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Environmental Law in the European Union: New Approach for Enforcement

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The European Union is indeed becoming "an ever closer union among the peoples of Europe."[1] One reflection of that integration is Europeans' willingness to accept and implement European Union (EU) policy on areas peripheral to the Community's original mandate, such as EU environmental policy. Up until the last eight years, Europeans had issued a great deal of environmental legislation, but had balked at thorough-going enforcement of those laws. Since 1998 however, the EU has taken three significant steps that signal a willingness to enforce EU environmental laws: judicial enforcement with the threat of sanctions; central coordination of inspections and monitoring; and new legislation on public access to environmental information. This Article examines these three areas of enforcement and how they represent a major change in EU policy.

These signs of a willingness to enforce a Community environmental policy are consistent with Europeans becoming willing to speak with a common voice on monetary policy, foreign policy, and constitutional objectives. In the 1992 meetings on the EU's Maastricht Treaty, or Treaty on European Union (TEU), Europeans concluded a Common Foreign and Security Policy, which although criticized for its lack of resolve in responding to major crises such as Kosovo and Iraq, has been seen as a success with its Rapid Response Force, its Euro Corps and its coordinated aid efforts.[2] On January 1, 2002, the EU began to coin its own currency, the Euro.[3] In 2003, the EU submitted a Constitution for ratification, which while overly ambitious and initially rejected by EU citizens, nevertheless represented a dramatic step towards integration.[4] In 2004, the fifteen member states of the EU accepted ten additional members to become a union that would include almost all of Europe.[5]

Since the 1980s, EU legislators had issued a great deal of legislation harmonizing EU environmental law. However, *enforcement* of environmental laws within the EU remained, at least until recently, a

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1. Treaty on European Union (or Maastricht Treaty), ratified in 1992, and enacted in 1993, art. 1, Feb. 7, 1992, 1997 O.J. (C 191) [hereinafter TEU].

2. JOHN MCCORMICK, THE EUROPEAN UNION 90 (3d ed. 2004). According to McCormick, the continuing weaknesses in European foreign policy were demonstrated by the halfhearted response to security problems in 1998 such as the U.S.-led attempts to put pressure on the Iraqi regime and the violent suppression by the Yugoslav government of the Albanian secession movement in Kosovo.

3. *Id.* at 96-97. All but three of the fifteen member states opted to turn in their currencies for Euros, with Denmark, Britain, and Sweden opting out following national referenda.

4. *Id.* at 93. Euroskeptics argued that the draft constitution gave the EU too much power, especially in the field of common foreign and security policy.

5. Two more countries became EU members in 2007. Gareth Harding, *Bulgaria, Romania Join EU*, WASH. TIMES, Jan. 1, 2007, at A1.

separate question. From the outset of efforts to form a limited union for the movement of goods, Europeans perceived environmental law as outside the economic objectives for the European Community. Indeed, asking member states to enforce compliance with environmental regulations tested European resolve to become part of "an ever closer union."[6] As European integration has recently deepened, so has comfort with the enforcement of EU law. In this way, the topic of recent EU enforcement of environmental law becomes a window through which Americans may view larger questions of European integration.

This Article traces the development of EU environmental law and policy and the challenges inherent in the implementation within the EU, and then identifies the legal elements essential to enforcement of environmental law, evaluating the recent developments of each within the EU. The three developments that show a changed approach to environmental enforcement are: (1) the use of sanctions by the European Court of Justice (ECJ) in enforcing violations in the case against Greece, (2) inspections and access to environmental information by central EU authorities, and (3) the legislation inspired by the Aarhus Convention on access to environmental information and to the courts by the public within the EU.

Scholarship in the area of European environmental law is strong.[7] However, little has been written on the recent developments in EU environmental *enforcement* and what they signify for European integration. By examining recent European environmental case law and legislative developments, as well as the EU's political context, this article should provide illumination on the dramatic shift that enforcement of EU environmental law is taking.

I. HISTORICAL OVERVIEW

Critical to understanding the history of enforcement of environmental law within the EU is the historical context of integration in which this legal policy has developed. The EU is a supranational, treaty-based organization consisting of four central institutions: the European Commission, the European Parliament, the European Council of Ministers, and the ECJ.[8]

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6. TEU art. A. The preamble for the *Treaty on European Union* states that it "is resolved to the process of creating an ever closer union among the peoples of Europe."

7. To name only a few, Ludwig Krämer, Jan Jans, Eckard Rehbinder, and Gerd Winter have all published a number of articles and books on the subject of European environmental law.

8. These four institutions were established by article 4(1) of the EC Treaty.

What is now called the EU began after World War II with the establishment of the Council of Europe in 1949 and the Coal and Steel Community in 1951.[9] In 1957, the six member countries formed the European Economic Community (EEC) pursuant to the Treaty of Rome, or the EEC Treaty.[10] This "extended customs market," as it was called, was dedicated to the creation of a common market and to the harmonization of the six member countries' economic policies.[11]

Seeing their common interests furthered by a reduction of trade barriers, the original six member states of the European Economic Community were willing to tolerate central enforcement of laws and policies to the extent that this enforcement harmonized trade, but it would be years before they would become interested in a joint environmental policy, let alone the enforcement of environmental laws. The Treaty of Rome, in article 30, provided one of the early tools for harmonization by forbidding undue restrictions on trade, and by authorizing the ECJ to rule on the member states' compliance with various treaty obligations, suggesting that EC law was superior to national law.[12]

A. The ECJ's Role in Developing Environmental Law

The ECJ has been seen as one of the most important institutions of European integration[13] and is one of the most significant institutions for establishing member state compliance with Community law, including Community environmental law. Charged with interpretation and application of the treaties, the Court is the supreme legal body of the EU.[14]

The European Community (EC) promulgated its first environmental laws in the context of removing trade barriers. However, as the entity responsible for interpreting and implementing the treaties establishing the European Community and ensuring compliance by the member states, the ECJ made clear that it would not let stand national environmental policies if those policies were primarily trade barriers in disguise.[15] Thus, the ECJ was strict in monitoring whether member states' national environmental policies violated the nondiscrimination

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9. McCormick, *supra* note 2, at 43-54.
10. *Id.*
11. Treaty Establishing the European Economic Community (EEC), 25 Mar. 1957 [hereinafter EEC Treaty].
12. EEC Treaty arts. 226-29.
13. MCCORMICK, *supra* note 2, at 173.
14. *Id.* at 184.
15. *Id.* at 245-47.

standard embodied in article 30 of the Treaty. In the 1974 *Dassonville* case, the ECJ held that "all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions."[16]

In the 1979 *Cassis de Dijon* case, the ECJ modified the approach taken in the 1974 *Dassonville* case by balancing national health, safety and environmental concerns against trade interests.[17] In *Cassis de Dijon*, the ECJ established the principle of mutual recognition, under which a product made and sold legally cannot be barred by another member state, and examined the member states' justification for the regulation that allegedly hindered intra-Community trade.[18] In this sense, this case was significant for Community integration and indicated the balancing approach the ECJ would take to member states' health and environmental measures.

