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The European Community In 1992: An Integrated Approach to Economy and Ecology

I. INTRODUCTION

The environmental crisis has assumed international dimensions.¹ Today, virtually every kind of pollution can be transmitted across state and national lines. Several catastrophes in Europe illustrate the scope of the environmental crisis and the necessity for international cooperation. In 1976, a chemical explosion in Seveso, Italy forced restriction of food sources and evacuation of contaminated areas in both Italy and Switzerland.² In 1986, a Soviet nuclear power plant explosion resulted in the evacuation of 135,000 people within an eighteen mile radius and caused fallout damage throughout Europe.³ Six months later, firemen combating a chemical fire in Switzerland washed "824 tons of insecticide, 71 tons of herbicide, 39 tons of fungicide, 4 tons of solvents, and 12 tons of organic compounds containing mercury into the Rhine river."⁴ The consequences for France, Germany, the Netherlands and Switzerland were catastrophic.⁵

In addition, other quiet disasters—such as the international problem of transboundary acid rain—are occurring throughout

1. Pope John Paul II, in his annual message for the Roman Catholic Church's World Day of Peace, made a plea for all nations to start behaving wisely in connection with the environment. He rebuked industrialized nations as the "privileged few . . . selfishly wasting resources while millions of people live in squalor," and warned developing countries that they were "not morally free to repeat the error made in the past by others and recklessly continue to damage the environment." N.Y. Times, Dec. 6, 1989, at 7, col. 1.

2. Initially, officials waited 27 hours before notifying the local authorities of the accident. Seven days later, the authorities were notified of chemical pollutants in the air. The effects of the disasters ranged from hundreds of cases of skin disease to loss of revenue from produce, furniture, clothing, etc. Decontamination required the removal of more than two tons of chemical waste from 4,400 acres of land. See Nanda & Bailey, *Challenges for International Environmental Law—Seveso, Bhopal, Chernobyl, The Rhine and Beyond*, 13 COLUM. J. ENVTL. L. 1, 2-4 (1988).

3. The "Chernobyl incident" initially resulted in numerous deaths. The ultimate toll of related deaths cannot be accurately measured, but estimates by experts range in the thousands. Increased levels of radiation caused the European Community to impose a temporary ban on food imports from the areas affected by the Chernobyl incident. *Id.* at 10-14.

4. *Id.*

5. *Id.*

the world.⁶ From a global perspective, the environment and the economy are integrally entwined. Nations must cooperate in order to halt further degradation of the environment. In the past, economic concerns have prevented governments and private industry from rectifying large-scale environmental problems. However, given the catastrophic consequences of neglect, society must "change its economic calculus and explicitly recognize that the dispersion of wastes into the air and water is not a free good, the disposal of solid wastes is not a free good, and the long-term health effects of exposures to toxic substances is not a free good."⁷

Amid the chaos of environmental destruction, the European Community (EC) has emerged as a leader in the effort to solve global environmental problems cooperatively.⁸ The EC has achieved progress through specific directives and four comprehensive environmental programs. Initially, EC goals focused on establishing free trade among member states.⁹ Environmental issues received low priority because they were not directly linked with trade and commerce. Recently, however, the EC has taken a new direction by addressing environmental issues along with economic goals.¹⁰

6. Norway, Sweden, Switzerland, Eastern Canada and the Netherlands have encountered the most serious damage from acid rain. In response, these countries have implemented stringent air control measures. However, their action can address only 40% of overall air pollution. Sixty percent of the sulfur dioxide originates in other nations. Westone, *Acid Rain in Europe and North America: U.S. Lags in Commitment to Control*, 13 *Envtl. L. Rep. (Envtl. L. Inst.)* 10096 (1983). Thus, the countries most heavily affected by pollution must rely on neighboring polluters to rectify the problem.

7. Barnes, *The Growing Dimension to Environmental Issues*, 13 *COLUM. J. ENVTL. L.* 389, 390 (1988).

8. For example, after the chemical explosion in Seveso, EC member states agreed to a unified recovery plan and adopted the Seveso Directive. The Seveso Directive pooled environmental experts, established an accident alarm and notification system, minimized economic disadvantages of industrial safety controls, and addressed special circumstances in which industry location affected international boundaries. Member states also agreed to a uniform system of installation, transportation, and storage of hazardous waste. *Id.*

Also, following the Chernobyl incident, the EC established uniform standards on acceptable levels of radioactivity and began developing an inspectorate to monitor safety standards. *Id.*

9. The EC originated in 1957 with the Treaty Establishing the European Economic Community, signed March 25, 1957, 298 U.N.T.S. 3 (effective Jan. 1, 1958) [hereinafter cited as Treaty of Rome]. An English translation is located at 1 *Comm. Mkt. Rep. (CCH)* ¶ 151 (1971). Noel, *Working Together—The Institutions of the European Community* 3 (Official EC Publication, 1982).

10. Geddes, *1992 and the Environment—Sovereignty Well Lost?* 138 *NEW L.J.* 826 (1988).

1992 promises to begin a new era dedicated to protecting the environment in Europe. 1992 EC policies seek to establish uniform environmental standards by explicitly addressing economic and environmental issues together. The EC takes a quality-oriented approach to controlling pollution,¹¹ combining international and national government regulation with a "polluter pays" emphasis and with economic incentives. This approach attempts to reduce both physical and economic harm caused by pollution and may provide a model for future international efforts to control pollution.

Part II of this comment traces the development of EC environmental law from the Treaty of Rome to the present, examines Treaty provisions and their limitations, and details the four environmental programs enacted from 1973 to 1987. Part III analyzes the advantages and disadvantages of the EC's approach to a cooperative environmental policy. Finally, Part IV concludes that, although the EC must make a greater effort to implement its environmental policy, the EC approach provides a model for international cooperation on environmental issues.

