Loyola of Los Angeles International and Comparative Law Review

Volume 15 | Number 2 Article 1

2-1-1993

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LOYOLA OF LOS ANGELES
INTERNATIONAL AND COMPARATIVE
LAW JOURNAL

VOLUME 15 FEBRUARY 1993 NUMBER 2

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I. INTRODUCTION

In recent years, Europe has been riding a roller coaster of integration and disintegration. During the final months of 1991, the European Community ("EC") concluded drafting the Maastricht Treaty—an agreement expected to rapidly and profoundly move the continent toward union.[1] The Maastricht Treaty was signed while the EC's Single European Act of 1987[2] ("SEA") was still being implemented with great success, and the momentum toward further European integration seemed irresistible. This atmosphere engulfed not only the EC states, but the rest of Europe as well. The handful of

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1. The Maastricht Treaty that created a European political, economic, and monetary union was negotiated during December 1991 and formally signed on February 7, 1992. *See Maastricht Treaty Signed*, AGENCE FRANCE PRESSE, Feb. 7, 1992, *available in* LEXIS, Nexis Library, AFP File.

2. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] May 25, 1957, 298 U.N.T.S. 11 (as amended 1987). The Single European Act amended the Treaty of Rome that established the EC and serves as the EC Constitution. The SEA emphasized the creation of a free internal market and the preservation and protection of the environment within the EC. *See* Louise Kessler, Note, *Banking on Europe: 1992 and EMU*, 60 FORDHAM L. REV. 395, 396-97 (1992); William Wilson, *Environmental Law as Development Assistance*, 22 ENVTL. L. 953, 961 (1992). The full text of the SEA is reprinted at 1987 O.J. (L 169) 1.

mostly neutral, wealthy, and geographically peripheral states of the European Free Trade Zone ("EFTA") seemed anxious for eventual EC Membership—Austria and Sweden were knocking at the EC's door and even historically standoffish Switzerland was reconsidering its rigorous neutral independence. In 1991, with the formation of a common economic area between the EFTA and the EC, greater unity seemed just a matter of time. Further, in the East the newly "democratic" former Soviet satellites pushed for admission at Western Europe's economic gates.

Today, however, this momentum toward integration has reversed itself. The Danes rejected the Maastricht Agreement by referendum, historically pro-integration French voters narrowly approved it, and the British Parliament has stalled its progress. The EC states are aggravated with Germany because it is cushioning the impact of absorbing East Germany with high interest rates that siphon investment away from the rest of Europe and create recessionary pressure. In addition, the unenlightened attitude that German neo-Nazis have displayed toward foreigners, and the Bonn government's lukewarm response to such racism, does not help matters. When not fearing and condemning Germany, other West Europeans criticize the self-centered French who insist on preserving a lavish EC financial dole for their agricultural industry. These subsidies could threaten a trade war with the United States, the failure of GATT international trade negotiations, and result in an attendant global economic crisis. Last, Britain continues to drag its feet on European unity—especially monetary and environmental policies—to the consternation of every one else.[3] Combine all this with the EC's failure to fulfill its initial intent to act as peacemaker in former Yugoslavia, and the picture is not a harmonious one. In fact, it provides quite a contrast to the euphoria of unity that followed Maastricht in December 1991.

The deflation of the European unity balloon in 1992 should not have surprised those familiar with EC environmental enforcement. While the EC has been modestly successful in articulating environmental policy goals over the last twenty years, its ability to implement and enforce its standards has been limited. Enterprises jealous of their profits, and member states jealous of their sovereignty and pro-

3. Tom Redburn, *A Chance to Quiet Guns of Trade War*, INT'L HERALD TRIB, Nov. 11, 1992, *available in* LEXIS, Nexis Library, IHT File; Joel Havemann, *Dreams of European Union Dying a Slow Death in Britain*, L.A. TIMES, Mar. 13, 1993, at A3 (discussing the growing opposition toward European unity).

tective of their industries, stand in the way. For example, the EC presently lacks a coordinated program for data collection and monitoring to evaluate the environmental picture. Further, petty national arguments prevent the EC from agreeing on the headquarters for the new Environment Agency, effectively stalling any modest information gathering effects that the proposed agency will perform.

Effectively harvesting information and restructuring humankind's sovereign relations are two of the most important challenges to our explosively changing global community. Both these challenges beset (or bless) the EC as it attempts to realize its espoused environmental aims. A daunting information gap prevents the EC from gauging exactly how dangerous its environmental condition is and therefore prevents it from prescribing the best remedies. Further, the changing balance of power, shifting in varying degrees from national capitals downward to regions and upward to Brussels, aggravates the problem of regulatory enforcement inherent in any federal system.[4] Environmental laws passed in Brussels do not get enforced—at least not rigorously or uniformly. Although environmental experts have complained about this for years, only recently have the EC Board Court of Auditors and the Commission acknowledged the problem.[5]

The EC is changing fundamentally and rapidly now. Part of this change is a commitment, at least rhetorically, to fighting pollution and improving the natural environment.[6] Another major commitment of the changing EC is to eliminate regional economic disparities.[7] This latter commitment is part of the so-called social dimension

4. There is much semantic wrangling over whether the EC is becoming a "federal" system. In fact, Great Britain resisted signing the recent Maastricht Treaty on European union until the sovereignty-threatening adjective was deleted. British national dignity notwithstanding, a duck is a duck, even if you call it a goose. Within the collective territory of the twelve EC states, there is an increasing division of governing power that is nothing if not "federal."

5. *EC Auditors Find Environmental Mess in Europe*, ENV'T WK., Oct. 1, 1992, *available in* LEXIS, Nexis Library, ZEV1 File; Frances Williams & David Gardner, *Gatt Chief to Intervene in Europe—US Oilseeds Row*, FIN. TIMES, Nov. 10, 1992, at 1.

6. *See* EEC TREATY tit. VII (as amended 1987); Christopher Barnes, *Switzerland 3: Facade of Democracy Comes Under Fire*, FIN. TIMES, June 10, 1991, at 3; Gavin Souter, *Kloman Views Impact of Single European Market*, BUS. INS., Apr. 15, 1991, at 26; William D. Montalbano, *Focus on Environment: Green Wave Surging Over West Europe*, L.A. TIMES, May 11, 1989, at A1; Mark Maremont, *And Now, The Greening of Europe*, BUS. WK., May 8, 1989, at 98D; Tyler Marshall, *Public Spurs Cleanup: West Europe Has Its Fill Of Toxic Waste*, L.A. TIMES, Feb. 28, 1989, at A1; William Sweet, *Chernobyl Reactor Blew Up Like a Bomb: Can't Happen Here? It Happened There*, L.A. TIMES, June 9, 1989, at B11; David Marsh, *Pollution Control: Lessons Of The Rhine*, FIN. TIMES, Mar. 6, 1987, at 17.

7. EEC TREATY tit. V (as amended 1987); *Regional Policy: Disparities Still Significant Claims Fourth Report on Regions*, EUR. REP., Dec. 15, 1990, at D14; *Regional Policy: Notion*

of 1992. Whether these two important goals can be harmonized, or whether there is even a practical likelihood for significant progress toward either, are central considerations of this Article. Such harmonization is the essence of the currently popular notion of "sustainable development."

Globally, the need for sustainable development increasingly dominates the discussions of creative environmental policy makers. It was the central theme of the Earth Summit in Rio de Janeiro in June, 1992, and set the tone for agreement, and North-South disagreement, on the establishment and implementation of world-wide principles.[8] The dialogue concerning politics and ecology in the EC follows this trend. First, the SEA and the Maastricht Treaty now integrate environmental concerns into the EC's basic policy formation process in a way that did not exist before. Numerous recent mandates within the EC include environmental policy and environmental protection within economically-specific regional,[9] development planning.[10] Although it is unclear whether the EC will fully honor this mandate, it has progressed beyond the United States in explicitly adopting as part of its policy aims the consideration of environmental concerns in all economic development planning.

Superficially, EC environmental regulation looks good. But such appearances belie immense problems regarding information and implementation. Often, there is insufficient scientific data necessary for meaningful debate. Further, the lack of implementation on the national level, inadequate local enforcement, and competing policy concerns also aggravate the problem. For example, monitoring within the various regions of the EC is non-uniform at best and non-existent at worst. European environmentalists and members of the EC bureaucracy, especially the Environment Directorate-General

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of Charter for the Regions Grow in Stature, EUR. REP., Apr. 27, 1991, at D7; *Regional Policy: How Much of 60.3 Billion ECUs to Languish in Community Coffers?*, EUR. REP., Feb. 16, 1991, at D2; *Regional Policy: Gulf Conflict to Strain Economic and Social Progress*, EUR. REP., Feb. 16, 1991, at D8; *Regional Policy: No Substantial Improvement for Regions, Claims Millan*, EUR. REP., Feb. 1, 1991, at D11; *Social Policy: Regional Funds Dominate Employment*, EUR. REP., Nov. 1, 1990, at D13.

8. For a discussion of the agenda of the Earth Summit at the United Nations Conference on the Environment and Development held in Rio de Janeiro from June 1-14, 1992, see *Earth Summit Opens: Nations to Take up Treaties on Climate Change, Biodiversity*, 15 Int'l Envtl. Rep. (BNA) 343-46 (June 3, 1992).

9. Council Regulation 2052/88, 1988 O.J. (L 185); Tim Dickson, *The Surprising Greening of Mr. Ripa Di Meana*, FIN. TIMES, May 6, 1989, at 7.