In the 1988 *Danish Bottles* case, the ECJ extended this balancing test to balance the Community interests of fostering trade and national interests of protecting the environment. The Commission had brought Denmark to the ECJ, arguing that a Danish law requiring that beer sold in Denmark be sold only in a standard size recyclable bottle provided an unfair trade advantage to the Danes and negatively impacted intra-community trade.[19] The Commission argued that the Danish regulation on beer bottles had no public health justification and was solely for the purpose of protecting the environment.[20] The ECJ ruled that the requirement that producers use only the approved containers was "disproportionate to the objective pursued," and disruptive of free trade.[21] Significantly, the Court sanctioned the interference with trade for environmental protection, as long as Denmark set limits on the interference, further opening the door to national environmental legislation.[22]

Given that the first EC environmental cases involved a conflict between Community trade interests and member state regulations based on public welfare, it is not surprising that, for the early years, ECJ decisions were protective of trade interests at the cost of environmental

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16. Case 8/74, Procureur du Roi v. Band Dassonville, 1974 E.C.R. 837, 852.
17. Case 120/78, Cassis de Dijon, 1979 E.C.R. 649.
18. *Id.* at 662.
19. Case 302/86, Commission v. Denmark, 1988 E.C.R. I-4607.
20. *Id.* at 4628.
21. *Id.* at 4632.
22. *See* Kenneth Lord, *"Bootstrapping an environmental" Policy from an Economic Covenant: The Teleological Approach of the ECJ*, 29 CORNELL INT'L L.J. 571, 590 (1976).

goals.[23] Later, once the Community had established environmental directives, ECJ decisions would show the Court to be protective of Community environmental law as an instrument of integration.[24] Nevertheless, these early ECJ decisions show that the ECJ was willing to recognize environmental protection as important to the harmonization of European Community law long before the EC Treaty had established an express legal basis for environmental law.

B. EU Treaty Developments

The foundations of EU law are based upon the treaties, which set out the goals and principles of European integration and the limits on the member states.[25] Europeans first provided explicit legal authority to environmental protection in the Single European Act (SEA) of 1987.[26] Acclaimed as the single most significant step in European integration, the SEA was the first of the treaties to explicitly acknowledge environmental protection.[27] The SEA set the goal of removing all fiscal, physical, and technical barriers to trade in which the "free movements of goods, persons, services and capital" would be assured.[28] The SEA was significant for environmental policy in that it changed the votes necessary for passing most environmental laws from an absolute to a qualified majority.[29] With its enactment, the twelve member states agreed to accept 282 new pieces of legislation, many of them on matters outside trade, such as environmental protection.[30]

The 1992 ratification of the TEU extended explicit EU jurisdiction beyond purely economic matters, articulated the importance of integrating environmental objectives, and declared that EU environmental policy "shall aim at a high level of environmental protection taking into account the diversity of situations in various areas

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23. David Baldock & Edward Keane, *Incorporating Environmental Considerations in Common Market Arrangements*, 23 ENVTL. L. 575, 584-605 (1993).

24. *Id.*

25. The 1951 Treaty of Paris, the two treaties of Rome of 1957, the Single European Act of 1987, TEU, and the 1997 Treaty of Amsterdam. MCCORMICK, *supra* note 2, at 112. At present the EU Treaties remain in force until the draft Constitution proposed in 2003 is ratified by the member states. *See* Marcus G. Puder, *Constitutionalizing Government in the European Union: Europe's New Institutional Quartet Under the Treaty Establishing a Constitution for Europe*, 11 COL. EUR. LAW 77 (2004-05).

26. JOANNE SCOTT, E.C. ENVIRONMENTAL LAW 4 (1998).

27. *Id.*

28. MCCORMICK, *supra* note 2, at 83.

29. Scott, *supra* note 26, at 7.

30. JOHN MCCORMICK, THE EUROPEAN UNION: POLITICS AND POLICIES 66 (2d ed. 1999); *see* Molly Hall, *European Integration vs. State Sovereignty*, *in* GERMANY IN TRANSITION 39, 42 (G. Mattox, G. Oliver & J. Tucker eds., 1999).

of the Community."[31] Significantly, article 171 of the TEU extended the ECJ's jurisdiction to enable it to impose fines upon member states for failure to comply with Court judgments, most notably in the environmental arena.[32] The Treaty of Amsterdam of 1997 provided that the European Council, Commission and Parliament must consider environmental protection on all harmonization measures.[33] The Treaty of Nice of 2001 stated that a high level of environmental protection must be integrated into EU policies.[34] Thus, over time, we see the European treaties, like the ECJ, validating the concepts of integration and environmental protection.

C. Environmental Legislation

During the late 1980s and 1990s, environmental objectives quickly gained legitimacy in Community legislation issued in the form of regulations and directives.

The European Commission initiates EU legislation and the European Parliament and the European Council then enact that legislation in one of five different forms, the most important of which are regulations and directives. Regulations are directly binding in that they do not need to be implemented by the member states to be turned into national law. Directives, on the other hand, give member states a specified time to implement the directive into national law.[35]

By 1992, the Community had issued 220 directives dealing with the environment.[36] By 2002, the Community had twice as many environmental directives.[37] The European Commission created the Environmental Directorate General (formerly DGXI) to assist member states in implementing these directives in 1981. Having the Commission to assist did not ensure member state environmental enforcement, however. Implementation of the new EC directives by the member states

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31. TEU art. 130r, 1992 O.J. (C 191) 28; EC Treaty art. 174.

32. EC Treaty art. 228.

33. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2, 1997, 1997 O.J. (C 340) 1 [hereinafter 1997 Treaty of Amsterdam]; Treaty of Nice Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80) 1 [hereinafter 2001 Treaty of Nice].

34. 1997 Treaty of Amsterdam; 2001 Treaty of Nice.

35. ELSPETH DEARDS, EUROPEAN UNION LAW TEXTBOOK 47 (2004).

36. LUDWIG KRÄMER, FOCUS ON EUROPEAN ENVIRONMENTAL LAW (1992).

37. Christoph Demmke estimates that by 2002 there were 250 "legal acts" and 500 environmental directives. Christoph Demmke, *Trends in European Environmental Regulation: Issues of Implementation and Enforcement*, *in* 3 Y.B. EUR. ENVTL. L. 329, 343 (H. Somsan ed., 2003).

was typically late and imprecise, and the Commission's tools (information gathering, monitoring, inspections) remained inadequate.[38] To this day, some member states do not have environmental reporting systems in place that can statistically measure the breaches.[39] This means that the exact dimensions of the implementation and enforcement deficits can not easily be quantified.[40]