II. DEVELOPMENT OF THE EC'S ENVIRONMENTAL POLICY

Environmental degradation was an unforeseen problem when the Treaty of Rome was concluded in 1957. Thus, the early Treaty neither expressly addresses environmental concerns, nor does it contain the words "environment" or "pollution." The primary purpose of the Common Market is to facilitate the free circulation of goods, services, people and capital. Consequently, original EC "environmental policy [was] not directly linked with the establishment and functioning of the Common Market."¹² When environmental issues surfaced in the 1960s, the EC derived a tenuous legal basis for addressing these environmental issues from the general provisions of the Treaty of Rome.¹³ The

11. Industrialized society's heavy dependence on natural resources is not likely to revert to accommodate a more simplistic lifestyle. Therefore, a realistic approach to the pollution crisis—one that recognizes that since the production of pollution will not stop, society must seek effective means to minimize the harm—is necessary.

12. E. REHBINDER & R. STEWART, 2 INTEGRATION THROUGH LAW: ENVIRONMENTAL PROTECTION POLICY 15 (1985).

13. Other treaties provide additional building blocks for EC environmental policy. The Treaty Establishing the European Coal and Steel Community, (*signed* April 18, 1951, *reprinted in* K.R. SIMMONDS, EUROPEAN COMMUNITY TREATIES (Sweet & Maxwell 1975)) covers limited pollution control policy for the coal and steel industry. The Euratom Treaty (*Id.*, Treaty Establishing the European Atomic Energy Community,

Community reasoned that the economic aims established by the Treaty also encompassed environmental issues because promotion of balanced economic growth included qualitative as well as economic elements.¹⁴

The jurisdictional basis for European Community-wide environmental policy was derived indirectly from Articles 36, 100 and 235¹⁵ of the Treaty.¹⁶ Fortunately, the European Court of Justice adopted a broad interpretation of these articles.¹⁷ Although most member states accepted this interpretation, the articles remained fundamentally weak because their scope was too narrow to constitute a comprehensive environmental policy.¹⁸

signed March 25, 1957) deals with health and safety problems arising from the operation of nuclear power plants. The treaty establishes uniform safety standards to protect the health and safety of workers and the public and also requires member states to inform the Commission before discharging radioactive substances. The Commission can then determine the possible contaminating effects on other member states. In an emergency, the Commission may also issue a directive to require member states to prevent infringements on basic standards.

14. Grant, *Implementation of the EC Directive on Environmental Impact Assessment*, 4 CONN. J. INT'L L. 463, 510-11 (1989).

15. Article 36 authorizes member states to limit imports and exports to protect the health and life of persons, animals, and plants. By implication, member states are vested with the basic responsibility for environmental protection. Treaty of Rome, *supra* note 9.

Article 100 provides for the harmonization of member states' laws authorizing Community directives "for the approximation of such provisions laid down by law, regulation or administrative action in Member States as directly affect the establishment or functioning of the common market." *Id.*

Article 235 provides that the Council, by unanimous action, may take "appropriate measures" to "attain, in the course of the operation of the common market, one of the objectives of the Community" when the "Treaty has not provided the necessary powers" to do so. *Id.*

16. Articles 43(2), 75(1)(c), 84(2) and 200, which address the common agricultural and transportation policies, give the EC indirect jurisdiction over environmental protection measures. *Id.* However, their scope of application and relationship to Article 100 have been hotly debated. See E. REHBINDER & R. STEWART, *supra* note 12, at 19.

17. In the 1980 decision of *Commission v. Italy*, 30 COMM. MKT. L.R. 331, 343 (1980) (cases 91-92/79), the Court held that Article 100 could be a basis for environmental action because a lack of harmonization of national environmental policies may distort competition. The Court argued that different national requirements on products clearly have a direct effect on the Common Market, and stated in dictum that provisions on the environment may be based on Article 100 of the Treaty. "Provisions which are necessary by considerations relating to the environment and health may be a burden upon the undertakings to which they apply and if there is no harmonisation of the national provisions on the matter, competition may be appreciably distorted."

18. Viewed liberally, the articles' provisions cover all environmental problems relating to agriculture or transportation. Viewed narrowly, by contrast, the articles only justify Community action toward environmental protection with economic objectives. Thus, when the Community expands into the area of environmental law and policy without any express authority, it does so at the expense of member states. E. REHBINDER & R. STEWART, *supra* note 12, at 19-20.

Aside from the provisions embodied in the Treaty, the EC can regulate member states' activities by three types of legislation: regulations, decisions, and directives. A regulation takes effect within each member state without further action by that state's government. A decision also binds member states but is generally limited to non-routine legislative matters. A directive¹⁹ orders each member state to adopt or amend legislation²⁰ in conformity with the corresponding EC directive.²¹ A deadline is set in which member states must adopt, publish and implement the EC provisions into their national legislation.²² Implementation through national legislation or administrative action is necessary before the directive is binding upon individuals.²³

EC environmental directives affect member states in the following ways: (1) heavy emphasis on environmental issues insures that environmental concerns will be considered in the planning stages; (2) EC external controls facilitate information sharing and compliance; and (3) expanded discretion decreases the need for judicial review.²⁴

In the 1970s, environmental issues began to generate widespread concern. During this period, the EC recognized that a decentralized approach to pollution control could not solve systemic environmental problems. In a 1972 meeting of the member states, the EC adopted an official environmental policy based on principles of uniform regulations and market participation.²⁵ For

19. There are different types of directives. Result-oriented directives are "typical" directives. Regulation-type directives contain detailed substantive provisions (such as prohibitions, standards and tolerances) and provisions for implementation (such as testing and measurement methods). Framework directives set out the objectives and basic principles applicable to a broad area of concern. Usually, a framework directive is binding on member states and must be incorporated into state law.

