A Comparative Search for a *ius Commune*

Public environmental law in Europe; a comparative search for a *ius commune*

Michiel A. Heldeweg, Associate Professor of Constitutional and Administrative Law, University of Twente

René J.G.H. Seerden Associate Professor of (Comparative) Administrative and Environmental law, University of Maastricht and Judge of the District Court of Maastricht and

Kurt R. Deketelaere Professor of Law and Director of the Institute for Environmental and Energy Law, University of Leuven, Visiting Senior Fellow in EC law at the Institute of Advanced Legal Studies of the University of London, and Vice-Chair of the Environmental law Research Taskforce of the IUCN Academy of Environmental law

All three authors are members of the Ius Commune Center for Environmental Law (ICCEL).

Summary: The evolution towards a *ius commune* in environmental law, especially within Europe, is the main subject of this article. It aims to present some of the main environmental issues, such as: general legal foundations, main legal instruments, procedural rules of implementation and rules of enforcement. Each issue is discussed from the viewpoint of developments within EC member states, the EC and, as a point of “external reference”, the USA. As the features of the present day systems of Environmental law are compared, not only do we find a greater coherence but also a linkage with the concept and principles of good governance. Maybe environmental law in the legal orders concerned has reached a stage at which unification is of less importance than allowing for differences and learning from them.
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I. Aims and scope

Article I.5 of the draft Treaty establishing a Constitution for Europe\(^1\) states the aim of a high level of protection and improvement of the quality of the environment as one of the main Union’s objectives. This is reflected in Art. II.37 of the draft which stipulates that this objective is to be integrated into the policies of the Union and is to be ensured in accordance with the principle of sustainable development. Subsequently the Arts III.129-131 of the draft offer the operational normative foundations (such as more specified objectives, principles, instruments and procedures – likewise to the present Art. 174-176 EC-Treaty) for the Union’s environmental policy undertakings.

These Articles clearly show that environmental protection and improvement will remain a major and integrated part of the future Unions actions.\(^2\) It is also noteworthy to refer to Art. I.13 of the draft, which (amongst others names “environment” as one of the principle areas of shared competence between the Union and its member states. Hence the title to this contribution. The scope of “Environmental law in Europe” expands the subject of European environmental law, so as to also include the “autonomous” member states’ environmental law. In this respect the existence of a shared normative perspective can be seen as a prerequisite for a positive synergy between the Union’s and the member states environmental policies.

It is the quest for this perspective that has been the prime motive behind the studies comprised in *Public Environmental Law in the European Union and the United States, A Comparative Analysis*, for which we had the pleasure to take editorial responsibility.\(^3\) For this purpose the basic elements of public environmental law of 12 EC Member States were presented and (briefly) compared – not only amongst themselves, but also in the light of EC environmental law. Furthermore, to mirror the outcomes of this comparison, the basic elements and characteristics of federal environmental law in the United States of America were included. Thus the quest for a *Ius commune europaeum* in environmental law could possibly be complemented by a comparison with a *Ius commune americum* in environmental law (from the federal viewpoint)\(^4\) and possibly the outcomes of this added comparison will contribute to a better view on the concept of “good environmental governance”. A concept that is closely related to the notion of a “European governance”, which is officially in debate since the presentation in 2000 of the EC Commission’s White Paper on this subject.\(^5\)

This article is aimed at underpinning the rise and understanding of this notion of good environmental governance. To this end it presents an overview of the main findings of the comparative study and in conclusion relates these to the good governance concept. Environmental law is defined primarily as the law concerning the prevention and protection against pollution; not including relations with the law on physical planning and nature conservation.

The overview itself will be structured along four basic elements of public environmental law:

1) general legal foundations – what are the legal basis generally relevant for or specifically set to underpin or (otherwise) structure a more or less comprehensive and consistent system of Environmental law?

2) main legal instruments – what are the main legal instruments to protect and improve the environment and is there a clear view on the use of these instruments?

3) procedural rules of implementation – what are the main rules, especially in the procedural sense, relevant to the use of the environmental legal instruments?

4) instruments and rules of enforcement – what are the main legal instruments to enforce environmental law, which legal safeguards surround these instruments and under which legal policies are they being applied?

With the analysis of the findings for each element we will focus on the *Ius Commune Europaeum* and where suitable we will refer to the relevant findings in the United States. As our main source we refer to the above-mentioned comparative study.\(^6\) Naturally such a study offers an analysis of environmental law at a certain point in time; we can not rule out the possibility that on (minor) points (especially Member) State law may have evolved further.

II. General legal foundations

First of all we want to look at the relevant more general and the more specific legal bases for protecting and improving the public environmental interest. What are the main cornerstones for governmental involvement and are there specific environmental competences, leading environmental principles, general environmental legal duties, maybe even general environmental law codes and environmental authorities within the various legal orders?

General cornerstones

The cornerstones of the EC, the EC Member States and of the USA are the ideals of *democracy, the rule of law, respect for human rights and the right to judicial review*. These ideals

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1 18 July 2003, CONV. 859/03; http://europa-convention.eu.int/ bienvenue.asp?lang = EN

2 Even though some interested parties would have appreciated a strengthening of the environmental interest in the draft. See, for instance, the comment by the Green G8 (of most important Environmental NGO’s): http://www.esb.org/press/Green_G8_on_Convention_29_04_02.pdf.


4 No analysis was made of the environmental law of (most of) the separate states of the USA.


6 We have decided to limit ourselves as to the number of specific reference to this book in the text. The issues discussed almost always will be easy to trace in the respective chapters. For an earlier general analysis in this journal see René Seerden and Michiel Heldweg, “Toward a Ius Commune in Public Environmental law? Report on the Conference on Comparative Environmental law in the European Union, Maastricht 12-13 June 1997” [1998] EELR 40-46.
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are generally shared, regardless of the sometimes very different ways in which they have been put into positive legal rules (both written and unwritten; take for instance the fact that the United Kingdom by exception has no written constitution). There are indeed — generally more technical — differences in views on the “sovereignty of parliament”. In some legal orders parliamentary involvement limits judicial control, for instance in Denmark, the United Kingdom and the Netherlands. In other cases however, such as in Austria, Belgium, Germany, Ireland, Italy and Spain, as well as in the USA, there is room for judicial control over legislation through a constitutional court. The existence of such a Constitutional Court can also add to the legal underpinning of environmental law; both in terms of the division of regulatory competences (in the environmental field) as to the (enhancement of) basic (environmental) rights and principles.7

**General structures: federalism and decentralisation**

From the labels “federal” or “decentralised” no conclusions can be drawn as to the specific allocation of environmental legal competences. Within the USA at the federal level the substantive competencies are often limited to setting minimum-standards and on a state level supplementary regulation is possible. In Germany, however, in some environmental matters the federal level has exclusive powers — so the states have no say at all. On the other hand, for instance, in Belgium the state regions carry the most important environmental powers and (furthermore) regional legislation is considered to be of equal stature as national/federal legislation (which again clearly differs from, for instance, the regimes of Germany or Italy).