10. EEC TREATY art. 130(r) (as amended 1987).

have observed the poor enforcement of European environmental policy.[11]

In addition to better information gathering, monitoring, and enforcement of norms, "greener" programs in all areas of EC activity are needed to close the gap between word and deed in the environmental sphere. Regional development policy is especially important. The poorer regions of the EC such as Greece, Portugal, and Spain can expect the most rapid economic growth.[12] Because the pressure on the environment will be strongest in those regions, they have the greatest need for clean growth programs.

II. A Significant Transition Period

Environmental policy in Europe is in the midst of a significant transition period. For many newly developing regions of Europe,[13] accelerated changes make this especially true. A confluence of factors has shaped environmental policy within the EC. Some of these factors are discussed below.

A. A Confluence of Factors Causing Policy Movement

1. Public Awareness

A greater public awareness of environmental issues has developed in Europe as in the United States.[14] Disasters such as Chernobyl,[15] massive oil spills in the North Sea,[16] The English Channel, and the Mediterranean,[17] and chemical spills in the

11. Richard North, *Pressure Grows for Integration of Green Policies*, THE INDEPENDENT, May 8, 1990, at 8; Conrad B. Mackerron & Emma Chynoweth, *Europe's CPI Plays Catch-Up in Environmental Cleanup*, CHEMICAL WK., Mar. 7, 1990, at 24; *Ripa Di Meana Stresses Central Importance of Legislation*, EUR. REP., June 2, 1990, at 10; *EC Announces Big Environmental Spending Plan for Poor Regions*, REUTER LIBR. REP., Nov. 29, 1989, *available in* LEXIS, Nexis Library, LBYRPT File.

12. Bronwen Maddox, *High Cost of a Cleaner Europe: Environment Policy is Facing Funding Constraints*, FIN. TIMES, Nov. 3, 1992, at 18.

13. Council Regulation 2052/88, *supra* note 9. See *infra* part V(A) for a discussion of these regions.

14. *See* sources cited *supra* note 6.

15. *Id. See also* James Yuenger, *Nuclear Nightmare*, CHI. TRIB., May 5, 1991, at 3 (reviewing GRIGORI MEDVEDEV, THE TRUTH ABOUT CHERNOBYL (1991)).

16. *Dutch Say Bulgarian Ship Caused Latest North Sea Oil Slick*, REUTER LIBR. REP., Nov. 13, 1990, *available in* LEXIS, Nexis Library, LBYRPT File; *No End To Challenges in the North Sea*, ENERGY ECONOMIST, Mar. 1990, (Energy); *North Sea Facing Possible Oil 'Catastrophe'*, UPI, Jan. 23, 1989, *available in* LEXIS, Nexis Library, UPI File.

17. *Riviera Residents to Sue Over Haven Oil Spill*, AGENCE FRANCE PRESSE, May 3, 1991, *available in* LEXIS, Nexis Library, AFP File; *Italy Declares National Emergency Over*

Rhine[18] and Seveso[19] have prompted a public dialogue concerned with acid rain,[20] solid waste disposal problems,[21] nuclear hazards, chemical and oil spills, the greenhouse effect,[22] and the depletion of the ozone layer.[23] This last item has generated special attention since scientists revealed in 1991 that holes in the ozone layer had appeared over the Northern hemisphere, including parts of Europe as well as over Antarctica.[24] Many Europeans have become quite sensitive to EC environmental regulation in response to increasing concerns about threats to their health from the air they breathe[25] or the food they eat,[26] as well as aesthetic[27] and humanitarian[28] concerns about the ecosystem surrounding them.

2. A Greening of Politics

As public awareness has fostered greater political debate, politics

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Oil Spill Threat, REUTER LIBR. REP., Apr. 13, 1991, *available in* LEXIS, Nexis Library, LBYRPT File.

18. *See* sources cited *supra* note 6.

19. Marsh, *supra* note 6, at 17; *Faulty Reporting of Seveso Birth Defects?*, CHEMICAL WK., Feb. 28, 1979, at 24; Eileen Keerdoja, *Persistent Poison*, NEWSWEEK, June 13, 1977, at 10.

20. John Hunt, *Long-Term Acid Rain Threat Seen By Minister*, FIN. TIMES, May 29, 1991, at 10; Nicholas Schoon, *Damage Done By Acid Rain 'Will Worsen,'* THE INDEPENDENT, May 16, 1991, at 9; Tony Austin, *Acid Rain Belt Spreads Northwards in Sweden*, REUTER LIBR. REP., Apr. 8, 1990, *available in* LEXIS, Nexis Library, LBYRPT File.

21. John Hunt, *The Haste to Cut Out Waste*, FIN. TIMES, Oct. 24, 1990, at A14; Kenneth Gooding, *Aluminum: Best Years Are Ahead for 'Green' Metal*, FIN. TIMES, Oct. 24, 1990, at 1; Peter Marsh, *No Time Or Place For Waste*, FIN. TIMES, Sept. 23, 1989, at 7.

22. Maremont, *supra* note 6, at 98D; *Green House Effect: Europeans and American Disagree Over Urgency Of Action*, EUR. REP., Apr. 25, 1990, at 1; Ian Rowlands, *The Security Challenges of Global Environmental Change*, WASH. Q., Winter 1991, at 99; *Ecological Tax System*, INT'L GAS REP., Aug. 18, 1989, *available in* LEXIS, Nexis Library, IGASR File.

23. Maremont, *supra* note 6, at 98D; David Israelson, *New Chemicals Pose Threat to Ozone Layer, Scientists Say*, TORONTO STAR, June 21, 1991, at A26; *The Threat of Losing a Life-Saving Shield: Washington Must Act to Protect Ozone Layer*, L.A. TIMES, Apr. 6, 1991, at B5.

24. *See NASA Satellite Data Confirms Largest Ozone Hole Over Antarctica*, 15 Int'l Envtl. Rep. (BNA) 635 (Oct. 7, 1992).

25. Amy M. Rinas, *British Environmental Concerns Provide Excellent Opportunities for U.S. Exporters*, BUS. AM., May 7, 1990, at 21.

26. *Id. See also* David Kelch & Walter Gardiner, *Europe 1992: Implications for Food and Agriculture*, NAT'L FOOD REV., Oct. 1989, at 11; *Food Flaps Hurting U.S. Exports*, CHI. TRIB., Aug. 28, 1989, at 4; Patty Rose, *Antioxidants Trend to all Natural Camp: Food Additives '89*, CHEMICAL MKTG. REP., June 26, 1989, at SR21.

27. *The Foundering Ark*, THE ECONOMIST, Jan. 6, 1990, at 83; Thomas E. Graedel & Paul J. Crutzen, *The Changing Atmosphere*, SCI. AM., Sept. 1989, at 58.

28. *See Foundering Ark*, *supra* note 27, at 83; Graedel & Crutzen, *supra* note 27, at 58.

has become "greener" in Europe.[29] The Green Parties of the 1970s have so succeeded in their proselytizing aims that they have pre-empted their own political power. Mainstream parties of the left, center, and even the moderate right have integrated environmentalism into their own platforms. Environmental legislation and enforcement by the dominant political parties may not match the rhetoric, but their words are green if not their deeds.[30]

3. Structural Changes in the EC

Structural changes in the EC, legislated in part by the SEA and symbolized by the goal of a single market in 1992, provide an important framework for environmental change. The SEA establishes the environment as an EC concern with an explicit legal protection in the EC's constitution.[31] The SEA mandates that environmental policy form an integral part of all EC projects.[32] Furthermore, for matters affecting the single market, the SEA enables passage of environmental directives by a qualified majority.[33] Finally, the major reform of EC structural funds includes a provision to finance large environmental projects.[34]

4. International Events

International events have also contributed to the current atmosphere of change in EC environmental policy. Recent revolutions in Eastern Europe carry multiple meanings. Of great significance to Western Europe was the unveiling of the environmental mess in the former Soviet block.[35] Now Western Europe is concerned about the

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29. *See* sources cited *supra* note 6.

30. *See generally CB Press Briefing World Resources Institute*, FED. NEWS SERVICE, July 6, 1989, *available in* LEXIS, Nexis Library, FEDNEW File (quoting speakers: Robert Repetto, Jessica Mathews, Gus Speth, William Moomaw, and Rafe Pomerance discussing environmental issues at the economic summit).

31. EEC TREATY art. 100(a) (as amended 1987).

32. *Id.* art. 130(r) (as amended 1987).

33. *Id.* art. 100(a) (as amended 1987).

34. Coopers & Lybrand, *Regional Policy*, EC COMMENTARIES, *available in* LEXIS, Europe Library, EURSCP File at *7.

35. *See Resources for the Future Seminar*, FED. NEWS SERVICE, Feb. 13, 1991, *available in* LEXIS, Nexis Library, FEDNEW File (Richard Liroff of the World Wildlife Fund discussing the environmental catastrophe in Eastern Europe and possible policy responses); Ruth E. Gruber, *Word Is Out: East Europe Is A Disaster Area*, CHRISTIAN SCI. MONITOR, Apr. 18, 1990, at 10; *Pollution in East Described as Grim*, N.Y. TIMES, June 17, 1990, at 11; Tony Carritt, *East Europe Says Pollution Killing its People*, REUTER LIBR. REP., June 16, 1990, *available in* LEXIS, Nexis Library, LBYRPT File; Martin Sieff, *Pollution, Grave Health Con-*

direct and indirect effects of environmental degradation in the East.[36] First, the environmental poisoning of the East could directly affect the West through the atmosphere or shared rivers and seas.[37] Second, indirectly, the concurrent need for environmental recovery and economic and political rejuvenation complicates further integration with Eastern Europe. Finally, Western Europe is concerned that cheap goods, having low production costs due to lax environmental standards, will obtain a competitive advantage over EC products.