20. Article 189(3) of the Treaty of Rome states that Community directives "shall be binding as to the result to be achieved" but shall leave Member states "the choice of form and methods." Treaty of Rome, *supra* note 9, art. 189. A directive has "binding force in respect of the result to be achieved [by] every Member State to which it is addressed, while it is left to the discretion of the national authorities to choose the form and methods of enforcing [it]." Kelly, *International Regulations of Transfrontier Hazardous Waste Shipments: A New EEC Environmental Directive*, 21 *TEX. INT'L L.J.* 85, 90 (1986) (quoting Kapteyn & VanThemaat, *Introduction to the Law of the European Communities*, 110 n.19 (1973)).

21. *European Environmental Laws & Regulations*, Government Institutes, Inc. I-10 (1983).

22. *Id.* at II-7.

23. Kelly, *supra* note 20, at 90-91.

24. Grant, *supra* note 14, at 476.

25. A uniform environmental policy was necessary in a common market if industry and commerce were to compete on equal terms. Failure to agree would open the door to

the first time, the official environmental policy reinforced the close relationship between the environment and the economy.

The first EC environmental action program extended from 1973 to 1977²⁶ and focused mainly on pollution control. The program recognized six principles to guide EC environmental policy.²⁷ Although the first program was too vague and general,²⁸ it at least established principles and priorities for an EC environmental policy.²⁹ In addition, the program described the environmental measures to be taken in the following two years and "added a new dimension to the construction of Europe"³⁰ by opening a new field for EC action provided for in the Treaty of Rome.³¹

Furthermore, the first program amended the EC's harmonization program to increase responsiveness to environmental concerns. At the Paris Summit Conference in October, 1972, various heads of state endorsed a Commission initiative for a common EC environmental policy and a "Programme of environmental action of the European Communities." This initiative was for-

divergent national environmental measures, leading to unequal production costs and a consequent distortion of competition. *Id.* at 508, 510.

26. The full name of the program is "Declaration of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council on the Action Programme of the European Communities on the Environment" [hereinafter First Program].

27. These six principles are:

1. Prevention is a more effective environmental policy than *ex post facto* cure of pollution.
2. Polluters are to be financially responsible for the costs of prevention and control of pollution (known as the "polluter pays" principle).
3. The most appropriate decision-making level must be sought for each type of action; therefore, the Community will only act where:
 - a. national action would be ineffective,
 - b. there is a common interest,
 - c. divergent national action would cause major economic or social problems.
4. The Community will make an environmental impact assessment.
5. Efforts will be made to prevent transboundary pollution.
6. Member states are given the power to enact more stringent national measures than those provided by the Community. First Program, *supra* note 26.

28. E. REHBINDER & R. STEWART, *supra* note 12, at 59.

29. *Id.* at 17.

30. Seventh General Report of the European Communities (Brussels 1973) n.9, point 258.

31. E. REHBINDER AND R. STEWART, *supra* note 12, at 17-18.

mally approved by the Council and representatives of member states on November 22, 1973.³²

The second environmental action program³³ extended from 1977 to 1982.³⁴ This second program added several new sections on waste management, noise control and nuclear energy. Although still quite general, greater emphasis was placed on pollution prevention.³⁵

This program promoted the Environment and Consumer Protection Service to a Directorate General for the Environment, Consumer Protection and Nuclear Safety, increasing the authority and significance of environmental protection services within the EC and demonstrating EC commitment to the environment.³⁶

The first and second programs were retroactive in scope and remedial in application. Their primary task was to remedy the harm caused by industrial society. By the early 1980s, however, the EC recognized that remedial action alone was insufficient. Preventive measures were needed. Pollution may be controlled more effectively, efficiently, and with greater health benefits when confronted prior to the development of an economic enterprise. Thus, in 1982, the EC adopted a third program which emphasized safeguarding the environment and natural resources before engaging in economic ventures.

The third environmental action program³⁷ extended from 1982 to 1986. It addressed problems of pollution control, ecological balance, and improved living conditions. It placed even greater emphasis on preventive aspects of environmental protec-

32. 16 O.J. EUR. COMM. (No. C 112) (1973); 16 O.J. EUR COMM. (No. C 177) 1 (1973).

33. The full name of this program is the Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting in the Council on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment [hereinafter Second Program].

34. Kelly, *supra* note 20, at 89.

35. The following measures were among the most prominent and concrete:

1. environmental impact assessment;
2. ecological mapping of the Community;
3. establishment of a resource economy (i.e., recycling of wastes);
4. redirection of Community industrial policy according to environmental considerations. Second Program, *supra* note 33.

36. E. REHBINDER & R. STEWART, *supra* note 12, at 18.

37. Resolution of the Council of the European Communities and of the Representatives of the Governments of the Member States Meeting Within the Council on the Continuation and Implementation of a European Community Policy and Action Programme on the Environment [hereinafter Third Program].

tion than did the second program, especially rational use of land and natural resources.³⁸ Noise control and hazardous waste transboundary transportation received special emphasis.

