EUROPEAN ECONOMIC COMMUNITY—ENVIRONMENTAL POLICY—ECONOMIC AND FISCAL INSTRUMENTS—REPORT OF THE WORKING GROUP OF EXPERTS FROM THE MEMBER STATES PROPOSES THE USE OF ECONOMIC AND FISCAL INSTRUMENTS TO ATTAIN COMMUNITY-WIDE ENVIRONMENTAL GOALS

I. FACTS

On November 28, 1989 the Environment Council of the European Community requested that an independent group of national experts prepare a detailed report on the use of economic and fiscal instruments in the environmental policy of the Community. The purpose of the report was to evaluate the potential effectiveness of these instruments in addressing the environmental problems before the EC. The impetus for this action was the failure of the current regulatory measures and the push toward a unified market. Due to the fact that the experts participated on an individual basis, the report is neither the official responsibility of the Commission nor of the Member States; however, it serves as a theoretical framework for a new approach to environmental regulation by the European Community.

The Report of the Working Group of Experts from the Member States on the Use of Economic and Fiscal Instruments in EC Environmental Policy (Experts’ Report or Report) is an important point

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1 The Environment Council is composed of the environment ministers from the European Community’s twelve Member States.
2 The European Community (EC) consists of: Belgium, Denmark, Germany, Greece, Spain, France, Ireland, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.
3 The group of national experts was drawn chiefly from senior environment department officials from each state. Pienaar, Brussels Takes Stronger Line on Pollution “Fines”; Radical EC Proposals For “Green Taxes” Will Provoke Stiff British Resistance, The Independent, Sept. 21, 1990, at 2.
4 Regulatory measures consist of the traditional practice of implementing maximum emission levels allowable under penalty of law.
5 The Commission is expected to formally adopt this report in the coming months. Dickson, Carbon Tax Plan Reappears on the EC Agenda, Fin. Times, Aug. 9, 1990, at 7.
in the Community's gradual movement from a regulatory policy of environmental protection to a policy based on the use of economic incentives.\(^7\) Though this concept is not new to the region, the shift in policy has been dramatically accelerated over the past year.

After the initial request for the Report was made by the Environment Council, the Environment Ministers convened for an informal meeting on April 21, 1990, to further address the use of economic and fiscal instruments. During the conclave, the Ministers reiterated their commitment to the imposition of a system of EC-wide instruments to complement, and in some instances replace, the regulatory measures that were currently in effect. The presidency conclusions to the meeting stated that the "Ministers acknowledged the value of supplementing existing regulatory instruments... by the use of economic and fiscal instruments."\(^8\) A very similar position was espoused during the Bergen Conference\(^9\) in May 1990, when an increased commitment to the use of environmentally driven tax measures was made.\(^10\)

In June of 1990 the European Council, during its meeting in Dublin, included in its Declaration a chapter on environmental concerns. The text of the chapter concluded with the following statement:

We therefore call on the Commission to accelerate its work in this field [of economic and fiscal instruments] and to present, before the end of 1990, proposals for a framework or guidelines within which such measures could be into effect by the Member States in a manner consistent with the Treaties.\(^11\)

This Declaration was followed by the release of a draft report by the Economic Instruments Task Force. The task force study was initiated by the Commission in response to its determination that fiscal initiatives were a necessary component of its environmental policy. The report\(^12\) called for the use of economic instruments and stated that the harmonization of taxes within the Internal Market

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\(^7\) Economic and fiscal instruments used in environmental policy are sometimes referred to as "ecotaxes" or "green taxes."

\(^8\) Experts' Report, supra note 6, at 2.

\(^9\) Id. Ministerial Declaration of the Bergen Conference, May 1990.


\(^11\) Experts' Report, supra note 6, at 2.

must be accomplished with environmental concerns in mind. These previous initiatives by various entities within the Community increased awareness in the potential effectiveness of economic instruments and resulted in a need for an exhaustive analysis of such a policy.

The Experts' Report proposes a comprehensive system of financial incentives and penalties to address the increasing problem of environmental degradation. The paper is supported by the Italian government, the present holder of the EC presidency, and the Environment Commissioner, Carlo Ripa di Meana. While the Report calls for the Commission to formulate proposals on this matter by the end of 1990, to this date no formal action has been taken. Regardless of the delay, this report provided sober reading for those who doubted that fiscal instruments would be implemented on a Community-wide scale.

The Experts' Report is comprised of three major sections: an introduction into the need for market mechanisms; an examination of the basic elements of economic instruments; and an evaluation of environmental problems which could be addressed through these instruments.

The present structure of environmental control by the Community consists predominately of regulatory measures. The market mechanisms that are in effect are products of individual legislation by Member States rather than a Community-wide program. The Report states

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13 The Report disagreed with the traditional view that economic growth and environmental concerns were mutually exclusive. Rather the task force position was that with a new commitment to sustained growth, the Community should be able to reconcile economic development and the environment. EC Official Says Fiscal Instruments to See Greater Use for Pollution Control, 13 Int'l Env't Rep. (BNA) No. 4, at 151 (April 11, 1990).