D. The European Commission and the European Environmental Agency

The European Commission serves as the executive administrator, legislative engine, implementing agency, ambassador, and think tank for the EU.[41] As the guardian of the Treaty, the European Commission is authorized to monitor member states' implementation and to bring enforcement actions against member states whose implementation is not timely or thorough enough.[42] The European Commission currently consists of 25 Commissioners, who are nominated by the member states and appointed by the European Council. With a staff of approximately 16,000 to 20,000 personnel for all areas, 500 of these Commission employees are devoted to environmental matters.[43] Approximately 200 of the 500 have college training, and 20 of the 200 employees work in environmental enforcement.[44] These 20 enforcement attorneys have staff support of three persons.[45] Typically, the Commission is responsible for some 12,000 cases currently running against member states, including 500 new cases brought every year.[46]

The total Community expenses for the environment, including the Commission, the European Environmental Agency and the LIFE program were estimated to be approximately 600 million Euro per year in 2000-2001.[47] In comparison, during the same 2000-2001 period, the United States Environmental Protection Agency had 18,000 employees (over 35 times larger than the Commission's staff for the environment),

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38. *Id.* at 344.
39. *Id.* at 334.
40. *Id.*
41. The College of Commissioners houses political appointees and the Directorate Generals and Services are staffed with career civil servants. Puder, *supra* note 25, at 104.
42. EC Treaty arts. 211 (ex 155), 226 (ex 169), 228 (ex 171). Enforcement actions will be discussed in more detail in Part II.
43. KRÄMER, *supra* note 36, at 35.
44. *Id.*
45. Interview with Ludwig Kramer in Brussels, Belgium (Feb. 19, 2001).
46. *Id.*; *see also* KRÄMER, *supra* note 36, at 26.
47. Interview with Ludwig Krämer, *supra* note 45; *see also* KRÄMER, *supra* note 36, at 27.

with a budget of $7.8 *billion*.[48] This does not include the budgets and staff of over 150 attorneys in the United States Department of Justice's Environmental Enforcement Section and the attorneys handling federal environmental cases in the United States Attorneys' Offices.[49]

In 1990, the European Community created the European Environmental Agency (EEA), which became operational in 1993 with its seat in Copenhagen. With a mission of collecting, processing, and publishing information on the Community's environment, the EEA has a staff of approximately 100 persons, and a budget of 20 million Euros.[50] At the time of the EEA's creation, the European Parliament discussed whether the Agency would enforce application of the law, but consistent with the member states' reluctance to allow outside enforcement and monitoring, the question was postponed and is no longer discussed actively.[51]

Despite other signs of change in the EU's approach to environmental enforcement, it is doubtful that the EU will significantly augment the resources allocated to EU environmental enforcement in the near future, as it grapples with the economic challenges posed by the integration of the ten to twelve newest member states. The historical reasons for Europeans' disinclination to distributing resources to environmental enforcement are discussed below.

For many European policymakers, stricter national environmental laws in some member states would continue to be perceived as one of the barriers that the SEA had set out to remove to enable the free movement of goods, persons, services and capital.[52] This conflict between the free movement of goods, persons and services, and national environmental restrictions intensified following the economic recession of 2001 and the challenges attendant to the 2004 enlargement from fifteen to twenty-five

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48. *See* EPA Web Site, http://www.epa.gov/epahome/aboutepa.htm (last visited Mar. 22, 2007). At the time of this writing, the EPA had approximately 18,000 employees nationally and had a requested budget of $7.3 billion for 2007. *See also* James Lofton, *Environmental Enforcement: The Impact of Cultural Values and Attitudes on Social Regulation*, 31 ENVTL. L. REP. 10491 (2001).

49. *See* U.S. Dep't of Justice, About Environment & Natural Resources Division, http://www.usdoj.gov/enrd/About_ENRD.html (last visited Mar. 22, 2007); State of Wis. Dep't of Justice, Division of Legal Services, http://www.doj.state.wi.us/dls/environpro/ (last visited Mar. 22, 2007). The fifty state environmental agencies and state attorney general offices are dedicated to enforcement of state environmental laws.

50. KRÄMER, *supra* note 36, at 40.

51. *Id.*

52. Daniel Gros, *Europe Needs the Single Market in Services*, FIN. TIMES, Apr. 7, 2005, cmt. section, at 13.

member states.[53] As Europeans struggled with the challenges attendant to taking on ten new member states and drafting a constitution, some in the EU may push environmental protection laws to the back burner.

Nevertheless, by the time of the 2004 enlargement, the European Community had legislated a great number of specific environmental laws, the TEU and Amsterdam treaties had provided new constitutional authorization for Community environmental law, and the ECJ had given judicial support for the concept of Community environmental protection in the court decisions. Even against this backdrop of institutional support for European environmental policies, some measure of member state resistance to enforcement may continue.

The following Part explores the traditional reasons for member states' resistance to enforcement, and Part III looks at the way in which the ECJ, the Commission, and other EU institutions have responded.

II. CHALLENGES TO EU ENVIRONMENTAL ENFORCEMENT—MEMBER STATES RESISTANCE

In Europe and elsewhere, most environmental laws are structured to deter people from polluting or from harming the environment.[54] Once environmental laws have been legislated, codified, and harmonized, three major components are necessary for a system of enforcement. These components are: (1) the ability for judicial enforcement of the laws; (2) the ability for central oversight of the initial and ongoing implementation of the laws, including inspections and reporting; and (3) the transparency of the law and procedures and the ability of citizens to be involved in the oversight process. This Part looks at challenges from the member states in implementing Community environmental law, and the institutional response.

Clearly the EU, a network of member states, is different from the United States, and their approaches to environmental enforcement reflect their different levels of integration. Since its creation in 1970,[55] the United States Environmental Protection Agency was given the authority to conduct inspections of individual facilities, and the Department of

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53. *See* John Silberman, *Does Environmental Deterrence Work? Evidence and Experience Say Yes, But We Need To Understand How and Why*, 30 ENVTL. L. REPORTER 10523, 10524 (July 2000).

54. *See id.*

55. President Richard M. Nixon requested Congress assemble the EPA from parts of federal departments, bureaus, and administrations. *See* An Agency for the Environment, http://www.epa.gov/history/publications/origins6.htm (last visited Feb. 14, 2007).

Justice was authorized to bring legal enforcement on behalf of the EPA.[56] While the U.S. federal government is authorized to bring suit against states and municipalities to achieve compliance, its primary enforcement role is to pursue *individuals and companies* in violation of the Federal environmental laws. The primary purpose of the EU's Commission, however, is oversight of the *member states' implementation* of the law. In other words, the Commission monitors whether the member states have promptly and accurately transposed the European Community directives into their national laws.

Traditionally, most Europeans viewed the EU as a group of states who have come together under a limited system of treaties and laws, with a common court for settling only some disputes.[57] With an elected Parliament, a budget, and a Commission that has full authority to oversee trade relations on behalf of all the member states, the EU has some elements of supranational government. Only in the last six years has there been real coordination on matters outside of trade such as foreign policy and a common currency. The EU member states still define themselves as sovereign nations, and retain elements of sovereignty, such as the power to make treaties and to maintain an independent military, levy taxes and have, at the time of this writing, separate constitutions.[58] With member states ceding EU institutions only limited authority, it is not surprising that EU institutions have been unsuccessful at enforcing environmental law, traditionally seen as a secondary matter.