Apart from federalism, both the United States’ states and the EC Member States have (some form of) decentralised government. Again there is a considerable difference in the allocation of legislative and executive powers bestowed upon the different levels of government. In the case of Denmark, Ireland and France, for instance, central government is clearly a relatively dominant factor (in environmental law). As far as the USA is concerned decentralisation is embedded in the federal structure of the Union. The Constitution limits the federal powers and leaves the remaining powers to the states (and the people). The state administration mirrors the federal system. Within each state there is local government on the basis of state-law. Unlike the federation and the states, local government is not bestowed with any “sovereign powers”. Nevertheless it does play an important role in implementing environmental policies.

Within the EC-framework, the internal state-structure is a prerogative of the Member States.8 The counterpoint to this is that there is a national state-level responsibility for the implementation of European legislation; a state cannot deflect this responsibility by referring to the fact that environmental competences rest on a lower level within the nation-state.9 This in itself may, within EC Member States, give rise to a trend towards allocating environmental competences preferably to authorities on the central/federal level. Nevertheless the image still seems to hold that, apart from some examples mentioned earlier, in many member states decentralised authorities do still play a very important role (as for instance in the Netherlands, in Italy and in Finland) although it is not always clear whether these authorities have much policy-discretion in the matter of their competencies.

Clearly in the relation between the EC and the Member States, we find that the EC environmental policy has had an important impetus to put the national legislative powers into action (as for instance with the IPPC Directives),10 to introduce or have environmental regulations introduced. Under the provisions listed in Art. 95, section 4 (in respect of measures concerning the Single European market) and in Art. 176 of the present EC Treaty (in respect of measures concerning environmental policies), member states still have the possibility to derogate from environmental Union legislation, but under stringent conditions — amongst which the proportionality criteria of the Court of Justice.

**Specific legal basis**

Some EC Member States, such as Belgium, Finland, Austria, the Netherlands, Germany and Spain, offer a written legal basis for environmental regulation in their constitutions. Although this basis can be regarded as a duty on the state (i.e. the governmental bodies of the state) to take regulatory action to protect and improve the environment, nowhere does it correlate with a corresponding claim for individuals or groups of citizens.11 Possibly though, in conjunction with, for instance, the basic right to bodily integrity, a court may uphold an environmental basic right against government; as for instance in the Irish case of *Ryans v. Attorney General*, where the Constitutional Court held that every citizen has a right to bodily integrity and this principle was subsequently extended by the High Court to condemn an act or omission of the executive which, without justification, would expose the health of a person to risk or danger.12

Apart from explicit environmental basic rights we found examples of “accessory basic rights”, as, for example in Italy where the constitutional provisions on the protection of the natural heritage and the protection of health have by virtue of extensive interpretation been understood to legally underpin the governments title for environmental regulation.

Clearly these basic environmental rights will have to be weighed against other basic rights; both at the level of Member States13 as at the level of the EC and the USA. In

7 The existence of a constitutional court is often related to the federal nature of a state.
8 The notion of Euregions is not out of the political picture, but clearly has not risen to a legal stature similar to types of federalism and decentralisation as mentioned above.
11 Both Austria and The Netherlands seem to leave room for a claim in extraordinary situations; but there is no case-law to substantiate this interpretation.
13 Consider the contributions in our book on Austria and Italy, concerning the protection of property.
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the EC presently Art. 2, EC Treaty lays the foundation for an environmental policy. In terms of furthering this policy by legislation the Arts 95 (internal market) and 175 EC (to the environmental goals listed under Art. 174) provide a regulatory basis. However, the aim of creating an internal market, free of hurdles to the "free movement of goods", has led to continuously weighing of the environmental interest against this economic interest and also to a recourse to Art. 95 as a legal basis, even if environmental interests were at stake.

In the USA historically environmental law is rooted in doctrines of nuisance and trespass (with pollution as an infringement of property rights). With tort law offering little to no protection outside pro-erty or in cases of diffuse pollution, the need for federal or state regulations rose. However, the US Constitution does not offer an explicit mandate for environmental regulations. The Supreme Court ruled that the commerce clause to the constitution allows regulations for activities that have substantial effect on commerce, materials and persons which move through the channels of commerce. As in the case of Art. 95, EC Treaty the element of free movement of goods thus also can serve as a basis for environmentally regulation – although in both cases this will clearly involve a weighing of environmental protection against the free movement of goods. Furthermore, as a result of the legal aim of a free movement of goods, (Member) States in both the EC and the USA, have little to no competencies in the field of environmental standards for products as opposed to standards for (emissions and procedural requirements of) industrial establishments.

Finally on this issue, one should note that in legal orders where a specific legal basis for Environmental law seems to be lacking this has not stopped the governments concerned from introducing environmental regulation, for instance in the United Kingdom, by virtue of the "sovereignty of Parliament" doctrine.

*Environmental principles*

On the face of it the same can be said about the need for environmental principles. Nevertheless within Europe, in practice at both the Member States' and the Union level, these principles are being used in giving reasons for certain environmental decisions. They seem to fill a gap that is left by discretionary regulations (on environmental competences). There also seems to be an increasing consensus on the content of these principles. Even more so, in some cases, as in the Italian draft proposal for a framework law for the environment and in the Spanish Constitution, an explicit reference to the principles of Art. 174, EC Treaty is made.