14 Mr. Carlo Ripa di Meana has been an enthusiastic proponent of a market mechanism approach in addressing environmental degradation. Dickson, supra note 5, at 7. Additionally, the Commissioner is pushing hard for a harmonized "green tax" system to be implemented by the Commission. Pienaar, supra note 3, at 2.

15 One possible explanation is that the Commission believes that this is not the proper time to increase energy costs, given the uncertainty of energy prices due to the Gulf War.


17 A number of the more advanced industrial states would prefer that environmental taxes be continued on a national basis rather than be harmonized. The reasoning is that individual application may work an advantageous distortion of competition for those countries who already have made some headway in addressing this problem. Percival, Environment: Green Taxes for Europe? An Inter Press Service, Inter Press Service, Sept. 25, 1990, at 1.
that both the regulatory approach of the Community and the nationalists use of economic instruments are inadequate measures to address the Community's environmental problems.

Regulatory controls offer no incentive to the polluter to minimize his waste beyond that which is required by law. The result is that the cost of the damage to the environment is externalized and must be borne by the public sector. Through the implementation of fiscal and economic instruments, the Report attempts to internalize these environmental costs so that the price of a product or service will ultimately reflect the actual total cost to the Community. The Report does not call for the complete abolition of the regulatory controls, but rather for the simultaneous use of both static regulatory limits and fiscal instruments.

With regard to the implementation of these instruments by the Community rather than individual states, the Report points out that allowing separate systems to evolve would run counter to the planned realization of an Internal Market in 1992 as set out in the EEC Treaty. The Treaty was subsequently amended in 1987 by the Single European Act.

In addition to being more effective, Community standards avoid the risk of creating fiscal barriers between various Member States; a risk which is an inherent part of any nationalist approach. Thus, it is clear to the Member States experts that any environmental taxes which are implemented must be done on the Community level to avoid potential trade distortions.

One final impetus prompting the Commission to address this issue was that the Community is the signatory to a number of international conventions on pollution, and will certainly sign on to more in the future. In that capacity, the Community is ultimately responsible for environmental compliance on an international level.

The Report points out the importance of distinguishing between the incentive impact of economic instruments and the raising of revenue. The goals of the two are dissimilar, and therefore each should be conducted in a distinct manner. Obviously the incentive tax attempts to discourage harmful activity, while the revenue tax aims to accumulate the necessary funds to address environmental problems which do occur. One is preventive and the other curative.

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On an economic level, incentive charges should be budget neutral and create no additional tax burden.

Once the motive for implementing the market mechanism is determined, the policy and the surrounding conditions will dictate which fiscal instrument is best suited to address that specific problem. The mechanisms which are available to effect an alteration of behavior in a manner that is more favorable to the environment are: 1) environmental charges and taxes, 2) tradeable emission permits, 3) deposit-refund systems, 4) enforcement incentives, 5) financial aid, 6) industry agreements, and 7) environmental liability.

In order to determine the potential of proposed instruments the Report lists five criteria for review: 1) the overall environmental effectiveness or reduction of harmful practices, 2) the economic efficiency or degree of adjustments made to the price structure, 3) the practicability of the measure and its administrative costs, 4) the fairness of the policy and the acceptability to the public as well as industry, and 5) the economic impact to the Community.

The Report proposes that the Community apply these economic and fiscal instruments to address both global and regional environmental problems. The strongest proposal is for a drastic incentive tax on carbon dioxide (CO2) emissions to deal with the growing problem of global warming. The paper urges that such a tax or charge be implemented in order to internalize the actual cost of the energy source and to reduce the overall consumption of fossil fuels. Possibilities suggested are either a tax system or a more moderate system of tradable emission permits.

As far as direct taxation, an emissions charge determined at the source of the pollution is the most equitable for industrial waste. The consumer, due to the number and mobility of the sources, could be assessed a product charge based upon the contribution of that

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20 These may be applied as emissions charges, products charges/taxes or tax differentiation.

21 This creates a secondary market in pollution permits that acts as a component of a regulatory scheme.

22 Some examples are performance bonds and non-compliance fees which coerce the polluter to abide by the regulations that are prescribed.

23 Though Community subsidies are an option, this contradicts the "polluter pays" principle of Article 130r.

24 A switch to strict liability places the burden of proof on the polluter and results in higher premiums for the insured unless he can lower the environmental risks of his activities.
fuel source to the overall global warming problem. Clearly the desired effect of such a program is a drastic increase in the price of fossil fuels.

Ozone depletion is the other global issue dealt with by the Report. Chlorofluorocarbons (CFCs) are the cause of severe ozone depletion. Given that safer alternative chemicals cost three to five times as much as the CFCs used today, an incentive tax should be put into place to force a switch to the available, cleaner technology.

The regional problems addressed by the study run from water contamination to air traffic noise pollution. The proposed fiscal instruments are again an effort to internalize the cost of these products and to put the "polluter pays" principle into practical effect. In order for the "polluter pays" approach to be realized, the polluter must be responsible for all direct and collateral effects of his actions.