As the guardian of the Treaty, the job of ensuring enforcement of the law formally falls to the European Commission. The European Commission has been criticized for its reluctance to fulfill the role mandated by article 211.[59] Nevertheless, pursuant to article 175, it is the member states' duty to ensure implementation of the Community law.[60] According to the former director of Commission's Directorate on the Environment, Ludwig Krämer, the EC's implementation and enforcement problems can be attributed to a lack of political will and a resulting lack of resources.[61] One reason for this lack of political will has been the member states' unwillingness to cede sovereignty for

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56. This is not undermined by the fact that the fifty states also take an important role in enforcement.

57. *See* McCormick, *supra* note 2, at 8-9.

58. *See* MCCORMICK, *supra* note 2, at 11-12, 88-89.

59. *See* Rhiannon Williams, *Enforcing Environmental Law: Can the European Commission Be Held Accountable?*, 2 Y.B. EUR. ENVTL. L. 271, 271-93 (2002).

60. LUDWIG KRÄMER, E.C. ENVIRONMENTAL LAW 284 (1999).

61. Krämer worked in the section of the Commission responsible for environmental law from the section's inception in 1973 until 2003. Interview with Ludwig Krämer, *supra* note 45.

environmental matters to central authorities in Brussels (the site of the European Commission and the European Council), Luxembourg (the site for the ECJ), and Strasbourg (one seat of the European Parliament).[62] While the member states have, from the beginning, accepted the Community's authority on trade issues, it has taken longer for many Europeans to concede that concerns such as environmental protection, that are collateral to trade, should be addressed at the European level. After fifty years of integration, many Europeans still feel that the institutions are distant from their local lives and concerns.[63]

Similarly, in many of the member states the feeling persists that Community rules are "foreign laws." In addition to the perception that the EU is distant, there is the difficulty of legally integrating community environmental laws into what may be a longstanding and elaborate system of national rules built up over decades.[64] Some member states have resisted implementation of EU directives because their legal structures lack "the procedural tradition" upon which the EU directives are based.[65] The consequence of this is that member states, such as Germany, have found themselves at odds with many of the procedurally oriented environmental directives, such as the directive requiring an integrated approach, the Integrated Pollution Prevention and Control (IPPC Directive); the directive on impact assessments; and most notably, directives allowing access to information on the environment.[66] Additionally, many Europeans believe that environmental protection should be addressed at the most local level possible. This concern is addressed with the principle of subsidiarity, which maintains that the Community shall take action to the extent to which the Community's objectives can be attained better at the community level than at the level of the individual member states. The principle of subsidiarity was first introduced to the E.C. Treaty in 1987.[67]

In addition to incompatible legal structures, many Europeans have not had the resources to implement environmental directives. Leaders in

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62. Ludwig Krämer, *Deficits in the Implementation and Enforcement of European Community Environmental Law and Their Cases*, *in* THE IMPLEMENTATION AND ENFORCEMENT OF EUROPEAN ENVIRONMENTAL LAW 7 (Gertrude Luebbe-Wolffe ed., 1996).

63. Concerns with the "democratic deficit" of the European Union are well documented. In addition to the general lack of transparency, Europeans criticize the fact that the European Parliament, the only democratically elected EU body, has only limited powers. *See* MCCORMICK, *supra* note 2, at 124, 134, 282-83.

64. KRÄMER, *supra* note 36, at 6.

65. Demmke, *supra* note 37, at 338.

66. Directive 96/61, 1996 O.J. (L 257) 26; Directive 85/337, 1985 O.J. (L 175) 40; Council Directive 90/313, 1990 O.J. (L 158) 56; Council Directive 2003/4, 2003 O.J. (L 41) 26.

67. E.C. Treaty art. 5 (ex 3b).

some member states such as Greece, Spain, and Portugal, as well as the new Eastern European member states, believe that their countries' infrastructures can not support a well-developed environmental agency.[68] It goes without saying that as the political parties of the ruling government in some member states change, so too may their commitment to environmental protection.

In the case of centralized countries such as Germany and Spain, the government may be unsuccessful at implementing European directives because it cannot prevail upon the regional states or regions that are responsible for administering the environmental directives.[69] For other countries, an environmental directive may conflict with a long held tradition such as hunting. For example the Wild Bird Directive, which requires the establishment of protected areas for habitat, conflicts with the long-held French tradition of hunting.[70]

With twenty-seven member states in the EU as of January of 2007, it is not surprising to find almost as many reasons for refusing to implement policies perceived as peripheral to free trade as there are member states.[71] However, recent polls show that the European public considers protection of the environment to be as important an objective as the strengthening the economy.[72] To the extent that most of the environmental laws in the new member states originate in European Community measures, rather than national laws, the EU is responsible for the most significant developments in the member states' environmental law and policy.[73] Additionally, almost fifty years after the 1957 Treaty of Rome, momentum is growing not only for European environmental law as a whole, but also for *enforcement* of European environmental policies.[74] Using three elements essential to environmental enforcement—court penalties, inspections, and public

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68. Reasons for inadequate implementation include not only a general lack of personnel and equipment, but also a dearth of understanding by environmental officials within the member states as to what the European-initiated law entails. *See* Kurt Riechenberg, *Local Administration and the Binding Nature of Community Directives: A Lesser Known Side of European Legal Integration*, 22 FORDHAM INT'L L.J. 696, 716-17 (1999); *see also* LUDWIG KRÄMER, ENVIRONMENTAL LAW 13 (1999).

69. Demmke, *supra* note 37, at 339.

70. Council Directive 79/409 on the Conservation of Wild Birds, 1979 O.J. (L103) 1; Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna & Flora, 1992 O.J. (L206) 7.

71. *See* DIRECTORATE GENERAL COMMUNICATION, STANDARD EUROBAROMETER 66 (2006), *available at* http://ec.europa.eu/public_opinion/archives/eb/eb66/eb66_en.htm.

72. *Id.*

73. EUROPE AND THE ENVIRONMENT: ESSAYS IN HONOUR OF LUDWIG KRÄMER (Marco Onida ed., 2004).

74. Scott, *supra* note 26, at 4.

access to information—the following Part details the development of a new approach to environmental enforcement within the EU.

III. ECJ PENALTIES, EU INSPECTIONS, AND ACCESS TO INFORMATION

A. The ECJ

Lawmakers recognize that enforcement depends upon first, codifying clear and uniform laws that include some sort of punishment for failure to comply with the law; second, having a police force or a group of inspectors that can go and find out who is in compliance; and finally, having the option of taking those not in compliance to court. Punishment alternatives can include penalties, prison, withholding something the person wants (such as a permit), and shaming the violator of the law.

During the 1980s and 1990s, the European Community codified a great number of EU environmental laws.[75] It has only been within the last fifteen years that the Community had financial penalties available for failure to comply, and only in the last six years that the institutions of the EU were willing to use them.[76] As we see below, the adjustment to allowing Community-level inspections and transparency of Community procedures has been slower in coming.