An era of increasing interest and concern with the environment began. During the previous decade (1973-1983), over seventy legislative texts concerning environmental policy were adopted.³⁹ From 1976 to 1987, the EC implemented more than one hundred measures covering areas such as nuclear safety and radioactive waste, water, air and noise pollution, conservation of flora and fauna, and waste management and clean technology.⁴⁰ The EC also entered into more than twenty international agreements concerning subjects ranging from marine pollution to the conservation of migrating animals.⁴¹

In 1987, the EC implemented a fourth program, commonly referred to as the Single European Act.⁴² The SEA established environmental protection as a top EC priority⁴³ by making environmental protection an essential element of all economic and social policies.⁴⁴ Member states amended the Treaty of Rome to include a section on the environment and established a clear legal basis for Community jurisdiction in this area. The SEA actually inserts the word "environment" into the Treaty and thus gives a "constitutional" base to the EC's environmental policy.⁴⁵

Based on the principle of preventive action, newly added Articles 130r through 130t⁴⁶ provide that environmental damage should, as a priority, be rectified at its source, that the polluter should pay, and that environmental protection must be a component of the EC's other policies.⁴⁷ "The breadth of [the SEA's]

38. E. REHBINDER & R. STEWART, *supra* note 12, at 58, 60.

39. *Id.* at 18.

40. Geddes, *supra* note 10, at 826.

41. *Id.*

42. Single European Act, BULL. E.C., Supp., Feb., 1986 [hereinafter SEA].

43. *Id.*

44. *The European Community and Environmental Protection*, Commission of the European Communities, Directorate-General for Information (March 1987).

45. Vandermeersch, *The Single European Act and the Environmental Policy of the European Economic Community*, 12 EUR. L.R. 407 (1987).

46. Article 130r sets out the new policy objectives as follows:

- 1) "to preserve, protect and improve the quality of the environment;"
- 2) "to contribute towards protecting human health;"
- 3) "to ensure prudent and rational utilization of natural resources."

47. Article 130s establishes a legislative process for the creation of Community environmental law. Article 130t restates the directive rule that member states may impose more stringent protective measures of their own.

objectives and the complexity of its detail sets out to accomplish nothing less than a revolution in the way Community man treats the earth, sea and air which surround him and on which he depends for his existence."⁴⁸

The environmental portion of the SEA has four important themes. The first theme raises environmental policy to "an essential component of the economic, industrial, agricultural and social policies implanted by the Community and its member states."⁴⁹ Accordingly, the Commission intends that "all economic and social developments throughout the Community whether undertaken by public or private bodies or of a mixed character have environmental requirements built fully into their planning and execution."⁵⁰

The second theme identifies specific areas of concern in agriculture, industry, transportation, tourism, and international cooperation.⁵¹ The third theme sets out an ambitious program for conserving nature and natural resources. The program prescribes "a Community instrument aimed at protecting not just birds but all species of flora and fauna, not just the habitats of birds but the habitats of wildlife—animals and plants—more

Article 100A will most likely have the greatest impact on the Community law-making process. It provides in part:

1. The Council shall, acting by a qualified majority on a proposal from the Commission . . . adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in the Member States which have as their object the establishment and functioning of the internal market.
2. The Commission, in its proposals envisaged in paragraph 1 concerning health, safety, *environmental protection* and consumer protection, will adopt a high level of protection as a base.

See Lomas, *Environmental Protection, Economic Conflict and the European Community*, 33 MCGILL L.J. 506, 512 (1988).

Furthermore, Article 100B reemphasizes the harmonization of national laws, specifically including environmental laws. *Id.*

48. Geddes, *supra* note 10, at 826.

49. *Id.*

50. *Id.*

51. The SEA defines the following as the five most important areas:

1. *agriculture*, especially problems of soil erosion, control of agro-chemicals, treatment of agricultural waste and conservation of species' habitats and landscapes;
2. *industry and energy generation*, particularly regarding pollution control, clean technologies and waste management;
3. *transport*, in relation to atmospheric and noise pollution and landscape impact;
4. *tourism* and its impact on Europe's national and architectural heritage; and
5. *international cooperation* in coping with problems such as acid rain, genetic engineering and transborder shipment of wastes.

Id. at 826-27.

generally."⁵² The program cites an earlier policy statement regarding the protection of animals:

[T]here are many questions raised by the exploitation of animals in Europe: the use of animals for experiments, factory farming, trade in animals and the processing of animals for consumption purposes. The Commission will examine all possible steps which can be taken in this connection. . . . [I]t is important in the context of the Fourth Environment programme to put some flesh on this brief statement.⁵³

The fourth theme concerns the problem of urbanization with its accompanying problems: rural depopulation, inner city decay, poor housing, overloaded infrastructure and consequential degradation of the quality of life. To solve these problems, the Commission proposed several regulations and directives which impose Community-wide standards.⁵⁴ Furthermore, the Commission stated its intent to enforce these measures more rigorously than ever. Nations who cooperate and comply with the new regulations and directives will receive funds to compensate for resulting loss of profits, to help with research, and to subsidize the replacement of environmentally harmful industrial processes with clean technologies.

III. ANALYSIS OF THE EC'S ENVIRONMENTAL POLICY

A. *Advantages of the EC's Approach*

EC environmental policy contains many strengths including, perhaps most importantly, a commitment to cooperation between participants. A continent of many nations possesses diverse socio-political systems, sub-groups of military, political and economic alliances, and non-coinciding national aims and interests.⁵⁵ The EC seeks to overcome these differences by addressing common objectives, promoting ecological safety, and adopting a cooperative approach throughout the Community.

Limited land area and interdependence make cooperation a necessity for European countries. Because of their small land

52. *Id.*

53. *Id.* at 827.

54. For example, uniform standards on exhaust emissions and water purity were set and similar bans on the use of chemicals harmful to the atmosphere (such as fluorocarbons) were imposed.

55. Timoskenko, *International Legal Problems of Environmental Protection in The European Region*, 4 *CONN. J. INT'L L.* 441, 452 (1989).

masses, many European countries cannot be self-sufficient and must rely on other countries for resources, waste disposal and other necessities.