One of the more drastic proposals in the Report concerns a new approach to agricultural policies within the Community. Agricultural production is the source of many environmental contaminants to both the soil and the groundwater supply. These substances include pesticides, as well as nitrates and phosphates found in fertilizers. The larger problem is found in the present system of price support within the Community which, through governmental price support, encourages the farmer to maintain the status quo in agricultural methods. The result is that intensive farming practices which are most harmful to the environment are encouraged. In response to this problem, the Experts' Report proposes an abolition of certain types of national aid, in conjunction with an incentive tax on these agricultural contaminants. Due to the effectiveness of the pesticides and fertilizers in use, a high incentive tax must be applied in order to facilitate a switch to more environmentally correct methods. One way that the report suggests to lessen the financial blow on the farmer is to channel a portion of the revenue raised back to the farmers in the form of subsidies. Obviously these subsidies must be consistent with the competition guidelines of the Internal Market.

Another proposed solution concerns the Community's high level of automobile traffic and the subsequent air pollution that results.

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25 Such a system would consist of a graduate charge increasing in severity based upon the level of CO2 emissions of the fuel. In essence, coal would be charged a much higher rate than gasoline.

26 EEC Treaty, supra note 18, art. 130r(2); added by Single European Act, supra note 19, art. 25, at 12.
The Report's response to this issue is a combination of economic and fiscal measures. First, the report reiterates the need for an excise tax on carbon fuels, to be harmonized in accordance with the dictates of the Internal Market. Secondly, it suggests a vehicle or special consumer tax which could be returned as a subsidy to reduce the cost of automobiles which employ cleaner technology. Thirdly, it proposes an annual road tax on all vehicles based upon the automobile's weight and engine capacity or, in the alternative, upon the degree of carbon emission. Finally, the report calls for a fixed road use charge or toll to be applied consistently throughout the Community in order to prevent fiscal barriers or distortions.

In the area of waste disposal, the Experts' Report calls for a three part approach. Given in the order of importance, the areas are: 1) prevention, 2) reuse and recycling, and 3) more efficient treatment, incineration and land disposal of the waste that is created. To further these aims the Report proposes a deposit/refund system, as well as a charge or tax differentiation\(^\text{27}\) for harmful products. The degree of incentive tax should obviously vary according to the risk of the product.

This Report, given at the urging of the Commission, is a clear mandate for a comprehensive system of economic and fiscal instruments to address the growing environmental problems within the Community. In conclusion the Report states:

> The development of economic and fiscal instruments of environmental policy is also required at EC level, essentially to cope with pollution on a transboundary or a global scale, to prevent trade distortion, and to prevent each Member State from postponing action to avoid competitive disadvantages, even in the short term.\(^\text{28}\)

This exhaustive analysis of options available to the Commission should form the basis of the Community's environmental policy and create support for a shift from the static approach of regulatory limits to a more dynamic policy of market mechanisms.\(^\text{29}\)

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\(^{27}\) Thus, cleaner products would carry a lower tax than dirtier ones. This has been an effective instrument in the introduction of unleaded gasoline within the Community. Its attributes are that it is budget neutral and has very little administrative costs. *Commission Expected to Consider Issue of Using Taxes to Promote Pollution Control*, 13 Int'l Env't Rep. Current Report (BNA) No. 10, at 383, (Sept. 26, 1990).

\(^{28}\) Experts' Report, *supra* note 6, at 19.

\(^{29}\) The implantation of this position has already begun, although not on a formal level. In a December 20, 1990 "working paper," the European Commission called for a package of taxes to address the issue of global warming. *EC Favors Energy Tax, Will Sound Out Members First*, The Reuter Library Report, Dec. 20, 1990.
ing Group of Experts from the Member States on the Use of Economic and Fiscal Instruments in EC Environmental Policy (Sept. 5, 1990).

II. LAW

Environmental concern is not a recent development within the Member States or the Community. However, at the inception of the EC none of the three treaties creating the Community contained explicit provisions granting authority to act in the area of environmental policy. Therefore, initial control over environmental issues remained in the hands of the Member States.

In the 1970s the Community began to move toward the harmonized control of certain environmental matters. In its progression toward a single market, the Community began the "General Program for the elimination of technical barriers within the Community." Included within this program were several directives which laid down Community-wide environmental regulatory standards, which in some instances replaced inconsistent national standards. Examples of this type of directive are: 1) measures against air pollution caused by motor vehicles, 2) requirements on the biodegradability of detergents, and 3) limits on the sulfur content of specific fuels. The Community realized that differing environmental standards would produce fiscal barriers within the Common Market and undertook to harmonize their regulatory approach.