Before examining these momentous changes, a bit of background on the roles of the Commission and the ECJ in the implementation process is appropriate. The European Commission oversees member states' application of Community environmental law in three ways: (1) it monitors to see that member states have notified the Commission of national transposition of Community measures, (2) it checks to see whether national measures are in conformity with the E.C. directives, and (3) it monitors the practical application of directives and regulations.[77] Only the Commission has the authority to bring proceedings for infringement of Community law against member states, and this is the Commission's most effective enforcement tool.[78] Article 226 of the E.C. Treaty states:

> If the Commission considers that a member state has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations.

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75. *Id.*
76. LUDWIG KRÄMER, E.U. CASEBOOK ON ENVIRONMENTAL LAW 391-92 (2002).
77. EC'S SECOND ANNUAL SURVEY 35 (1999).
78. EC Treaty art. 226; *see also* KRÄMER, *supra* note 36, at 385-88.

> If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.[79]

The primary function of the ECJ is to interpret and implement properly the treaties established by the Community in order to ensure that both member states and branches of the Community government comply with Community law.[80] The contribution of the ECJ has been critical in providing the authority to build a body of law by ensuring that the interpretation and application of the treaty is observed. As perhaps the most supranational of all EU institutions, it has been a key player in promoting integration.[81]

Whether it is due to political unwillingness, the technical complexity of environmental matters, or the costs involved in implementation, there are more infringements within the arena of environmental law than any other.[82] Between 1976 and 2002, the ECJ decided almost 300 environmental cases.[83] Cases referred to the Court for implementation take a long time.[84] The average time between the decision of the Commission to send a letter of formal notice and the actual application to the ECJ is thirty-three months.[85] This does not take into account the need for the parties to submit briefs and for the ECJ to hear arguments and make a decision.[86] Because the process is so lengthy, referring a case to the ECJ is not the most efficient of tools. Without inspections or administrative hearings, however, the Commission has fewer enforcement options than do American environmental institutions.[87]

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79. EC Treaty art. 226.

80. *See* EEC Treaty, Mar. 25, 1957, arts. 164, 171-173; EC Treaty art. 220.

81. *See* MCCORMICK, *supra* note 2, at 173.

82. Eighteenth Report on Monitoring the Application of Community Law, COM(2001)309 final (July 16, 2001).

83. KRÄMER, *supra* note 36, at 388. During 1998, for example, the Commission referred to the ECJ 15 cases against member states, and sent 118 original or supplementary reasoned opinions. In 1997, the Commission referred 37 cases and sent 69 reasoned opinions.

84. Richard Stewart, *Environmental Law in the United States and European Community: Spillovers, Cooperation, Rivalry, Institutions*, 1992 U. CHI. LEGAL F. 41, 43 (1992).

85. KRÄMER, *supra* note 36, at 388.

86. *Id.* at 290.

87. In fiscal year 2006, the EPA concluded 173 judicial enforcement cases, issued 4,624 final administrative orders, initiated 305 criminal cases, and conducted 23,000. In addition, 9,000 enforcement actions were pursued by the 50 states. EPA FY 2006 Compliance and Enforcement Results, http://www.epa.gov/compliance/data/results/annual/fy2006.html (last visited Apr. 4, 2007).

1. The ECJ's Use of Penalties in the Case Against Greece

On July 4, 2000, the ECJ imposed financial penalties on a member state for failing to comply with environmental directives. Specifically, the court ordered Greece to pay 20,000 Euros for each day of delay in implementing the measures to comply with several EU waste directives.[88] The case was greeted as groundbreaking because it was the first time the ECJ imposed monetary penalties for failure to comply with a directive.[89] Prior to the entry into force of the TEU in 1992, the ECJ could not impose a financial penalty to enforce its judgment against member states.[90] The Commission had referred seven cases for sanctions for failure to comply with or apply Community directives to the ECJ, but the case against Greece was the first in which the Court delivered a judgment ordering a penalty before the member state complied or the case was resolved.[91]

The penalties case began in 1987 when the Commission became aware of a trash facility, which had been disposing industrial and commercial waste in the area around the mouth of the Kouroupitos River on the Island of Crete. The waste could easily leech into the water and the degree of environmental danger posed by the improper disposal methods was seen as severe.[92] After several years of correspondence between the Commission and Greece on the need to comply with the EU waste Directives 75/442 and 78/319, the Commission found Greece's replies unsatisfactory and brought the infringement case to the ECJ in 1991.[93] The Greek government explained that it had not complied because of public opposition in Chania to the creation of new landfills or incinerators.[94] The Court held that public opposition was not an excuse for failure to implement, and that the improper disposal had let to "significant deterioration of the environment during the protracted period."[95] The Court issued a penalty based on the level of severity and the number of days of noncompliance. Greece implemented the first

88. Case C-387/97, Commission v. Hellenic Republic of Greece, 2000 E.C.R. 2000 E.C.R. I–05047.

89. KRÄMER, *supra* note 76, at 391-93.

90. TEU art. 171. By the end of 1993, eight-nine judgments remained unimplemented, according to the Eleventh Annual Report. Eleventh Annual Report on Monitoring the Application of Community Law, at 169-73 COM (1993) 500 final (July 6, 1994).

91. KRÄMER, *supra* note 36, at 389.

92. Interview with Ludwig Krämer, *supra* note 45.

93. *Greece*, 2000 E.C.R. at I-5058.

94. *Id.* at 5061.

95. *Id.* at 5061, 5072.

judgment in late February 2001 and paid approximately five million Euros for the period from the judgment to implementation.[96]

At the time the case was hailed as a significant change in approach.[97] While the Commission has referred a number of cases to the ECJ for penalties under article 228 for failure to comply with earlier ECJ judgments, the ECJ has issued penalties in only two other cases since its judgment against Greece in 2000.[98] These were the 2003 Spanish bathing water case and the 2005 French fisheries case. In the 2003 case *Commission v. Spain*, the ECJ imposed a penalty payment on Spain because one percent of the bathing areas in the Spanish inshore area were not in conformance to the limit values laid down by Directive 76/160.[99] The penalty of 624,150 Euros per year was imposed until Spain was entirely in compliance with the EU Bathing Waters Directive. In *Commission v. French Republic*, the ECJ found France to be in breach of an EU fisheries directive, allowing undersized fish be offered for sale over the course of eleven years: from 1991 until 2002. The Court inflicted periodic payments of over 57 million Euros for each six-month period starting from the Court's second ruling until compliance, and lump sum of 20 million Euros.[100]

Some commentators have been frustrated with the Commission and the ECJ's highly selective use of the penalties provision of article 228, describing the sanctions as "more of a political weapon than a deterrent instrument."[101] However, the fact that the ECJ has been willing to use sanctions even once sends a strong message to member states about the importance of implementing EU environmental law. Infringement actions that the Commission brings to the ECJ serve as an important instrument in ensuring compliance, and the ECJ's use of the penalties provision of article 228 increases the effectiveness of that instrument against infringement. The credibility of the EU and its ability to implement and enforce its legislation are, of course, intertwined. With the increasing political integration of the EU, the member states have begun to take all EU requirements, including environmental requirements, more seriously. As EU institutions grow in legitimacy, the

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96. Nineteenth Annual Report on Monitoring the Application of Community Law (2001), at 12, COM (2002) 324 final.