Even though most environmental principles have a legal basis, mostly in various places in general or sectoral environmental statutes, they are generally considered merely to be guidelines for policy making, rather than legal principles such as principles of natural justice or proper administration. To be successfully invoked before a court of law a principle will have to be seriously compromised (beyond the margin of reasonableness) or will have to prove useful in the interpretation of other provisions; consider for instance the possibility of linking the precautionary principle to legal concepts such as liability or the burden of proof.

Meanwhile, unlike (A. 174 of) the EC (Treaty), at the federal level of the United States we found no similar specific environmental principles. Only in a broad sense can one derive some "guidelines" for environmental regulation on the basis of the doctrines concerning the most relevant, previously mentioned constitutional clauses. It seems an interesting question for legal comparison to find why indeed no (federal) principles of environmental law are found.15

*Duty of care*

In some cases we can point at a statutory or perhaps even constitutional provision entailing a duty of care towards the environment from the individual citizen. Section 20 of Finland’s Constitution offers an example by laying down a general responsibility of all towards nature, the environment and the cultural heritage. More specific and clearly binding is Art. 22 of Belgium's Flemish Regional Environmental Decree stating that anyone who undertakes a classified activity must, regardless of the permit granted, always take the necessary measures to avoid damage, nuisance and serious accidents, and, in case of an accident, limit the consequences. In this case the duty of care provision is clearly enforceable, but limited to those members of the public who undertake classified activities. In the Dutch Environmental Management Act, Art. 1.1a offers a broader range: all citizens have a duty of care towards the environment, both in avoiding harm altogether and in limiting the consequences if harm is done. Because the provision is aimed at every member of the public and the wording of this duty is relatively vague, the legislation stipulated that penal enforcement is excluded – only administrative and civil law sanctions are allowed for. In practice, however, it seems that these sanctions are hardly ever used so that the Dutch duty of care provision is mainly of symbolic importance.

In most legal orders we found no similar general duty of care provision. Two reasons may explain this. Firstly some legislators find it more useful, if only to avoid merely symbolic "soft law" or a loss of legal certainty, to limit themselves to specific duties of care laid on a particular group (of, for instance, entrepreneurs or permitholders) and with regard to specific kinds of environmental pollution or damage (such as due to hazardous waste). Secondly, often general provisions for civil liability are considered (more than) adequate to serve the purpose of a duty of care provision.

*General law codes*

Within Europe, there seems to be a trend towards general environmental codes. Presently countries such as Denmark, Finland, Ireland and the Netherlands have some form of a general environmental statute. In some other EC member

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14 Another important basis for federal environmental policies in the US is the *property-clause* (in short: providing for federal) environmental regulations with regard to the public domain; enforced by the necessary and proper clause and in the supremacy clause and limited by for instance the *taking clauses*. For practical purposes co-operation with the states concerned seems to be the key-element in the use of these powers.

15 Our scope does not extend to the US (member) state level.
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states, such as Germany and Italy, there are initiatives, sometimes even draft proposals, for such a code. Legal certainty, uniformity and coherence present important motives for this trend. In some countries, for instance in Italy and Denmark, attempts are made to improve coordination or co-operation between authorities through a general code in order to overcome fragmentation in the relationship with civilians or the general public.

Although the EU/EC does not offer a general environmental law code it offers a considerable thrust to the making of such codes, especially by virtue of "horizontal" (or non-sectoral) directives, such as on integrated pollution prevention and control (IPPC). Surely such directives will also serve to increase the similarities of environmental legal systems of Member States.

Theoretically we can distinguish between four systems of environmental legislation:

1) a system with only sectoral regulation;
2) a system with sectoral legislation along with general regulation for the procedures of specific environmental acts (e.g. licences);
3) a system with general environmental legislation (not only procedural) with additional sectoral statutes; and
4) a system with just one general environmental law code.

We do not believe we will ever witness system no. 4 in practice; the subject matter of environmental problems is too diverse, as well technologically, economically as socially, to be captured in one design (unless this code itself is divided into relatively separate parts). Having said this, it is also unlikely that (in a few years time) we will witness examples of system no. 1 within EC member states. Clearly EC-legislation pushes states in the direction of systems 2 and 3.

On the federal level in the United States we (also) find a patchwork of sectoral statutes. Presently there is no initiative to create a federal framework statute. We believe this is very much due to a federal structure with limited federal competences in conjunction with (member) state sovereignty.

**Independent authorities**

Finally, as far as the *executive* branch of government is concerned, it is relevant to notice that in many cases there are functional and to some degree independent administrative authorities that play an important regulatory part in environmental law. For instance in Ireland where the Environmental Protection Agency (EPA) issues licences. The EPA in the United States is the primary regulator for pollution, through regulations based on statutes on air and water pollution, and on wastewater and toxic substances. It also enforces environmental standards and supervises states. Some other countries have similar institutions, though mainly with advisory or supervisory tasks. The European Environmental Agency (EEA, located in Copenhagen), of course, is not an authority that carries competencies to enter into legislation or enforcement of environmental regulations, such as the EPA in the USA, but rather an institute on environmental information. Especially from the viewpoint of the balance between democratic legitimacy and professional expertise it is important to seriously "keep track" of what stake these functional authorities have in environmental policy-making.

**In conclusion**

Thus, the leading question to this paragraph (What are the legal bases generally relevant for or specifically set to underpin or (otherwise) structure a more or less comprehensive and consistent system of environmental law?) is easy to answer in terms of grand ideals (such as democracy and the rule of law), but in practice, especially when it comes to tracing relevant competences, every legal order presents its own "jigsaw puzzle" (with similar pieces but different configurations). Furthermore the public environmental interest is generally treated as a matter under a specific normative scope. Even though sometimes legal bases are more accessory (e.g. "natural inheritance" and the "commerce clause"), normative cornerstones such as environmental principles, duties of care and general environmental regulations (if not codes) shape a specific legal regime for environmental care. In comparison, at the Union-level, it strikes us that the aim of creating a separate normative context for the environmental issue is more elaborate (or more sophisticated) in the EU/EC and the legal basis as such seems to offer room for greater involvement. Whether this leads to more effective and more sustainable environmental policies is yet another question.