In Paris during 1972, national leaders of the Member States of the Community published the "summit declaration" which expressed their desire that the Community develop an EC environmental policy. This declaration was followed up by a draft action program submitted by the Commission to the Council calling for just such an EC-wide environmental policy. This Community action program has been modified in 1977, 1983, and in 1987. While this program called for

30 In fact, the term "environment" is not found in any of the documents at that time. Haagsma, The European Community's Environmental Policy: A Case Study in Federalism, 12 FORDHAM INT'L L. J. 311, 315 (1989).
32 Haagsma, supra note 30, at 316.
an environmental policy, it did not provide the legal foundation for one.\footnote{Haagsma, \textit{supra} note 30, at 319.}

The original EEC Treaty provided only an implied authoritative basis to implement a Community environmental policy in order to attain a single market. Article 100\textsuperscript{39} grants authority to the Council, acting unanimously on a proposal from the Commission, to preside over all matters that directly affect the "establishment or functioning of the common market."\footnote{EEC Treaty, \textit{supra} note 18, art. 100.} Thus, the Community could address all environmental matters which have the potential of erecting fiscal barriers within the planned Internal Market.

The Single European Act (SEA)\footnote{Id.} in 1987 went one step further by granting the Community express oversight into environmental matters. First, the SEA amended the Treaty by inserting Title VII, referred to as the Environmental Title ("Title").\footnote{Single European Act, \textit{supra} note 19.} Secondly, the amending document added a specific reference to environmental protection to the new article 100a on the harmonization of Member State legislation.\footnote{Single European Act, \textit{supra} note 19, at 11.} Thus, the SEA gave the Community explicit authority to continue and expand upon its endeavors in the area of environmental protection.

While the legal basis for unified Community control was achieved, the enhanced role of the Community in the environment had its critics. Several states which already enforced high environmental standards objected to centralized control for fear that the Community standards would be lower and less effective. The new Treaty addressed this concern in article 100a(4) by allowing individual states to opt out of a harmonized standard for reasons of environmental protection.\footnote{"If, after the adoption of a harmonization measure by the Council ... a Member State deems it necessary to apply national provisions ... relating to protection of the environment ... it shall notify the Commission of these provisions." See EEC Treaty, \textit{supra} note 18, art 100a(4); added by Single European Act, \textit{supra} note 18, art. 18, at 8.}

Article 130r\footnote{EEC Treaty, \textit{supra} note 18, art 130r(1); added by Single European Act, \textit{supra} note 19, art. 25, at 11.} of the Environment Title provides the substantive goals of the Community's environmental polices. Due to the broad
sweep of power that this general aim places with the Community, the Member States insisted that unanimous Council vote be required in order to implement any measure based on this article. The Member States felt that this protection was necessary in order to ensure that the Community did not abuse its power.

The Title sets out four principles that should be used to guide the EC’s environmental policy in article 130r(2). “Action by the Community relating to the environment shall be based on the principles that:

1. preventive action should be taken,
2. environmental damage should, as a priority, be rectified at the source,
3. the polluter should pay,
4. and the environmental protection requirements shall be a component of the Community’s other policies.

It appears that given the broad nature of these principles, the institutions of the Community can claim a relatively large discretionary margin. The European Court of Justice (ECJ) should only declare a regulation or directive based on this article invalid when it is in manifest error, a misuse of power, or when the institution clearly exceeds its bounds of authority.

Within this criteria, the authority for economic initiatives is laid. The foundation of all fiscal approaches to environmental protection undertaken by the Member States is the “polluter pays” principle encapsulated in article 130r(2). The principle states in clear terms that all who burden or harm the environment are required to bear the costs of avoiding, eliminating and compensating for these injuries. This principle provides the legal basis for a dynamic approach to the reduction of pollutants and the development of clean technology.

The “polluter pays” principle does not always exist in pure form. In some instances environmental regulation will result in severe ec-

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46 EEC Treaty, supra note 18, art. 130s; added by Single European Act, supra note 19, art 25, at 11.
47 Haagsma, supra note 30, at 337.
48 EEC Treaty, supra note 18, art 130r(2); added by Single European Act, supra note 19, art. 25, at 11.
49 Haagsma, supra note 30, at 340.
50 Id.
51 EEC Treaty, supra note 18, art. 130r(2); added by Single European Act, supra note 19, art. 25, at 11.
52 Id.
onomic hardship for vital national undertakings. The compromise solution that has been taken by the states is to adjust the "polluter pays" principle to comply with the economic realities of a competitive market through the use of subsidies. Subsidies channel public revenues to the private concern so that it is able to meet its duty under the "polluter pays" principle of article 130r(2). This compromise between the goals of environmental protection and undistorted trade is one of the substantial problems in the individual application of fiscal instruments by the Member States.

Though subsidies are used, there are limitations under the EEC Treaty. Article 92(1) prohibits all state aids which distort or threaten to distort competition by favoring certain undertakings or certain goods as far as they affect trade between Member States. This severe restriction does not apply to the European Commission, thereby granting it a free hand to aid those concerns which are unduly disadvantaged by a stricter approach to environmental protection.

In administering such a fund, the Commission is not restrained as the Member States are with respect to the creation of distortions within the market. The result does not conform to the true intent of the "polluter pays" principle, but provides a practical solution to the possible severe economic impact of tighter environmental controls.