97. KRÄMER, *supra* note 76, at 398.

98. European Commission Secretariat-General, Application of Community Law, http://ec.europa.eu/community_law/eulaw/index_en.htm (last visited Mar. 22, 2007).

99. Case C-278/01, Commission v. Spain, 2003 E.C.R. I-14141.

100. Case 304/02, Commission v. French Republic, 2005 E.C.R. I-06263; 2005 3 C.M.L.R. 13, 275.

101. Demmke, *supra* note 37, at 354.

Commission will be able to draw upon other tools for enforcement and central oversight, and the number of implementation cases that the Commission refers to the ECJ will decrease. These other enforcement measures might include monitoring and inspections, warning letters, civil and criminal enforcement actions against the actual polluters (rather than against the member states), notifying the public of emission levels or of violations through press releases, compliance assistance and an array of financial incentives.[102] All of these serve the purpose of demonstrating that someone—be it the government or the public or both—is monitoring compliance with environmental law and will use measures to ensure enforcement.

2. The Use of Monitoring and Inspections Within the EU

Before a court can compel compliance with the law, the case must be referred to the court. Therefore, the centralized collection of data that allows governmental entities and the public to collect and compare information on each facility's discharges and emissions with clear environmental standards becomes a significant component of any environmental enforcement program. Although the Commission has been the primary monitoring body of the EU, the environmental directorate has had no central inspection bodies to examine whether and to what extent the member states are complying with Community environmental law. The Commission's Environmental Directorate conducts no more than one inspection per year, total.[103] This is unique when compared with other areas of E.C. law: there are Commission inspectors for enforcement in the areas of competition, veterinary, customs, regional, and fishery policy.[104]

For Americans, the contrast between the European Environmental Directorate and the United States Environmental Protection Agency is striking. The ten regional offices of the U.S. EPA conduct some 22,000 inspections annually, along with an estimated 146,000 inspections conducted along federal guidelines by the fifty state environmental agencies.[105]

Results of several studies show that there is a strong correlation between inspections and compliance. One reason inspections improve

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102. Silberman, *supra* note 53, at 10,525.

103. One inspection per year does not mean one inspection per facility or one inspection per case, but rather one inspection per year, total. Interview with Ludwig Krämer, *supra* note 45; *see also* KRÄMER, *supra* note 36, at 381.

104. Interview with Ludwig Krämer, *supra* note 45.

105. Silberman, *supra* note 53, at 10,523.

compliance is that they communicate the governmental agencies' presence and therefore the increased certainty that the lawbreaker will be caught. A study by the California Air Resources Board found noncompliance to be three times higher at gasoline-dispensing facilities that were inspected once every two to three years, as opposed to retail facilities that were inspected annually.[106] An informal analysis conducted by the EPA Office of Enforcement and Compliance Assurance between 1990 and 1996 also found a relationship between increased noncompliance and greater lag times between inspections.[107] The effectiveness of a legal threat or deterrent depends upon the *certainty* that a lawbreaker will be caught, the nature and *severity* of the punishment, the *speed* of apprehension and punishment, as well as the lawbreakers' *perception* of these factors.[108]

In Europe, environmental implementation has primarily been left to the member states, and in many of the member states, these inspections are conducted at the regional level.[109] In Germany, the German states, or *Länder*, conduct most environmental inspections in the context of issuing a facility's water, air, zoning and land use permits.[110] While inspections need not be conducted at the EU level rather than by the member states, some central coordination is necessary to monitor compliance and refer cases of noncompliance to the ECJ. The EU member states not only vary widely in the frequency and thoroughness of their environmental inspections, they have also been unable to coordinate the collection of environmental information.[111] Most environmental directives require member states to submit information on their implementation efforts to the Commission, but the Commission has long been unsuccessful in getting this information.[112] Although the Commission has published annual reports since 1983, these reports were largely restricted to general topics such as the application of Community law, and perceived as

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106. *Id.*

107. *Id.*

108. *Id.* at 10,531.

109. While member states recognize the need for the Commission to remain "guardian of the Treaty" and investigate transgressions, they have never been keen on appointing independent environmental inspectors whether in the context of the Commission or the European Environmental Agency. Sybille Grohs, *Commission Infringement Procedure in Environmental Cases*, *in* EUROPE AND THE ENVIRONMENT: ESSAYS IN HONOR OF LUDWIG KRÄMER, *supra* note 73, at 38.

110. THE IMPLEMENTATION AND ENFORCEMENT OF EUROPEAN ENVIRONMENTAL LAW, *supra* note 62, at 77, 85; *see also* Molly Hall, *Pollution Havens? A Look at Environmental Permitting in the United States and Germany*, 7 WIS. ENVTL. L.J. 1, 25-26 (2000).

111. KRÄMER, *supra* note 36, at 381.

112. *Id.*

neither entirely reliable nor transparent, in part because the data could not be compared from one year to the next.[113]

The 1992 case *Commission v. Italy*[114] demonstrates the disregard with which many member states have viewed EU requirements for information. The Commission brought the case against Italy for failure to comply with three directives: on wastes, dangerous wastes, and transport of dangerous wastes. Campagnia, Italy, produced some 1.62 million tons of waste per year, but its one and only waste disposal facility was unauthorized and uncontrolled. The case caught the attention of an Italian member of the European Parliament in 1987 when Campagnia, with limited waste disposal facilities and no incineration facility, began accepting another 500,000 tons of waste annually from the United States.[115] The Commission requested that Italy submit information on its compliance with EU waste directives. Italy refused, maintaining that it "had no obligation to furnish the Commission with the information requested."[116] The ECJ ruled against Italy, holding that the member state had a responsibility to enforce implementation of EC directives within the regions, a responsibility to report to the Commission, and a responsibility to furnish proof of Campagnia's plans and programs for compliance as required by the waste directives.[117] The Court's holding in *Commission v. Italy* is one of the more blatant examples of a member state's disregard for both EU environmental protection and EU reporting requirements.