The Netherlands and Germany are illustrative. In the Netherlands, waste management is the focus of public concern. The country has many large, old, contaminated waste areas. Limited land space adds to this problem because the geology, topography and dense population make new land disposal facilities difficult to locate. In Germany, the population density is such that there are few unpopulated areas. Consequently, the country must take extra precautions to manage existing land space in the best possible fashion.

The correlation between land space and cooperativeness is further substantiated by drawing a comparison between larger, more self-sufficient countries such as Britain and the United States. Britain, larger and more independent than its neighboring European countries, is also the largest emitter of air pollution in Western Europe. Until recently, Britain denied responsibility for the pollution problems in downwind countries and rejected suggestions that it implement costly control programs. However, Britain has stated that transboundary air pollution concerns will be considered in future developments. Whether positive action will be taken in addressing these concerns remains to be seen.

Arguably, the United States has demonstrated an even more uncooperative attitude. Reagan administration policies relaxed emission standards, and the EPA ruled that international impacts need not be considered in the relaxation of emission limitations. Although the United States does not share a border with Europe, ignoring pollution problems will cause serious international consequences. Problems between the U.S. and Canada have already arisen. If the U.S. were more dependent on other countries, it would have added incentive to conform with international policy and a cooperative approach would be expected.

With each successive environmental program, the EC has become more land-use conscious. The third directive explains some of the factors accounting for this trend:

Land in the Community is very limited and [a] much sought after natural resource. The way in which it is used very largely conditions the quality of the environment. Physical planning is

therefore one of the areas where a preventive environment policy is very necessary and very beneficial.⁵⁶

Ultimately, land limitations provided the impetus for flexible solutions to environmental concerns. Such flexibility is a major advantage of the EC environmental policy.

1. Emphasis on flexibility, dissemination of information, and education

The EC allows member states to develop environmental solutions based on their own needs. The EC tailors its governmental and economic action in accordance with the particular type of pollution and the geographical area affected. If a program is effective at a particular governmental level, it will remain operative without threat of preemption by higher authority. This practice allows the EC to maintain uniform standards while permitting individual flexibility. Member countries enjoy latitude in implementing the directives within their own borders. Waste management programs illustrate the resulting diversity that can occur. For instance, the Netherlands' waste management is controlled on a national level and to a lesser extent by provinces.⁵⁷ By contrast, Belgium is controlled regionally with an emphasis on gathering and sharing information.⁵⁸ Germany operates much like the U.S., with national regulations enforced through the states.⁵⁹ France's hazardous waste is also handled nationally through regulations.⁶⁰ Britain likewise endorses national regulation, while leaving enforcement to local authorities.⁶¹

56. Clark & Herrington, *The Role of Environmental Impact Assessment in the Planning Process* (1988) (quoting Commission of the European Communities, 1983, art. 26).

57. Williams, *A Study of Hazardous Waste Minimization in Europe: Public and Private Strategies to Reduce Production of Hazardous Waste*, 14 B.C. ENVTL. AFFAIRS 165, 178 (1986-87).

58. *Id.* at 171-72.

59. *Id.* at 176.

60. The French government has developed a financial agency that collects fees on discharges of pollutants in the water. The revenues subsidize the cost of treatment equipment and other management methods. France, concerned that flat limitations would encourage illegal dumping, has been reluctant to implement strict regulation. Instead, the government favors subsidies and other measures. However, the cost of proper disposal and treatment remains high, and the emphasis on fees has not created enough incentive to minimize the waste. *Id.* at 172-76.

61. Britain's particular system provides little national review and lacks consistent application. Britain dislikes uniform controls, preferring individualized controls at the source. Britain's system defines hazardous wastes only in terms of harm to humans, ig-

Auto emissions are similarly regulated by uniform EC standards which are implemented in a variety of ways. In the 1960s and 1970s, West Germany imposed an emissions policy that threatened the EC's uniform system, thereby posing a potential obstacle to trade between member states. The Community issued Directive 70/220/EEC,⁶² which limited vehicle emissions across the EC⁶³ to avoid possible inequities. Member states chose various methods of compliance, some much more stringent than others.⁶⁴ In June, 1989, the EC took further action to curb auto pollution by agreeing to impose stricter emission standards in 1992.⁶⁵

Ultimately, the EC sets mandatory uniform standards which member states may meet in any manner they see fit. The range of possibilities for each member state is broad, allowing individual needs to be met in the most functional and effective manner. This approach has achieved promising results.

Each member's potential for success is furthered through the EC's emphasis on gathering and disseminating information. In this manner, member states and industries stay current on environmental developments in technology, enforcement, legislation, and protection. Many tasks essential to environmental control are almost impossible without accurate information.⁶⁶ By

noring other potential harms. Thus, regulatory and economic pressures to avoid hazardous waste or to recycle when possible are very low. *Id.* at 179.

62. 13 J.O. COMM. EUR. (No. L 220) 1 (1970).

63. Williams, *supra* note 57, at 179.

64. In West Germany and the Netherlands, where auto emissions threaten forests and other parts of the environment, stiff regulations require the use of unleaded gasoline. While countries such as Great Britain, France, Italy, Portugal and Greece have been relatively indifferent to auto pollution control in the past, they too are developing stiff regulations of their own. In Great Britain, some auto companies are even offering catalytic converters at no extra charge. Other Western European nations have followed Britain's lead by taxing leaded gasoline until it retails 10 to 20 cents more per gallon than unleaded. See Prokesch, *Europe Takes on Auto Pollution*, N.Y. Times, Oct. 2, 1989, at 1, col. 1.