Global issues also press the Europeans toward new environmental policy making. Multilateralism is becoming a more common way to address environmental problems because of the transboundary nature of the problems.[38] Negotiations regarding greenhouse gases, ozone depletion, Antarctic preservation, and rain forests are forcing the Europeans toward new and often EC-coordinated action regarding worldwide ecological problems.[39] For example, recent findings that a Northern Hemisphere hole has developed in the ozone layer prompted the EC to take the lead and push to phase-out ozone depleting chemicals.[40]

The Europeans, originally imitators of United States' environ-

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ditions Plague East Europe, WASH. TIMES, Jan. 24, 1990, at A7; Larry Tye, *The Scars of Pollution: Iron Curtain Rises to Reveal Dirt, Death, Poison in the East*, BOSTON GLOBE, Dec. 17, 1989, at 1.

36. Tony Carritt, *EC Ministers Tackle Pollution Legacy of East Bloc Communism*, REUTER LIBR. REP., Apr. 20, 1990, *available in* LEXIS, Nexis Library, LBYRPT File; Tony Austin, *Nordics Concerned Over Green Catastrophe in East Europe*, REUTER LIBR. REP., Feb. 28, 1990, *available in* LEXIS, Nexis Library, LBYRPT File; David Usborne, *East Confesses Crimes Against its Environment*, THE INDEPENDENT, June 18, 1990, at 10.

37. John Kay & Aubrey Silberston, *Green Economics: Solution to Environmental Pollution*, NAT'L INST. ECON. REV., Feb. 1991, at 50; David Thomas, *1992 - Redrawing the Map of Europe*, FIN. TIMES, July 2, 1990, at 7.

38. *World Statesmen Urge Multilateral Action to Save Environment*, PR NEWSWIRE, May 30, 1989; *Environment, U.S. Introduces Proposals to Assist Eastern Europe With Ecological Problems*, Daily Rep. for Executives (BNA), Mar. 1, 1991, at A4; *EEC/Eastern Europe: Priority Given to Nuclear Safety at Environment Ministerial*, EUR. REP., June 20, 1990, at 1; *European Lawmakers Urge Greater Cooperation On Environment*, UPI, Oct. 25, 1990, *available in* LEXIS, Nexis Library, UPI File.

39. *GATT Council Debates Best Way To Recognize Link Between Trade And Environmental Issues*, 8 Int'l Trade Rep. (BNA) 859 (June 5, 1991); *LIFE: Financial Vehicle for the Environment*, EUR. ENV'T, Feb. 5, 1991, at 1; *International Environment: 1991 Offers Chance to Set Global Agenda*, Daily Rep. for Executives (BNA), Jan. 17, 1991, at S18.

40. *See U.K. Government Urged to Step Up Ban, Push for Earlier Phase-Out of Substitutes*, 15 Int'l Envtl. Rep. (BNA) 635 (Oct. 7, 1992). But see *Montreal Protocol Nations Expected to Speed Phase-Out of Ozone Depleters*, 15 Int'l Envtl. Rep. (BNA) 732 (Nov. 18, 1992) for a discussion indicating that the United States is also pressing for phase-out of ozone depleting chemicals.

mental policies, have expressed concern regarding American foot-dragging on ozone, global warming, biodiversity, and other international ecological issues.[41] In fact, the EC's Commissioner for the Environment, Carlo Ripa di Meana, refused to attend the 1992 Earth Summit in Brazil due to his sense that no substantial progress could be made there. The United States' resistance to meaningful mandatory standards in many areas contributed to that belief.[42]

B. Hopeful Aims of the Single European Act

The SEA amended the original Treaty of Rome that was the constituent document for the EC.[43] The central core of the SEA and most well-known aspect is the advent of the single market,[44] commonly referred to as "Europe 1992." At the end of that year Europeans hoped to have an economic market similar to that in the United States with few barriers. Just as West Virginians do not have to pass a customs booth when they drive seven miles north across the Pennsylvania border, the Europeans hoped for the same when a German crosses the Dutch border. Just as insurance companies headquartered in Pennsylvania and New York can operate in Ohio, the Europeans intend the same for British insurance companies or other financial institutions seeking to operate in France and Germany. Just as the same technical specifications for an electric toaster manufactured in Ohio apply to those made in New Jersey, it is hoped that the same will be true for appliances made in Britain and Germany. Further, just as the gaseous emissions permissible for a car manufactured in Michigan match those for one made in Ohio, it is hoped that the same will be true for cars made in Britain and Germany.[45]

A necessary procedural step in forming this single market was the change from a primarily unanimous voting requirement by the EC Council of Ministers, the Community's legislating body, to a qualified majority requirement for certain conditions.[46] Currently, a qualified

41. *See Top Environment Official Declines to Attend Earth Summit; Division on Energy Tax Faulted*, 15 Int'l Envtl. Rep. (BNA) 346 (June 3, 1992).

42. Ripa di Meana resigned as EC Environment Commissioner shortly thereafter to become Italian Minister of the Environment. *See* David Haworth, *EC Environment Minister Di Meana Resigns*, ENV'T WK., July 2, 1992, *available in* LEXIS, Nexis Library, ZEV1 File.

43. EEC TREATY art. 1 (as amended 1987).

44. *See id.* art. 13 (as amended 1987).

45. Council Directive 88/76, 1988 O.J. (L 36), *available in* LEXIS, Europe Library, LEGIS File.

46. EEC TREATY arts. 100(a), 149 (as amended 1987).

majority may pass new regulations and directives which promote a single market.[47] This procedural change has important ramifications for both regional and environmental policy.

Environmental[48] and social cohesion[49] are two of the specified goals of the SEA. Environmental regulation must be coordinated in order to aid the single market because differing environmental regulations could act as economic barriers to a free market. Additionally, the SEA enshrines environmental quality as a positive good in and of itself (that is, beyond mere economic considerations) and considers it a principle of European policy that must be considered in all other EC activities.[50]

The other major goal of the SEA, social cohesion, emphasizes eliminating regional disparities.[51] The mandate to expand the funds available for eliminating economic disparities complemented the plan to create a single market by 1992.[52] If a single market emerges, but extreme regional economic disparities remain, the single market will aggravate the disparities further. If the EC does not eliminate extreme regional economic inequality, the removal of market barriers would lead to labor and capital movements from the less developed regions to the more developed regions, a dangerous downward spiral.

Economic developmental policy and environmental policy are both legally and practically related. Under the SEA the EC shall consider environmental impacts when formulating and implementing policies.[53] Specifically, economic development requires consideration of the environment.[54] Thus, for instance, to bring major industry into a region supported by EC regional funds requires consideration of environmental factors.[55] For example, they must question whether there will be a net environmental gain by bringing in or stimulating this industry. Environmental costs to a particular development create an implicit obligation to implement remedial measures that prevent those costs from becoming predominant.

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47. *Id.*
48. *See id.* art. 130(r) (as amended 1987).
49. *See id.* art. 130(a) (as amended 1987).
50. *See id.* art. 130(r) (as amended 1987).
51. *See id.* art. 130(a) (as amended 1987).
52. *Id.* art. 130(b) (as amended 1987).
53. *Id.* art. 130(r) (as amended 1987).
54. *Id.*
55. *Id.*

C. The Maastricht European Union Treaty of December 1991

Just as the Europe of 1992 was approaching, and one could expect European federalists to take a breather, they succeeded in pushing integration further still with the new European unity agreement signed in Maastricht, Netherlands in December, 1991.[56] Increased powers for the Brussels bureaucracy and the pro-environment European parliament should present an opportunity for real environmental enforcement. Other European and international phenomena related to the environment are also pushing the EC in that direction. Faced with the possibility of an ozone hole over northern Europe, the EC is now considering the world's toughest regulations on the production and use of ozone-depleting chemicals. At the same time, it is considering such tools as "green" taxes and environmental audits of industry[57] as innovative mechanisms for improving environmental quality.

Two significant categories of political reality stand in the way of such environmental progress. First, some solutions depend not only on European action, but on international cooperation with major players that are not nearly as environmentally enthusiastic as the Europeans: the United States and Japan. The second category of difficulty is internal and reflects the very theme of this Article. Specifically, there is still many a slip 'tween cup and lip when it comes to implementing the political mandates for the environment at the industrial level articulated in Brussels and Strasbourg.

The EC's environmental policy has had a substantial impact on the Maastricht morass in which the EC now finds itself. However, with so much attention focused on Deutchmarks, interest rates, and immigration fears, little commentary has emerged on the relationship between environmental regulation and faltering European union. An examination of the lurching progress toward common continental environmental policy over the last few years reveals many of the same national, institutional, and interest group tensions that have generally plagued the unification process.[58] For some, the environmental program of the proposed post-Maastricht Community promises too little;

56. *See Maastricht Treaty Signed, supra* note 1.

57. The European Commission's present environmental activities are basically uncoordinated, poorly supervised, and carelessly audited. *See EC Auditors Find Environmental Mess in Europe, supra* note 5.