**III. Main Legal Instruments**

The question what are the main instruments of environmental policy-making is also in need of a view on different strands in the general choice between various types of regulation. That is why the issue of this general choice is put at the forefront.

**Direct, indirect and self-regulation**

There is a clear trend towards indirect regulation and self-regulation. In almost all legal orders we find examples of taxation, subsidies and tradable emission rights, as well as gentlemen's agreements and contracts (between government, NGO's and industry) as alternative instruments to the more unilateral direct regulation.

The EC environmental policy is aiming at more indirect and self-regulation, and less direct regulation, as the 5th and 6th Environmental Action Programmes clearly proclaim. For a number of issues the EC offers instruments, such as taxation, subsidies, (voluntary) agreements and systems for environmental care. In the USA the direct regulation (also) still dominates, but (especially) indirect and (also) self-regulation have become increasingly popular. Compare the 1995 EPA-Project XL on the basis of which regulations can be set aside by an agreement and fiscal incentives towards realising specific environmental aims. The trade, on the basis of the Clean Air Act, of certain emission rights (such as on sulphur dioxides) is also a striking example of this trend.

Nevertheless it seems as if some of the euphoric on alternative regulation has died down. We now find a more

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"realistic" approach as it has become increasingly clear that indirect regulation and self-regulation suffer from drawbacks that will in many cases be outweighed by the advantages of direct regulation. By and large the tendency is to apply a less dogmatic, more ecocentric approach in which dependent on the issue at hand the optimal mix of instruments, regardless of their character, is sought.

Considering that presently direct regulation still dominates the regulatory spectrum, in the following remarks we will focus on some of the main instruments of direct regulation, such as planning, quality standards, permit systems, general emission rules and environmental impact assessment.

### Planning

Clearly planning has become one of the main policy-instruments of environmental law, bridging between policy articulation and regulation – such as in the case of the EC-Environmental Action Programmes (based on Art. 175, EC-Treaty). In most cases planning resembles the setting of policy guidelines, such as in the United Kingdom, with the so-called Planning Policy Guidance documents. Generally speaking environmental plans or programmes are not in themselves binding, but a basis for further regulation; to be taken into account for instance when a decision has to be taken on a request for a permit.17

General nationwide plans often limit themselves to key or strategic decisions of environmental (legal) policy-making, both in targets and means (and possibly on the basis of an analysis of "the state of the environment"). The Italian central government issues a (three-year) Action Programme on Environmental Protection. In Denmark there are several strategic plans that concern the environment, such as in the area of sustainable development and biodiversity. Naturally these plans are, if at all, only very loosely legally binding.18

The same applies to the EC Environmental Action Programmes. At the Union level, the US has no comparable type of plan – again due to the federal, more sectoral regulatory system.

Certainly from a legal standpoint the sectoral environmental plans still dominate the policy – and regulatory – process. Germany, for instance, has no overall comprehensive environmental plans, but a wide variety of sectoral plans (on air pollution control, noise reduction, water resources management, sewage disposal, waste management, landscape and forests). Sectoral plans seem to be especially important in the areas of water quantity and quality (for instance in Austria, Belgium and Spain) and the disposal of waste, where plans tend to be rather more of a programmatic nature, in the sense that more precise and strict standards are set. The same applies to the United States. These plans can indeed be legally binding, as the Water Supply Plan in Austria and, to a certain extend, the Environmental Policy Plan in Belgium's Flemish Region. However, in Denmark regional and local sectoral plans seem to be totally non-binding.

In a number of EC Member States urban or physical planning has a more important impact on environmental regulation, for example in Ireland where local government plans mainly concern "land-use management". In other countries, such as Austria, Denmark and the Netherlands, urban planning is very important in addition to specific forms of environmental planning. This can give rise to a complex system for mutual adjustments; a system that can become even more elaborate once plans for nature protection are also fitted in. For some countries, such as the Netherlands, this has given rise to experiments to create one "environmental plan" covering all elements of the physical environment together (also under the heading of "sustainable development").

Finally it should be noted that the directive on Strategic Environmental Assessment (SEA) requires an impact assessment of plans or programmes likely to have significant effects on the environment.19

### Quality-standards

Setting criteria for environmental quality is the core issue of environmental law, if only because emission standards need quality-standards as a basis. Almost all of the environmental statutes offer one or more types of general quality standards. Often these standards are formulated in rather vague terms, such as the environmental principles mentioned above. Standards such as "avoiding harm to the public health", or "in accordance with the "best available techniques not entailing excessive costs" (BATNEEC)" can be frequently found. In Germany the federal Constitutional Court upheld that these vague legal terms are "constitutional" and no infringement of legal certainty. Furthermore it has become apparent that EC directives, such as the IPPC Directive, have given an important thrust to the effort of setting and harmonising these standards. As to the legal nature quality standards can differ considerably; from strict legal bindingness, to no more than a policy-aspiration. The technical know-how involved in setting quality-standards often leads to a greater influence or even a mandate of independent organisations. Along this line the US EPA has a mandate to issue binding quality-standards on the basis of various sectoral statutes (such as the Clean Air and Clean Water Acts); these standards in practice operate as minimum standards to which the states can add even more stringent norms. On the European community level we find that the comitology-procedure (in which the Commission establishes a committee that advises (mainly) on technical standards with which to implement a piece of general legislation, on the basis of a special clause in the specific regulation or directive) is an important vehicle for setting these types of standards.20

### Permits

The permit system is still a dominant instrument in environmental law throughout all of the EC Member States and also in the USA. Clearly there is a trend towards IPPC. In an increasing number of EC Member States different kinds of pollution are dealt with under one permit system

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17 Compare the general environmental programmes in The Netherlands, or the sectoral Waterplanning in Finland.
18 With the possible exception of certain specific elements included in such a plan; as for instance in the Flemish action plans.
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(for instance in Denmark, Ireland and The Netherlands). Thus different environmental hazards can be analysed simultaneously and preventive pollution control can be made effective in a programme of provisions that are closely and effectively locked together.

In several countries for a large number of small sized activities general rules at the central level are set up to replace individual permits (Denmark, and The Netherlands) handed out by decentralised authorities. The latter have to be notified and stay competent to enforce these general rules. In the USA the term "general permits" is used for this category. The main reason behind this approach is to lessen the administrative burden and to ensure a more equal treatment and more legal certainty for the industry. As a consequence the possible involvement of third parties may be restricted.