65. The new standards will apply to new small cars, and possibly trucks and other heavy duty vehicles as well. *Id.*

66. A recent example of the benefits of information sharing is found in the chemical control area. The EC adopted a system for classifying and labeling dangerous chemical substances. More than 1,000 substances have been given an EC label, which identifies the chemical and provides a warning symbol and standardized risk and safety phrases. When the U.S. adopted The Toxic Substance Control Act, 15 U.S.C. § 2601-71 (1988), the EC responded quickly by developing a new chemical notification law, and working with the U.S. and other industrialized nations "to develop internationally harmonized procedures for testing, hazard assessment and governmental use and exchange of information relating to chemicals." Whitehead, *E.C. Environmental Policy is Model for*

providing access to information, the EC also prevents individual national measures from adversely affecting the functioning of the common market. Sharing technical, practical and scientific expertise allows member states to learn from each other's experience.

Another positive aspect of the EC program is the incorporation of environmental policy into the educational system. The EC, realizing that the need for environmental protection concerns all citizens, views education as a means to address environmental issues. The EC Committee envisaged continuous environmental education at all levels of society.⁶⁷ Raising environmental concerns within the school systems generates both immediate and long-term positive effects. Immediate benefits stem from the attention directed at current environmental problems. Long-term benefits occur as students mature after having been exposed to conservationist values.⁶⁸

2. Availability of legal recourse

A problem inherent to many international treaty organizations is their lack of law-making power. Hence, many organizations that reach agreement over environmental concerns have no power to enforce their programs. The EC is an exception.⁶⁹

EC directives are the only international provisions that are recognized within a judicial system. As a result, the potential for compliance and enforcement is enhanced. Illustrative is *Commission of European Communities v. Italian Republic*.⁷⁰ The European Court considered Italy's failure to fulfill obligations under the EC Treaty. The Italian government argued that the directives at issue had not been transposed into Italian law, and that, because Italian domestic legislation included provisions enabling some of the objectives of the directives to be obtained,

Other Nations: Many are Studying European Toxic-Waste Management Programs, 1985 EUR. COMMUNITIES 30-31 (1985).

67. Bentil, *Environmental Quality Measures—Prevention Is Better Than Cure*, J. PLAN. & ENVTL. L. 639, 641 (1980). The first two EC policies in the early 1970s emphasized these factors. The policies provided some guidelines by which educational brochures were prepared for teachers in the secondary and primary grades. Lectures were prepared for higher level institutions. *Id.*

68. Perhaps the educational emphasis is a contributing factor to the Green Party's success, as discussed below. See *infra* notes 82-84 and accompanying text.

69. Guruswamy, *EEC Legislation Controlling Dangerous Substances: Legal Odyssey or Unchartered Voyage of Discovery?*, 1979-1983 LLOYD'S MAR. & COM. L. 464, 479.

70. See Case 309/86 2 March 1988.

Italy's obligations to the EC had been met. The Court held that Community directives must be transposed into domestic law, and that their full application must be guaranteed. Thus, the Italian government had failed to fulfill its obligation and was ordered to pay the costs.

In a recent landmark decision, the European Court for the first time allowed environmental concerns to prevail over economic interests. In *Commission v. Denmark*,⁷¹ the Court considered whether Denmark's restrictions on returnable bottles violated its EC obligation to refrain from unduly obstructing trade flow within the Community. Member states are allowed to enact and enforce economic restrictions to meet EC mandatory requirements, but they must do so in the least restrictive manner. The Commission challenged as being too restrictive a regulation requiring manufacturers to market beer and soft drinks in reusable containers approved by a Denmark governmental agency.⁷² The Commission argued that such regulation unduly restricted competing countries and impinged on the free movement of trade within the European Community.

The EC allows national restrictions if essential to member states' compliance with EC mandatory requirements. Obstacles to free movement within the EC are acceptable in so far as they are necessary to satisfy a mandatory requirement recognized by Community law. In *Denmark*, the Court expanded previous precedent and found environmental protection to be within the scope of EC mandatory requirements. Thus, to the extent Denmark's restrictions furthered environmental aims, they were acceptable. However, because enforcement resulted in excessive economic disparities between the countries, the court held the restrictions overly burdensome. Denmark had failed to use the least drastic measures to achieve its environmental goal. Nevertheless, the principle of environmental protection as a mandatory requirement was established.

71. 54 COMM. MKT. L.R. 619 (1989) (case 278/85).

72. The Denmark governmental agency considered whether the container was technically compatible with the recycle system, whether the return system would ensure that a sufficient proportion of containers would actually be re-used, and whether there was already an approved container of equal capacity. *Id.* at 619-20.

3. *Emphasis on participation by outside groups*

Environmental aims have also been furthered by outside organizations. This recent surge in environmental legislation is not being driven by narrow, special interests.⁷³ Rather, the "upsurge of environmental consciousness . . . is essentially non-partisan."⁷⁴ Since the disasters in Chernobyl, Seveso and Basle, Switzerland, European environmental consciousness has skyrocketed. The movement is popularly referred to as the "greening" of Europe.⁷⁵

The EC has taken advantage of support provided by an array of private, national, and international⁷⁶ organizations. One influential group is the "Green Party," which has emerged spontaneously across the continent as a compilation of independent political groups.⁷⁷

The Green Party supports equal rights, solidarity with third world countries, unilateral disarmament, and protection of the natural environment. It advocates a grassroots approach and usually operates at local levels with a strong preference for participatory party organization. Support is mobilized through unconventional methods such as demonstrations, sit-ins, information campaigns and similar tactics.