58. For further examples of interest group tensions and their effect on adoption of environmental proposals, see *Parliament Calls for Earlier Deadlines in Proposal to Cut Sulfur Content of Gas Oil*, 15 Int'l Envtl. Rep. (BNA) 159 (Mar. 25, 1992) (discussing burden of reducing sulfur content on southern EC member states).

for others, it threatens too much.[59] Eroding national sovereignty discomforts many, as does the "democracy gap"—a reference to a EC where political power is increasing faster than political participation.[60] The EC's recent difficulties in moving its environmental policy from the standard setting stage toward effective implementation were warning signs that the road to Maastricht ratification would turn out, as it has, to be a bumpy one.

The Danes are central players in the present Maastricht draft. Were it not for their rejection of the treaty by referendum in June, 1992,[61] President Mitterand probably would not have submitted it to French voters, whose barest of majorities hardly provided swelling momentum for further unity in Europe.[62] If anything, the French vote was evidence that millions sensed something was rotten, and not just in Denmark. Just as we thought that old nineteenth century notions of state sovereignty were happily waning, the enlightened Danes started the ball rolling in the other direction, with forty-nine percent of the French giving it an added push. It is worrying to imagine what a British "go at the ball" might do.

And what headed the Danes into this retrograde vanguard? Environmental concerns and related sovereignty issues were major propellants. Danish environmental standards are among the strictest and best enforced in the world. Many Danes feared that a lowest-common-denominator effect from less strict community standards could compromise their country's environmental rigor.[63] Such fear is certainly ironic and possibly unfounded. It is ironic because for most of Europe, EC environmental regulation has been progressively action-forcing—EC directives have compelled member states to clean-up, protect, and conserve in many instances where such progress would

59. For example, Germany, Scandinavia, and the Netherlands have tough, progressive laws while Southern European countries and the United Kingdom lag behind. There is a long way to go in harmonizing environmental laws in Europe. Emma Chynoweth, *Environmental Harmonization*, CHEMICAL WK., Sept. 23, 1992, at 36.

60. For many, the strengthening of the Brussels bureaucracy, which is not acountable to voting citizens, exemplifies the "democracy gap."

61. The Danes narrowly rejected the Maastricht Treaty by a 50.7% to 49.3% "no" vote. *Denmark Rejects Maastricht Treaty on EC Union*, AGENCE FRANCE PRESSE, June 2, 1992, *available in* LEXIS, Nexis Library, AFP File.

62. France ratified the Maastricht Treaty but with only 51% in favor. *See* Alan Riding, *Turmoil in Europe: French Approve Unity Treaty, but Slim Margin Leaves Doubts*, N.Y. TIMES, Sept. 21, 1992, at A1.

63. "The watering down by the EC of some of Denmark's existing environmental legislation was one of the concerns that led to the 'no' majority." Peter Melchett, *Danish Vote*, THE TIMES (London), June 5, 1992, *available in* LEXIS, Europe Library, TTIMES File.

not have occurred unilaterally.[64] It is possibly unfounded because the European trend is toward protecting a state's right to enforce environmental norms stricter than the EC's.[65]

In any event, the Danish voters did reject Maastricht, slowing down the ratification process sufficiently so that all the forces that began to stiffen against the treaty—nationalist, environmentalist, anti-immigrant, Germanophobic, anti-Europcrat—had the time to do so. The treaty on European unity will probably be approved in some form, but not with the ease and quickness initially anticipated.[66]

The gap between word and deed in EC environmental policy is plausibly a prime reason for the Danes' skepticism towards EC proclamations of ecological commitment. The recent history of the EC program reveals laudable standards that fail not only for lack of enforcement, but also for measurement. Additionally, short-term economic and narrow political considerations further weaken the EC's environmental will. That the Danes fear being dragged down to a common state of laxity is not surprising.[67] An examination of noncompliance with regulations mandating the information and enforcement gap provides some insight into the broader issues that are now disquieting the EC and its citizens.

III. The Information Gap

Surprisingly, there is no official and comprehensive documentation that describes the directives that EC countries have complied with terms of legislative implementation or actual enforcement. For example, it is unknown whether the individual member states each implemented the EC directive on sulfur dioxide by national statute. Furthermore, the sulphur count in the air around the individual cities is unknown. Such comprehensive statistics do not exist.[68] Of course, *some* data does exist on some environmental parameters. Nevertheless, there is no systematic compilation of implementation and en-

64. *See EC Court Ruling May Allow Restrictions on Waste Imports*, 15 Int'l Envtl. Rep. (BNA) 462 (July 15, 1992) (discussing effect of EC Directives on control and shipment of waste).

65. *Id.*

66. France's ratification does not guarantee ultimate triumph for the Maastricht Treaty, but has averted what could have become a slide into nationalist discord. *See* Riding, *supra* note 62, at A1.

67. Howard LaFranchi, *Danish Views on Europe to be Tested in Unity Vote*, Christian Sci. Monitor, June 1, 1992, at 3.

68. When we began our research project at the West Virginia Regional Research Institute, we expected to find comprehensive EC statistics that answered such questions.

forcement performance measured for each EC environmental norm in each member state. Therefore, not only are EC environmental standards sporadic and irregular,[69] there is no way of telling exactly *how* sporadic and irregular. The information is just not there.

A. Closing the information gap

The positive side of the information gap is that changes have started to occur in the last five years or so. After a period of stagnation of for EC institutions,[70] Europe decided that it had to move beyond its position as a mere customs union in order for the EC to survive. To further the goal of greater European unity, the EC adopted the SEA—a major EC treaty supplementing and amending the EC Constitution, or the Treaties of Rome and Paris.[71]

The SEA furthers European integration in various ways. Creating a single market is perhaps the central goal of the SEA.[72] A primary tool for promoting this aim is the increased use of weighted ("qualified") majority voting in the EC Council, the ultimate law-making body. Where harmonized environmental standards promote integrated economic activity, such new environmental norms may be passed by majority vote.[73] The SEA also explicitly makes the environment an area of EC competence and mandates that environmental concerns be taken into consideration in forming and implementing other EC policies.[74] All this creates a greater need for environmental information and monitoring.

B. The European Environment Agency

The European Commission proposed the creation of the Euro-

69. "The Commission and the EC member countries are jeopardising the most valuable parts of their huge legislative effort . . . by their failure to enforce the rules, or even to discover that they are being broken." Maddox, *supra* note 12, at 18.

70. The term that was used in the early 1980s for stagnation of EC institutions was "eurosclerosis." David Warsh, *EC Farmers Offer a Nasty Reminder of Eurosclerosis*, BOSTON GLOBE, Dec. 9, 1990, at A85; *Emerging Eastern European Democracies Classified Preventive for "Eurosclerosis,"* BUS. WIRE, Oct. 30, 1990; *Eurosclerosis at Work*, SUNDAY TIMES, Apr. 22, 1990, *available in* LEXIS, Nexis Library, TTIMES File.

71. EEC TREATY tit. II, ch. 1 (as amended 1987). For the full text of the SEA, see 1987 O.J. (L 169) 1.

72. See *supra* notes 43-45 and accompanying text for a discussion of the aims of the SEA.

73. *See* EEC TREATY art. 130(s).

74. *See id.* art. 130(r).

pean Environmental Agency ("EEA") in 1989.[75] Environmentalists originally wanted this agency to have monitoring and enforcement powers similar to the United States Environmental Protection Agency,[76] but this was not politically feasible because not all EC members would approve such enforcement powers.[77] The Commission's proposal to the Council did, however, include active monitoring as well as passive information gathering as part of the agency's charge. After much debate, negotiation, and lobbying, the powers of the agency were watered down further. In general, the EEA receives information but does not independently monitor environmental compliance.[78]

However, even such a limited mandate could be a significant step forward. As already noted, one of the first problems in addressing European environmental ills is the task of describing those ills with some degree of precision.[79] Both in terms of physical environment and legal regulation, the present situation is quite unclear. There is no reliable and comprehensive collection of data describing all the major forms of environmental pollution, and there is certainly no clear idea of exactly what is being regulated, either on the books or in practice. Some data exists, but it is not uniform or comprehensive, and is not always reliable.[80] Further, a major political and logistical hurdle stands at the beginning of the path for a newly approved environmental agency. Specifically, the French government has refused to

75. *New European Environmental Agency*, EC ENERGY MONTHLY, June 1989, *available in* LEXIS, Nexis Library, ECENGM File.

76. *See, e.g.*, Dickson, *supra* note 9, at 7; Carolyn Aldred, *Cost of Europe's 'Green' Wave Unclear*, BUS. INS., May 14, 1990, at 35; Tim Dickson, *Environment 'Threatened By Single Market,'* FIN. TIMES, Aug. 31, 1989, at 2.

77. *Euro-Parliament Threatens to Torpedo Environment Agency*, REUTER LIBR. REP., Feb. 14, 1990, *available in* LEXIS, Nexis Library, LBYRPT File.

78. Commission Regulation No. 1210/90, 1990 O.J. (L 120), *available in* LEXIS, Europe Library, LEGIS File.

79. *See* discussion *supra* part III.