Article 130r(3) formulates the criteria to be considered before the Community undertakes any environmental action. The Community shall take account of:

1. available scientific and technical data,
2. environmental conditions in the various regions of the Community,
3. the potential benefits and costs of action or lack of action,
4. the economic and social development of the Community as a whole and the balanced development of its regions.

However, in taking these factors into consideration, the Community shall only take action within the environmental field if the desired objectives can be better attained at the Community level rather than

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53 EEC Treaty, supra note 18, art. 92(1).
54 See, European Social Fund, Id. at art. 125; the European Investment Bank, Id. at art. 130; the European Agricultural Guidance and Guaranty Fund, Id. at art. 40(4).
55 EEC Treaty, supra note 18, art. 130r(3); added by Single European Act, supra note 19, art. 25, at 11-12.
through individual state legislation. This allocation of authority is referred to as the principle of "subsidiarity." Its application allows the Member States to retain a degree of sovereign control over their environmental policies.

The last provision of the "Environmental Title," article 130t, allows individual states to adopt measures which are more stringent than those put into place by the Community; provided they are compatible with the remainder of the Treaty. In order for a Member State to implement stricter measures, the displaced Community standard must be intended only as an environmental measure and not as a means to accomplish additional Community goals, such as the removal of fiscal barriers.

Though articles 130r-t grants the Community greater authority for environmental control, each Member State retains its sovereign power over its environmental policies, thereby giving articles 130r-t a declaratory character. The powers of the Community do not preempt those of the states under the EEC Treaty, but rather run parallel to them.

One of those powers retained by the states is the use of economic and fiscal instruments. In the policies of the Member States, taxes are the most important instruments used to enforce the "polluter pays" principle. However, there are severe restrictions on these national instruments which are necessary to prevent unequal competitive positions between the Members of the Community.

Environmental taxes, like all other charges levied by the Member States, are subject to article 95 of the EEC Treaty which prohibits any discriminatory taxation of goods imported from another Member State. This provision deals exclusively with taxes which are imposed when goods cross borders; it is strictly concerned with the movement

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56 EEC Treaty, supra note 18, art. 130r(4); added by Single European Act, supra note 19, art. 25, at 12.
57 Haagsma, supra note 30, at 342.
58 EEC Treaty, supra note 18, art. 130t; added by Single European Act, supra note 19, art. 25, at 12.
59 Haagsma, supra note 30, at 347.
60 Id. at 348.
61 Id. at 425.
62 Id.
64 EEC Treaty, supra note 18, art. 95.
of products and is an extension of the sovereign power of the Member States.\textsuperscript{65}

Article 99 of the Treaty deals with the harmonization of indirect taxes, including environmental excise taxes.\textsuperscript{66} The harmonization is intended to prevent any distortion of competition.\textsuperscript{67} As long as the Council does not enact provisions calling for the harmonization of these indirect taxes,\textsuperscript{68} the Member States are free to introduce new indirect environmental taxes.

The harmonization of direct taxes, such as duties and contributions, is governed by articles 100\textsuperscript{69} and 100a,\textsuperscript{70} with the same concern for preventing distortions within the Internal Market. To this point, no legislation has been drafted to bring complete control of all direct taxation, including environmental charges, under the oversight of the Community authorities.\textsuperscript{71}

The individual states are also free to impose customs duties to implement their environmental policies with several restrictions. In order to comply with article 12 of the EEC Treaty,\textsuperscript{72} the charges must be levied against both outgoing domestic products and incoming foreign goods. Additionally, the charge must be based on the same features in the products or be assessed against the same stage of production. Within that framework, an environmentally oriented duty may be assessed in the form of an inspection fee, used to determine the environmental compatibility of the product, as long as the collected funds are not used solely for the benefit of domestic undertakings.\textsuperscript{73}

EEC Treaty article 100a, introduced by the SEA, relates to direct environmental charges or taxes and bestows upon the Community a legal duty to dismantle trade barriers which prevent realization of the Internal Market.\textsuperscript{74} Though this amended provision grants the Council expanded powers in the area of environmental charges, the

\textsuperscript{65} Grabitz & Zacker, supra note 63, at 442.
\textsuperscript{66} EEC Treaty, supra note 18, art. 99.
\textsuperscript{67} Id.
\textsuperscript{68} One current example is the excise tax on leaded gasoline, imposed on a state-by-state basis as an incentive to encourage the use of cleaner unleaded petrol.
\textsuperscript{69} EEC Treaty, supra note 18, art. 100.
\textsuperscript{70} EEC Treaty, supra note 18, art 100a; added by Single European Act, supra note 19, art. 18, at 8.
\textsuperscript{71} Grabitz & Zacker, supra note 63, at 445.
\textsuperscript{72} EEC Treaty, supra note 18, art. 12.
\textsuperscript{73} Grabitz & Zacker, supra note 63, at 443.
\textsuperscript{74} Id. at 445.
Member States, under article 100a(4), retain the power to enforce more stringent national environmental charges even past the point of complete harmonization.\textsuperscript{75}

The overall effect of the SEA did not remove the Member States ability to implement economic and fiscal instruments for the protection of the environment. However, the addition of the "Environmental Title" gave a mandate to the Council to develop a system for the practical application of the "polluter pays" principle.\textsuperscript{76} Additionally, article 100a requires that all measures designed to achieve a single market must incorporate the environmental dimension.