The Green Party, represented in nearly all party systems in Western Europe, has directed protests against liberal and conservative targets alike. This tactic, along with growing dissatisfaction with the established parties, has given the Green Party opportunity to gain new supporters. In the June 1989 European Parliament elections, Green candidates or their close allies won thirty-nine seats, as opposed to only nine in 1984.⁷⁸

73. U.S. Cham. Comm., *EC Technology Policy* 78 (1989).

74. *Id.*

75. *Id.* at 72.

76. The International Union for Conservation of Nature and Natural Resources is an international group which takes an active role in intergovernmental conferences addressing environmental protection. Its focus is to improve international legal regulation. Williams, *supra* note 57, at 451.

77. Initially, the Green Party tried to influence the larger leftist parties. However, because an economic crisis caused an increase in unemployment, the leftist governments were forced to work more closely with trade unions and other conventional interest groups. Thus, established leftist parties were unreceptive to incorporating the Green ideology and the Green Parties emerged as independent parties. See Muller-Rommel, *New Politics in Western Europe, The Rise and Success of Green Parties and Alternative Lists* (1989).

78. Supporters have been found to be active in politics. A large portion have higher educations and view government more critically than the average voter. Many Green

The Green Party will likely have a respectable following and a strong impact on future decisions as long as bureaucracy infringes on individual self-determination, nuclear annihilation remains a possibility, and one environmental catastrophe follows another. The "greening" of Europe promises to continue.

4. *Emphasis on a combination of regulations and market participation*

Incorporation of market incentives also contributes to the EC's success. Market incentive systems apply free market principles to achieve environmental goals. Rather than mandate uniform regulation, incentive programs impose economic costs on conduct that creates pollution. Pollution rights are bought through a permit system. The number of available permits is determined by the number needed to control environmental quality. Permit price is set by the market through supply and demand. Individual enterprises decide whether the pollution permits are cost effective, i.e., whether benefits to the company outweigh the costs of buying additional rights to pollute. Enterprises causing heavy pollution are eliminated by market forces. Companies that can realize a profit buy according to their need to pollute and pay a tax proportionate to their pollution.⁷⁹

This system enjoys many advantages over a purely regulatory approach. First, it allows efficient, cost-effective redistribution of responsibility for pollution control between high and low polluters. Second, it eases government administrative duties of gathering detailed information to set regulations. Third, it allows for creativity in devising new pollution-control methods. Fourth, it does not impose an unfair burden on new enterprises, as all pollution sources are subject to the same incentive levels. Fifth, it focuses on the specific risks that should be controlled and on how much control is needed. Sixth, it provides the government with a source of revenue by requiring the polluter to pay to disperse wastes, rather than allowing polluters to meet minimum regulations free of charge.⁸⁰ Potential fines decrease violations which, in turn, decrease enforcement costs. Revenue

Party members are drawn from younger age groups, particularly those with middle class backgrounds.

79. Stewart, *Controlling Environmental Risks through Economic Incentives*, 13 J. ENVTL. L. 153, 158-61 (1988).

80. *Id.* at 159-60.

generated from violations allows enforcement procedures to be improved.⁸¹

However, despite the many advantages, an economic incentive program has potential defects. One defect is the inequitable cost allocation between direct and indirect dischargers. Many of the industries discharge into a municipal sewer system. The industry pays the same fee as other users, thereby escaping direct liability for the heavier discharge of waste. Rather than charge all customers uniformly, customers should pay for actual use. To maximize the benefits of this system, the municipal charge system must be made more efficient.

Many international organizations support the "polluter pays" principle as a viable means of pollution control.⁸² The EC has also incorporated market principles in numerous other programs.⁸³ For example, the EC improved the waste management market's performance by providing economic incentives, strengthening competition, and decreasing regulation. First, the EC studied methods to create a stable market for recycled materials. Then waste exchanges were promoted and further studies conducted to compare waste processing of different organizational systems. Finally, the EC improved communications between the Community and industrialists, aroused public awareness, and encouraged overall cooperation.

Water management programs demonstrate the positive potential of market principles. West Germany's water system, based on effluent charges, provides one example. West Germany had a long tradition of local water control. However, in recent years, rapid industrialization placed excessive burdens on the system. Both internal and external pressures necessitated im-

81. *Id.*

82. Brown & Johnson, *Pollution Control by Effluent Charges: It Works in the Federal Republic of Germany, Why Not in the U.S.*, 24 NAT. RESOURCES J. 929, 931 (1984).

83. In implementing new processing procedures, companies weigh the profits generated against the cost of production. Under an ordinary business analysis, companies appraise the bottom line and implement the minimal requirement. Usually profits are maximized by meeting minimum regulations rather than by installing costly environmental technology. However, economic incentives can change the matrix.

With incentives, the latest and most efficient technology can become the most cost-effective decision for a company. Company profits may be enhanced by recycling generated waste. Benefits may accrue through innovative technology which allows the company with less pollution to produce more. If pollution costs become part of the financial analysis rather than just a free good, management will concentrate on making environmental protection cost effective rather than concentrate on meeting minimal regulations.

provement in addressing environmental problems.⁸⁴ Ultimately, Germany adopted a combination of regulatory and market participation principles. Effluent charges reflect the "polluter pays" concept,⁸⁵ in which it becomes more efficient for companies to terminate business when the effluent charge becomes excessive.