80. For partial data on different forms of environmental pollution and their regulation, see David Thomas, *Findings of "Pollution Audit" Disputed*, FIN. TIMES, Mar. 29, 1990, at 8; *Sea Pollution: Commissioner Urges Review of Sea Transport Rules*, EUR. REP., Apr. 17, 1991, at 8; *France To Double Spending Against Water Pollution*, REUTER LIBR. REP., Mar. 20, 1991, *available in* LEXIS, Nexis Library, LBYRPT File; Susan Watts, *Statistics in UN Pollution Survey "Years Out of Date,"* THE INDEPENDENT, May 30, 1991, at 6; Marlise Simons, *Europeans Begin to Calculate the Price of Pollution*, N.Y. TIMES, Dec. 9, 1990, § 4, at 3; *Environment: Statistics Programme Outlined*, EUR. REP., Dec. 8, 1990, § 4, at 2; David Goodhart, *The Green Spirit Lingers On*, FIN. TIMES, Dec. 6, 1990, § 1, at 20; Marlise Simons, *New Taint on East German Pollution*, N.Y. TIMES, Sept. 9, 1990, § 1, at 20; *Environment: Eurostat Report on Raw Materials and the Environment*, EUR. REP., June 15, 1991, at 1.

approve a site for the agency without assurance that the EC parliament will remain in Strasbourg, France.[81] As a result of this impasse, the EC has made no significant progress in hiring staff or accomplishing other necessary prerequisites for a functioning agency.[82]

C. Working with Available Statistics

Environmental statistics that have been collected by EC agencies are quite incomplete,[83] in part because of the limited resources available for such work. In addition to being incomplete, the published data contain some inconsistencies as well. Some of the inconsistencies seem to be attributable to mathematical or clerical error. Nonetheless, the EC can draw a few tentative inferences through synthesis and analysis of the limited data available.

The EC Commission compiles some environmental statistics that the member states provide to it and publishes them in a series called *Eurostat*. While the data is not complete, comprehensive, or necessarily accurate or comparable, it does provide some insight into both the information gap and the environmental situation. For example, sketchy information exists about sulfur dioxide ("SO_2") levels since the EC passed its 1980 directive. The data seems to indicate a slight decrease in SO_2 levels, although it is not certain that any such decrease resulted from regulation. Concerning another major air pollutant category, nitrous oxides ("NO_x"), *Eurostat's* background data seems suspect and its reported figures are open to varying interpretations. The information available regarding the EC's 1975 Water Quality Directive seems to indicate pitiful monitoring. The directive was extended from surface water only to include all drinking water. The Commission's many legal actions regarding drinking water suggest that the directive has been unsuccessful. In other areas, the limited *Eurostat* data tentatively indicates that Belgium is especially

81. *EC Environment Chief Accuses France of Blackmail in Agency Row*, REUTER LIBR. REP., May 31, 1991, *available in* LEXIS, Nexis Library, LBYRPT File; John Hunt, *EC to Decide on Agency*, FIN. TIMES, Mar. 18, 1991, § 1, at 6; Colin Brown & David Usborne, *Thatcher to Call for Conditions on EC Aid to Soviet Union*, THE INDEPENDENT, June 25, 1990, at 2; Peter S. Green, *Environment Ministers Call for Cleanup in Europe*, UPI, June 23, 1991, *available in* LEXIS, Nexis Library, UPI File.

82. *See EP Pushes for Agency*, CHEMICAL WK., June 19, 1991, at 20. The European Parliament's Committee on the Environment, Public Health, and Consumer Protection has expressed regret that member states have not been able to agree on the location for the EEA base.

83. *See* sources cited *supra* note 80.

"dirty" with respect to lead pollution, that chloroflourocarbons ("CFCs") have slightly increased between 1976 and 1987, and that no significant response has occurred to carbon dioxide ("CO_2") directives. While such broad conclusions are sometimes possible after digging through the non-organized European statistics, they are a far cry from a complete, accurate, and comparable data base. To say that the statistics are insufficient to understand the environmental situation, let alone to serve as a basis for a comprehensive enforcement effort, is an understatement.[84]

Not only are the statistics on actual environmental conditions incomplete, but there is no comprehensive listing of what national laws have been passed to implement each of the EC environmental directives.[85] In other words, in addition to lacking complete technical data on compliance with EC environmental standards, the EC does not even know whether those standards have been adopted by it members as required.[86]

IV. The Implementation and Enforcement Gaps

A. Obstacles to Implementation and Enforcement

Implementation is the enactment into national law of the requirements of EC directives, including promulgation of administrative regulations or sub-national law making where necessary.[87] Enforcement, of course, is the actual policing of compliance.[88]

Since a complete compilation of national laws implementing EC environmental directives does not exist, an accurate picture of the implementation problem is impossible. Nonetheless, EC environmental officials and European political leaders recognize the difficulties of im-

84. Carolyn Roberts, Senior Lecturer, Faculty of Environment, Cheltenham and Gloucester College of Higher Education (UK), Lecture at the West Virginia University Regional EC Institute (June 6, 1991) (reconfirmed by Nov. 24, 1992 telephone conversation).

85. The Regional Research Institute's EC Environment project sought such a compilation from a number of EC sources and was told on all such occasions that none existed. Nor was any comprehensive state-by-state implementation information available from any library or commercial source.

86. The Commission may have somewhat better information than it reveals in this particular matter. A source at the Commission, who wished to remain unidentified, revealed that the Commission probably had a fairly good idea of which states had implemented which law, but for political reasons "did not want to point fingers." Telephone Interview with Carolyn Roberts, *supra* note 84, (Nov. 24, 1992).

87. Europeans tend to use the term "transposition."

88. For a discussion of the implementation and enforcement provisions, see EEC Treaty art. 189.

plementation and enforcement. Because the problem has many dimensions, no single remedy can solve it; instead, a host of remedial activities are required. Despite a near consensus that something must be done, any remedy is likely to run into serious political or structural opposition, often from forces representing the more general environmental consensus. For instance, while the French government appears enlightened on many environmental fronts, it has single-handedly blocked the start-up of the EEA in an effort to extract an EC pledge to keep the European Parliament in Strasbourg.[89] In addition, special interests repeatedly frustrate the general interest. Institutional inertia and ill-defined responsibility also aggravate the situation.[90] Further examination of implementation and enforcement issues illustrates this conundrum.

Twenty years after the EC's environmental policy was established, the EC still lacks an official compilation of national laws purporting to implement environment directives.[91] The Commission has confronted member states on a piecemeal basis for failure to implement or enforce EC environmental standards, taking the violator state before the European Court of Justice ("ECJ") in some recalcitrant cases.[92] But no comprehensive system to monitor and enforce compliance exists.[93] A number of factors might explain such incomplete implementation. First, local economic and political interests can

89. Marlise Simons, *Europe Environment Plan Hits Snag: France*, N.Y. TIMES, Feb. 16, 1992, § 1 at 12; *New Tactics Seen Needed to Break Deadlock Over Siting Environment Agency*, 14 Int'l Envtl. Rep. (BNA) 304 (June 5, 1991).

90. *See generally* David A. Westbrook, *Environmental Policy in the European Community: Observations on the European Environment Agency*, 15 HARV. ENVTL. L. REV. 257 (1991) (reviewing criticism of EEA and proposing ways to realize agencies).

91. The Commission has noted that based on more than fifteen years of experience with environment policy, "in some cases it has had to establish reports on the implementation of specific directives on the basis of information from only a few member states. In other cases, the Commission has not been in a position to establish a report at all." *Environment Ministers Approve Directive to Standardize Reports on Air, Waste, Water*, 14 Int'l Envtl. Rep. (BNA) 534 (Oct. 9, 1991).

92. *The Dirty Dozen*, THE ECONOMIST, July 20, 1991, at 52; *Several EC Member States to be Charged With Failing to Implement EIS Directive*, 15 Int'l Envtl. Rep. (BNA) 12-13 (Jan. 15, 1992).

93. *The Dirty Dozen, supra* note 92, at 52. The reforms needed are injunction and enforcement powers for the ECJ and a European environmental inspectorate. *See also Former EC Environment Commissioner Says Single European Act May Need Revision*, 14 Int'l Envtl. Rep. (BNA) 213-14 (Apr. 24, 1991). The "[p]owers of the European Commission and of the European Court of Justice are severely limited in cases of breaches of environmental law. The Commission's powers are limited by the absence of an inspectorate for environment . . . . The Court is limited in its inability to impose sanctions." *Id.* at 213 (quoting Stanley Clinton-Davis, former EC Commissioner for the environment).

probably impede passage of national laws, despite their inability to block EC directives. For example, an industry more dominant in a member state than in the EC as a whole could produce such a result. Second, legislative and bureaucratic inertia frustrate full implementation of EC directives.[94] For national and regional bodies to promulgate new laws of any kind requires time and effort. Complex environmental standards certainly are no exception. Third, a tiered system of legislative jurisdiction inherently poses increased problems of interpretation.[95] Subordinate national or provincial parliaments or agencies may not understand the exact requirements of a particular EC directive. On the other hand, national entities may take advantage of purported ambiguities to benefit local interests by implementing lower standards or procedures. Finally, resources, priorities, and commitment levels will vary among legislative bodies, with environmental legislation progressing more quickly in some than in others.[96]

The EC has passed most of its environmental legislation as directives.[97] The "directive," a creature of European legal creation, stands in contrast to another form of legislation, the "regulation." A regulation normally functions like a federal statute in the United States. It is immediately effective everywhere within the EC.[98] For example, EC regulations prohibit price fixing under the EC's competition policy.[99] That regulation affects every company in Europe immediately; national governments need not enact any legislation. Environmental legislation, on the other hand, is promulgated by directive.[100] The

94. *See, e.g., Court of Justice Says Italian Government Failed to Implement Two Waste Directives*, 14 Int'l Envtl. Rep. (BNA) 680-81 (Dec. 18, 1991); *Development Plans Being Pursued at Expense of Environment, Groups Claim*, 15 Int'l Envtl. Rep. (BNA) 18 (Jan. 15, 1992).