The manifold of differences in the positioning and nature of the competent authorities for issuing permits – (more) central or decentralised, hierarchically embedded or (more) independent from political control (as a special agency), or combining administrative and judicial activities – is almost impossible to unravel, let alone describe in detail. Often these differences relate to the particular constitutional and administrative law framework of the country in question, as well as to historical developments and geographical circumstances.21

Impact assessment
Environmental Impact Assessment (EIA) has been introduced in all of the EC Member States either or not to implement the EIA Directive.22 In most cases the obligation to prepare an EIA report is linked to the request for a permit; by exception, for instance in the Netherlands, the list of EIA projects also includes specific forms of large-scale urban and energy planning. A recent EC directive also obliges Member States to produce EIAs's with regard to national plans and programmes and not only in relation to the realisation of specific activities at the stage of a request for permission.23 Where it is appropriate an environmental impact assessment must include the main alternatives (for instance with regard to locations) for a specific project – according to Art. 5(2) of Annex IV of the (amended) Directive.

In most countries for every project to be assessed, specific instructions are set out as a guideline for the make-up of the EIA. In some cases the report is to be prepared by persons whose expertise needs to be certified by government.24 Both Italy and The Netherlands have special committees for the EIA; in other countries, such as Finland and Belgium, regular administrative authorities are involved. Mostly this involvement amounts to offering either instructions (guidelines) for the EIA beforehand, or to give an expert opinion on the content of an EIA. Note that the approval of an EIA report is to be distinguished from the decision on the request for permission to go ahead. The EIA itself has to fit ecological standards whilst the decision on the relevant project rests on standards that include other interests.

Clearly in the United States EIA is an acknowledged environmental instrument. At the federal level the obligation to make an EIA is laid down in the national Environmental Policy Act and concerns all federal agencies whilst performing major federal actions, such as permits and regulations, significantly affecting the quality of the human environment. The federal EIA report should also include alternatives to the proposed action and a study of the short term uses and long term consequences, as well as clarifying the uncertainties of the effects and potential mitigation measures. One should consider that most environmental planning occurs at the state-level and thus does not fall under the federal EIA obligation. Furthermore the federal EIA does not address private operators.

New environmental instruments
As we stated above there is a trend to an increased use of new, less "command and control" more market-oriented environmental instruments. For some time now the EC regulations on eco-labelling25 and eco-management and auditing (EMAS)26 present a communicative type of regulation. The schemes may be moulded in the directly binding format of an EC regulation, nevertheless participation takes place on a voluntary basis. The Eco-label Award Regulation is based on a preceding German example. The regulation aims to promote the sales of products which are less harmful to the environment by informing consumers through the attached label. This label is attached to a product only if the environmental impact of a product is reduced in the course of its entire life cycle. When the competent national authority awards an eco-label it enters into an agreement with the applicant on matters of the use of the label.27 The EMAS Regulation is concerned with voluntary participation of industrial companies in an eco-management and audit scheme, designed to monitor and improve the environmental performance of a company and to offer information on the performance to the general public (enhancing a "green" image for that company). A company's application will only be awarded when it adopts an environmental eco-management system that incorporates (continuously updated) standards. If all criteria are met voluntarily, a competent national authority will register the company.

A somewhat different innovative strand of regulation was recently introduced in the field of tradable allowances. Regulation 2037/2000 on substances that deplete the ozone layer,28 implementing the Vienna Convention and Montreal Protocol,29 contains a system of trade through licences to import or export controlled substances from other countries (either or not a party to the Montreal Protocol). More importantly, and certainly more innovative is the directive establishing a scheme for greenhouse gas emission allowance trading within the Community.30 This scheme precedes the

21 As an example of the latter consider the Finnish Waterboards.
22 Mostly on the basis of Directive 85/337 (amended).
23 See n. 20.
24 For instance in Belgium (Flanders).
28 OJ 2000 L244/1.
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obligations under the first commitment period of the Kyoto Protocol (2008-2012) and is aiming at preparing the Community for allowances trade. The possibility of allowances trading has two important advantages: 1) emission reductions will take place where it is most cost-efficient to do so; and 2) the use of a trading-system will minimise distortions of competition. Furthermore one may argue that trading-systems will be a stimulus to developing of less pollutant production techniques.

Furthermore, most recently, the EC energy taxation directive was adopted, introducing harmonised minimum levels of taxation of energy products in Europe. Clearly instruments of indirect- and self-regulation are taken up on the member states level. In many countries we can find examples of new instruments, such as taxation, subsidies, tradable emission rights, gentlemen's agreements and schemes for labelling, audits and management.

In conclusion
Thus, the leading question to this paragraph (What are the main legal instruments to protect and improve the environment and is there a clear view on the use of these instruments?) can be answered firstly by saying that despite an increasing number of examples in which market-based instruments are being applied, direct regulation still dominates the environmental playing field. Planning, quality standards, permits and general permissions and EIA add to a careful and increasingly more sophisticated and integrated environmental decision-making process.

IV. Procedural rules of implementation

Public environmental law is often laid down in copious sectoral legislation (for instance dealing with air, water or soil pollution, noise, etc.). Thus procedures often differ from one piece of sectoral legislation to another. In various countries attempts are made to link procedures, to coordinate between different authorities, or sometimes to fully integrate one administrative act into another (in Germany, for instance, the building permit can be incorporated into the environmental permit). We will point at some of the main characteristics and recent developments, in as far as they seem relevant in a comparative analysis of environmental law.

Administrative uniformity
In several countries there is a movement towards more uniform administrative procedures for handing out sectoral environmental administrative permits (e.g. in Finland). In places where basically only one integrated environmental licence is required there is logically only one administrative procedure for this licence (e.g. Belgium). There are countries in which an even more general Administrative Law Code (or Procedures Act) exists for the establishment of (all) administrative acts (for instance in Germany, Austria, The Netherlands and the USA; either with only procedural safeguards or also including substantive issues, such as a codification of principles of natural justice). However, one can say that even in these cases environmental legislation often holds specific additional provisions.