Until a comprehensive Community plan is introduced, the Member States may continue to assess environmental charges provided that they burden domestic and foreign products equally.\textsuperscript{77} At this point the Council has not attempted to harmonize indirect taxes under article 99 nor have they addressed the harmonization of direct taxes under article 100a. Therefore, individual states are competent to implement appropriate economic and fiscal instruments to address their environmental concerns.\textsuperscript{78}

Though the Council has not implemented any Community-wide economic instruments, there are nonetheless several successful examples which are currently being used on a national basis. Greece and the Netherlands have imposed tax differentiation systems which promote the use of motor vehicles that are safer for the environment. Greece grants a tax break of up to 40% for cars which are equipped with a three-way catalytic converter. These tax advantages result in a lower purchase price offered by the dealer. The Netherlands bases its tax advantage on the quality of the cars' exhaust, and the automobiles with better emission figures receive a discount on the special consumer tax which is added onto the Value Added Tax (VAT).\textsuperscript{79} This measure is budget neutral due to the fact that the discounts are financed through an increase in the tax on all other cars. The result in the Netherlands has been an increase in the sale of these cars from 5% to 60% of the market.\textsuperscript{80}

\textsuperscript{75} Id. at 446.
\textsuperscript{76} Id. at 447.
\textsuperscript{77} Id.
\textsuperscript{78} Id.
\textsuperscript{79} "Value Added Tax - a tax assessed on the addition to the original worth of raw materials or components as they are processed further in manufacturing." BLACK'S LAW DICTIONARY 805 (5th ed. 1983).
\textsuperscript{80} Experts' Report, supra note 6, at Annex 2-1.
Germany has used a system of water effluent charges since 1981. The charge is assessed against industrial as well as individual consumers that discharge certain impurities into the water. The charge is based on the chemical oxygen demand, the organic halogen compounds, heavy metals and the toxicity to fish. An incentive is offered to employ the best possible technology to maintain the effluent level below that permitted; discounts up to 80% are possible. The result has been a substantial increase in the number of water treatment facilities, both collectively and privately owned.81

Denmark employs a deposit-refund program for beverage containers used for beer, wine and soft drinks. The system results in a nearly 100% return rate of the containers. This system has been approved by the Court of Justice, with the reservation that it may be invalidated if the Community harmonizes this area of taxation.82

In 1989 Italy introduced a charge on all non-biodegradable plastic bags which were domestically produced or imported. The charge trebled the price of the product and the consumption of the bags declined 40%.83

Several EC Member States have introduced an excise tax differential between leaded and unleaded gasoline; the purpose being to increase the market share of the cleaner burning unleaded gasoline. The excise tax resulted in a drastic decline in the demand for regular petrol and forced oil companies to withdraw it from the market. This penetration of unleaded gasoline into the market made the introduction of three-way catalytic converters possible throughout the Community. However, the Report points out that lack of concerted Community action resulted in a loss of efficiency which could have been avoided.84

While presently no program of economic and fiscal instruments is in place on a Community-wide basis, it appears that there is adequate authority within the amended Treaty for such a system to exist. Additionally, the actions of the Member States within this area have demonstrated the potential effectiveness of this approach in addressing the environmental issues within the Community.

III. Analysis

The support for the use of economic and fiscal instruments in the Community's environmental policies stems from the failure of reg-

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81 Id. at Annex 2-1, 2-2.
82 Id. at Annex 2-2.
83 Id.
84 Id. at Annex 2-2, 2-3.
ulatory measures and the desire to avoid the inevitable trade distortions that accompany separate national legislation.

The regulatory controls have failed to effectively address the increasing environmental problems facing the region. The use of this static method provides no incentive to reduce pollutants below the permitted levels, and in doing so fails to properly internalize the cost of the damage to the environment. The historic preference for regulatory control has been rooted in two beliefs. First, the Member States and the Community believed that a regulatory limit offered a greater assurance that environmental quality standards would be met; the assumption being that sanctions are more effective than incentives. Coupled with this belief, industry was opposed due to the additional costs that it expected would be added to production.

The Member States experts discount both positions. Clearly the system that is in place today is ineffective in protecting the environment, and this failure will become even more evident with the economic growth which will undoubtedly accompany the establishment of the 1992 Internal Market. In addition, the experts do not adhere to the traditional notion that environmental protection and economic growth are mutually exclusive. Rather, there is a new emphasis on sustainable growth.

Given this mandate for action, the use of dynamic market mechanisms is the most promising option. Their success is not only theoretically attractive, but there is evidence from their use in the Member States that economic and fiscal instruments can be, if used properly, powerful tools in managing the environmental assets of the Community.