95. *See* sources cited *supra* note 94.

96. The United States faces a similar problem. Much environmental legislation in the United States depends on local implementation of the federal statutory standards. The Clean Air Act, 42 U.S.C. § 7401 (1993), enforced through State Implementation Plans ("SIPs") is a good example. Some state governments have greater resources or greater political will than others. Thus, states enforce the air standards unevenly. Without an oversight agency like the United States Environmental Protection Agency, the European problem is greater than the United States'.

97. *See, e.g.*, Council Directive 76/464, 1976 O.J. (L 129) 23 (addressing pollution caused by certain dangerous substances discharged into the aquatic environment); Council Directive 78/659, 1978 O.J. (L 222) 1 (addressing water quality to support fish life); Coopers & Lybrand, *Environment*, EC COMMENTARIES (Jan. 28, 1993), *available in* LEXIS, Compny Library, CLE File.

98. EEC TREATY art. 189.

99. Council Regulation 2349/84, 1984 O.J. (L 219), *available in* LEXIS, Europe Library, LEGIS File.

100. *See* John B. Nicholson, *European Economic Community—Environmental Policy*, 21

directive does not create directly binding law on individuals and corporations within the EC, but only creates an obligation on the part of each national government to pass laws that implement the directive's environmental standard.[101] For example, consider the EC environmental directive governing SO_2 emissions from a power plant:[102] until France passes a national law that adopts the EC standard, there is no law enforceable against an individual violator. And of course, Spain, Britain, Ireland, and all other EC nations besides France must repeat such implementation.

No EC legal auditor checks whether such laws are passed, nor does an EC police force monitor whether such laws are obeyed. Both the enactment level (putting directives into national law) and the enforcement level (making sure that national law is obeyed) are left to the individual nation states.[103] In the first twenty years of European environmental policy, the EC has been very successful in enacting fairly comprehensive anti-pollution standards,[104] similar to the collection of United States laws for waste management, clean air, and clean water. What the EC has not done, however, is create mechanisms to make sure these standards ultimately are obeyed.[105]

If the EC chose to legislate on the environment in the form of *regulations* rather than *directives*, this legal implementation problem would be partly solved, since EC regulations have immediate legal effect in member states.[106] No national enactment would be needed. Historically, member states' concern for their national sovereignty, predictably heightened in high polluting countries, has precluded such direct EC law making. Furthermore, prior to the passage of the SEA, the EC lacked an explicit mandate for environmental law.[107] The EC initiated its environmental program under broad catch-all

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GA. J. INT'L & COMP. L. 285, 287-88 (1991) (noting that current EC environmental controls consist predominantly of legislation the member states propose, not EC-wide programs).

101. EEC TREATY art. 189.

102. Council Directive 89/247, 1989 O.J. (L 201) (amending Council Directive 80/779, 1980 O.J. (L 229)), *available in* LEXIS, Europe Library, LEGIS File.

103. EEC TREATY arts. 189, 192.

104. *See* Coopers & Lybrand, *supra* note 97.

105. While such regulatory mechanisms exist in the United States, many environmentalists argue that federal administrators uncommitted to serious environmental enforcement have weakened or ignored the mechanisms for over a decade.

106. EEC TREATY art. 189.

107. *See generally* Christian Zacker, *Environmental Law of the European Economic Community: New Powers Under the Single European Act*, 14 B.C. INT'L & COMP. L. REV. 249 (1991). "Prior to 1987, the EEC Treaty contained no mention of environmental protection. The stated Community objectives contained in the Preamble and articles 2 and 3 did not per-

provisions of the Treaty of Rome.[108] With such a shaky constitutional foundation, it is not surprising that EC environmental standards have taken the form of directives, less threatening to member state independence than regulations. However, the SEA and the recent Maastricht Treaty have changed things considerably; they provide environmental law with an explicit constitutional basis and mandate that all EC programs make the environment a priority.[109]

European leaders have discussed moving toward more direct law making in this area.[110] Such a move is possible, but opposition from certain industries and member states will make it difficult.[111] Most likely, future direct EC environmental policy-making will not involve the prohibitory environmental standard-setting that characterized the 1970s and 1980s. The member states are probably still too resistant to change.[112] The severe limits placed on the new EEA's power exemplifies such resistance. Although currently favored over increased prohibitionary directives, even indirect policy enforcement mechanisms, such as tax incentives, have stalled recently.

The EC Council recently refused to enact a carbon tax that the Commission recommended, apparently concerned that the tax would place the EC at a competitive disadvantage if the United States and Japan did not subject their industries to equivalent "green" taxation.[113] Development of programmatic environmental policies may be

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tain to environmental issues." *Id.* at 261. *See also* EBERHARD GRABITZ & CHRISTOPH SASSE, COMPETENCE OF THE EUROPEAN COMMUNITIES FOR ENVIRONMENTAL POLICY 24 (1977).

108. It has been suggested that the EEC treaty provides at least some authority for a common environmental policy because regulation of corresponding environmental pollution and misuses is a necessary corollary to sound economic development. Zacker, *supra* note 107, at 261.

109. The SEA supplemented the EEC Treaty with explicit environmental lawmaking powers. EEC TREATY tit. VII (as amended 1987).

110. *See, e.g., Other Countries Urged to Match New EC Regulations Banning CFCs in 1977*, 14 Int'l Envtl. Rep. (BNA) 240 (May 8, 1991); *Proposed Energy Tax Hits Major Snags in Run-Up to Join Minister's Meeting*, 14 Int'l Envtl. Rep. (BNA) 645 (Dec. 4, 1991).

111. *See Sweden: Environmental Tax Proposals Cause Split between Government Ministers*, 14 Int'l Env't Rep. (BNA) 572 (Oct. 23, 1991) (Industry Minister expresses strong opposition to a new tax on nuclear power, the source of fifty percent of Sweden's electricity); *EC Commission Recommends Energy Tax, Makes Link to U.S., Japan*, REUTER LIBR. REP., Sept. 25, 1991, *available in* LEXIS, Nexis Library, LBYRPT File.

112. *Proposed Energy Tax Hits Major Snags*, *supra* note 110, at 645.

113. *See Official Criticizes U.S., Japan for not Moving on Climate Change Issue*, 15 Int'l Envtl. Rep. (BNA) 198-99 (Apr. 8, 1992); *Environment Commissioner Faults Bush on Refusal to Commit to Emission Limits*, 15 Int'l Envtl. Rep. (BNA) 184-85 (discussing EC industries' concerns that unilateral adoption of carbon tax will place them at a competitive disadvantage); *Japan Sends Message to U.S.: Sign Treaty on Carbon Dioxide Emissions*, 15 Int'l Envtl. Rep.

another alternative to regulating for EC ecological well being, with EC coffers funding development projects such as waste treatment facilities.[114]

Enforcement problems are not only legal, but also political, economic, and systemic. As discussed above, there are no laws to enforce until the individual member states pass laws implementing the European Community environmental directive in question. An additional tier of federalism or regionalism in which a substantive political entity, such as the province of Andalucia in Spain or the state of Bavaria in Germany, must legislate compounds the enforcement problem in some European states. In some cases, significant anti-centralist sentiment makes the task even harder.[115] When the EC agrees that a particular environmental standard is desirable, but the national or regional level does not share that view, political obstacles become greater. Such political obstacles often have an economic aspect. Enforcement costs money. This problem is aggravated in economically lagging regions of the EC where financial resources are least available. Further, as already discussed, the lack of procedures for monitoring and enforcement, or any functioning EC institutions to aid in such activity also aggravates the situation.

B. Regional Difficulties

Regional or federal government divisions in some European countries further complicates the problems of implementation, monitoring, and enforcement of EC environmental regulations more complex. As one director of the EC Commission explained:

> Regional authorities are bound, within their powers, and by all the duties of cooperation resulting from article 5 [of the EEC Treaty]. However, if a regional authority fails to fulfill one of these obligations, it is the national government, not the regional authority, which is brought before the Court. This is important: the widespread failure to implement directives, especially environmental directives, is because regional authorities take their duties under

(BNA) 189-90 (noting that Japan has already made commitments to stabilize CO_2 emissions at 1990 levels by the year 2000).

114. Such a programmatic approach is discussed more fully *infra* section V.

115. Alan Riding, *Changes in Eastern Bloc Heighten Nationalist Yearnings of Basques*, N.Y. TIMES, Jan. 28, § 1, at 10; George Esenwein, *Can Socialists Reign in Spain?*, S.F. CHRON., Nov. 22, 1989, at A21; David H. Rosenthal, *Thriving Without a State: After Years of Repression Catalans Have Revived Their Language and Economy, and are Winning Significant Autonomy from Spain*, ATLANTIC MONTHLY, June 1989, at 20.