Regardless of the existence of a general administrative or environmental law code, procedures for environmental administrative acts carry similar elements in them: such as the duty of authorities to give notice (to inform the public) of applications for environmental licences, the duty of authorities to give environmental information, and the opportunities for public participation prior to the administrative decision by the authorities.

**Public participation**

Sometimes public participation is shaped as an *actio popularis* where everybody is allowed to make objections against, for instance, the draft issue of an environmental licence (e.g. The Netherlands). Sometimes, however, even in this early phase in the administrative procedure, a personal interest that is being affected by the project is needed in order to have sufficient legal standing to make objections (e.g. Italy). In the latter case, the opportunities for environmental organisations to participate in administrative licensing, especially when acting in the interest of more general environmental values, are limited or absent. Although in the last ten to twenty years rights for general public participation in this respect may be said to have increased – especially with EIA procedures – the consolidation of these participation rights does not always seem obvious (as the requirement of "subjective interest" in German environmental law shows). However within the EC, the three cornerstones of the Aarhus Convention on access to environmental information, public participation and access to judicial review in environmental cases, will lead to important changes and additional statutory provisions to ensure a greater and more significant public involvement in the environmental administrative decision-making process.

In the USA, on the basis of the Administrative Procedures Act, similarly citizens are acknowledged as stakeholders in environmental decision making.

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33 See Eco-, Product-, Fuel- and Green-taxes in Austria, Denmark, Germany, Italy and The Netherlands; Seerden et al. (2002), p. 17, 109, 219, 293 and 367.
34 See the income-tax system in Flanders (Belgium) and the German subsides (in connection with agreements on reduction targets); Seerden et al. (2002), p. 54-55 and p. 220.
35 These are hard to find at a Member State level. There certainly are (or have been) discussions on this matter, but no implementation - apart from tradable rights in the agricultural area.
36 As in Flanders (on waste policy), in Denmark (with a general legal basis in the Environmental Protection Act) and in Germany (both on private and public law basis), Seerden et al. (2002), p. 32, 108 and 222.
37 For instance in Flanders, Denmark, Ireland, Italy and Spain; Seerden et al. (2002), p. 52-53, 103, 260-261, 293 and 428.
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**Administrative control**

Concerning administrative control within environmental law, in several countries systems of administrative appeals exist against the (final) environmental decisions of administrative bodies. There are many differences between these various appeal systems. Sometimes, there is only one appeal possible to a hierarchic higher authority. Sometimes, two or three appeal authorities of this kind exist (e.g. Austria). Sometimes an appeal can be addressed to a more independent agency (e.g. United Kingdom, Denmark, Ireland). Some permits are not handed out by decentralised authorities but by politically more independent agencies (for instance, in Finland, the Permit Boards). Yet another approach is propagated within the United Kingdom. There the Environment Agency issues IPPC draft licences and the appeal against these has to be lodged with the EPA itself. Whether or not it concerns a hierarchic higher authority or a more independent appeal agency, mostly the legality as well as the merits of the decision is questioned. This may imply that the licence issued by the administrative authority is being replaced by the decision of the appeal body.

In some countries, if the statutory administrative appeal is not used, the right for judicial review is lost (e.g. in Belgium). An existing appeal is not compulsory for judicial review in Greece and in, for instance, Denmark an appeal is a not compulsory preliminary to court action unless this is otherwise stated. In the United Kingdom, in planning cases, the applicant for the licence has some limited possibilities of appealing. In other countries, the range of those who can appeal is, sometimes according to the sectoral legislation, broader. Environmental groups or associations can appeal in, for instance, Belgium and – more recently – in the United Kingdom. In the USA with permits under the Clean Air and Clean Water Acts (amongst others) there is the possibility, for the permitholder or an interested party to appeal through EPA’s administrative process (which entails an appeal to the Environmental Appeals Board – within the EPA). Following this appeal the party concerned may seek judicial review at a federal court.

**Judicial review**

In EC member states and in the USA (interested) individuals (within certain time-limits) can ask for judicial review against administrative acts (from the licensing authority or the appeal instance) such as the issuance of environmental permits. In some countries, there is also a right of access for environmental organisations although in general some interest has to be proved (Ireland, The Netherlands, USA). It is often up to the courts whether or not they take a generous attitude towards the granting of access to organisations (in Italy only certain approved environmental organisations can have standing).

In most EC member states there are administrative courts that deal with environmental administrative decisions. In Ireland, the United Kingdom and Denmark there are no (specific) administrative courts and judicial review has to be sought in the ordinary courts. Sometimes we see that there is only one administrative court (in the first and only instance: e.g. Belgium, Netherlands). Sometimes we see that there are more administrative courts (e.g. Germany).

We said earlier that on administrative review the legality as well as the merits of the administrative decision are at stake. In court proceedings generally only the legality is checked. This almost necessarily leads to more restrictive competencies for the courts. A decision is more likely to be quashed than replaced by a decision of the court itself. This being the case, it is not impossible that administrative courts exercise quite strong judicial control (e.g. in Germany), for instance in the light of constitutional provisions. Sometimes constitutional courts play that role (e.g. in Spain). In some countries judicial review suspends the administrative act (e.g. in Finland). In other countries one has to ask for suspension of the respective administrative act (e.g. in Belgium and Netherlands). Other variations are possible.

At the EC level presently a proposal for a directive on access to judicial review is presently on the table.\(^{39}\)

**In conclusion**

The fabric of rules concerning procedural and “horizontal” environmental law has clearly evolved over the last decades. In Europe especially the Aarhus Convention has provided for an important thrust for (Member State) regulation (whether autonomously or on the basis of EC directives) and will continue to do so. As with the subject of general legal bases, the “positive” legal provisions may vary considerably among different states, but the basic ideal – a greater administrative uniformity, public participation, judicial review and free access to information – are (increasingly) shared; also across the Atlantic.

V. Analysis of the Relevant Instruments and Rules of Enforcement

Enforcement (under administrative law in relation to private and penal law) of environmental law is a matter that requires permanent attention and, if necessary, changes in legal tactics and strategies. Presently an EC proposal for a directive on environmental liability is under debate. A common position on this proposal has been arrived at.\(^{40}\) Clearly, as it stands, legislation on this issue will be far less ambitious than the preceding White Paper initiative.\(^{41}\) Certainly for the time being the member states’ “autonomous” arrangements for environmental enforcement remain of paramount importance.