In essence, the EC's combined system is a carrot and stick approach: the stick being regulations and directives which impose uniform standards on the Community, and the carrot the economic incentives which reward those who conform to environmental standards. These incentives can compensate for loss of profits, help with research, and subsidize the replacement of harmful industrial technology with environmentally sound processes.⁸⁶

B. Disadvantages to the EC's Approach

As with most solutions to complicated problems, the EC approach suffers some drawbacks. One obvious problem is that the European economy can be bolstered with limited reductions of pollution, while the environment would benefit from absolute reduction and elimination of pollution. Thus, the EC must balance economic and environmental needs. Such balancing generates

84. Many political groups supported a market approach in which "charges would be levied on waste dischargers in direct proportion to the damage caused by their use of public waters." Brown & Johnson, *supra* note 82, at 931.

85. To initiate the effluent charge program, the states surrendered control of minimum standards for water pollution. An appointed task force set the new standards. The task force reduced the potential for a stalemate between polarized political groups. A user discharge permit is issued based on the established minimum standards. The permit contains two parts: (1) a legal portion, which establishes a discharge right and the maximum/minimum requirements for certain time periods; and (2) the practical portion, which specifies the maximum concentration of each pollutant and the volume of waste the discharger expects to produce.

Both positive and negative incentives are incorporated in the effluent charge system. A positive economic incentive is available to dischargers who meet the federal minimum standard. By meeting the federal minimum, they are allowed a 50% discount on their charges. If actual discharges are more than the federal minimum, the polluter not only loses the 50% charge reduction, but faces legal repercussions as well. If the maximum is exceeded more than once, the actual, not estimated, discharge becomes the new base and the charge is increased proportionately. A hardship clause, which permits temporary exemptions for significant detrimental consequences, buffers the initial impact of the charges.

The success of the new system is not clearly known at this time. However, one study indicates that "the cost of the charge and avoidance measures were [sic] less than 2 percent of the sales for the most serious polluters." See Brown & Johnson, *supra* note 82, at 931, 937.

86. Geddes, *supra*, note 10, at 827.

complex questions concerning "how far and to what extent Member States can be permitted to hold on to any competitive advantage they have" while still protecting the environment. The *Denmark* case is a good example of this balancing technique, evening the scales for the environment.⁸⁷

Slow implementation of directives by member states is an obvious problem. Directives are the most important tool for implementing EC environmental policy and constitute the majority of EC actions in this area.⁸⁸ Many countries have been delinquent in meeting directive deadlines. Further, directives are seldom comprehensive. Each directive only addresses one high-priority problem at a time. In addition, directives only set forth framework principles for a broad environmental field instead of specific guidelines and instructions.⁸⁹

Problems also arise from a lack of a fully developed jurisprudence regulating international environmental matters. Traditionally, treaties do not provide adequate enforcement mechanisms for punishing violators, much less procedures for determining who is responsible for violations. Both substantive and procedural norms are required "which establish international legal relations and a method for measuring compensatory damages in the event of a violation of a treaty obligation."⁹⁰

Direct actions by individual citizens pose another area of concern. Well established in the European Court of Justice and accepted by most national courts is the notion that directives, like the Treaty of Rome itself, have a direct effect on member states and grant citizens individual rights against member states. These rights may be enforced and protected by national courts.⁹¹ Hence, in light of member states' slow compliance with directives, citizen suits threaten to create a tremendous judicial backlog.

Preemption raises additional concerns. Community law supersedes all conflicting national laws. Under this principle of supremacy, directives take precedence over the laws of member states, binding the legislature, courts, and administrative au-

87. *Commission v. Denmark*, 54 COMM. MKT. L.R. 619 (case 278/85).

88. Kelly, *supra* note 20, at 90.

89. E. REHBINDER & R. STEWART, *supra* note 12, at 57.

90. Timoskenko, *supra* note 55, at 446-47.

91. Article 169 of the Treaty of Rome provides an infringement procedure, initiated by EC authorities, to enforce the obligation upon member states to implement directives. E. REHBINDER & R. STEWART, *supra* note 12, at 37.

thorities of member states. The area of preemption, however, is still developing. Currently, the EC cannot claim exclusive legislative jurisdiction over an area by issuing a directive for the harmonization of that area and thus preempt member states from legislating in that area.⁹²

A change in focus from a purely economic orientation to a combined environmental and economic perspective also poses drawbacks. Until recently, EC environmental policy has focused on problems relating to trade and competition, such as industrial pollution and environmental and health risks posed by certain products. Directives regarding land-use planning and protection of flora and fauna have had minor significance. The limited scope of these environmental directives may be explained by (1) the narrow treaty provisions on which the EC relies in making environmental policy and (2) the stronger political support for initiatives when trade and competition are at stake. However, with the surge of environmental activity, the EC must evaluate environmental and trade factors in establishing a balanced community.

If regulations and disincentives are too burdensome, officials react by warning that such limitations could negatively affect the EC's competitive position in the international market.⁹³ Therefore, economic incentives must be attractive enough to gain the support of industry.

IV. CONCLUSION

Many factors contribute to the success of EC environmental policy: the use of both positive and negative market incentives, the SEA amendment to the Treaty of Rome which confers explicit authority to the Commission to draft and enforce environmental legislation, and the emergence of the environmentally conscious Green Party. However, although the initial steps towards a sound environmental/economic policy have been taken, much remains to be done. Actions must now align with expressed policy.

1992 promises a new era of environmental protection. The highly conservation-minded European public supports the new measures and will probably continue to do so. The Green Party will likely continue to grow in influence at both local and inter-

92. *Id.*

93. *Id.* at 26.

national levels. Industries must be required to make adjustments to comply with new standards and deadlines, and member states must actively pursue implementation of directives. EC Commissioner for the Environment, Carlo Ripa di Meana, recently commented, "The attainment of the internal market has to be brought about with the highest level of environmental protection."⁹⁴ Europe is well on its way to implementing an effective international pollution control regime and is leading the world with its cooperative example.

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94. *EC Technology Policy*, *supra* note 73.