[EC] law less seriously than do national governments.[116]

Among the less developed regions of the EC, Spain is the most extreme example of this regional difficulty. Although all of Europe faces the problem of assuring that national legislation appropriately implements the mandates of EC directives,[117] Spain carries an additional burden. Spain's autonomous regions must implement the national environmental legislation passed in Madrid. Further, local officials possessing greater independence than officials in highly centralized states like France monitor most environmental quality standards and enforce environmental rules.[118] Thus, the ball can be dropped at many points along the course. Although the more centralized states often fail to enforce environmental standards, politically decentralized states run a far greater risk of nonenforcement.[119]

V. Regional Policy, Federalism, and Economic Development

A. *Regional Policy and Programmatic Environmentalism*

Development of regional policy may provide one way to close the gap between word and deed in EC Community environmental policy. There is a significant irony in this: large economic infrastructure projects that the European Regional Development Fund ("ERDF")

116. John T. Lang, *The Development of European Community Constitutional Law*, 25 Int'l Law. 455, 466 (1991).

117. Deidre Curtin, *Community Law Continues Advance into Domestic Forum*, Fin. Times, July 11, 1991, § I, at 6.

118. Spain's situation is complicated further by history. The historical tension between Madrid's central government and some of its peripheral regions such as Basque Country and Catalonia make coordination even more difficult. Although government officials in Madrid dislike using the word "federalism" to describe their governmental system, with its autonomous regions, the system seems to function much like a federal one. This phenomenon affects development and environmental policy. Researchers in Andalucia at the University of Seville have criticized past efforts at ecomonic development in the far south of Spain. They assert that projects aimed at economic growth in their region have exploited cheap labor and natural resources but have not significantly contributed to the permanent wealth of Andalucia. Instead, wealth has gone to economic interests centralized in Madrid or perhaps Barcelona. In some cases, wealth has left Spain altogether, a process EC membership has accelerated. Telephone Interview with Carlos Roman, Director, and Henri Earay, Graduate Student, Instituto de Desarollo, University of Seville, Spain (April 1991). Even without investigating the validity of such claims, it seems likely that the existence of such a perception would make local environmentalists wary of development efforts that necessarily will be financed by outside capital.

119. *Regional Policy: 385 Million ECUs for Portugal and Spain*, Eur. Rep., June 22, 1991, § IV, at 1; *Regional Policy: 4 Billion ECU Package of Regional Aids*, Eur. Rep., Dec. 19, 1990, § IV, at 1. David White, *Andalucia 5: Infrastructure Problems Inhibit Growth*, Fin. Times, May 15, 1987, at V.

financed since 1975 have significantly *contributed* to the EC environmental problem.[120] Nevertheless, the SEA mandates environmental protection, as well as the goal of regional development policy, namely economic convergence.[121] Projects financed by the ERDF and other structured funds should assure, rather than threaten, environmental quality.[122]

1. The Concept Behind Regional Policy

Most Americans are not familiar with the concept of regional policy. Probably the closest analogy to European regional policy would be the isolated phenomena of the Tennessee Valley Authority[123] in the 1930s and the Appalachian Regional Commission[124] in the 1960s, both of which still exist but with their original functions altered or limited. Generally speaking, however, the United States does not have a regional policy through which the United States tries to bridge the gap between the nation's most affluent and the least affluent regions.[125]

Regional policy in Europe generally tries to remedy the economic and social gaps between lagging regions and affluent regions. The lagging regions fall into two basic categories: "Objective One" and "Objective Two" regions.[126] An Objective One region is an underdeveloped or developing area that never has been as advanced, at least in recent history, as core industrialized regions.[127] An Objective

120. DARIA DARNELL, REGIONAL POLICY IN THE EUROPEAN COMMUNITY AND ITS ENVIRONMENTAL IMPACT 15, 19 (1992).

121. *Id.*

122. *See infra* notes 137-41 and accompanying text.

123. *Threat of War Brings Prosperity*, ENGINEERING NEWS-REC., Jan. 4, 1990, at 57; Richard E. Balzhiser, *A Clearer View of U.S. Energy Prospects*, CHEMICAL ENGINEERING, Jan. 11, 1982, at 75.

124. *Byrd: ARC Approves Grant to Establish Tourism Development Center*, PR NEWSWIRE ASS'N, Sept. 19, 1990, *available in* LEXIS, Nexis Library, PRNEWS File; *Appalachian Absentee Landlords Pay Minimal Local Taxes*, COAL AGE, May 1981, at 30.

125. For the purposes of regional and environmental policy analysis, a good analogy can be made between the federal United States and the EC. Although the EC's jurisdictional competence is much narrower than that of the United States federal government, for purposes of analysis one may treat the EC as a federal union. *See generally* EMILE NOEL, WORKING TOGETHER: THE INSTITUTIONS OF THE EUROPEAN COMMUNITY (European Documentation Series) (1988).

126. *See* Council Regulation 2052/88, *supra* note 9.

127. For example, in modern times Greece has always lagged behind Northern France in economic development. *See generally* Cynthia B. Schultz & Tamara Raye Crockett, *Developing a Unified European Environmental Law & Policy*, 14 B.C. INT'L & COMP. L. REV. 301, 316-18 (1991).

Two region is one that is experiencing industrial decline, in other words, a "rust belt" region.[128]

In the EC, Objective One regions would include areas such as Greece, Southern Italy, Spain, Portugal, and Ireland. Geographers have sometimes observed that such regions tend to occur on the peripheries of political units, while the core areas tend to be more developed.[129] About eighty percent of the EC's regional development funds go to these underdeveloped areas of the European Community. Environmental problems in the underdeveloped regions typically include an underdeveloped environmental infrastructure, agricultural pollution, desertification, a burgeoning tourist influx, and threats to flora and fauna from rapid new development.[130]

Objective Two regions, those experiencing industrial decline, are more prevalent in the geographical core of the political unit because these regions developed early and were successful participants in the industrial revolution. They are now suffering, however, from the same kind of industrial decline that has hit the steel belt and coal belt in the upper Midwest and Central Appalachia of the United States.[131] Their environmental problems typically include abandoned and polluted industrial sites, air and water pollution from outmoded manufacturing processes, a deteriorated infrastructure, and a lack of economic resources to remedy past environmental degradation.[132]

The EC provides regional aid in a proportion of about four to one between the Objective One and the Objective Two regions. European regional policy and related structural policies account for the second largest portion of the EC budget, amounting to billions of dollars.[133] By 1992, the EC aims to have regional development funds[134]

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128. Commission Decision 89/288, 1989 O.J. (L 112); Commission Decision 90/400, 1990 O.J. (L 206), *available in* LEXIS, Europe Library, LEGIS File.

129. *See* sources cited *supra* note 128.

130. *See* Telephone Interview with Carlos Roman and Henri Earay, *supra* note 118.

131. In the United States context, West Virginia represents various types of regions. Large areas of rural West Virginia exhibit Objective One characteristics of underdevelopment, while the rust belt problems of industrial decline exist in the northern panhandle and parts of north central West Virginia.

132. *Regional Policy: Over 2 Billion ECUs for Objective 1 and 2 Regions*, EUR. REP., Jan. 5, 1991, § IV, at 3; *Structural Funds: 60 Billion ECUs Committed to Doubling of Funds Before 1993*, EUR. REP., Oct. 27, 1990, § IV, at 5; *Regional Policy: Envireg Programme Grows in Stature*, EUR. REP., Sept. 5, 1990, § IV, at 5.

133. The Common Agricultural Policy makes up the largest part of the EC budget. Because of pressure from the United States and other nations, Europeans have attempted to decrease the percent of the EC budget dedicated to the Common Agricultural Policy. Consequently, the regional development budget has gained at the expense of the Common Agricul-

account for about twenty-five percent of its total budget—a very large amount.[135] The magnitude of this financial commitment highlights the importance of regional policy for overall environmental policy.[136]

2. Regional Programs with Environmental Impact

In order to develop and implement the EC's environmental policy, the Commission funded a variety of environmental protection projects.[137] The EC has incorporated many of these projects into LIFE,[138] the financial instrument the EC Ministers approved to help fund environmental protection programs. The EC has contributed approximately 27.6 million Ecus for projects promoting, among other things, sustainable development and the quality of the environment.[139] Other initiatives, such as ENVIREG, aim to reduce pollution in coastal areas, control and manage toxic waste, and improve environmental training programs.[140] Finally, the Commission has

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tural Policy. *See* NOEL, *supra* note 125, at 17-18; Karen Tumulty, *Nothing Short of a Miracle Needed at Trade Talks*, L.A. TIMES, June 2, 1991, at D1; Peter Montagon et al., *Governments Held to Ransom*, FIN. TIMES, July 14, 1990, § 1, at 6; Stanley Hoffman, *The European Community and 1992*, FOREIGN AFF., Fall 1989, at 27.

134. To assist in the development of its less-developed members, the EC set up a system of "structural funds." There are five major funds: the European Regional Development Fund ("ERDF"), the European Social Fund, the European Agricultural Guidance and Guarantee Fund ("EAGGF"), the European Coal and Steel Community Fund ("ECSC"), and the European Investment Bank ("EIB").

135. Council Regulation 2052/88, *supra* note 9; Council Regulation 4253/88, 1988 O.J. (L 374); *Regional Policy: No Substantial Improvement for Regions, Claims Millan*, *supra* note 7.

136. Regional policy expenditures are now budgeted under the structural funds, newly reorganized by the EC. The larger structural funds grouping includes programs, in addition to regional policy, that aim to remedy long term economic ills and disparities, whether sectoral or territorial. Structural fund reforms require integrated cooperation of the EC officials with national, regional, and local officials. In the underdeveloped Objective One areas, such programs promote the building of an infrastructure that never existed—bridges, sewers, electric plants, water treatment centers—plus intangibles such as job training and consulting for small firms and medium size enterprises. In Objective Two areas, they mandate the rehabilitation of declining industrialized regions in a physical sense, such as reclaiming derelict industrial sites, and in an intangible sense, such as funding worker retraining. Council Regulation 2052/88, *supra* note 9; Council Regulation 4253/88, *supra* note 135.