**Administrative enforcement**

In each of the EC Member States and in the USA there is legislation concerning the administrative enforcement of administrative environmental law; either in general or in sectoral environmental regulation (and sometimes in general administrative law; e.g. in The Netherlands). Instruments of administrative enforcement – such as fines, the withdrawal of licences, and the power to remedy the results of illegal activities and recoup the expenses thereof – are often related to the authority that grants permissions (e.g. Ireland and

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\(^{39}\) See previous footnote.


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The Netherlands). Sometimes enforcement is in the hands of authorities or agencies that do not necessarily have the license authority (for instance in Finland, Belgium and France). It should be added that there are also supervisory environmental agencies with inspection tasks (e.g. Italy).

Having the power of enforcement does not necessarily mean that it is actually used in practice. Sometimes there is some reluctance, often because of the economic consequences. However, in general (certainly for people likely to be affected) judicial review is possible if the enforcement bodies do not take action in case of violation of environmental legislation and administrative acts such as permits.

In the USA governmental enforcement rests with the EPA and the US Department of Justice. The EPA can apply administrative actions but criminal and civil enforcement falls under the responsibility of the Justice Department. Much of the enforcement, even of federal regulation, rests with state authorities (on the basis of delegation). If a violation is detected the EPA may choose to approach the matter first with an informal response (informing the “trespasser” and making it clear what action is required). Apart or next to that the EPA can choose to apply a formal response in the shape of a legal order.

Civil law enforcement
Private environmental law enforcement is mainly general tort law. Certainly in environmental law though, there is a shift from fault (subjective) liability to a more strict (objective) liability. In, for instance, Austria formerly strict liability was applicable only in cases against the state and public corporate bodies, but today also in cases between individuals.

A serious breach in the use of property may well lead to liability and a duty of financial compensation. It is however more difficult to start a successful private legal action when there is no breach of subjective rights such as property. What if environmental pollution “merely” affects the general quality of human life or – even – the environmental conditions for birds in the sky? Sometimes in such cases only public authorities can claim compensation (as for instance in Italy) but there are also examples where environmental organisations can do so too. In countries where a clean and healthy environment is a strong constitutional right (either written or unwritten, explicitly or implicitly), the latter is more probable than in countries where such constitutional support is lacking.

In the USA citizens can bring forward two types of civil actions to enforce federal statutes: either against an agency or against the violating polluter. In the second type of action the citizen will have to give way if an agency, such as the EPA, decides to file a complaint by itself. Generally speaking the provisions for standing in these types of citizen suits are relatively liberal. Because these suits are specifically dealt with in “administrative” law one may wonder whether they really can be regarded as “private” law remedies. If “administrative” law only stands for actions by governmental bodies this of course may be the case. Whatever “heading” to be used, apart from these citizens’ suits, private persons can issue common law claims, especially on the basis of nuisance and trespassing.

Can a polluter escape civil liability when acting in accordance with a valid environmental administrative licence? In penal law such licences almost always have a legitimising effect. In private law this is not necessarily the case. Whether this is decided by legislation or by case law, in most countries an environmental licence is not considered as a right with absolute force. Denmark seems to be an exception. There, acting in conformity with a licence seems to grant exemption (be it only) from fault-based liability. In most of the cases in which environmental harm is caused “in conformity” with a licence, the seriousness of the damage seems to be the decisive element; disproportional damage has to be compensated. However, a prohibition on a damaging activity for which a valid licence exists generally is not in the legal cards.

Private law liability is primarily something between individuals. However, there is an increasing trend to use private law for the state. In some countries there is even a kind of administrative private law (e.g. Austria and the USA). Examples of this include preventive and clean-up actions, recoupment of expenses in cases of illegal pollution, and also the conclusion of agreements (instead of using legislation or administrative acts). In other countries there is a strict separation between private and administrative law leading for instance to the possibility that pollution by authorities is dealt with in another way (and by other courts) than pollution caused by individuals (e.g. France). Finally some countries, such as The Netherlands, seek to combine an approach through administrative sanctions on the one hand (such as administrative orders to clean-up) and civil sanctions on the other (liability if government has invested in clean-up activities). Some debate exists on the question of whether government can use civil sanctions, for instance a court order to prohibit a certain activity, where the aspired outcome of this sanction can also be arrived at through administrative means.43

Penal law enforcement
Penal, or criminal, environmental law is no longer an *ultimum remedium* to address those who commit environmental offences. Although criminal law enforcement does not necessarily lead directly to the lessening or avoidance of environmental pollution, it has increasingly become an autonomous instrument of environmental enforcement. In the United Kingdom, for instance, room for the deployment of Penal Law extends to the competence of private persons as well as administrative authorities to directly initiate criminal proceedings (as equally in Spain). In criminal proceedings there are also increasingly more opportunities for individuals (and environmental organisations) to ask for financial compensation for damage suffered (as in Italy and the USA, albeit dependent on specific statutory arrangements). In this respect it is interesting to add that in Spain and the USA specialised prosecution offices exist to prosecute environmental offences.

In many countries legal entities as well as natural persons can be prosecuted where criminal environmental offences have taken place (e.g. The Netherlands and Finland). However, the authorities themselves cannot always be

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43 For a Dutch example see Seerden et al. (2002), p. 387 (the Bordeu case).
44 Ibid., p. 388-389.
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Prosecuted. Sometimes, the authorities can be prosecuted if they act as individuals and harm the environment (e.g. The Netherlands) or when the statute so determines (e.g. Denmark). In some other countries under certain circumstances officials can be prosecuted (e.g. Germany and Spain) and there can be criminal responsibility for administrative bodies which neglect their duties to control (e.g. Austria). In other countries legal entities still cannot be prosecuted (e.g. Germany and the USA). On the other hand in some countries (for instance, in Austria, Belgium and Germany) environmental co-ordinators within (certain) firms can be prosecuted, as can company directors, managers, etc.