The imminence of the completion of the Internal Market provides the impetus to implement these instruments on a Community-wide, rather than a national, basis. The requirement that all fiscal barriers be dismantled prohibits the use of national product taxes which distort trade; environmental taxes fall into this category. Given the dramatic structural change that will come about within the Community as a result of an Internal Market, it is an opportune time to implement a more effective environmental policy.

Besides the harmonization problems inherent in the state-by-state use of economic instruments, there is also the issue of effectiveness. The experts clearly believe that effective action against these regional and global problems can only be achieved through Community-wide action. First, individual Member States are not capable of dealing with transboundary pollution problems. Secondly, only through centralized control can the Community comply with the international
conventions on global problems to which it is a signatory.\textsuperscript{85}

Finally, the Report concludes that although incentive taxes should be budget neutral, there is likely to be some use of these instruments as a means to raise revenue for environmental purposes. Given that scenario, it is likely that the funds would be returned to the Community in the form of subsidies, and only the Commission is immune from the severe restrictions that the EEC Treaty puts on subsidies as a form of state aid.

The significance of the acceptance of this dynamic approach to environmental policy is that the environment will become inextricably linked to all facets of industrial and agricultural economic planning.\textsuperscript{86} While the traditional command-and-control system of regulation will remain in place to a certain degree, economic instruments will offer a financial incentive to conserve and preserve the Community's resources.\textsuperscript{87} This new political approach to the environment is a product of increased public concern, as well as industry's realization that further steps are needed. In a recent Community survey, one-half of the European businesses polled considered environmental protection an important consideration.\textsuperscript{88} Even the oil industry expressed its qualified support for the use of reasonable economic instruments in the place of "rigid command-and-control legislation."\textsuperscript{89} While industry may not be an enthusiastic supporter of all aspects of fiscal and economic instruments, this cognizance of environmental issues is evidence that there is support for increased Community action on this front.

While there is an increased awareness that action needs to be taken, there is also a predictable amount of concern over the economic cost


\textsuperscript{87} \textit{Id.}

\textsuperscript{88} \textit{Id.}

\textsuperscript{89} During the European Conference of Ministers of Transport (ECMT), Gilbert Portal, the Secretary General of the European Petroleum Industry Association (Europia), voiced the oil industry's support for fiscal initiatives. \textit{Oil Industry Drags Its Feet at Transport Ministers' Meeting}, European Energy Rep., Dec. 14, 1990, at 1.
to the Community that a new policy of fiscal initiatives may entail. Some economic forecasters predict that if a radical shift in environmental policy occurs, resulting in severe fiscal measures which are harmonized on a Community level, the result could be a cost of 362 billion ECU$ ($495 billion) by the year 2005. Additionally, concern exists that the least advanced Members of the Community will bear a disproportional burden of this cost. However, this fear may be tempered by the prediction that the stronger "green" policy would also create new opportunities within the Community that could make the environmental protection market worth more than 150 billion ECU$ within the same time frame. An additional benefit is that this new commitment would accelerate the penetration of new, cleaner technologies, thus giving the Community a competitive edge within the global market.

On the microeconomic scale, an increase in the use of economic and fiscal instruments will clearly translate into higher consumer costs, especially in the energy sector. This increase is a necessary component of any incentive oriented "green tax."

While the Report by the Committee of Experts deals with the issue of trade distortions within the Community, it does not address the effect that the inherent costs of these fiscal instruments will have on the transactions of EC undertakings outside of the Market. Potentially these policies could, by forcing EC industries to reduce their reliance on certain resources, make these undertakings less competitive on the international scale. In such a system, costs of production will increase for companies operating within the Community, which will translate into higher prices for the consumer. However, the non-EC importer of the same product does not incur those additional costs and is therefore at a competitive advantage. This is especially true when the Community addresses global concerns such as the greenhouse gases. A unilateral reduction in CO2 gases serves to benefit the international community, but only the EC pays the cost for that environmental

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91 The countries that have expressed opposition to such a program include: Spain, Portugal, Greece and Ireland. Various Environmental Taxes May be Introduced by End of 1990, 13 Int'l Env'tl. Rep. Current Report (BNA) No. 6, at 226 (June 13, 1990).
92 Measures to Control Pollution Could Cost Western Europe Billions, supra note 90, at 461.
93 Id.
gain. A possible ramification is that Community undertakings will move production to countries where production costs do not internalize environmental damage.94

One solution which has been proposed is a variation on the Value Added Tax (VAT).95 The system would function by assessing a pollution based tax on every stage of the production and distribution of a product.96 The total Pollution Added Tax (PAT) is passed along to the consumer if the product is sold domestically.97 This tax would be applied to imported goods on the same basis.98 However, if the product is exported, the PAT is excused in order to allow the product or service to compete on a level playing field within the international market.

