments contended that the directive gave Member States a wide margin of discretion both in designating and subsequently reducing the extent of SPAs. The Court held that, while Member States do have a certain discretion with regard to the choice of SPAs, the scheme of the directive requires that any reduction of the extent of a protected area once designated can be justified only on exceptional grounds corresponding to a general interest superior to the ecological objective of the directive. Economic and recreational interests did not suffice.

In the particular case, the Court held that the danger of flooding and protection of the coast constituted sufficiently serious reasons to justify the dyke works, provided that they were kept to the strict minimum and involved the smallest possible reduction of the protected area. In addition, the works would enhance the ecological value of the area by closing two navigation channels and creating new salt meadows.

The Santona Marshes case concerned an area, lying east of Santander in northern Spain which was agreed to be one of the most important ecosystems in the Iberian peninsula for aquatic birds. The Spanish government had designated the Marshes as a nature reserve but not as an SPA. In addition, extensive interference with the integrity of the Marshes had been allowed, including the construction of a new road and two industrial estates, the establishment of a clam farm, the tipping of solid waste and the discharge of waste water.

The Spanish government argued that the decision to designate an area as an SPA remained within the discretion of Member States, both as to extent and to timing. The Court examined the scheme of the directive and concluded that, while Member States have a margin of discretion in selecting SPAs, the directive specifies certain ornithological criteria for selection which must be complied with – in particular, the presence of birds listed in Annex I of the directive and the designation of a habitat as a wetland area. Applying these criteria, the Santona Marshes clearly ought to have been designated an SPA, so excluding any question of discretion.

The Spanish government also claimed that, since the area had never been designated as an SPA under the directive, the Commission could not rely on the directive as the basis for condemning any of the interferences with the integrity of the Marshes. The Court concluded that, if this were so, it would defeat the purpose of the directive. It also rejected the social and economic arguments advanced by the Spanish government to justify what had been done.

Following the decision in Leybucht Dykes, the Wild Birds Directive was amended by the Habitats Directive so as to permit encroachment on a SPA for social or economic reasons. In the Lappel Bank case the issue was whether such considerations could be taken into account at the earlier stage of designating an SPA.

Lappel Bank forms part of a wetland of international importance, the Medway Estuary and Marshes (east of London). But it was also the only realistic area for expansion of the fifth largest port in the United Kingdom for cargo and freight handling, the Port of Sheerness. The United Kingdom decided to designate the Medway Estuary and Marshes as an SPA but to exclude Lappel Bank because of its potential economic importance as part of the Port of Sheerness. The decision to exclude Lappel Bank was challenged in the English courts by the Royal Society for the Protection of Birds. Having again considered the purpose and scheme of the directive after amendment, the Court concluded that the distinction must be maintained between the stage of designating, and determining the extent of, an SPA and the subsequent stage of deciding whether its integrity can be interfered with. At the first stage, ornithological and ecological considerations prevail. At the second stage, economic considerations can, in exceptional circumstances, be taken into account, but the interference must be justified and proportionate.

**Conclusion**

The Court has developed the doctrine of direct effect so as to ensure that the citizen can play an active role in ensuring the correct implementation of environmental law. The Court has also shown that the Four Freedoms and environmental protection need not be in contradiction. It has done so by adapting existing jurisprudence to changing perceptions of the Community's objectives. The primary rule to be applied (free movement of goods, environmental protection or conservation of wild birds) will be established on the basis of the objectives laid down in the Treaty or implementing legislation. Exceptions to the primary rule can be justified on grounds of overriding public interest, but only to the extent that is necessary and proportionate. Thus a balance is struck. Where the economic advantage of free movement of goods is the primary goal, environmental protection may justify necessary and proportionate exceptions. Where environmental protection is the primary goal, exceptions may be justified on economic grounds. In this way programmatic statements of economic, social or environmental objectives can become legal instruments capable of administration and enforcement.