Penal environmental law can be found in the general penal codes as well as in the sectoral environmental statutes. Especially in the latter case penal environmental law relies heavily on administrative environmental law. Sometimes this causes problems, either because administrative regulations are insufficiently in tune with criminal law doctrine, because administrative and penal sanctions coincide ("non bis in idem") or because different courts (criminal and administrative) have to interpret the same provisions (and may apply different viewpoints). Subsequently closer relations between administrative and penal authorities are necessary. In the USA, the EPA and the Justice Department frequently enter into enforcement agreements — also with state authorities — to ensure a proper co-ordination in enforcement action.

In conclusion

Increasingly there seems to be an overlap between the three types of enforcement (administrative, civil and penal). To a large extent this was already the case in common law systems, such as the USA, the UK and Ireland. However, what we see in these countries is that statutory remedies are becoming more and more important. In the European continental law systems the overlap between administrative and penal enforcement is much more present than before (since penal enforcement is often no longer the *ultimum remedium*) and both types of enforcement can be applied simultaneously — which may give rise to questions in the light of the European Convention on Human Rights. The doctrinal division between the public and the private law seems to keep these two systems of enforcement apart, but even there, for instance through the legal standing of NGO's and liability suits by and against government, we see that there are (ever more striking) changes taking place.

VI. From a *ius commune* to good governance in environmental law

Within the EC, there are many similar features and trends and these similarities are increasing. The acceptance of basic environmental rights, the duty of government to protect and improve the environment, environmental principles, the use of certain instruments — such as planning, permits, quality standards and impact assessment — the opportunities for public participation, access to information, judicial review, all of these elements, though often different in their precise content or shape, have so much in common on their legal aspects that we feel that one can indeed speak of a *ius commune* in environmental law. Naturally, within the EC, it is also clear that EC regulation plays an important role in this trend to greater uniformity in public environmental law — impact assessment and quality standards are examples of this, but in the near future also in the sphere of civil and criminal liability. When there are differences, as for instance in the organisation of courts, the procedures for legal review and the state’s organisation in terms of federalism or decentralisation, these differences often relate to historical and sometimes geographical circumstances.

In 2001 the EC Commission issued a White Paper on good governance listing five principles relevant to all levels of government:

1) openness, which stands primarily for active communication by the institutions and making governmental decisions more accessible and better understandable;
2) participation, mainly by ensuring wide involvement throughout the whole policy-chain;
3) accountability, which entails that institutions and member states explain their actions and take responsibility;
4) effectiveness, requiring that policies are effective and timely, with clear objectives, evaluation of further and past-impact, and are pursued at the proper level and implemented in a proportionate way; and
5) coherence, insisting that policies and actions cross the boundaries of sectoral policies are performed with a clear view on the overall consistency and are more easily understood.

The core element in governance is the (intricate) relationship between government and (civil) society. In that sense, governance emphasises that it takes a “joint venture” between government and society to arrive at certain policy-targets and that even the setting of these targets is or can be a matter of joint discourse. The White Paper refers to the concept of civil society, stating that it includes: “trade unions and employers’ organisations ("social partners"); non-governmental organisations; professional associations; charities; grass-roots organisations; organisations that involve citizens in local and municipal life with a particular contribution from churches and religious communities.”

Organisations of civil society are said to mobilise people and support, and can also serve as an early warning system for political debate. The EC wants to encourage the development of civil society and expects organisations of civil society to follow the principles of good governance.

Clearly elements of this approach are present in many of the legal systems within our study. It seems as if environmental law is undergoing a kind of horizontalisation: both in types of regulation as in relating to the civil

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44 We did not enter into empirical research on the environmental policy practice. Aspects of this practice are reflected in case law and thus included in our findings, but closer scrutiny of this policy practice could paint a more 'colourful' picture.
45 See n. 40.
47 WP, p. 14, n. 9.
48 WP, p. 15.
49 For further debate on environmental (good) governance in the EC: http://www.europa.eu.int/comm/environment/governance/index
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stakeholders. Through the Aarhus Convention, for instance, we see that the package of access to information, public participation and judicial review has made its way in all the legal orders within the study, both European and American; even though the mode and the extend may vary, often due to the specific legal context. Nevertheless the importance of openness and participation is generally considered to be a cornerstone of environmental law.

The same applies to the accountability of public authorities, both in the democratic political process as under the rule of law; considering the administrative but also the civil and penal instruments that can be used against public authorities. Especially with regard to (semi-) independent authorities, such as EPA’s, it is of great importance that they seek the dialogue with NGO’s, but also with the industry and generally uphold openness.

Within the search for the optimal balance between instruments of direct, indirect and selfregulation governments are showing a greater willingness to choose instruments on the basis of a (more horizontal) dialogue with the relevant stakeholders and thus arrive at a greater effectiveness. Against the backdrop of the political primacy over the public environmental interest, we find an increasing number of examples in which standard-setting has become more of a interactive process. Hopefully this interaction also offers a more obvious legitimacy to enforce when regulations are infringed upon.

We also feel that the introduction of environmental (legal) principles and environmental law codes offers a valuable impetus to the coherence within environmental law and also in enhancement of its legal standing in society. Coherence is also an issue in terms of the internal and external integration of Environmental law. Clearly a greater effort is made to both integrate different environmental sectors and to improve the coherence with other policy area’s such as spatial planning and nature conservation. In these respects we find that the concept of sustainable development serves as a stimulus to a more “holistic” approach.

In conclusion we feel that there is more of a *lus commune* in environmental law than in previous decades. This applies clearly to Europe and is largely due to Community legislation. Whether there is a greater “environmental closeness” within the European Union than within the United States lies beyond the boundaries of our study. Clearly however there are still important structural differences between Europe and the US, both in the framework of environmental legal competences as in the treatment of the environmental issue as a separate area of law. Possibly though, this is more of a reflection of the specific legal structures (“European subsidiarity” against “American federalism”) than of a different legal practice; in terms of good environmental governance at least the systems in study seem to share in the adherence to similar general principles. Maybe then we have come to a stage where further unification of environmental law should not be our prime focus. This unification will grow as countries and federations learn from each other. In order to be able to keep learning by comparing we need to allow for differences. These differences can be constructive differences if we view them as an added stimulus to co-operate (internationally) in the protection and improvement of the environment.