Although such a system aims to permit the unilateral adoption of more stringent environmental controls, its administration would be difficult and costly. A more efficient solution to this problem may be a program of Commission regulated subsidies used to channel revenue from environmental taxes back to the affected industries to be used for the development of new technology. Not only would it be more manageable on a practical level, but it would also provide the proper incentives to the Community undertakings. The subsidy approach also avoids the inevitable GATT conflicts that would arise if the Community assessed an environmental duty on all goods entering its market.100

The release of this Experts' Report laid the groundwork for a comprehensive system of economic and fiscal instruments; however, the report itself is not a formal Commission document. Thus, there

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94 Walter, Environmentally Induced Industrial Relocation to Developing Countries, in ENVIRONMENT AND TRADE: THE RELATION OF INTERNATIONAL TRADE AND ENVIRONMENTAL POLICY 67 (1982).
95 Comment, Proposal: A Pollution Added Tax to Slow the Ozone Depletion and Global Warming, 26 STAN. J. INT'L L. 549 (1990) (authored by Peeyush Jain).
96 Id. at 555.
97 Id.
98 Though this would provide an incentive for importers located abroad to reduce their emissions, such a reduction is unlikely since it would put them at a competitive disadvantage in every market besides the one employing the PAT.
100 A possible problem is that even though domestic products are taxed at the same rate as foreign imports, the revenue is used solely for domestic purposes and may be seen as a method to subsidize domestic industry through the use of a duty on imports. General Agreement on Tariffs and Trade, supra note 99, art. III.
must be action by the Commission and ultimately by the Council for such a program to become a reality. There is every indication, given the action of the Commission and the Council up to this time, that appropriate measures will be taken in the near future. Additionally, support exists in the Parliament for measures of this nature as well.

In December of 1990 the Committee on Legal Affairs and Citizens' Rights issued an opinion for the Committee on the Environment, Public Health and Consumer Protection regarding "financial incentives for measures for environmental protection and on a new Community approach to reconciling economic and ecological considerations in a market economy." The opinion called on the Committee on the Environment, Public Health and Consumer Protection to ask the Commission to submit to Parliament a strategy for applying financial initiatives in the area of environmental policy in accordance with articles 100a and 130r of the Treaty. Given the across the board recognition that these instruments are necessary components of the Community's environmental policies, it appears that their introduction is inevitable.

Evidence of the implementation of this approach is already present. The area which will most likely be initially addressed is that of carbon dioxide emissions (CO2). Mr. Ripa di Meana, the EC Environment Commissioner, released a confidential proposal to the Commission to impose a substantial excise tax on gasoline in order to address global warming and combat excessive energy consumption. The document foresees a five year introductory period culminating with a tax of $10 per barrel of oil; additionally, the paper suggests that the fall of prices after the Gulf War may present a "unique window of opportunity."

Shortly after release of the Commissioner's paper, the Commission proposed a "green tax" on carbon dioxide emissions, focusing primarily on automobiles and power plants. The plan advocates a graduated tax based on the level of CO2 emission. An explanatory paper has been sent to the Council of twelve environment ministers; if they react favorably the Commission can be expected to furnish implementing directives within the coming months.
One sign of the Commission's intent to harmonize environmentally directed fiscal initiatives is its recent rejection of a German proposal to provide tax benefits for cleaner burning diesel automobiles. Bonn planned to grant tax breaks of $358 on new diesels that complied with emission criteria which were stricter than the recently imposed Community standard. The Commission held that while the plan was not a state subsidy, it nonetheless was a trade distortion favoring cars meeting the non-EC standard. The Commission has taken a strong stance in enforcing its position that no Member State fiscal instrument may exist which attempts to regulate an area previously harmonized by the Community. This is a clear indication that the Commission intends to take the reins of the region's environmental policy and that its actions will preempt any existing contradictory Member State legislation.

From these developments it appears that the Commission is initiating a move toward the centralized control of environmental policy through the use of economic and fiscal instruments as envisioned in the Experts' Report. The Report placed its greatest emphasis on the problem of global warming, and therefore the Commission has undertaken to address that issue first. While such a step is only one aspect of the plan of action called for by the Report, its importance must not be minimized. The successful implementation of a carbon tax on a Community-wide basis will create the framework for a comprehensive system of economic and fiscal instruments within EC environmental policy.

Given that there is no painless or perfect solution to the environmental problems facing the Community, the use of economic and fiscal instruments is a positive step toward achieving a sustainable balance between economic growth and environmental protection.

IV. CONCLUSION

Clearly there will be economic costs to a comprehensive program of economic and fiscal instruments as proposed by the Experts' Report; however, a much greater cost would result if the Community did not take steps to rectify the ineffective environmental controls presently in place. Additionally, any short term damage to Community undertakings can be mitigated through the use of Commission subsidies.

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The more important aspect of this policy is that it is an effective means to address environmental degradation within the Community through dynamic mechanisms which reduce injury in a way that no static control can. Through such a program, the undertakings of the Community are encouraged to develop clean technology that will grant them a clear competitive advantage in the international market in years to come. The control of these financial initiatives must come under the authority of the Commission in order to achieve harmonization required of the Internal Market.

The Community has initiated a new era of environmental policy that should provide a successful model for the coexistence of economic growth and environmental protection.

John B. Nicholson