The last decade and a half has brought increased Community cooperation on collection of environmental data, central monitoring, and inspections, however. Since 1992, the Commission has funded an informal network of national environmental inspectors, the Implementation and Enforcement of Environmental Laws network, or IMPEL.[118] The objective of this voluntary network is to "create the necessary impetus in the European Community to ensure a more effective application of environmental legislation."[119] From its secretariat in Brussels with one full-time expert and a budget of between 400-500,000 Euros, IMPEL has a training program for inspectors and

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113. *Id.*
114. Case C-33-90, [1991] E.C.R. 5987.
115. *Id.* at 5988.
116. Case C-33/90, para. 17.
117. *Id.* paras. 19-26.
118. The legal basis for IMPEL was provided by Decision No. 1600/2002/EC of the Parliament and the Council, laying down the Sixth Environmental Action Programme.
119. *Id.*

minimum criteria for environmental inspections and reports.[120] Efforts to establish formal requirements for EU-wide inspections have been less successful. In 2001, the European Parliament attempted to enact a binding directive establishing minimum criteria for environmental inspections, but the European Council opted instead for a recommendation.[121]

The European Commission's Sixth Environmental Action Program issued in 2001 also called for improved standards of inspections for member states, some reporting on implementation via an annual Commission report, and a new strategy by which the Commission would publicize the names of violators, referred to the as "name, shame and fame" strategy.[122] The Commission has used this "blacklisting" in "name and shame" seminars, but its effect has been limited since the list focuses on member states that have failed to implement EU environmental policies rather than individual companies.[123]

Another enforcement tool is the emissions register called the European Pollutant Emission Register (EPER), which Europeans designed following the model of the American "right to know" legislation seen in the U.S. Toxic Release Inventory (TRI).[124] Implemented as part of the Integrated Pollution Prevention and Control (IPPCJ) Directive, the EPER requires member states to collect data on pollution emissions from some 20,000 facilities and report that data to the European Commission.[125] At that point, the Commission and EEA then make this site-specific information available via the Internet.[126]

As directives incorporating aspects of the 1998 Aarhus Convention on access to information and justice are applied, European Institutions such as the EEA should be able to better help member states comply with

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120. *See* IMPEL Web site, http://europa.eu.int/comm/environment/impel/ (last visited Mar. 22, 2007).

121. 2001 O.J. (L 118) 41, Recommendation 2001/331/EC of the European Parliament and the Council on Minimum Criteria for Environmental Inspections, proposes that EU environmental inspections reinforce those done at the member state level. *See also* KRÄMER, *supra* note 36, at 381.

122. *Communication from the Commission to the Council, the Environmental Parliament, the Economic and Social Committee, and the Committee of the Regions on the Sixth Environmental Action Program of the European Community "Environment 2010: Our Future, Our Choices"* (Jan. 24, 2001), *available at* http://eur-lex.europa.eu/LexUriServ.do?uri=CELEX:52001DC0031:EN:HTML.

123. Demmke, *supra* note 37, at 352.

124. The TRI requires over 23,000 manufacturing facilities to report annual emissions of 651 toxic chemicals to the EPA, which then makes them available via a public database. *Id.* at 351.

125. *Id.* at 351-52.

126. *Id.*

the required reports submitted to the Commission on their compliance with environmental directives.[127] Consistent with the Aarhus Convention, the Commission has prepared measures to improve access to justice for environmental cases at the national level. Additionally, the Commission's publication of annual reports, regular press releases, and decisions on the Internet should help inform the public on progress of infringement cases.[128] Thus, while Europeans remain reluctant to authorize EU-wide environmental *inspections* by an EU entity, IMPEL has succeeded in making the *criteria* for environmental inspections in EU member states more uniform, and increasing the types and amount of environmental monitoring information collected. Additionally, as discussed below, the 1998 Aarhus Convention and the resulting EU legislation has brought more centralized *collection and publication* of environmental data, and greater access to information.

3. Access to Information and Justice Within the EU

Access to information and public participation have been considered as central principles of environmental law in several international legal documents and conventions such as the Rio Declaration on Environment and Development.[129] Article 1 of the TEU states that decisions should be made "as openly as possible."[130] The development of laws providing access to information and public participation has been difficult, with opposition arising even in member states such as Germany, which otherwise supported EU environmental directives.[131]

The importance of transparency in environmental decision-making cannot be overstated. When policy-makers provide the facts, data, studies, and monitoring results on which they will base their decisions to act or not to act to the citizens who may have specific information about the geographic area, and to the organizations that may have experience protecting the environment, the quality of participation in these decisions improves, as does the quality of environmental protection.[132] The European Council recognized the link between transparency, or access to

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127. KRÄMER, *supra* note 36, at 137-45.

128. *See* UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters; *see also* Grohs, *supra* note 109, at 37.

129. Jonathan Vershurren, *Public Participation regarding the Elaboration and Approval of Projects in the EU after the Aarhus Convention*, 4 Y.B. EUR. ENVTL. L. 29, 30 (2004).

130. TEU art. 1.

131. Hall, *supra* note 110, at 35-36.

132. Ludwig Krämer, *Access to Environmental Information in an Open European Society—Directive 2003/4/EC*, 4 Y.B. EUR. ENVTL. L. 1 (2004).

information, and judicial guarantees of environmental protection in the preamble to Council Directive 90/313/EEC, Freedom of Access to Information on the Environment.[133]

Europeans have long admired American administrative procedures providing for access to information, and the American procedures for environmental impact assessments. Consequently, American administrative procedures were used as a model in drafting EU directives on access to information.[134] Importing laws built on foreign legal models did not come without costs, however, as indicated by the lacuna between the legal principles of access to information and the legal realities discussed below.

B. The Traditional European Approach to Access to Information

Until recently, the law in Germany and other European member states was that information regarding environmental matters belonged to the environmental agency unless the person seeking the information could demonstrate an interest in the controversy and a reason why the agency should release the documents. The German *Verwaltungsverfahrensgesetz* (Administrative Procedures Act) was typical of administrative law for many member states before the 1998 Aarhus Convention, in that the German Procedures Act allowed authorities to deny permission for a number of reasons, including "the rightful interests of participants or third parties," or the fact that access would impair "the regular fulfillment of the authority's tasks."[135]

In 1990, the Community adopted Directive 90/313/EEC on Freedom of Access to Information on the Environment, which established terms under which information was to be made available.[136] The 1992 TEU, or Maastricht Treaty, established a basis for openness, stating that the EU was conceived as an open society "in which decisions are taken as openly as possible and as closely as possible to the citizens."[137] Article 255 of the 1997 Treaty of Amsterdam provided a more concrete basis for openness by granting citizens statutory right of access to documents related to decision making by the European Parliament, the European Council, and the European Commission.[138]

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133. 1990 O.J. (L 158) 56.

134. Eckard Rehbinder, *U.S. Environmental Policy: Lessons for Europe?*, 1 INT'L ENVTL. AFFAIRS 3, 8 (1989).

135. Hall, *supra* note 110, at 36-37.

136. Council Directive 90/313/EEC, 1990 O.J. (L 158) 56.

137. TEU art. 1, 2002 O.J. (L 325) 5.

138. EC Treaty art. 255; *see* Frankie Schram, *Public Access to EU Environmental Documents—Regulation (EC) No. 1049/2001*, 5 Y.B. EUR. ENVTL. L. 23, 24-25 (2005). Access

Regulation (EC) No. 1049/2001 on Access to EU Documents would apply not only to documents drawn up by EU institutions, but also to documents received by them in the course of EU activities.[139]

C. Greenpeace v. Commission

The 1998 ECJ case *Greenpeace v. Commission* illustrates the EU perspective on access to information and access to justice. In *Greenpeace*, the ECJ refused to grant standing to the environmental nongovernmental organization, Greenpeace, on the grounds that the potential consequences of a contested Commission decision, which concerned EC financing of a power station, could only affect the rights of a NGO such as Greenpeace indirectly. Greenpeace sought information on whether the European Commission had allocated Community Structural Funds to Spain in 1991 to build power stations on the Canary Islands without first requiring Environmental Impact Assessments, as required by Directive 85/337/EEC.[140]