137. *See LIFE: Selection of First Projects to be Funded*, EUR. ENERGY, Sept. 25, 1992, *available in* LEXIS, Europe Library, ALLEUR File.

138. Council Regulation 1973/92 of 21 May 1992 Establishing a Financial Instrument for the Environment ("LIFE"). LIFE incorporates the Mediterranean Environment Plan ("MEDSPA"), the Northern Coastal Area Protection ("NORSPA"), and the Nature Conservation ("ACNAT") environmental and nature conservation initiatives that the EC Ministers adopted in 1990 and 1991. *LIFE: Selection of First Projects to be Funded*, *supra* note 137.

139. *LIFE: Selection of First Projects to be Funded*, *supra* note 137.

140. *See EC: Commission Grants 92M Ecus to Envireg Programme*, AGENCE EUROPE, Oct. 8, 1991, *available in* LEXIS, Europe Library, ALLEUR File.

proposed an amendment to the EC Directive on Environmental Impact Assessment which would strengthen the environmental protection aspects of the Directive.[141] These programs and activities indicate that, despite any shortcomings EC regional policy may have, the EC is committed to addressing environmental protection issues.

B. Comparison to the United States

The European approach to the environmental problems affecting lagging regions seems superior to that of the United States in a few respects. Although there is often a tension between the environment and development, the problem does not seem nearly as fundamentally intractable in Europe. First, Europeans accept the very notion of regional policy more than Americans do.[142] For Europeans, planning is a very important and acceptable economic tool. They do not expect the "magic of the market" to do all things and meet all human needs. Such "market magic" may not work with the interaction between environment and development, but through regional policies may very well have both environmental and economic advantages. Even if developing an environmentally-clean public development projects requires a greater short-term investment, the long-term gains from such planning will most likely compensate front-end costs.[143] In order to promote economic development, states offer tax advantages and a lenient regulatory climate. Major United States corporations often relocate to such a state, often in the sun belt, which has less stringent environmental enforcement, pro-management labor laws, and tax advantages.[144] The EC, on the other hand, mandates overall planning that prevents pernicious competition between underdeveloped regions that are often under environmental stress.[145] The European system of

141. *See* Coopers & Lybrand, *Environment*, EC COMMENTARIES (Feb. 18, 1993), *available in* LEXIS, Compny Library, CLE File. The EC Directive on Environmental Impact Assessment is part of the EC program on preventative action to protect the environment. The Directive ensures that developers and national authorities consider environmental effects in their project proposals. *Id.* The new proposal for the Directive would broaden its scope "to ensure that an environmental impact assessment is made of even more plans and programmes . . . ." *Id.*

142. JEFFREY HARROP, THE POLITICAL ECONOMY OF INTEGRATION IN THE EUROPEAN COMMUNITY 109-11 (1989).

143. *See generally Environmental Policy in the European Community*, EUROPEAN DOCUMENTATION 13-14 (Periodical 5/1990).

144. This attitude has also been referred to as the "race to laxity."

145. *Congressional Research Service Report on Implications for Economic Policy and Labor Legislation of Decline in Union Membership*, DAILY LAB. REP., June 13, 1986, at D1.

rational planning, environmental assessment, and the absence of regional competition in environmental laxity is preferable to the approach of the United States.

Until recently, environmental policy has been largely regulatory policy in both Europe and the United States. The term "regulatory policy" refers to negative government prohibitions on certain kinds of activity or affirmative government mandates for particular action.[146] The advantage of this regulatory approach is the low cost: the expense of passing a law and maintaining some level of bureaucracy is relatively inexpensive. On the other hand, programmatic activity such as the Common Agricultural Policy stands in sharp contrast to regulatory policy.[147] Government is actually performing some kind of substantive function that costs much more than mere regulation. The environmental advantage from the convergence of regional policy and environmental policy is this: not only do the Europeans have the "stick" of their environmental directives available to demand certain levels of sulphur or nitrogen or certain modes for transporting wastes; they now have the "carrot" of using development money for affirmative environmental projects. The United States has nothing similar to this comprehensive approach that makes programmatic funds available for affirmative environmental development projects. Perhaps Superfund[148] is the closest example in the United States, but Superfund has not been a great success and is not coordinated with overall development planning.

This comparison indicates that while there is a tension between environment and development in the EC, Europeans have the tools and the attitude to deal with that tension better than any approach taken the United States. There is no assurance that the Europeans will succeed in protecting their environment, either in absolute or relative terms. Yet the structure they have begun to implement, the structure they have started to set up, partly motivated by the movement toward a single Europe, seems to be a structure in which they should take guarded pride.

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146. *See, e.g.*, EEC TREATY tit. V (as amended 1987).

147. In the latter case, the government acts on others, demands of others, or prohibits others, but does not provide the programs itself.

148. The Superfund was part of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), 42 U.S.C. §§ 9601-9657 (1988). CERCLA was intended to bring order to the assortment of redundant, inadequate federal hazardous substances cleanup and compensation laws.

VI. Prospects and Conclusion

The EC is well positioned to set an example for multiregional environmental goals. It is similarly well situated to promote such environmental progress in harmony with economic development.[149]

In the last six years, the EC has twice broken through political barriers in furtherance of European unity. First, the SEA took effect in the latter 1980s along with the program for the single market by 1992. Second, in December, 1991, the Maastricht Summit finalized the new European Unity Treaty. Both these historic phenomena increased the stature and enforceability of EC environmental policy within their broader program to promote European unity. The EC has given the environment priority in policy making and program design. Further, the pro-environment European Parliament now has greater legislative power because enacting environmental law is easier with majority voting. The European Court of Justice has backed pro-environment legislative procedure.[150] Finally, new institutions have been formed with environmental mandates.

Despite such apparent gains, however, the sailing is far from smooth for significant environmental progress in Europe, partly because of generally troubled EC waters and partly because of rocks and shoals particular to the EC environment program. While the EC has articulated laudable ecological goals and norms with increasing frequency and force, their application has lagged. The admitted enforcement problem is huge, and the dearth of comprehensive environmental statistics makes it impossible to gauge the problem's form precisely, let alone pursue an effective enforcement strategy. The recent European reaction against the bureaucratic centralism of the EC has stalled the ratification of the Maastricht Treaty and cast doubt on the Commission's ability to wield increased environmental enforcement power. Rather, the emerging rhetoric of "subsidiarity" leaves environmental enforcement (or non-enforcement) to the states and perhaps yields significant norm-setting powers to the national capitals. Disharmony in the monetary policy, agricultural subsidies, external relations, and EC spoils has created an uncooperative atmosphere in which environmental progress has suffered — witness the inability to start the operations of the EEA due to nationalistic bicker-

149. *See generally* Frederick R. Anderson, *Negotiation and Informal Agency Action: The Case of Superfund*, 1985 Duke L.J. 261 (1985); James R. Buckley, Note, *The Political Economy of Superfund Implementation*, 59 S. Cal. L. Rev. 875 (1986).

150. *See generally* Schultz & Crockett, *supra* note 127.

ing over the site of its headquarters. Lack of financial resources, especially in the poor countries with the weakest implementation and enforcement, exacerbates these problems. Additionally, the Southern states chafe under a sense of cultural near-sightedness, perceiving that the existing EC environmental norms focus on issues of greater interest to the North and ignore Southern ecological concerns like desertification. But Europeans seem to recognize all these problems and are trying to move their environmental reality closer to their environmental ideals.

The EC will likely dominate modern Europe. Proximity and growing economic strength, especially for Germany, may cause the former Communist states to turn to the EC for guidance and well being.[151] Already, environmental laws in some emerging Eastern states are mimicking EC norms, both to improve terribly deteriorated environmental conditions and to win EC approval, economic aid, and association. That such norms prove enforceable in the West is a key to their future in the East. Support for these environmental standards and sustainable economic development is perhaps even more critical to the struggling new democracies than to the members of the EC.

Beyond Europe, developing nations face even greater combined stress from underdevelopment and environmental damage. Europe can help the Third World realize environmentally sound development through its traditional connections with these countries and the experience Europe is now gathering in environmental enforcement in harmony with economic growth.

Western Europe is in a position to lead the world in environmental progress. The EC's willingness to make a commitment to the environment bodes well, as does its apparent recognition that environment is not just a matter of regulation, but of ecological soundness within all its programs. The key question that remains is whether nationalism and other forms of special interest parochialism will frustrate Western Europe's opportunity for international

151. See *Court of Justice Annuls EC Directive on Reducing Titanium Dioxide Industry Waste*, 14 Int'l Env't Rep. (BNA) 325 (June 19, 1991). For example, in Commission v. Council, the Court of Justice held that the EC Council was wrong to base an environmental directive on an EC Treaty of Rome article that requires a unanimous vote from member state governments. Instead, the Court followed the Commission's reasoning: directives that include both environmental and internal market measures should be based on Article 100(a), the single market provision. As a result, such a directive would require a majority vote. Case C-300/89, Commission v. Council (1991) (not yet reported).

leadership.[152]

152. *See* Schultz & Crockett, *supra* note 127, at 304-10.