In 1993, Greenpeace asked the Commission for full disclosure of all information relating to the funding measures the Commission had taken on the construction of the two Spanish power stations. The Commission refused to provide Greenpeace the information, claiming it concerned an internal decision making procedure of the Commission. The Commission's argument was that Greenpeace was unable to demonstrate harm peculiar to itself as an NGO, that is, that it could not show that the decision affected the Non-Governmental Organization in such a way that distinguished it individually.[141]

Greenpeace's central argument to the ECJ was that given the nature of environmental interests (which a number of persons living in an area might share), there could never be a 'closed class' of applicants who could be distinguished individually and could sue to ensure compliance with EC legislation. The *Greenpeace* case shows the difficulty for third parties to gain access to information in the EU. In the Court's view, harm per se could not confer *locus standi* on an applicant, because that harm could affect a large number of people and the floodgates would be open

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to documents held by other Community bodies was based upon the rules and procedures of each body.

139. 2001 O.J. (L145) 43; Schram, *supra* note 138, at 31.

140. Case 321/95P, Greenpeace Council (Greenpeace Int'l) & Others v. Commission, 1998 ECR I-1651.

141. *Greenpeace*, 1998 E.C.R. at I-1656. According to Birget Dette, the idea of a closed class was set out in the 1960s, before environmental matters became a concern for the Community. Birgit Dette, *Access to Justice in Environmental Matters*, *in* LEGAL ESSAYS IN HONOUR OF LUDWIG KRÄMER 9 (Marco Onida ed., 2004).

to the multitudes.[142] Ironically, according to the ECJ, the more people harmed by a violation, the less the likelihood that the criterion of "direct and individual concern" can be met.[143]

D. The Aarhus Convention 1998

The most significant symbol of the Community's change in policy on access to information and justice came with the signing in 1998 of the Convention on Access to Information, Public Participation on Decision Making and Access to Justice in Environmental Matters (Aarhus Convention) by all fifteen of the member states and the European Community itself.[144]

Following Aarhus, the European Commission introduced two proposals for directives on the right of public access in the member states, the Directive on Access to Information 2003/4/EC, and the Proposal for a Directive on Access to Justice in Environmental matters.[145] The Directive on Access to Justice provides legal standing to citizens who can show the impairment of an interest or an individual right.[146] Also introduced was a proposed Regulation on applying the Provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters to the EC Institutions and Bodies.[147] The objective of the proposed regulation was to create a framework of minimum requirements for access to justice within the member states to implement the Aarhus Convention, to provide for a better enforcement and practical application of Community environmental law, as well as a higher level of protection.[148] Qualified entities would have the right to request an

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142. Rhiannon Williams, *Enforcing Environmental Law: Can the European Commission Be Held to Account?*, 3 Y.B. EUR. ENVTL. L. 271, 274 (2003).

143. The ECJ may soon change its position on the question of who may be granted standing, if the holding of the European Court of First Instance (CFI) is any indication. In 2002, the Court of First Instance redefined the notion of 'individually concerned' by departing from the ECJ's closed class interpretation. The Court of First Instance regarded a person as concerned if the measure affected his legal position in a manner that is definite and immediate. Case T-177/0, Jego-Quere v. Comm'n, 2002 E.C.R. II-2365. In 2004, the ECJ overturned the Court of First Instance's decision in this case, and rejected standing for the interested party. Case C-263/02, Comm'n v. Jego-Quere, 2004 E.C.R. I-3425.

144. 38 I.L.M. 517 (1999). The Aarhus Convention was signed in Aarhus, Denmark, on 25 June 1998 and entered into force on October 30, 2001.

145. COM (2003) 624 Final.

146. Dette, *supra* note 141, at 18.

147. COM (2003) 622 Final.

148. COM (2003) 624 final.

internal review of a decision without having to show impairment of an interest or individual right. [149]

Adopted on January 28, 2003, the Directive 2003/4 on Public Access to Environmental Information (repealing Council Directive 90/313/EEC) was designed to be consistent with the principles of the Aarhus Convention without going beyond them.[150] The consensus was that the Directive on Access to Information concerned only environmental information, not information generally. The 1990 Directive had contained an exhaustive definition of information relating to the environment, with the presumption that if it was not listed, it was not covered.[151] The intention of the 2003 Directive was to be less ambiguous and include more areas.

IV. CONCLUSION

As the EU has achieved a higher level of integration, the ECJ has shown less tolerance for member states' failure to comply with EU law, including laws traditionally seen as peripheral to the EU's central concerns. The developments of environmental enforcement identified here illustrate the EU's extension of integration beyond legislation to enforcement.

Before one can discuss enforcement of the law, there must exist a cohesive body of codified law that can be enforced. During the 1980s the European Community began to harmonize its environmental laws by issuing directives and regulations to be implemented in all the member states. At the same time, acceptance for the concept of environmental regulation and for central Community institutions was only beginning to gain momentum. Unlike the United States, where the authority of the U.S. federal government was recognized well before the emergence of environmental laws, the credibility of the European Community's central institutions developed in parallel with the emergence of its environmental law and policies.

After two decades of legislating environmental policy for the European Community, EU commitment to enforcement of those laws remained spotty. Since 1998, however, the European Community has taken three significant steps towards enforcement of environmental law: judicial enforcement with the threat of sanctions for failure to implement the law; improved monitoring of the law by EU-affiliated institutions;

149. Dette, *supra* note 141, at 17.
150. Krämer, *supra* note 132, at 1-27.
151. *Id.* at 8.

and new legislation providing public access and public participation in the enforcement process.

First, in its 2000 judgment against Greece, the ECJ issued monetary sanctions against a member state that had failed to comply with an earlier court judgment for failing to implement an environmental directive on landfill waste. In requiring penalties from Greece (and Spain and France), the ECJ has shown the seriousness with which it views compliance with European environmental laws.

Second, although reluctant to authorize EU-wide inspections by the Commission of the European Environmental Agency, many member states have brought minimum inspection criteria and more uniform reporting procedures in through the back door, using IMPEL (Network for Implementation and Enforcement of Environmental Laws).

Finally, in adopting the 1998 Aarhus Convention, Europeans have demonstrated a willingness to implement procedures that will provide access to more environmental information, opportunities to participate, and access to justice.

Taken together, these developments indicate a growing acceptance of enforcement of environmental laws among the EU member states. Although the economic challenges attendant to the addition of ten new member states in 2004 and two in 2007 may appear to take priority over environmental enforcement, implementation of environmental law within the EU seems to have become an accepted and coherent practice.

The fact that EU member states are willing to comply with a peripheral social issue such as environmental law, illustrates a certain level of Community political integration. And as EU integration continues to increase, one can expect growing acceptance within the EU of enforcement of EU environmental law.